**Class 1 –** Defining a Trust

**Defining a Trust**

* ownership split into trustee/legal title and beneficiary/equitable title
* Trusts have a component that is a future interest.
* In rem rights: the connection is between you and the thing itself and so if the person who currently holds it obtained it in good faith, he can have no connection to you at all, but you as a plaintiff or owner can have a right of action against the owner not because of a previous connection with them but rather a previous connection with the thing. That
* One person, the trustee, gets the right to use (a generic word that captures the authority, the power, of an owner to control, manage, and administer the property, to make key decisions about how that property is to be used).
* The other component, the fruendi, beneficiary. The revenue that is generated, the enjoyment.
* Trustee can transfer to other trustees and the beneficiary can in most cases transfer as well

Equitable Maxims

* Where the equities are equal the law will prevail: if both the plaintiff and the defendant have equal equities then look to see how the common law would deal with it, and apply that
* Equity is equality: trying to be equal in its treatment of everybody
* Equity looks to intent rather than form: try to do what was intended, in looking at the use. It was given effect by looking at the intent and thus will split legal from equitable ownership as that gives effect to the intent of the grantor/fiefor.
* Equity acts in personam (but also in rem...): you can trace into accounts which you cannot do in common law, so if money is stolen but can appear in an account which is not held by a bona fide purchaser for value, the beneficiary can come in and absorb that money.
* Equity will not assist a volunteer: if you’re a volunteer, being bona fide will not help you, title will still go to beneficiary.

**Class 2 – Express Trust, Vesting, Forms of Dealing, the Three Certainties, Strong/Bird rule**

Express Trust

* Fragmentation of title into legal title and equitable title put together by settlor in inter vivos or testator if done in will.
* Settlor only continues to have involvement is if trust instrument say so, otherwise out of picture
* Trustee has the the utendi, the right to manage, control, administer, USE the property. Trustee does hold trust assets in his or her own name, but that is not part of the trustee’s personal estate but is held for the beneficiary.
* Trustee’s obligations are policed by the beneficiary, not by the settlor.
* For the trust to be effective, the trustee has to be fully VESTED with the trust assets. Trust not effective until those assets are within his or her jurisdiction, has to be in his name.

Methods of Vesting/Creating an Express Trust

* Form of dealing: what is the kind of trust arrangement being set up in this express trust? Examples: settlor declares she or he from now on continues to hold legal title but beneficially for the cestui que trust. The settlor appoints a trustee to hold the property for the cestui que trust. Potential beneficiaries agree to contribute property to a trust fund that will be managed by an agreed trustee
* Declaration of trust: the settlor declares the he/she also wants to be a trustee, making a declaration that they will continue to have legal title, but will create an equitable estate in the named beneficiary.
* Appointment: where settlor appoints someone to administer and hold the property for the beneficiary/cestui que trust. For instance, set up a trust in a will, naming someone to be a trustee (who has to accept) and then define who beneficiaries are.
* Trustee has to accept that appointment but “a trust will not fail for want of a trustee.” If settlor or testator is dead and not taken the precaution to nominate several people to be trustee either together or as alternatives and the single person refuses, beneficiaries can go to court offering another list of people court can look at to appoint as trustee.
* Agreement: Trust can also be set up by an agreement of group of people. A dozen people, for instance, have $100K to blow but on our own, we can’t do anything significant as real estate developers, but combined, we have a lot of money (say $1.2 million). So the trust emerges as result of an agreement among the beneficiaries, that this is how we want our money to be administered and controlled and we want the benefit from that, and agree on a trustee.

Vesting – Types of Property

* Have to see what is necessary for the transfer of that particular tyle of property and whether it has taken place if there is to be vesting.
* Land: doesn’t transfer from a grantor to a grantee until there has been registration. Stocks and shares: transferred by registration in books of the Company. No vesting until these rules have been satisfied.
* Money/cheque: as simple as handing it over. Chattels (choses in possession): just handing over the product or just handing over something symbolic (handing over the keys to a car).
* Choses in Action (debts under a contract) are also a property: to transfer, there must be a written agreement, an assignment, may even just be an actual agreement, not in writing, just written evidence of it.

Form of Dealing

* When asking whether or not a trust has been constituted, have to look at the form of dealing, see whether the trust has been properly constituted.
* If it’s a personal declaration of trust, you don’t have to do a lot because settlor is also the trustee and already has the legal title as is, just declaring a trust is enough for that trust to be constituted – nothing to be transferred, trustee already has in title. It doesn’t even have to be in writing in most jurisdictions
* Appointment: has the transfer officially taken place? If still in the name of the settlor, vesting hasn’t occurred.
* Agreement: have all the parties agreed? If one beneficiary doesn’t do what the others did and agreed to, they can get specific performance.
* Milroy: trust fails – the trust assets never transferred because the shares were still registered in the company’s books under the settlor’s name (and he’s now dead). As a result, they go back to his estate when died and the beneficiary loses the shares. Property never constituted a trust. However, Milroy got to keep the money/dividends that had been paid to her up to that point, which were effectively transferred, it was handed over to her. When money went to her, it became hers. So she also got to keep any shares bought with that money, which were not trust assets. Once the money is officially given over to her, it becomes hers, even if it came from an imperfect trust.
* Milroy: beneficiary can keep income from imperfect trust

More Details on Vesting (Date, Knowledge of Beneficiaries, Strong/Bird, etc)

* Re Ross: date of transfer/vesting is ruled to be when he declared having given the shares to wife and kids and NOT the date on which the transfer was actually effected (the company updated their register). This is because the testator dideverything he could do to give these shares to his wife and kids as a trust; actual registration was a time circumstance he had no control over. This is critical for death duties (imposed on all trusts made by the settlor within 5 years of his death)
* Glynn: immaterial whether the beneficiaries actually know about their interest. Just look to the settlor’s intention at the time of transfer. If trustee uses dividends afterwards, if he’s not entitled to this, beneficiaries can have cause of action against the estate. This was a declaration, so the fact shares were still in his name is just the way it should be: he’s holder of legal title.
* Cox: requirement that parties are immediately and unconditionally bound.

Strong v Bird rule for Perfecting a Gift

* Strong v. Bird: even if the trust is not completely constituted at the time of its creation, it may be completely constituted later. You can get a perfection of a debt in this way: if something is imperfectly done, if you later acquire legal title to something that hasn’t been perfected, get title to property that hasn’t been properly transferred, it is perfected.
* Re: Haley Estate: Canadian case refuses to apply Strong. Reason unclear. Deceased person immediately prior to demise transferred shares to his grand-daughter. But never registered in her name. Her mother became the executor of the estate and therefore acquired legal title. As legal guardian, she got title to everything, including those shares, but clearly would’ve been holding them on a trust through rule of Strong, but judge rejects that case
* Strong/Bird rule: if donee gets an imperfect gift from donor, then donor dies and appoints donee executor or administrator of estate, the gift is automatically considered perfected. This is because the donee gets legal title to the entire estate, including the imperfect gift.
* Requirements for rule to work: donor must have intended to make an inter vivos gift, donative intention persists until donor’s death, donee is appointed donor’s executor, subject matter of the gift must have been capable of enduring the donor’s death.

Trusts and Powers

* Intention
* Important to draw distinctions between powers and trusts. Reason to do so is that in a document that is labelled “trust agreement” or “trust settlement” or “trust agreement” (strong clue that trust is being created), not everything will be mandatory.
* within the agreement the appearance of the word “trust” is an imperative. There are certain things that settlors REQUIRE and make mandatory on a trustee to perform. Usually that will be connoted by words like “trust” or “shall.”
* Within the trust agreement, you will also find things that the trustee doesn’t have to do but is empowered to do so at his or her discretion. These are “powers.”
* Dispositive powers address the power the trustee has to choose beneficiaries from among a group or to choose how much a very defined group of beneficiaries is to receive. Whilst there is a trust or obligation to administer this property for a beneficiary, the trustee has the power and discretion to choose how to dispose of the income from that trust.
* Administrative power: the issue of control and management and administration of the assets is being clarified and possibly expanded from the common law limit by empowering the trustee to exercise a discretion. Sometimes in administration of estate, you can find trustee must do certain thing (eg: trust for sale) and sometimes trustee is given power to do something or choose to do something (eg: power to retain).
* Always look for shalls (trust/imperative) and may (powers). Look for identification of trustees and specification of trust obligations (“must) which are the limits on the ius utendi. Or specification of trust powers (“discretion” or use of the word “power”)

The Three Certitudes Required for an (Express) Trust

* Certainty of words: make sure intention of the settlor was to create a trust.
* Certainty of objects: Make sure that there was an intention or certainty around what the trust objects are. If trustee doesn’t know what the trusts assets are, there can’t be a trust.
* Certainty of beneficiaries: have to know who the beneficiaries are. Purposes alone are not enough, as purposes do not have beneficiaries/someone who can enforce it.
* Exception: charitable trust. Enforced by the AG. Only purposes that are enforceable as grounds for charitable trust are health, education, religion, and relief from poverty.

Certainty of words

* clarity around this being a trust.
* Hayman: have to ascertain the intent of the settlor. May even be a trust if the word trust is never used. If i’m giving money to someone and impose a legal obligation, even if that word is not trust, to use it for the benefit of somebody else, it’s still a trust. Howevever, if I give x money and “I do hope you will use it for y” it’s ambiguous. However, if I’m not related to x but I am related to y, you can ascertain the intention: makes no sense that there’s no benefit for y, but one for x. Can say that that’s a factor that suggests an intention of trust.
* have to look at the words and the relationships between the parties to ascertain intention.

Certainty of Subject Matter

* need to know what the trust refers to. Can’t, for example, use phrases like “the trust asset is my blue chip securities” which is too general. What’s “blue chip.” Whereas if said “all my securities,” you can measure and find out but if I put an adjective in there, it’s a matter of interpretation, semantically and conceptually unclear.
* Test for certainty: do the provisions in the settlement of trust enable the trust property and the beneficial interest to be ascertained or ascertainable? It’s not absolute certainty that’s needed, but rather a level of reasonable certainty.
* Re: Beardmore: trust was to take effect on his death. The stuff was identified in terms of being 3/5 of husband’s net estate. Court says this looks like a will, but you’ve not complied with Wills Act, so it’s no good for want of formality
* Also, at the date that the trust was created, we don’t know what the assets are, so therefore the trust is invalid. The trust assets must be ascertainable at the time of trust’s creation. Questionable case, as it looks more imperfect than invalid. Could’ve just been unenforceable until date came about where you could measure what 3/5 is.

Certainty of beneficiaries/objects

* “my best friends,” words by their very nature have an ambiguity

**Class 3 – Certainty of Objects, Appointing Beneficiary, Evidentiary Uncertainty and Powers**

Certainty of objects

* trustee must know who the beneficiaries are, must be a recognized person or group of persons. Can’t just be to a purpose (unless it fits charitable purposes)
* Way around this: give money to a club (which is either an incorporated body (a person) or you can argue that you’re giving it to all the members of a club, again individuals). Give it to individuals who fit within a group that are advancing a particular cause
* Trustee needs to know who is going to hold him or her to account in their trusteeship. Important secondary consideration is that a court wants to give effect to the testator’s or the settlor’s intentions. Trustee needs the certainty and the settlor’s intentions need to be accommodated. Balance these interests. If you put too big a burden on the meaning of “Beneficiary” then the results of that is to say that the trust is invalid, so the settlor/testator’s intentions will thereby have been frustrated

Appointment of Beneficiary

* Sometimes this is done by way of a trust in the sense of “it must be done,” in the form of an imperative “this is the person who is the object of my bounty in giving equitable interest”
* sometimes settlor won’t be that exact and will instead describe a class and give the trustee discretion to choose who within.
* May also say that it won’t be the trustee who will choose but rather the donee of the power of appointment. It can also be the two of them agreeing.
* The power of appointment only works if the donee of it, like the trustee, wants to exercise it. Theree is very minimal duty imposed by a power, it’s only to consider whether to make an appointment, not to actually make one.
* Settlor can add a “gift over”: If you, the trustee, haven’t exercised that power of appointment within a period or haven’t yet appointed enough to exhaust the trust fund, that money will be given to so-and-so.

Uncertainty

* Conceptual uncertainty: the words being used to describe the class are insufficiently precise such that ordinary information cannot tell who fits within it.
* Evidentiary uncertainty: conceptually certain and precise/accurate, but practical difficulty in actually getting the necessary information due to that description
* Level of precision of the trust duties affects how much object uncertainty is allowed. If the level of object uncertainty doesn’t prevent the trustee from filling the trust then it may be okay.

The Methods of Appoint and Certainty of Objects

* Fixed trust: there MUST be a distribution to everyone within that category, a compulsion. Everybody within that group HAS to get. Here, you must be able to identify who the person is. Simplest is to actually use names, the more identification and info you can give, the better. The problem when instrument identifies the beneficiaries as someone within a class. Need a definition of the objects that is very clear. “My children” is okay but “relatives and dependants” can be problematic, as in Badon 1 and 2, as what is the definition of “dependent”? Emotional dependence? Relatives is ambiguous – how strong a relation? If religious, Adam and Even, everyone is a relative.
* Power of appointment: Less of a problem. I’m going to give you trustee, a huge amount of discretion in who you choose. You MAY if you want to distribute. Now, we’re not so concerned about how tight a definition or how conceptually accurate and clear the semantics and linguistics must be. The trustee just needs to consider the range, has to be enough info that he or she knows the range of objects that are possible, because he or she can select whoever they want. A beneficiary that’s been excluded can’t do anything, because even if you are a member of the class, trustee has discretion to still say you’re not getting anything.
* Powers of appointment: general (anybody in the whole world is in the class – and if nobody, it’s a gift over), or it can be special (to a defined class of people – you have power as to who gets it, but if you do appoint, has to be in that class, but you don’t have to give to anybody), and hybrid (everybody in the world EXCEPT somebody in a particular place).
* Power of appointment just requires that the trustee or donee of the power just consider from time to time whether to distribute. If not, when the end date comes and money is left, it’s either distributed through a gift over or held on resulting trust for settlor/testator’s estate.
* Trust power: you MUST distribute, but have a discretion to choose to whom and in what proportion. Called a discretionary trust.

Tests for Certainty of Objects

* Fixed trust: description of the class must be sufficiently certain and clear and linguistically precise to enable the trustee to draw up a complete list of everybody that fell within the class. This is the “list certainty test.” If it’s “all my children” it’s quite clear.
* Power: because of the enormous discretion given to the trustee in making an appointment. The test is the “criterion certainty” test, which requires you to say of any individual who puts himself up as a beneficiary, there has to be enough info and clarity around the class to say of somebody that he or she is or is not within the class of beneficiaries contemplated by the settlor
* Discretionary Trust: has moved from the list certainty test to the criterion certainty test
* Badon 1: changed the test for discretionary trusts (pension plan – got to choose who to distribute to within criteria, but had to distribute all the money)

Badon 2

* an attempt to get the “is not” requirement knocked out of the criterion certainty test. Make the test just say whether you can show someone IS in the class, not also if someone “is not” in the class (trustee’s argument). Court does r defuseso this, CA leaves the is/is not in it.
* Sax: you’ve satisfied conceptual certainty for purposes of powers, even if you have a number of “don’t knows.” Based on the info you have, as long as there are a number of people that it’s clear enough that you can do the “is” that’s okay. The fact that you have a number of “don’t knows” is alright, you’ve satisfied conceptual certainty if you can say that a person “is” even though it’s not clear enough to enable you to do “is not”, result of which is a lot of don’t knows.

Evidentiary Uncertainty and Powers

* If you’re dealing with a power, certainly a general power (can give to anybody, even yourself), the issue of evidential certainty is really not an item that is likely to constitute an issue. Evidential certainty is giving you more info, you’re not saying anything wrong with criteria, just difficult to establish it, hard to get the proof. Not a problem for general power or power, because you could just choose the people you CAN prove.
* Hays Settlements: Power is so large and so broad that it’s hard to see why evidential uncertainty will ever be an issue, such a large discretion given to the trustee that there’s no scope for evidentiary uncertainty to be a basis on which to attack the trust and the dispositive power that was given.
* Re Manisty: Evidentiary is however an issue in discretionary trust and maybe even a special power (you have to fit within a class to get benefit). With discretionary trust, different from a power, there is a requirement to make a distribution. The scope of the power is around who you choose, but you have to choose RIGHT, because if you don’t, you have a lot of disaffected people. Can’t rely on fact that you never had to appoint anyone
* once you have certainty around the class, according to is/is not, you may find that it is difficult to, in practice, find out who fits within the class. You know what the class is but difficult to determine who is in it, which may render the trust no good as evidentiary uncertain.
* Discretionary trust to residents of Greater Vancouver: conceptually certain but evidentially uncertain and trust is administratively unworkable. Volume of people you have to look at and get background info from to see if they have a right to collect and that trustee has done job of being fair to all beneficiaries (where you have bunch of beneficiaries and there is a trust, you have to be FAIR to all the beneficiaries)

**Class 4 – Administrative Unworkability, Precatory Words, Future Interests, Rule Against Perpetuities**

Tests for Certainty Elaborated

* Fixed Trust: need description of the object(s) that enable you to draw up a complete list. If there is wording that creates fuzziness about whether something is in a class or not, trust is void. Test is needed when dealing with anything with the word “trust” in it. Even if it looks like a discretionary trust, as long as it has word “trust” in it. Have to be able to ascertain each and every member of the class
* Problem: long-standing, enduring trust that needed high flexibility in choosing people from a very large class. The test for discretionary trusts becomes problematic, particularly for pensions.
* Power: the criteria test. The definition of an object is satisfied if you can say of any particular individual whether or not they fall within the class. This test is in Baden 1, where it was adopted for discretionary trusts.

Administrative Unworkability

* Discretionary trust problem: if you have too large a class, you may have difficulty either getting the info that enables you to actually identify people in a class that has been described with the sufficient degree of certainty that law requires. It may satisfy that test, but problem is that you’re going to have a lot of difficulty getting the info to ascertain whether people meet it.
* A trust might fail either because it’s hard to get the info (evidential uncertainty) or even though you can get the info, the class is so hopelessly wide that it’s impossible to administer. If administrively unworkable, it will destroy discretionary trust.

Precatory Words

* there must be certainty of subject matter – “some of my property” isn’t enough.
* “I am confident” “I would hope” are also precatory words not enough to make a trust, should say “I trust.”

Executors

* the testator is always a settlor and the executor/administrator the trustee.
* Remember, however, to always look for the beneficiaries. “to distribute as she sees fit” is not a trust, as there are no beneficiaries named. That would be a general power.
* Problem, however, is with no beneficiaries named, who will hold the trustee accountable?
* Daniels v. Daniels: it can’t exist as a trust. Must be clear wording that the trustee is meant to take beneficially if does not distribute, otherwise trust fails in these circumstances. Must be a named beneficiary, or it must say that executor takes it beneficially if he doesn’t distribute.

Future Interests

* A future interest in a thing is a presently-held right of property which, after the passage of defined time through the realization of described, future circumstances, leads to possessory rights of occupation and use in that thing.
* Examples of immediately-vested, future interests include reversions and remainders.
* Reversion: fragment possession, allowing someone now to hold and somebody in the future to get to hold the property. A holds fee simple and leases to B. B has in rem right to be in occupation of the property while A has a reversion – a future interest – property that will enable him at the end of B’s leasehold interest to come back into occupation.
* Remainder: if this future interest is transferred to C so that now C has the ability to take occupation at the end of the lease, this is not reverting to C as they didn’t have it to begin with. So we call C the remainder. C can transfer this interest
* some future interests are not immediately vested; there may be some kind of contingency or condition that has to be fulfilled – like being born, in order for it to become vested. Contingent remainder: interests in a thing (equitable interests) are subject to a condition precedent.
* Right of Entry: Interests in a thing subject to a condition subsequent. I give it to you but it is subject to being divested from you if certain characteristics come to apply to you.

Rights of Entry vs. Determinable Interests

* Rights of entry have “condition language,” which is “subject to” or “but if.” Condition is framed in language that connotes a condition.
* Determinable interest, on the other hand, is very similar in substance, but doesn’t use those words or language. Instead, “so long as” or “when” or “during” or “while.” Here, the interest is in determinable form – don’t get a right of entry in the event of a breach, it gets a possibility of reverter. In rights of entry, you provide an estate in fee simple and you are limiting the ordinary time that the law ascribes to that interest (fee simple is indefinite...BUT if these contingencies take place, interest ends and interest of future interest-holder has right to enter into the property and take over). Added a condition to indefinite fee simple.
* Determinable fee simple: you are actually defining the scope of the time. You are not giving an indefinite time, but rather an indefinite time less than an indefinite time, defined by the contingency described. Fined-tuned the definition of the duration aspect.

Vesting of a contingent future interest

* for an interest to be vested, the person or persons entitled to the interest are ascertained and alive. You must know who they are and they must exist/be in being.
* Wills and inter vivos trusts tries to create interests for unborn children; these are – as soon as they come into existence, it becomes vested, unless there are other conditions.
* Interest must be ready to take effect forthwith and be prevented from doing so only by the existence of some prior interest
* Circumstances identified as the condition or delimitation are lawful (do not prevent alienation, do not violate public policy proscriptions, are not uncertain). For instance, can’t be racially based. If it can go to you unless you’re a homosexual, that’s also banned. Such conditions would simply be struck out and the person would just receive the interest without the condition.
* the condition must be legally recognized and CLEAR (we must know what the event is that’s going to precipitate the future interest). If uncertain, it’s invalid.

Rule Against Perpetuities

* prevents remoteness of vesting, vesting happening too far in the future.
* Common law rule: At the time the interest becomes effective, when the trust is created or the will becomes operational (at death of deceased), you have to be satisfied that the contingency in the non-vested contingent interest will be met within the duration of the lives of those people living when interest is created plus 21 years. If the person is a fetus at the time, you get an extra nine months.
* Certainty of vesting rule: if you can concoct one hypothetical scenario where the future interest might not vest in time, that it will vest outside the perpetuity period, then the entire contingent interest is void as violating the rule against perpetuities.
* If you cannot conceive of a scenario in which one of those beneficiaries not getting it within the 21 year period, certainty of vesting rule is thus satisfied.
* To unborn kids is easier than to unborn grandkids as for kids, the parents are lives in being whereas for grandkids, the parents may not be lives in being.
* Rule does not apply to charitable trusts.

Perpetuity Act

* Turn to this if the common law rule is failed
* Royal Lives clause: substitute lives in being for a living royal descendant’s life, or one of the statutory lives laid out. Or just pick a number not exceeding 80 years (s.7)
* First thing you look to is the capacity to have children (s.14). They set the age at 55. If the future beneficiary is an unborn child, and the mother is childless and reaches age 55, it fails, or if is infertile. If you can prove to the court or assume from natural assumptions due to age 55 that person won’t have anymore children.
* S.9: wait and see. Contingent interests are presumed capable of vesting until actual events establish that the interest is incapable of vesting within the perpetuity period, at which point it is void unless saved by s.11-13
* If s.9 doesn’t help you, you are permitted to reduce the ages, under s.11. Even though the settlor or testator has put in age of 30 or 21 or whatever, that the grandchild has to meet to get the interest, you can simply reduce the age set by the testator or settlor to an age which fits within the lives in being. Child still has to meet the age, but not that set by the settlor. If you can meet contingency by reducing the specified age 30 to age 15
* You cannot just change the age to what the child is now.
* Class splitting (s.12): sometimes disposition is to a class of people, $100,000 to be shared amongst grandchildren who reach 21. You may have a child who won’t reach age 21 within the period and can’t be saved by other sections. Close the class. People who won’t meet the contingency for whatever reason, they can’t get, but won’t destroy the entire group as a result by saying interest is invalid. Split the class into those who meet and those who don’t meet.
* S.13: general cy pres. Basically, discretion of the court to do what it likes, try to effect intention

**Class 5 – Equitable Future Interests, Determinable and Rights of Entry, Formality, Secret Trusts, Resulting Trusts, Collapsing a Trust (Saunders)**

Equitable Future Interests

* Re: Robson – anything that happens on a death situation is an equitable future interest.
* Equitable future interests were not subject to the common law remainder rules. Trustee will always have the legal title vested in him.
* Only two things to worry about: the quality of the future interest: if it is an illegal activity or against public policy in the context of a property transaction (eg it prohibits alienation), it will be held invalid. Sometimes a condition can look like it’s illegal, restraining marriage, but it was actually serving another objective. Have to look at motive/intention.
* Don’t leave it uncertain, as uncertainty can lead to invalidity.
* Also, the attempt to contain property within a family by creating perpetuities. Policy issue: ensure a reasonable liquidity of property, that it is able to move with relative ease from an inefficient use to a more efficient use
* Other policy issue: Gives property owners control over others by placing certain conditions. It’s about balancing these two interests.

Determinable future interests and Right or Entry

* Determinable: “to Beetle and his heirs so long as alcohol is never served on the property”
* With a right of entry, the person in whom the interest would vest has to actually come in and take the property “to Bremmer but if liquor is ever consumed on the premises, then to Barnaby,” Barnaby has to show up, see he alcohol served, and take the property. If he doesn’t come in to take it, it’s okay.

Formality

* When looking to see if a trust is valid – first look at the quality of it (illegality? Uncertainty?) then look at rule against perpetuities, if it violates and if it is remediated by the Act.
* The conveyance of the legal title and the instrument must be in writing if it’s dealing with land.
* The rule is that a trust ordinarily does not have to be in writing; there are no formalities prescribed for the creation of a trust. They can be done orally. But what happens if it’s land? We know that for the legal estate, there must be a written memorial, but do you need one for equitable estate? In most common law jurisdictions, it’s yes, but for Canada, the answer is no,
* Another formality: Wills Act, which says if making a disposition under a will (which obviously will involve a trust, at the very least, to the executor). A trust must satisfy the provisions of the Wills Act, which requires that a will be in writing and signed by the testator in the presence of two witnesses who cannot be beneficiaries under the will.
* If there is no written will, it will go by rules of intestate succession.

Secret and Half-Secret Trusts

* When testator wants to provide for someone but doesn’t want rest of the world to know
* Someone appoints executor and there would be beneficiaries identified, but what you didn’t know from the document is that one of those beneficiaries or legatees had made a promise to the testator that the inheritance that that beneficiary gets from the will is actually to be used to support someone else (concubine/illegitimate child, etc).
* This beneficiary had promised that he’d use the property to act as trustee, to take care of or even pass the property on, to someone whose identity testator wanted to keep secret.
* if you could prove that a beneficiary had undertaken, before death, that they would receive this property for these unidentified people, then that would be given effect. This is clearly in conformity with the desire to give effect to the actual intentions of the testator.
* Violates the Wills Act, but if court were to ignore the fact that the identified beneficiary in a secret trust had undertaken to the testator to abide by wishes and then they recant from that and resile from that undertaking, then you are using the courts to help perpetrate a fraud
* In a fully secret trust: it must be shown that the testator must have intended that the named beneficiary is to hold the legacy on trust for the real beneficiary. That intention must be clear to both – the real and named . This MUST be done during testator’s lifetime and trustee must make clear they understood this and acquiesced. Don’t just choose B, B must know about it and accept it before testator dies.
* Half-secret trust: executor knows that the disposition to B is to act as a trustee. Testator must communicate to the named beneficiary that they were to hold it on trust and this must be done before the will is made. Testator must communicate to named beneficiary the identity of the true beneficiary before the will is made. B must then indicate his acceptance before or at the time the will is made.
* Half-secret trust: requirements of the trust must be met, at the latest, when the will is made, while for fully secret trust, it just has to be fulfilled before death.

Resulting trusts

* is all about presumed intention.
* Presumed intention trusts = match it against another presumption, and that’s where you WON’T create a trust even where ordinarily you’d presume a trust. That there’s a presumption that can actually off-set the presumption of a trust and that’s the presumption of advancement. This is where there’s a gift between A and B, but B is a child of A. There the presumption is in favour of a full gift of both legal and equitable title to the child and that is an advancement.

Common situations where ARTs occur are grouped as follows:

* Transfer of legal title to trustees in a trust that turns out to be void
* Transfer of legal title in property to trustee without disposing fully of the equitable interest in it
* Transfer of property to another subject with a specific limitation which has not occurred
* Surplus of funds after a trust-purpose has been achieved.

ART instances

* where gratuitous transfer from A to B, clearly intended to be a trust, but the trust is void for whatever reason, like uncertain objects, then does that mean the trustees now own it both legally AND beneficially? No, because the settlor likely didn’t intend that, he intended a trust and thought trust was valid (wrongly). As a result, the transferor holds beneficial title.
* Second category: there’s still some equitable interest left in it.
* Third category: applies largely with loans. A vehicle whereby you can create a trust in which you are able to give preference to certain creditors.

IRC v Broadway Cottages (the first ART category)

* In IRC, express trust failed for uncertainty of objects, but the property was already invested in the trustee, so who holds beneficial title? The court concluded that it was the settlor – the testator or his heirs own the equitable interest in a trust that turns out to be void on the basis of a resulting trust.
* Legal title, however, does NOT jump back.

Saunders Rule for collapsing a Trust

* holder of the equitable title who is sui juris can call for the legal title to him or her. So the whole thing collapses when this beneficiary calls for it
* attempts by settlor to prevent from happening is null and void.

Re:West (surplus assets)

* a trustee who is a solicitor administered the estate and did such a good job that at the end of the day, it was found that there was still some cash left over. He’d paid all the creditors, he gave to the legatees, and there was some money left over. He claimed that left over cash for himself. Court said no. Court said only if there’s a very specific indication that if there’s money left over it will go to the trustee, it will go to trustee.
* In reality, if money is left over, it will go to the heirs /settlor/testator.

Schmidt v Air Products Canada (surplus assets – category 4)

* look at contractual provisions around the setting up of trusts and if there is a contractual provisions that determines what will happen to surplus assets, you look to that.
* The purposes were discharged, but not all of it had been necessary to meet the obligations to the beneficiaries under pension plan. As a result, Air Products sought to get the surplus money, saying it belongs to them.
* Court said not so fast: what you have to do is trace the roots and if you go back to the constituting pension plans of the two companies, see the source under which they were created. One was contractually created, pursuant to the contract, there was a contractual provision providing for surplus funds to go to the company, so under contract, it goes to them.
* other company had no such contractual provision, whole thing rested on trusts, so unexpended money from that plan is to be treated and disposed of according to rules of resulting trust – it was undisposed but it belonged to the people who made the contributions, who were actually the employees. You have to see where the moneys were sourced and do the distribution of the surplus accordingly.

**Class 6 – ARTs, surplus funds, PIRTs, Rebutting PIRTs, Presumption of Advancement, Joint Accounts, Illegality, Proportionality, Locus Punitentae**

Automatic Resulting Trusts

* Art = deals with situation where something’s gone wrong or something has been fully fulfilled in terms of donor’s intentions but there is some property left and the question is who has ownership of that other than the person having legal title.
* Where there has been a transfer to transferee but turns out that trust is void – it’s been frustrated because the purpose behind that, the ability to be able to accomplish the trust’s objectives, are not possible. In those circumstances, trustee holds legal title, but not on his own account, it’s actually for benefit of the transferor, which is an ART, and the title bounces back to transferor, who can collapse the trust (Saunders).
* Other situation: the purpose has been achieved and there’s left over equity in the property. Again, this is not personal to the trustee, it’s held in an ART for the settlor/testator/transferor.

Quistclose (ARTsituation)

* resulting trust is being used to give in rem rights to the transferor. It becomes a way in which a transferor is able to ensure some kind of security that is preferential to those of other creditors.
* Quistclose: trying to prefer itself as a creditor and trying to scoop a bunch of money. Quistclose said that because they lent the money for a specific purpose, and you are not accomplishing that purpose. When company goes bankrupt a trustee is appointed for purposes of amassing all the debts, then taking all the assets and dividing it on a pro rota basis among all the creditors.
* Quistclose here had not taken out real security, no mortgage against RR’s property, but it was asserting that that money was loaned for a specific purpose and that purpose was not achieved, therefore they are entitled to get all the money back. They are not general creditors. Says Barclay’s bank can’t use it to offset your debt. Court accepts Quistclose’s argument. Court says the money is given for a specific purpose which was not achieved.
* First ascertain whether there is a primary duty (here, to pay the dividend, which is why Quistclose advanced the money).
* Court held that in these circumstances that where it is for a very specific purpose, where that primary duty is not fulfilled, then there is a secondary duty: the holder of the money holds it on a resulting trust for the transferor.

Surplus funds

* Re British Red Cross Balkan Fund: a fund created to assist people who were wounded in Balkan War. Money was applied to all those wounded in terms of the definition and there was money left over, court held that the subscribers there could get their money back because it was being held by the fund-keepers on resulting trust. Lots of large subscribers, easily identified.
* More tricky where it’s the general public subscribing to disaster relief, tons of small sums: Re Gillingham Bus Disaster Fund. Issue was whether if there was surplus money after helping the victims, that that money is to be held on a resulting trust and court said yes. Didn’t matter that it was hard to identify. Judge said trustees can just give money to court, put it in court fund, then up to people to prove they made a donation and how much.

Re West Sussex: (societies and funding drives)

* Fund was for wives of police officers killed in course of service, done through unincorporated association. Legislation made superfluous. These clubs would have local funding drives and collection boxes. Identify where the sources are and take out on a proportionate basis the funds in the hands of treasurer, failing that, say it all belongs to the Crown as bona vacantae.
* Money came from raffle tickets, fair admission, etc. Court ruled contributors shouldn’t get the money back though, as were paying for the entertainment. This is not question of you not getting adequate consideration. You parted with your money and therefore that money can’t be held on a resulting trust
* if there are large subscriptions, that may be resulting trusts. The large amounts of money will mostly be from members, but if the society is no longer available or practical and no extent purpose anymore, then the money that’s left is held by the Crown as bona vacantae.
* Does it belong to the members once purpose resolved? Judge says no, but there’s no clear reason. Instinctively concludes that since purposes of the association are no longer possible, it automatically belongs to the state. This case was one where the rules among the members was that no money should go to the members, only to the dependents, so by rules of the contract, no money was to be distributed to the members, which made ruling easier in this case.

Re Bucks Constabulary Fund (overrules West Sussex)

* judge clearly disagreed on notion that it goes automatically goes to the Crown.
* Distinction from West Sussex: here, the society was registered. For Friendly Societies, there’s a statutory provision for what to do with surplus funds if society terminates. The provision is that on termination, the money belongs to the members, distributed equally among remaining members unless the rules provide a particular formula. Dead members don’t get it.
* judge makes it clear that the appropriate way, even with a clause saying members don’t get benefits, once the association becomes moribund and money is left-over, this is held as ART for existing members. Only exception is where the society has dissolved not by conscious act, but just because everyone’s died out, and you’re left with only one member. Then bona vacantae. As a result, when only two surviving members, better terminate the society.

Presumed Intention Resulting Trust

* standardized factual inferences that the law has prescribed in certain circumstances.
* where a transfer of property from A to B has occurred that is gratuitous, how do we explain where equitable title is? B has legal title. Court says if we look generally at society, people don’t give property beneficially for no good reason.
* Presumed Intention: give legal title but to retain beneficial title.
* if there’s evidence that it was intended for the transfer to be an out and out gift, then the presumption will yield. But it’s up to the transferee to show this. Because presumption intends to lock the equitable title in the hands of the transferer.
* PIRT doesn’t apply where there is an obligation of dependency. If there is transfer between husband to wife or from father to child (NOT mother to child), because of this relationship of dependency and because of the moral obligation of the father and husband to protect and to advance the economic interests of those who were dependent on him, standardized inference is that he did intend to make an out and out gift. PIRT yields to the presumption of advancement
* PIRT occurs when there is a purchase of property in the name of another or a voluntary transfer of property to another. Where I direct you to transfer property to B and not me, but I pay you. Title shifts to B but under PIRT, B holds beneficially for me because I paid the transferor.

Rebutting a PIRT

* Standing v. Bowring: PIRT won’t work if there’s evidence that an out-an-out gift was intended. This intention can be given in circumstances where the person who’s benefiting doesn’t know. If there is any evidence, even if the beneficiary/transferee with legal title doesn’t know that he’s the legal owner, that in fact the transferor intended to benefit him then he has full out and out legal and beneficial title.
* Joint bank accounts (Niles v. Lake) is a frequent PIRT situation. Depends on the reason for entering into a joint account as to whether you own the account beneficially or whether you hold it on a resulting trust for the person/joint tenant who actually makes the deposit.
* Niles v. Lake: two sisters, one has money and the other didn’t, but they were close. They open up joint bank account and use it but all the money that went in came from one sister and she then dies and the other sister said that everything in that account belongs to me. The contest is now between the heirs of the deceased set out in the will (say she put all money in so while non-contributing has the legal title through right of survivorship but she’s holding that legal title on PIRT for them). Presumption of advancement doesn’t work for siblings.
* Niles: You cannot use evidence of the joint bank account as rebutting the presumption of PIRT because this clause was done solely to benefit the bank, there has to be other evidence.
* Russell v. Scott: example of this kind of “other evidence.” Scott fails in getting joint account to fall into the estate of the deceased because Russell is able to prove beyond the bank joint account agreement that Mrs. Russell wanted to benefit him specifically; she had made it clear to her lawyer that she wanted Russell to get whatever was remaining in that account.
* court is prepared to say that the money was left during their lifetime and it was under a joint account, there was already a form of ownership, even if only legal, for Russell given pre-death, so when she died, the equitable interest transferred. Preceded death so didn’t sidestep Wills Ac

Presumption of Advancement

* a legally recognized, standardized presumption that will trump PIRT.
* PIRT between husband and wife has been statutorially abolished in all jurisdictions save BC and Manitoba.
* Pecall vs. Pecall: they have extended this same presumption of advancement between mother and child
* Manitoba Case Metha Estate v. Metha: If the presumption of advancement didn’t apply from husband to wife, then presumably the PIRT applied and have to say she held title to this money but in actual fact, it was for her husband, so consequently his heirs are entitled not only to property he legally held but also to beneficial title to property that she legally held.
* Court said here that it recognized that the world had changed. Court says that there are older, traditional relationship where wife stays at home and husband works and the more modern one where both of them are independent operators that co-habit together and in that relationship, there is no need for presumption of advancement.
* Metha: even in jurisdiction that has not abolished that legislation, you have to investigate the nature of the relationship; if it’s a modern one, it probably doesn’t apply, but this was a traditional marriage and the presumption actually does operate
* From to wife to husband still does not work for presumption of advancement.

Joint Account Between Spouses and Advancement

* Warm v. Warm: Money was earned by both of them, though he earned more, they operated a joint bank account and they both contributed and withdrew from it (large and small). When they divorced, he argued that in actual fact he had legal title to it and as a result he didn’t owe her anything and what he had given to her was on a PIRT. She argued joint bank account, and it’s to be split between both of them.
* Court calls it a common purse with an understanding that things will be jointly owned. You’re putting money in, doesn’t matter what your contribution is, you’re making a common purse and when it’s split, everyone gets half not only of the account but of all purchases being made of the account (at least of things that can be split, eg not clothing).

Rebutting the Presumption of Advancement and Pirt (timing of evidence)

* if you have evidence that the presumption of advancement wasn’t intended, that will apply. It’s up to the party against whom the presumption operates to show it wasn’t intended.
* Shepherd v. Cartwright: what relevance is the evidence you’re going to use to rebut the presumption if it happens well past the transfer date?
* Judge looked at the actions of the father from the time of the transfer to many years later when he got the kids to sign the shares over to him. Shows a man who is very much in control and organizing his affairs according to his own needs, so this is a very nebulous kind of gift.
* This approach is rejected. House of Lords says presumption of advancement operates here as soon as the gift was made and then for timing factor: Judge says you can do events clearly before transfer/purchase, clearly at time of, or so immediately afterward to constitute a part of the transaction, but subsequent declarations are admissible only against the party who made it and not in his favour.

Illegality

* transferor conveys property to a complicit transferee in order to pursue some unlawful activity (like avoiding creditors). Later the transferor wishes to regain title to the property
* If the transferor is to regain legal title on basis that he never lost equitable title, the court has to hear the impropriety and to some extent give effect to it.
* Sherman: all the judges took position that the court really can’t listen and give effect to anything where there has been an illegal motive or an illegal purpose, even if it wasn’t a purpose that was actually carried through. The majority took position that just the mere breath of illegality meant courts would not touch it and gave effect to maxim that out of no base cause can an action arise and also applied rule that where there is equal guilt, we prefer the position of the possessor.
* Dissent in Sherman: yes there was this intention to defraud and yes there was actual transfer of property, but creditors weren’t harmed, they were all paid out, this was just a cautionary exercise and nothing more. The harm done is that someone is getting a free ride here in terms of the property. The intention alone cannot be enough, there must be some manifested result.

Goodfriend (later case that agrees with Sherman dissent)

* Goodfriend hides his property because he anticipates an action against him, though that action was impossible.
* SCC won’t accept that immoral intent is enough. How can you give effect to transfer of property and refuse to hear rebutting evidence on the basis of something being bad that wasn’t really bad? Immoral maybe, but not illegal. You couldn’t hinder or delay or defeat a creditor when there’s no actual potential creditor around.
* Sherman says you can’t rebut if evidence you give is bad intent. Here, court says they will hear the evidence even though you’re clearly motivated by something that was wrong.

David

* here a person has drinking problem, he’s living with somebody, she said to him, transfer the property in your name into my name because you’re going to have an accident and you’ll be clobbered by a lawsuit by injured person. He agrees and gives her the house. Then the relationship falls apart and he says he wants the house back and she refuses
* Court says they’ll just give effect to the PIRT. So this is another option: don’t hear the evidence and just give effect to the presumption.
* Also happened in Goder vs. Kriss: here actually DID have a potential creditor, a business associate of the transferor. He was paid and lawsuit never happened. Court just gave effect to the PIRT and ignored the evidence.
* Tinsley: English court doing the same thing, basically. Now you tend to find situations where the court will try to just give effect to the presumption and just say this result is a fair result because of the operation of the presumption and I won’t listen to the bad evidence, but I can still give effect to the transfer because I’m just giving effect to the presumption and ignoring the illegal evidence. Or it can hear the illegal evidence and forgive it if there is locus punitentae.

Locus Punitentae

* Exception: If you repent and grovel to the court and indicate you repented of your bad ways and there is no creditor actually defrauded, so you’ve manifested your repentance by making good (defendant in Tinsley felt guilty and paid back), then the court may allow all this info to come about and ignore it. Court can hear evidence, even in spite of illegality, if you repent before defrauding someone or make good.

Foster (Illegality and the Presumption of Advancement)

* to avoid a potential creditor, situation where a father transferred to his kids to defraud his wife.
* Couple of the kids cooperated and returned title to father but the defendant refused to do so and she also objected to any evidence being brought in to reject the presumption of advancement, due to its illegality. Judge says that with great reluctance that the evidence can’t be used to rebut presumption of advancement. Here, it wouldn’t allow the evidence, and if you ignored it, it resulted in her keeping the property.
* So this approach of refusing to hear the evidence helps out the transferor through the PIRT, but not when there’s a presumption of advancement

Nelson – Australian Case – Proportionality

* Mom wants to buy a house, but already had a house, so assistance wouldn’t help, so she transfers that house to kids, so it looks like she needs social assistance to get this other house. She makes up for it and wants her original house back.
* Issue is this is illegal transfer and advancement works in favour of daughter and because transaction was illegally based you couldn’t bring evidence of this illegality to rebut presumption of advancement.
* Judge: Should violation of one of modern society’s many small regulations disentitle you to bring evidence to rebut presumptions with consequence of losing major asset? Argues that this is an issue of proportionality. Is trying to avoid paying ticket enough to lose your house?
* in making a decision of whether you should be successful in rebutting presumption, there is an issue of proportionality – what are you losing and what have you done as a miscreant?
* Still have to look at statute to see the civil sanction prescribed. What is its purpose and the sanction the legislation prescribes? If it says you can lose a house, then so be it, but if it doesn’t focus on this scenario, of being able to use evidence that is tainted because it’s immoral or illegal in a regulatory way, you shouldn’t be barred.
* Look at what’s being scammed and how much, then look at what you’re losing.

**Class 7 – Sub-trusts, Management and Control, B as Agent of T (Bagot), Archer, Terminating a Trust, Variation, Assignment**

Settlor’s Role

* Fall out of the picture unless they appointed themselves trustees.
* Once you’ve given it as a settlor it’s too late to get it back

Powers of Trustee and Beneficiary

* With equitable title int he property the beneficiary has the real (ability to trace fraudulently converted property in the the trustee’s personal patrimony) and personal rights (breach of trustee’s duties) against the trustee who must comply with his duties under the terms of the settlement, as a fiduciary
* In managing and controlling the proprety, this may thus be to the extent that we replace it, not really producing anything. Trustee must look to the beneficiary’s best interests with respect to capital appreciation or actual delivery of income.

Transferring a beneficial interest (sub-trusts)

* The interest the beneficiary has is called a “chose in action.” This is a thing that you can get a court order to enforce. Transferring chose of action can be done orally.
* If i have an equitable estate and I’m transferring it to someone else, an equitable chose in action, it means that there are two people with equitable title. By transferring equitable estate, I have said that you get the benefit of the income that flows from the trust assets that are being administered by so-and-so. There are two of us with equitable title, but mine is not beneficial. I still have an ET because that’s the way it was created and until I do something more, drop out of the picture, that equitable title must stay
* This is because if I don’t perform properly, i must have something that the person ET was transferred to can sue me on.
* It all depends on how these things are formed. I may fall thus out of the picture and make that clear to the trustee, in which case there’s only one beneficiary and trustee administers it for that person and sub-trust is not relevant.

Management and Control

* As holder of equitable title you cannot manage and control the property. (Shallit v Nadler)
* Shallit v Nadler: Shallot was a tenant in a building and didn’t pay his rent, as a result of which, landlord wanted to exercise his rights to collect the rent. In order to do that, required to either sue for the rent, have the tenant evicted, or there is another ancient remedy of restraint to help yourself to assets on that land and only give them back if rent is paid or I’ll sell them and collect
* created a company and declared that he was trustee of this lease for which equitable title had been split between legal title in Nadler and equitable title in his company, Nadler Ltd. The distraining was all done in the name of the company. Shallit said this was illegal distraint. It is not the right of a beneficiary to control, manage, and administer the trust property (the lease)

Bagot (except to rule in Shallit)

* Family settlement trust. To reduce costs, the beneficiary wanted to take over the collection of rents from this piece of property and wanted to be administrator and the court approved, because there’s a very good motive.
* Court did say you are not acting as owner of this property (you only own equitable estate which gives no right to manage), but you can act as the agent of the trustee.
* the trustee can fire you as agent if you’re doing a bad job, even if you hold equitable estate.

Archer/Baker

* had stocks and shares, income from which weren’t coming into England, it was a trust estate being administered in NYC. The trustees were in NYC. Income was being generated in NYC, which was not coming into England, so therefore it did not attract English taxes
* Archer was beneficiary and tax authorities, Baker, want to tax her on the income from the stocks. She argues that she doesn’t own them – she may have equitable estate in the shares under a trust, but that’s all it is – an equitable estate in that trust – it is not an equitable estate in all those specific things, those stocks and shares that trying to be taxed on. All she has is an equitable interest that the fund be administered properly. So my income from those shares is not coming into England, it is income that’s coming out of a trust.
* Divided court rules against her, says the equitable estate is actually in the items that constitute that trust. This is contrary to New York law. It seems, however, that we would probably follow English law that we would consider all items to be under equitable title
* in a discretionary trust, the single characterization might work; as a potential beneficiary falling within a class, you only have rights regarding the trust as a whole, that you have a putative interest in the appropriate administration and if it isn’t, then that’s the nature of the action. Probably the equitable estate you have under this trust is the proper administration of fund.

Transfer of Equitable Title (Formalities)

* Transfer of equitable title to beneficiary may or may not require formalities.
* If it is a gratuitous transfer to a beneficiary under a will, that transfer is not going to happen unless the beneficiary has been appointed properly under the wills act
* land in some jurisdictions, the equitable interest must be in writing, but not the case in BC.
* where beneficiary has the equitable estate and he or she is handing that property on to a third party. Where this takes placed, beneficiary is called an assignor and the person getting the equitable interest is the assignee. The assignee is getting the debt that the trustee owes to the beneficiary.

Assignment

* Where you have a debtor who owed money under a contract to an assignor (creditor), this debt is a chose in action, as to enforce it, you have to go to court. It’s property, and you can transfer it to an assignee. Historically, if debtor owed an assignee, the assignor would sign the debt to the assignee and if the assignee tried to sue the debtor for the debt, it was no good at common law as there was no privity of contract between the parties and so couldn’t enforce it.
* The legislature responds to this by s.36, which said that you don’t need to do this, but you have to put in writing your assignment and you have to make sure that the debtor knows about it. It’s only at that point that the debtor becomes liable (worried he’d otherwise just keep paying the assignor and ends up vulnerable to assignee action).
* When a discretionary is vast in terms of potential people who qualify, restraining alienation doesn’t mean. If dealing with more finite beneficiaries though, clear that you cannot prohibit or restrain the alienation of those equitable interests.

Protective trust

* The settlor transfers assets to a trustee: giving a determinable life interest in favour of the “principle beneficiary”: (often a spendthrift or prodigal child) and providing that on the occurrence of a determining event the trust property is then held on a second trust which is often a discretionary trust in favour of a class of objects (the principal beneficiary’s children or, perhaps, the settlor’s other children).
* The determining events typically are the attempt by the principal beneficiary to assign his/her equitable estate to another or where there is an attempt to charge his interest or bankruptcy.
* Must be cautious that you aren’t couching the determinative event using conditional language.

Termination of the Trust

* Saunders Rule: if you have full legal capacity (sui juris) then you can call for the termination of the trust, call for the assets, the legal estate in those assets to come to you as the beneficiary.
* Only occurs where the beneficiaries interest is absolute (cannot be conditional)
* Rule in Saunders that requires you to be absolute in makes difference between interest and enjoyment – all that needs is that the interest is instantly vested. Doesn’t matter if enjoyment is postponed. If the interest is instantly vested but the enjoyment is postponed, you c an ignore the condition. Court in Saunders said that interest vested immediately and the age contingency was not hooked into the vesting of the interest, it was a contingency that related to when it could be enjoyed and if you’re not suspending the interest (which would mean not an absolute interest ), but only postponing the enjoyment through the condition, you can ignore
* Courts have said that if it’s vague on this point, they will interpret in favour of early vesting of the interest. If there’s a contingency, have to see whether it speaks to the vesting of interest or the enjoyment of it and if it’s the latter, the principle of Saunders will apply and you can ignore it, but if it speaks to the interest, you’re not fully vested.
* Lysiak: Court said that clause spoke to enjoyment and not the vesting of the interest, the interest vested immediately on death of settlor and hence when they became majors, they could get it.

Terminating a Trust with Multiple Beneficiaries

* Several beneficiaries: If they are all absolutely entitled, it’s vested, and they’re all sui juris, then they have to agree among themselves with unanimity required. (Smith, Chodak).
* Sandman: If they are not all sui juris or haven’t all agreed, but the property is divisible, you can divide it, but it must be clearly divisible.
* Dodak: a court may still turn down termination of a trust on basis of call by beneficiaries in circumstances where it is not in the interest of the other beneficiaries to allow a sharing of the assets. Even though the property was easily divisable, it left him in a very powerful position that enabled him to act to the detriment of the other beneficiaries, whereas if it stayed in the trust, the trustees are required to be evenhanded. Unless there’s provision that allows the trustee the sell these assets, that is going to be a problem.
* You need everyone to agree, if not, you can separate the assets, but it cannot be in a way that is detrimental to the other beneficiaries.

Varying Trusts

* Chapman: if there are bland administrative terms that could be added to deal with emergencies that threaten the trust could a court order a change.
* Maintenance Jurisdiction: like if there’s insufficient capital to maintain the person that was meant to be taken care of under the trust, but there would be if you tinkered with the trust.
* Conversion: court can also vary it if there’s a terrible asset in the trust – court will allow you to sell it if this will help.
* Compromise jurisdiction: take the matter to court (fake a dispute), and agree on a settlement, which is what you actually wanted, and court sanctions the compromise.
* Now there’s the option of application to court under Trust and Settlement Variation Act, which allows the court to approve of certain terms.
* Have to show that the people you are seeking court’s consent on behalf of, that it benefits them. But what if it doesn’t comport with settlor’s intentions? Can be okay

Re Burns (what’s needed to vary a trust – show benefit to beneficiaries)

* Trustees needed to get investment powers to ensure more favourable income tax status, needed courts permission because there were unborn children who were beneficiaries. Court looked at this and says tax minimization was laudable objective and said we can change this.
* Re Westin’s Settlement contrasts burns. Denning says you can’t just consider financial benefit to the beneficiaries (unborn children) but also the educational and social benefits. (Parents had tried to move family in order to relocate the trust to get better tax benefits)
* Re Harris: looks at settlor intent and financial benefit. Settlor killed himself and favoured one child, leaving a disproportionate share to that one. Mother wanted the benefits to be equal among all of them. Court refused to do this, saying that to redistribute here would be so unfairly prejudicial to the elder child that that was not in his interest, so not prepared to go along with the arrangement to distribute equally. Helping several beneficiaries at the cost ofone beneficiary is not a valid argument as to financial benefit.

**Class 8 – Variation, T’s Duties, Retirement, Appointing Trustees, Investing, Duty of Loyalty, Delegating?, Ousting Court’s Jurisdiction?**

Variation of Trusts

* Common law: very limited ability of trustee or beneficiary to vary the trust. Done by agreement among all the parties, cannot be unilateral, but if there were beneficiaries not yet ascertained (like unborn or not sui juris) then couldn’t vary.
* Absent full unanimity (in which case you could just collapse and resettle the trust as in Saunders), you have to go to court and ask the court to change.
* Can’t go to the settlor or testator as they’ve dropped out of the picture, unless settlor constructs trust instruments that give them the power later on to make changes.
* courts generally say no, can’t change terms of the will unilaterally, only do it in the circumstances named: compromises and small administrative stuff (Chapman).
* Trust and Settlement Variation Act changes this: if there are contingencies and you need to rearrange the will because there are impositions on those contingencies and you can’t get consent of everybody because there are unascertained people or people who haven’t met the contingency or not sui juris, then in those circumstances, you can take the arrangement that has been agreed to and put that to the court and if it is for the benefit for those who cannot give agreement, the court can approve it and consent on their behalf.

Benefit

* generally means financial benefit of the person whose consent you’re seeking to replace, but some courts say it’s not just this – have to look at well-being of everyone involved in that trust having regard to the intention of the settlor, but not letting that intention to be determinative.
* Bentall Corporation: pension trust fully funded by the employer and there was money left over. More than enough to meet obligations/purpose of benefiting the employees. Employer wanted to give more money to the members, and then to take even more for themselves. All but 7 beneficiaries voted yes. Court did not require unanimity among the sui juris beneficiaries? It was sufficient to be persuaded that it was in financial interests of all the parties. Court is able to consent on behalf of beneficiaries with contingent interests (here, the future interest is receiving the money contingent on the termination of the fund), even if they are dissenting.

Trustee’s Powers and Duties

* Trustee has the broad rights given to a legal owner – the right to be able to administer, manage the property. There are also correlative duties that limit those powers.
* the duty to collect and bring in the trust assets.
* You’ve got to agree to be the trustee, but having made that decision, the trust doesn’t come until you’re vested with the trust assets.
* First duty: find out where those trust assets are and whose name they are in, and bring them in. Find all the people indebted to the trust and collect and assemble the trust estate.
* Next job: administer this estate, to invest and to secure and then to maintain the estate, to ensure it doesn’t deplete in value so that... .
* Third duty: to distribute income and where, permitted, capital, to the beneficiaries.

Appointment of Trustees and Retirement of the Trust

* Trustees must be of legal capacity.
* Trustees must accept the appointment If nominated trustee refuses, the will usually sets out alternatives. Failing that, you can go to the court to have them appoint one. This will usually be at the behest of the beneficiary who will give a list of recommendations.
* If several trustees are appointed, they are appointed as joint tenants.
* Failing this there is a public trustee, where there is a problem, the court will refer the matter to the public trustee who will come in and start suggesting names.
* Where a trustee dies, the rest will continue as trustees, but where all the trustees die, the person who succeeds the estate of the last surviving trustee will become the trustee of this trust. If they do not accept, then move to the question of retirement, as court will not accept that there is no trustee.
* If you want to retire from being a trustee, you can’t just quit; you have legal title andyou have to get the consent of the other retirees (beneficiaries) to do that or go to court to get exonerated and have the court appoint a new trustee.

Opposition to Appointment

* dealt with among the beneficiaries
* Re Tempest: If parties can’t agree, court will first look at intentions of the settlor/testator, particularly the characteristics the settlor may have indicated implication or explicitly as to what we’re looking for in terms of competences and qualifications to discharge this trust.
* Court will also look at persons who are reasonable, fair-minded persons and they do not want trustees who have an axe to grind, either against a beneficiary or group of them or the settlor. Looking for people who are careful and not excessively bureaucratic
* Appointment will usually be in the trust instrument, though if trustee dies, statutory provisions deal with getting new ones, but the court can toss that out where the other trustees are rejecting someone else coming on, by looking at various grounds.

Multiple Trustees

* Unanimity is required among trustees for decisions of management and control
* problem, as it means you either don’t proceed or you go to court to ask them to approve.
* Courts don’t like this, as they don’t want trustees who are pusillanimous, continually coming to court. Problem is that if everything is done by court order, trustees can have an argument against liability.

Removal of trustees

* can be done under principals of Saunders, but must meet conditions for terminating a trustee.
* Judicial removal of trustees – courts are reluctant to do this, and there is a stiff burden
* Burden: is this trust become, because of a trustee or several trustees, one that can’t be administered anymore? Are you, by having trust with these trustees, impairing the welfare of the beneficiaries. Court will always look at benefit of the beneficiaries.
* Conroy: it was around the failure to produce accounts. Trustee was unwilling to disclose stuff and so beneficiary got angry. Question is if this is impairing the functionability and operation of the trust? Court says this is the criteria and it doesn’t meet this.
* Consiglio: group of trustees fighting and misunderstanding each other. Court says made it virtually impossible for trustees to agree on policies for efficient management of the trust.
* Court says that misconduct is not a prerequisite. The criteria is simply whether it is promotive or deleterious to the welfare of the beneficiaries. Where you have a bad atmosphere and decision can’t be made because the trustees hate each other, they order removal.

Trustee’s duties

* Trustee’s first duty: make sure the trust fund is a complete fund
* Trustee’s more difficult task: issue of maintenance for the purposes of generating income or increasing capital or doing both of those, bu investing the trust assets.
* For instance, if you’re getting land that is generating no income, you better have a good reason why, as a trustee, you’re keeping it, like a provision in the trust (a trust to retain) that orders you to keep it. Can’t rid of it unless all the beneficiaries agree that you should get rid of it and if not all are sui juris, you need to go to court (trust variation).
* it could even be a trust to sell – here you MUST sell. Usually this will be combined with a power to retain, which allows you, as trustee, to find the appropriate time to sell the asset.

Investments

* not a guarantor of performance as a trustee, not guaranteeing you can beat the market, only guaranteeing what a prudent business person would do handling their own assets (this is the standard in the trustee act).
* However, you can’t invest in a way that’s inconsistent with the trust, must look at instructions from settlor/investor
* Standard of care: the care, skill, diligence, and judgment that a prudent business person would use in their own investments.
* Fales: Question is whether you should apply same standard of prudence to the corporate trustee that you do to someone who is not a sophisticated business person who is, say, a co-trustee. Court says it’s one test, purely objective, and both the trust company and the widow fail.. But she’s not liable due to s.96 of Trustee Act.
* S.96 says that if a trustee appears to be in breach of trust, but appears to have behaved reasonably and fairly, the court can relieve the trustee wholly or partially from liability. Court does so: she acted honestly, and given her situation she was not a businessperson and was expecting informed decisions from Canada Trust (which she didn’t get)
* Investments you’re allowed to do (authorized investments): those authorized by the settlor in the document. If the authority was not clear or didn’t exist at all in the trust instrument, then it was authorized investments permitted under the Trustee Act.
* Scargill: Can’t restrain your investments according to your, the trustee’s, social or political beliefs. Scargill even says that as a trustee, you may have to act dishonourably because it’s in the interest of the beneficiaries, even if you may not have done it were it your own property.
* Trustees can get investment advice from experts.
* not an insurer of the trust fund as a trustee, you don’t have to avoid all risks. You can be forgiven errors of judgment provided you acted reasonably and honestly as in s.96.

Ousting the Jurisdiction of the Court?

* Rather, give you comfort as a trustee that whatever decision you make, from perspective of this settlor, that’s okay, regardless of however dishonourable or terrible it is. Re Wynn makes it clear this is not allowed.
* Re Wynn: Where you get a provision like this, decisions will never be “final or binding,” they will never countenance the exercise of bad faith. Court will not cooperate in helping fraud or bad faith or anything like that, so there’s always a ground to bring it to court.
* You can circumscribe court’s jurisdiction, for instance in broadly defined, inherently uncertain words, like giving absolute judgment of the trustee to define certain requirements may be okay.
* Still won’t be okay where the trustee has failed to exercise any discretion at all, regardless what settlor/instrument says. Nor can they act imprudently/unreasonably; court will always still be able to intervene.
* Re Poche: trustee was so hopeless that she didn’t even get all the assets of the trust together. Was found grossly negligent. Court said she’s no good and they got rid of her. She could be removed as trustees, regardless of exculpatory clause. Gross negligence, dishonest, wilful breach of trust are enough for court to step in and remove, regardless of clause
* Boe: privative clauses cannot prevent judicial review where the trustee fails to exercise any discretion at all, acted dishonestly, failed to exercise level of prudence of reasonable businessperson, or failed to act impartially between classes of beneficiaries

Impartiality

* Trustee has to act impartially, unless there’s an exoneration in the trust instrument.

Delegation by trustee?

* General principle:a trustee cannot in turn delegate. You can’t do this unless you have been specifically empowered to do so. This works in familial trusts, but it’s inadequate today.
* For instance, if you need legal advice but you’re not a lawyer, or you need to trade shares but aren’t a trader. Of necessity, you have to delegate/give power
* Speight: first opening of the duty that the trustee can’t delegate. Rule here; if in the course of administration, you are doing what ordinary businesspeople would do, then that is okay, even if what ordinary businesspeople were doing happened to be fairly risky. For istance, way stock was sold at the time was that you’d get a broker. This was standard practice at the time. Beneficiary sued the trustee here was unsuccessful because the practice adopted by the trustee was normal in terms of business practice (he sent broker the money, who sent script but never invested the money). This eroded the idea that only the trustee could do business.
* Moral necessity and regular course of business will justify not handling these things personally if you are a trustee (Speight). However, if he clearly went and appointed a broker well known as being fraudulent and a crook, that may be seen as negligent.

Re Wilson

* where there is a corporate trustee, court says it’s the board that makes the decisions. In actuality, this board did what was emerging as a common practice – delegated that authority to its general manager. Unlawful delegation?
* Unsuccessful: a trustee being personally responsible with exercise of judgment can’t escape liability by leaving to another the exercise of the judgment. They’re saying the board had that judgment, but in this day and age, that’d be ridiculous. So there is of necessity a delegation.
* More appropriate way of dealing with this: if you choose a trust company as trustee, you are also accepting as trustee the management practice it has adopted for managing those trusts.
* as a testator/settlor, you are taking on that structure and any mechanism present that allows for it to be changed in the future.
* Naming a company as trustee doesn’t mean that the trustee is the board.

Duty of Loyalty

* Keech: Landlord was prepared to lease to the trustee personally, but not prepared to lease where a person like the beneficiary, who was a minor, had an interest in the property. Trustee did so and vested personally. The beneficiary became a major and was very concerned with the profits made from this lease. He said that the trustee purchasing this lease had had breached his duty of loyalty. Court took the view that the trustee should’ve let the lease run out rather than have it to himself. Court says that it has to be a very strong, maximized obligation because the scope for fraud is too great. Trustees must not even place themselves in a position where their interests MAY conflict with the beneficiary’s. Strict, preventative approach

Boardman

* Trustees ascertain that increasing the shareholding in the poor asset would be purchasing non-authorized investments, they do not have power to purchase these investments. Boardman and Phipps ask trustees, what if they bought it personally? Trustees say this is a good idea so that at least these shares will be in friendly hands. It won’t be controlled by the trust but one of the beneficiaries will be a majority shareholder (acting as agent of the trustees) and the solicitor who acts for the trustee. They made a killing. Did all this without consent of all beneficiaries.
* the other beneficiary, is unhappy. Saw the largess accumulated in his brother’s hands. Says he got that money as a result of breach of trust: you have violated your duty of loyalty to the beneficiaries and consequence of that is the ordinary consequence at law which is that as a delinquent trustee, you will be disgorged of those profits (Keech)
* fiduciary cannot profit from their position without informed consent of beneficiaries. Here the info and purchase opportunity arose solely due to their positions.
* Strict approach to duty of loyalty and to avoid conflict of interest is taken.

Peso Silver Mines

* directors owe fiduciary duties to companies.
* Mining company tossed out a claim, but director used the info from that claim to profit personally. Company argued you owe a fiduciary duty to the company so should, as in Keech and Boardman, disgorge the profits.
* Judge says that the no-conflict principles are strict BUT in this modern day, where business is done through complicated corporate model, application of principles shouldn’t be extended beyond present limits, need to interpret them in terms of modern life and common practice.
* The info was not confidential, the directors acted in good faith, defendant acted as an individual
* Dissent: the complexities of modern business are the exact reason why the rule should used strictly, so that the modern complexity can’t be used as a smokescreen for fraud by trustees

**Class 9 – Obligation of Good Faith, Duty of Impartiality, Apportionment, Howe Rule, Self-Dealing/Fair-Dealing, Indemnity to Trustee, Settled Shares, T’s Duty to Provide Info and Accounts, Remuneration**

Obligation of utmost good faith

* This means that the trust assets which are vested in name of trustee must be used by him in a way in which he or she does not regard them as his own private property
* They can invest it according to the standards of a prudent businessperson but in terms of actually dealing with the property for their own benefit, there are problems with that.
* Keech: This rule is so strict in its original conception that any dealing by the trustee with that trust property that was even possibly at odds with the interests of the beneficiary resulted in a breach of trust in which the trustee would be liable for any profits personally acquired as a result of using this trust property in a way that could be beneficial.
* even if the property was such that the beneficiary couldn’t have the use of it, the trustee would still be required to disgorge profits
* Boardman: Beneficiaries do not have a duty of good faith to trustees. Even though both Boardman and Phipps were actually in good faith, they might not be, and even though this was a deal that the trust could not engage in, they were still held to be liable and had to disgorge
* Dissent: enunciates a test picked up in future case: the idea of a sensible, possible conflict

Canaero

* Canaero: Canaero argues for disgorgement of profits, that senior employees (not just directors) had duty of loyalty to company, were working with them to pursue corporate opportunity, then left and joined another company which you now owned, and continued with that same work
* SCC: let’s keep the rule rigid and widen the group that falls in: employees fall in too under certain situations. Laskin says you have to look at the role of the employees in question – straight up employees are not but employees with a power, potentially, can be looked at differently.
* On Boardman/Keech rule: says the rule is important but you can’t just do a one size fits all. Must look at the circumstances and after reviewing them according to certain criteria, that will help you decide whether or not there has been a breach of conflict of interest.
* General standard of loyalty, good faith, and avoidance of conflict of interest or good faith must be tested by many factors on case by case basis. Factors of position/office held, the nature of the corporate opportunity, its rightness and specificity and the managerial officers’ relation to it, the amount of knowledge possessed, the circumstances in which it was obtained, the factor of time, whether it was private or public knowledge, the circumstance under which the relationship between the employee and company was terminated (if you were fired, rule won’t apply, but if you resigned and used the info afterward, you will be). It’s a fuzzier test.

Canadian Arco

* New test: is there a sensible possibility of a conflict of interest?

Self-Dealing

* self-dealing: the trustee deals with the asset, buys it, sells it, and buys it, thereby putting himself on both sides of the transaction. It almost always results in this transaction being voided
* Holder (exception): Here, you got a trustee on both sides of the transaction but only nominally. We found that trustee didn’t want to be a trustee and had indicated that he was very interested in buying this farm very early on in the transaction and he was looking to get himself extricated as a trustee and the facts showed that he wasn’t in any way involved in the sale of that particular farm or decisions on the matter. Applying the “real, sensible possibility of a conflict” test said there was none here. Malken vs. Omega Oil follows this – where defendant isn’t really on both sides of the transaction due to only token trustee.

Fair-Dealing

* Courts have always allowed fair dealing.
* where there is an agreement between trustee and beneficiary so that legal title is in the trustee and the trustee negotiates with the beneficiary for equitable title. This constitutes a sale of the equitable title to the trustee.
* Creighton: it is imperative that there is full disclosure (particularly with respect to the value of the asset). If not, transaction is voidable.

Duty of Impartiality

* Can’t favour the life tenant interest over the remainder interest or vice versa.
* Law assumes the settlor wants impartiality, but the trust instrument can say otherwise (either expressly in sophisticated instrument, or argue that it’s implied).
* A duty of impartiality requires investment to restructer the trust asset portfolio for impartial treatment and change the trust assets into those that neither favour the income accounts (life tenant) or the capital accounts (remainderman)
* Obligation of the trustee to sell partial assets and put them into assets that are fair to the successive beneficiaries.
* Duty goes above the standard of the prudent businessperson: even if they are good from investment perspective, trustee may have to get rid of them because they are partial
* If the trust does not have a clause exonerating trustee from impartiality, must follow Howe
* Howe rule: where a testator dies and leaves residuary personalty to persons by way of succession (life tenant/remainder) and the residue includes a wasting asset (an asset that is unauthorized or is reversionary, wasting away and not generating income) then the trustee must sell the personalty that is wasting/unauthorized and invest the proceeds in authorized assets (personalty means realty is not included)
* it must be the residuary in the will, what’s left after you’ve paid all the debts of the testator and after you’ve made legacies to the different people involved, then what you’re left with is the residual estate, which is what goes to the heirs and if the heirs are appointed in succession and the asset is wasting, look to Howe rule.
* If there’s a trust to retain, it means you must hold onto the asset, even if partial

Apportionment

* selling the delinquent asset from the residuary and investing the proceeds may take time and in that time, either life tenant or remainder is being disadvantaged. At some point of time, that bad asset has to be sold, is sold, and the money realized must be apportioned. The rules in Howe and Earl of Chesterfield do these two things.

Situations the Howe rule Doesn’t Apply To

* if it’s realty and not personalty at issue (Re Oliver)
* there’s no clear instruction on partiality in the instrument.
* There’s nothing on the subject that can be implied from the instructions by the testator (for instance, a trust or power to retain or sell)
* Waters: Howe rule doesn’t speak to inter vivos trusts, there is no duty to be impartial where nothing is said here, as the settlor is taken to know what assets he wants to place in the trust and you live with those assets, even if they create impartial treatment, unless can infer different

Implications

* Trust for sale = implication to be impartial.
* Trust to retain = implication that partiality is okay.
* most are silent and it’s left to you to draw implications around terms to do with the retention and conversion of asset(s). When reading a trust settlement, make sure to look for words around sale, conversion, or retention.

Apportionment

* Howe rule: if the assets are sold within a year of testator’s death the value is assessed at the date of sale, otherwise value is taken at the first anniversary of the death.
* If it’s inter vivos trust with requirement of impartial, then value is taken as of the date of the trust being set up.
* If the income received pending sale is less than 2-7% of the value of the property, the life tenant receives all the income produced. If it later exceeds 2-7%, that difference is paid to the life tenant to make up the shortfall. If the shortfall is not made up before the sale of the asset, the life tenant can take it out of the proceeds of the sale.
* Flips the other way for apportionment of capital (Earl of Chesterfield).

Other examples of implied partiality

* Reversionary interests = interest in property of the estate that are not immediately available and are only available sometime in the future (eg remainders in shares, insurance policy on another’s life). These see remainders gain at expense of life tenants
* express trust for sale in a will = if there is one, that is an indication that this trustee or testator understands that this is not an appropriate asset to keep and that’s why you’re to get rid of it. Usually it’ll be combined with a power to postpone, can retain for period of time, so that you don’t have to sell it immediately and not get proper value for it.

Lottman/Stanford and Lauer/Stekl (application of Howe rule expanded?)

* express trust for sale with power to postpone. The court allowed the Howe rule to apply and they wanted to apply it in respect of real estate as well. It was argued that realty is no longer a sacred cow, it’s not that unique as it was in historic times so that the rule in Howe should be extended to everything.
* However, court ends up saying that real estate is an exception, going back to old Re Oliver
* Lauer and Stekl: same judge did allow real estate to be included in the sale of assets required to produce impartiality.
* Distinction: in Lauer, there was a requirement to sell all the assets, a direction to do so, whereas in Lottman, there was a distinction made between personalty and realty. Where there was a direction to sell ALL the assets, this will be taken to include the realty.

Duty to be Impartial cont’d

* Royal Trusts v Crawford: unfair to remainders, because capital was depleted substantially. Court says if you look at the wording of the instrument and look at life of testator and his wife (close one, he wanted to provide for her to live in comfort she was used to), but judge says if you look at it, there was a requirement to be impartial between the two parties irrespective of this and can’t deplete capital like that by paying huge dividend
* In spece gift means intention was not for it to be impartial

Duty of Impartiality cont’d (powers to sell and retain)

* Re Smith: a husband/father died and left everything to his son Peter and nothing to the widow. But he did have a precatory clause in the will in which he earnestly entreated his son Peter to take care of his mother by placing the income from a quarter of the shares in her benefit for her lifetime. Still, father didn’t mandate or require it, juts requested.
* Son did as requested, took number of shares and made inter vivos trust to take care of mother for her lifetime. Wife badgered trustee to sell (said not enough money)
* There was both a power to sell and a power to retain, so no compulsion one way or another.
* trustee had acted improperly by seeking directions from the settlor and suggested that it be removed as trustee
* Court took view that given that there was this power of sale and the duty to be impartial, you needed to get out of these shares in order to safeguard her life interest and did enter shares what would still have something that would benefit the remainder person, who was the settlor
* just a power for sale, and a power to retain, yet the court construed an obligation to behave impartially, notwithstanding the fact that it was inter vivos and the power to retain. Power to retain meant a discretion to retain but a duty to be impartial.
* Direction to retain = partiality, direction to sell = impartiality. If it’s powers only, how you deal with that...who knows? (arguable) In relation to real estate, law seems to be clear that it’s not subsumed unless there’s a clear indication that you must sell not only the personalty but also the realty (Laurie Steckle) and if you sell, get something that is impartial.

Settled Shares

* Shares that constitute the trust are settled, they are what they are.
* form is substance: if you have settled shares, we know that this is the asset of the trust, and quite clearly if you declare a dividend, that’s income, the shares remain as capital.
* you look to see as to how the directors labelled and classified the money that was being thrown out of the company for its distribution.
* This was not followed in Re Welch. The deceased, Welch, left his property (shares in his company) to second wife as a life tenant and gave remainder to his children from his first wife.
* decide to strip the assets of the company and for income tax purposes, all the assets are sold and the company has a lot of money, which forms part of trust but it’s now all being declared as a dividend. The form of the dividend is income – the greedy heirs of the widow declare that the form is income, so it’s all theirs. Other side saying this may now all be dividend, but it represents the capital of our father’s business.
* Judge says “form is substance” overridden by the intention of the testator and this testator did not contemplate that these children of the widow would get the money and so consequently, it went to his kids, the remaindermen. Wife is dead and was only intended to provide for her.
* Normally though, form is substance, you see how the directors classified things when they were stripping the assets, but if it doesn’t work, as was the case in Welch, form is not substance.

Apportionment of Debts

* apportioned between interests of the life tenant and the remainder people to make it fair. Trustee Act has abolished old rule for this, however, which was a jumble
* Generally speaking today, especially with trusts beyond the very simple ones, the whole investment question (particularly with shares and real estate) is more in line with a portfolio investment policy, so you look at ALL the investments and if there is an obligation to be fair and impartial, that should perhaps not be structured in terms of single assets, but rather the portfolio as a whole.
* As a trustee you must clearly pay the debts, and once done that, look at the assets remaining and try to do something fair to the two groups of beneficiaries, if that’s what the testator wants.

Trustee duty to provide info

* rule was that you don’t need to tell beneficiaries everything, there is no big common law duty to disclose to beneficiaries. But we’ve moved away from this.
* Courts say you are now entitled to info unless it’s personal and privileged to the trustee (exposes the trustee and makes privileged info no longer privileged).
* Londonderry Settlements: Still a protection of how trustee comes to decisions during a meeting. If it’s one trustee, this isn’t an issue, he just makes decisions and just ask for info about the assets and see the results, but if there are number of trustees, that have to act unanimously so they have to discuss in some detail. Courts have said beneficiaries are not entitled to things like minutes, agendas, or records of these discussions.
* when dealing with more public things, pensions, etc, courts are slowly but surely giving out more and more info as being entitled to beneficiaries.

Accounts

* trustee must keep accounts and must give account to beneficiaries.
* Don’t need to react immediately to request by beneficiary, can take some time, but in this electronic age, getting info quicker, like monthly instead of annual, is more doable and courts will thus more and more see that as something that is required.

Remuneration of Trustees

* practice originally was for a trustee not to charge for services, which is still the rule. To change that, must have a clause in the trust settlement that specifie. That may not work with wills.
* The court has always had the power to be able to order remuneration if beneficiary asks them to. Also, if as trustee you find that this last year has involved huge amount of work, you’ve been successful, but you put in so much energy, you can go to court and claim remuneration.
* Trustee Act: apply to court, who delegates to registrar to the Master to see if you are to be remunerated.
* Remuneration is up to 5%, but court generally doesn’t like to give percentages, rather than the trustee estimates an amount and gives reasons why.
* In addition, if you’ve done a particularly good job, can ask the court to give you a care and management fee that cannot exceed .4%. (s.88 of Trustee Act).
* Re Pedler: to get this extra fee, trustee must show value of estate/assets being administered, nature of them, degree of responsibility, time expended, etc. This is because trustee may have done nothing and the giant gains were due to other factors – trustee must show what they’ve done and the expertise they used.

Indemnity of the Trustee:

* trustee is entitled to be indemnified by the beneficiary.
* Re Reid: Situation where UK based trustee and insufficient money/revenue generated from the assets in the UK to meet income tax obligations and so the trustee was being hounded by UK tax authorities for this money. Ordinary rule is beneficiary should pay.
* Beneficiary argued this was a tax matter and he lived in BC, even though assets are being administered in UK. Says the UK authorities cannot sue . Court says no, fact is there is a liability here, the trustee is exposed to it, and you are the beneficiary who has the potential to gain from it and that being the case of it, you must indemnify. Doesn’t matter that the people going after the trustee can’t legally go after you. It’s still based on your assets.

**Class 10 – Unhappy with T’s Actions, Court Intervention, Constructive Trusts, Pettkus unjust enrichment, Guerin/LAC Minerals vulnerability test for finding fiduciary**

Tax benefits

* should the trustee be paying the tax or is it better for the beneficiary to do so? Most income tax statutes allow you to choose one or the other.
* You have to look at tax rates, the kind of objects you’re talking about, and issues about whether or not the trust is proper administration of the totality of the assets or if there’s a proprietary interest in every single item. Create tax efficiency. Look at purpose and advantage of the trust (like pooling resources for better negotiating position), then look at tax efficiency.

Calling for legal title

* Beneficiary can call for legal title if they all agree and are sui juris, don’t like what trustee doing
* Trustee can’t call for beneficial title without going through the process of fair dealing.

Unhappy with Trustee’s Actions

* Talk to trustee about the behaviour. If he doesn’t agree, take him to court
* If you don’t want to go to court, you either just say trustee is right and doesn’t have to do what we want or saying that they’re not doing what we want, but don’t want to go to court. Then need to consider whether you want to bring trust to end and call for legal title. Reason why you may not want to do this is because of tax efficiency or impracticalities
* Brockbank: very essence of the trust is that there is discretion for trustees in administrating. Here, beneficiaries tried to compel the trustee to accept a professional co-trustee. Court ruled that this is trustee’s discretion and they should agree on who co-trustee will be.
* Brockbank shows the very limited ability of the beneficiary to fine-tune the administration of the trust. They have sledgehammer of calling for the trust and negotiate with trustee on that basis. Ultimately, though, the decision of what you’re going to do as an administrator of the trust belongs to trustee, unless you’re acting outside the boundaries set out by settlor/testator.
* Butt v Kelson: where trustees are directors. Shareholder, despite beneficial interest, couldn’t get privileged info upon request. It privileges that beneficiary with info that could threaten the corporate opportunity in a particular venture, and hence the interests of other shareholders/beneficiaries. Also, while directors are fiducially bound not to tell competitors, beneficiaries owe no such duty of loyalty.
* Beneficiaries are important, but only in terms of receiving and calling for legal title. But they don’t factor into the administration. Management/administration/control is up to the trustee.

Court Intervention

* extent to which they will intervene in trust operations are narrow.
* s.86 of trustee Act. Insulates a trustee for breach of trust – get court’s opinion on a breach of trust that you weren’t sure on pursuing, if court says go ahead and do it and that turns out to be a bad action, then you as a trustee are not guilty of a breach of trust. Only exception is if you’ve brought all this because you’ve been fraudulent or misrepresented some of the information. It’s often used by trustees when they don’t have unanimity among themselves.
* Re Wright: here the court refuses to give an opinion. Canada Trust get an offer on shares and want to sell but the other trustees say it’s not a good offer. Canada Trust wants court’s blessing. Court won’t give opinion: it is discretion of the trustees whether or not it’s a good offer. Don’t keep running to the court, deal with it yourself/negotiate amongst yourself.
* The courts thus won’t with alacrity move in, scope out the scenario, and then give advice about what should be done; trustees sort it out themselves. Only if there is absolutely clear evidence that you can’t get agreement by the trustees on a significant issue, that courts will give advice.
* Tempest: trustees disagree. One goes to court to sanction, to provide consent for non-cooperative trustee. Court says no – testator has reposed confidence in both of these trustees. There must be agreement, then so be it, you can’t get it. That probably means it’s not the appropriate course to take and we’re not going to second guess.
* Re Billes: here the court does step in. The shares weren’t generating enough and needed to diversify. One trustee refused to do so. Court came to conclusion that the parties were just not getting along here at all was souring the whole relationship and a decision had to be made.
* Billes and Tempest together stand for fact that a trustee can be recalcitrant and resistant, , just means this course of action isn’t right, court won’t second guess that trustee unless you can show that it’s clearly not in the best interest of the trust and this trust is becoming dysfunctional as a result (which was the case in Billes).
* Schipper: Court will also interfere where they figure that trustees are operating outside the purposes of the trust; if your co-trustee isn’t consenting but you can show that the resistance is contrary to the very purpose of the trust, then the court will interfere and overturn the decision of the non-agreeing trustee.
* Re Fleming: the trusts were not acting even-handedly. There was a duty of evenhandedness (impartiality), that the trustee here didn’t act within the scope and purpose of what the will set up. If you are not in compliance of the law or the will, the court will give direction

Constructive trust

* trust is set up by operation of the law. Here, it’s not expressly set up and can’t really imply it, but you can say that the nature of the relationship between two persons are such that you have to say it is fair to say or reasonable to say that the relationship between these two parties is one of trust. The law constructs the trust onto that relationship.
* This is based on in rem rights: you can get the thing itself by having a right in the thing.

Institutional Constructive Trusts, Constructive Trusts cont’d

* courts established a list of different scenarios that give rise to constructive trusts.
* Usually involve situations that the court feels has been an unjust enrichment in some for or other. Usually client had property now in the title of somebody and they’re going to lose it and just be a concurrent creditor unless we can say they have an in rem right.
* Need to see if it looks like there’s been an unjust enrichment of the titleholder through deprivation of the client
* Usually, these scenarios also involve some position of power. Usually anybody in a fiduciary relationship, a relationship of utmost good faith between them, you’ll get something that triggers a constructive trust. Eg: solicitor/client, agency contracts.
* Directors share this – they’re not there by virtue of express or resulting trust and yet there is a liability that they have in respect of property that they take control over but which more properly belongs to the company. We say, in effect, that the property of the company that is being taken by the faithless director is held by him on a constructive trust. Canaero extended this concept to top management/employees. Money belonged to Canaero by constructive
* The CT is a device for saying that you are a faithless a fiduciary because court say in these circumstances that you are a fiduciary. And as a result, if you’ve a profit at the expense of someone for whom we say has an equitable interest, but we can’t identify the property anymore, then we say you are liable for damages, but they will be equitable damages.
* It is the court here that says there’s a fiduciary relationship in these circumstances because it feels you’ve been unjustly enriched and can do this in respect of property which has now become so dissipated among various accounts that it’s lost integrity as single unit, so court will give equitable damages. However, where there are discrete items of property, court may well give constructive trust in respect of that property (Pettkus)
* Institutional Trusts: arises automatically once requirements are met, whereas in remedial, court must consider if there is a fiduciary relationship. Breach of trust or of an existing fiduciary duty is institutional, CTS without a pre-existing fiduciary relationship is remedia.

Pettkus v Becker

* SCC: relationship that was together almost 20 years and amassed an empire out of nothing. Husband has been unjustly enriched through girlfriend’s contributing, and now getting the boot.
* Court says that in the interests of good conscience and equity, we will impose a trust and give her equitable title. That’s how a constructive trust arises.
* First see if someone has been enriched. Then, is there a legal justification for that enrichment? If there’s an absence of juristic explanation for it, then put a constructive trust if there’s a causal connection between property to which he holds legal title and the contributions which she has made to the acquisition of that property. We will then say there is an equitable title reposing in her. She can then call for common legal title in that property.

Remedial constructive trust

* CT is court saying that there are conditions that were met that satisfy them that the way to result the proprietary issues between these parties is to put a constructive trust on it
* Remedial CT has got courts, starting in Pettkus, but in earnest in Guerin, to look at trying to develop some principles around which a constructive trust may be given.
* RCT = not only are there institutional ones, but what is the general theory that binds those and any other CTs that we may wish to develop? Enrichment is usually the sniff test. If someone seems unjustly enriched in fact pattern, that’s the clue to start looking at constructive trust.
* If it’s one of the institutional ones, not a problem, just go to Waters and see what is needed
* If it’s not an institutional one but something new – Pettkus/Becker (changing social circumstances), Guerin.

Guerin (Vulnerability test)

* Idea is that if someone has been enriched and that enrichment is attributable to fact that they are in a position of power where the person that they are dealing or operating for is at their mercy and is vulnerable as a result. Issue of vulnerability.
* Wilson in Frame: She said that a constructive trust occurs where there is a fiduciary relationship and there is a breach of it. Three requirements for this relationship: fiduciary has scope for the exercise of some discretion or power, the fiduciary can unilaterally use it so as to affect the beneficiary’s practical or legal situation, and beneficiary is particularly vulnerable and at the mercy to the fiduciary holding the discretion or power. You can construct new CTs provided the scenario that leads to the enrichment can be attributable to conditions that these three requirements fit.

LAC Minerals

* Majority says this is not a scenario for a constructive justice.
* The majority didn’t want to say this was a breach of fiduciary relationship, as that creates problems around the issues of what you have to disclose in the course of negotiating a contract; they don’t want to regulate contract negotiations (negotiating parties owe each fiduciary duties?) and want the parties themselves to regulate it.
* Majority says you can only have a fiduciary relationship when you are vulnerable, going to Wilson’s test from Frame v Smith, and say the hallmark is vulnerability. They also quote from Dickson in Guerrin in which he says that you’re a fiduciary when you are at the mercy of somebody over whom you have power. Short of that, you do not have a fiduciary relationship and therefore cannot get a remedial constructive trust.

LaForest dissent gives 3 categories for CT:

* 1. Presumed in certain classes of relationships
* 2. The relationship can arise as “a matter of fact out of the specific circumstances of the relationship” even where not expected to normally rise. The hallmarks for making these circumstances fiduciary are: ascendancy, influence, trust, confidence, dependence: broader than Wilson’s, not as clear as “vulnerability.” Circumstances that give rise to fiduciary expectation. The presence of these factors will implicate the one party in the affairs of the other to the extent that he should protect or advance it. (LAC goes here)
* 3. Instrumental or facilitative category, where it doesn’t fall into the first two. Just have to do justice here, even though it doesn’t fit in the other categories. The term fiduciary is just used as a conclusion to justify a result. Chase Manhattan Bank: there was no relationship of dependency and no contractual thing saying trust, all we can say is that it was an overpayment and made by mistake and there’s an enrichment and the courts here just took that overpayed money and put it in CT for the person that made the mistake. Just doing right thing.
* If situation where an expectation has been created and someone has relied on that and you’ve done something that causes them to rely on that, then you are a constructive trustee if they’ve suffered a loss. As such, for LaForest dissent, LAC is constructive trustee.

**Class 11 – Expanding CT, Hodgkinson dependency test for finding F, Set Off, Remedies: compensatory damages, causation (damages, Canson), accounting for profits**

Expansion of the Constructive Trust

* a modification to those criteria to meet new corporate situations like in Canaero (where they took employees and cast on them a fiduciary relationship). Jurisdiction is broadening by extending the fiduciary a little bit.
* Canadian courts were inspired by Cardoza and have developed the concept of constructive trust/fiduciary through the issue of to what extent is it necessary and to what extent does it hold together, which is the criticism of more conservative jurisdictions.
* LAC Minerals – you should not be confined to institutional constructive trust, those that have grown and been recognized by common law/equity over 300 years. TSCC did this expansion in the context of unjust enrichment. That was the instrument to look at the fiduciary relationship.
* Requires looking at what the concept of a fiduciary is. Being able to use the constructive trust as a remedy if you can point to certain property which is not in the name of the person who is the plaintiff and alleging an unjust enrichment (Becker in Petkas). Must then consider whether Petkas is a fiduciary. This is not adequately delt with in Petkas, just assumed
* Court says for public policy reasons this is not fair and for not wanting the titled owner to get away with this.
* NZ: in opening up CT, when it can’t be done (Guerin), it leads to a substitute of equitable remedies (thus opening this up too). These are often superior to CL remedies as don’t follow restraints on CL compensatory remedies: no need to mitigate damages, show foreseeability. Even where remedial trust isn’t available, if it is a trust situation, other equitable remedies are available as substitute.
* You have to find the fiduciary relationship and issue is whether that fiduciary relationship is inherent in every unjust enrichment. It probably isn’t. Chase Manhattan Bank is an example – the dealings between the two parties where one person in error pays a second time, there was no duty of good faith or loyalty, there’s no fiduciary relationship, yet there’s a clear unjust enrichment. This bother some people, that the two are conflated in Canada

Hodgkinson

* LaForest gets the majority and expound the issue of what is a fiduciary and it is his conception of fiduciary that now forms majority and Sopinka and McLachlin are in dissent.
* LaForest says we’re looking at a situation here where the question of dependency, ascendancy, all the things he spoke about in LAC are applicable. Power dependency relationship – trustee/beneficiary is divided title but the power of management is constrained by duty of loyalty, can’t do whatever you want. Because the beneficiary is expecting that, that produces a power dependency relationship, and LaForest says this is the clue that you have a fiduciary relationship.
* Simms had sold Hodgkinson a MURB that he had a personal interest in, it was in his interest to sell these MURBS as opposed to others, even though it was a riskie oner. He’s suing because he’s saying that this is a power dependency relationship. He couldn’t show that he was vulnerable – he was a sophisticated investor himself.
* LaForest doesn’t care about vulnerability, just that there was a power dependency relationship, that Hodgkinson had placed high level of reliance on Simms, which caused the harm. Trust a reliance creates fiduciary relationship and hence CT; vulnerability is just correlative, not a requirement. This is a much broader test.

Law of CT

* the institutional constructive trust, which is the categories that have been well-established.
* In addition, the categories can be opened up where we can say of the relationship that it is a fiduciary one, that it is a situation where one party owes the other party utmost good faith. As soon as you can say that there is a fiduciary relationship between the plaintiff and the defendant, then court can declare it is a (constructive) trust. And the remedies are thus available – compensation and damages are assessed in terms of compensation at the equitable level. As a beneficiary, you have an equitable interest in this property, if it can be identified, which means you have available to you equitable in rem relief.
* LaForest is more nuanced and requires more evidence and personal judgment. Another problem with LaForest’s is that it seems to have occurred in unjust enrichment, we’re not sure if this entails fiduciary relationship, it is in some but not in others.

Remuneration in CT?

* Charging an additional fee for doing a really good job as a fiduciary/trustee. S.88. Only trustee, executives, and administrators having a right to seek remuneration. You probably can’t if you’re just a fiduciary in a CT.

Available remedies

* person likely to be a petitioner is the beneficiary. Rare to have trustees suing beneficiaries, only in unusual circumstances (like beneficiaries meddling too much).
* You can combine the remedies as long as they’re not inconsistent and don’t give you more than you should get.

Question of advice and direction

* Courts can give advice, and if you get it, it exonerates you as a trustee from a breach of trust unless you’ve been fraudulent in bringing the application, but it will generally anoint the particular course of action that the court accepted.
* Must be advice on a particular aspect. Often done jointly by trustee and beneficiary

Specific Performance/injunctive relief

* beneficiary says the trustee should be doing “this” and points to the trust settlement to justify it (usually a distribution to the petitioner). Seeking specific performance, like for a payment.
* trustee is pursuing a course of action not permitted under the trust instrument – get injunctive relief to stop it.

Question of compensation for loss

* If a breach of trust has occurred, as a beneficiary you can now sue the trustee for full compensation for the loss you’ve suffered as a result of that breach.
* In equity, that means that it’s full restitution. The nature of equitable remedies is restitutionary – restorative. It’s to put you in the same position you would’ve been in had the breach of trust not occurred.
* The remedy is intended to also be a deterrent to trustees. Damages are at such a high level that they serve as a deterrent.
* There are defences, but the court starts off by saying that they’re going to fully restore this plaintiff insofar as is possible because of the losses suffered as a result of this particular breach.

Finding a Fiduciary Relationship (Guerin)

* Guerin: Housing market is much more lucrative at time of action then when agreed to sell land for golf course. Developing land for residential now, but not the case back then. Court found fiduciary relationship – made it clear that you’re in a fiduciary relationship if you’re in a position of less power to someone else and are therefore at their mercy and vulnerable to them in terms of actions that powerful person can take that will affect you. This was Musqueam, as they were relying on govn’t to abide by terms and can’t go after golf club for fed’s actions. This breach of fiduciary relationship = breach of trust (carving out a CT from fiduciary duty).
* This wasn’t a principal/agent relationship, musqueam could thus not assert a institutional CT,

Compensatory Damages cont’d (Guerin)

* Court said that this was a breach of a fiduciary duty – the applicable brand of compensation is equitable damages. Equitable damages does not take foreseeability, mitigation, actual loss into account. It restores you to the position you would have been had the breach not happened
* restores you to that position *as at the date of the judgment* of the court.
* The award for damages is the lost opportunity for rental development at the date of trial. This would not have been the case in CL, where actual loss would have been assessed – damages mitigated by the low housing market at time of the deal, but equitable damages assess damages at time of judgment, not at time of the deal/breach

Canson (causation in equitable damages)

* has to be some causative link between your loss and the action of the trustee.
* McLachlin says it has to be a serious, reasonable connection that we can contemplate
* Law firm had not disclosed to the client that it was acting for another buyer who was upping the bid – a breach of trust. Purchaser buys, subsidence on the land destroys the building, purchaser seeks full restoration from law firm based on breach of trust. But the breach, the failure to disclose, did not cause the subsidence that caused the damages related to the destruction
* Court says there has to be some reasonable causative link. You can’t have it that disparate and unconnected. There has to be something sensible, it can’t be some intervening act which is completely unrelated to the breach of trust.
* Target Holdings vs. Redford: again the actions/breach attributed to solicitor in this case were not a cause for the actual loss. It wasn’t that Redford duped you, this is just the way transactions take place and it’s your job to check what the value of the property really is in terms of issuing the mortgage, that’s the causal link, it’s not the solicitor’s duty to figure out value. (if you can check it yourself, can’t sue fiduciary for breach for not disclosing to you?)
* Restorative damages require showing causation, but we don’t know how much. Probably not that much. McLachlin describes it as “reasonable, sensible causative link.” We’re not sure where exactly that line is.

Set off

* where I owe you 10K but you owe me 9K, I just owe you 1K
* Deare: use set off where the trustee had done a bad job on one set of shares, but on the other set of shares there were great profits. In suing for breach of trust on the negligently dealt with shares, court ruled that you should see the net gain to the plaintiff – look at the asset portfolio.
* Archer: what you’re assessed on is your handling of the entire portfolio as a whole, not each and every item in the portfolio. It’s the proper administration of the entire field.

Lack of statements

* trustee details the transactions that take place. Financial statements to tell you what happens to each of these trust assets, whether they’ve been earning, how much etc.
* administrative duty on the trustee to perform this act. If he or she doesn’t, you can apply for order of specific performance because of this duty to account.

Account for Profit

* beneficiary has the right to demand periodic financial statements from the trustee, in which trustee details the transactions that took place
* accounting is more difficult where the trustee has breached the trust and is now operating a company with shares that he has bought PERSONALLY, in a breach of trust.
* Because he’s in breach, the beneficiary is entitled to the profits.
* Issue is whether you are entitled to those profits in perpetuity. Is the trustee now working for you the beneficiary in perpetuity while he holds these shares? Is it fair to compel him to sell?
* Warman International: Court emphasized that equitable remedies are deterrent-like. Warman in many ways suffered no loss. However, court says this is irrelevant – there was a fiduciary duty here by Dwyer to Warman (as a GM), so there is a duty on them to account.
* The question then is how long this should go on for, which is at the discretion of the court. They are just to do something that’s fair, so long as it’s a deterrent to would-be trustees. They fixed it at 2 years and they did it on basis that they didn’t think Warman distributorship would have lasted much longer than that.
* Court also makes allowance for Dwyer’s skill. Case shows extent of court’s wide discretion and power in dealing with equitable remedies.

**Class 12 – Accounting for Profits cont’d, Defences for breach, Proprietary Remedies (CT), Unjust Enrichment = CT?, Results of CT (quantum meruit or quantum valeban), Tracing**

Accounting for profits

* Have to give financial statements as a trustee and if you don’t, you can be ordered to do so.
* accounting for profits that occurs afterwards for the trust assets that the trustee has appropriated and continued to utilize.
* Warman represents a slippery slope again, as in forcing Dwyer to account for profits, it finds a fiduciary relationship between an EMPLOYEE and a company.
* Yielding the profits of a company you started is an equitable remedy that invites other considerations and a lot of discretion on the court’s part. For instance, perpetuity? The court here cut it off at 2 years. Can also set remuneration for the defecting fiduciary. Making them account for profits for two years is entirely discretionary, based on deterrence/disciplining
* The beneficial interests are retained in all substitute assets. Trust assets in a normal trust are constantly changing, these shares, those shares. They have to be changing as the trustee has responsibility of keeping the portfolio updated. The value is the equitable interest the beneficiary has.
* Scott: A house is parlayed into a higher value house. Whether this is authorized or not, the trust assets had been modified. Court is looking at the date of distribution and the value in that point of time. So the increase in asset value always rebounds to the beneficiary. Also shows that in accounting for profit, if an asset is bought with a mix of both trust assets and the trustee’s personal assets, the beneficiary is entitled to an interest proportionate to contribution.

Defences

* informed consent by the beneficiary, provided they are sui juris. If you get their consent, then it’s okay; even if it is technically a breach of trust from what the settlor had prescribed.
* s.96: broad discretionary power of the court that it gets by virtue of trustee act. Have to show that you acted honestly and that you acted reasonably, then you have to show that it would be fair to excuse the person in the circumstances (similar to what happened in Fales).

Proprietary remedies/in rem remedies

* these are claims against the world – what that means is that it doesn’t matter where your property is, in whoever’s hands it falls, you are able to get it back.
* This doesn’t apply when it gets into the hands of a bona fide purchaser for value without notice. Equity balances interests and says if you acquired property in good faith and gave consideration and didn’t have notice.
* Constructive notice – that you should’ve known – is effective and recovery can take place.
* Equitable estate: in rem characteristics to equitable estate, unless bona fide purchaser
* you can recover it not only where it has converted into something else (the house in Scott), but even if you’re dealing with money. The CL refused the in rem right, the ability to recover, when money was mixed with the money of any third party.

In Rem Rights of the Beneficiary

* an express or resulting trust leads to beneficiary in that case, the non-legally titled person with the equitable interest, has an in rem right apropos their equitable interest. T
* his also operates for a constructive trust, but with constructive trust, there must be an actual declaration that there is a trust.
* We always need to court to find if my property is subject to a CT? Solution would be to have very clear rules regarding when a CT arises, such that a lawyer could be quite sure that it exists or not, that the rules be reasonably precise so that the lawyer can predict.

Remedies for Remedial Constructive Trusts

* First establish a fiduciary relationship outside institutional CT, using case law
* next question of whether we should impose a CT on it and remediate the breach by this fiduciary by giving the beneficiary, the injured party, a proprietary, in rem interest.
* Two levels: what is a fiduciary relationship outside those specific institutional constructive trusts, what are the ingredients for it? And secondly, what is the appropriate remedy? Should it always be a proprietary, in rem right, or can it be a personal right?

Peter

* Structural problem with the analysis: you can’t conflate unjust enrichment, always, with a fiduciary relationship. As we saw in Chase Manhattan, there are situations that are not fiduciary but are unjust enrichment. So are we saying then that CT is available not only in fiduciary cases but also unjust enrichment cases? This case seems to move a bit in that direction.
* You have to gather at whether there is a fiduciary situation by looking at other aspects, which are also whether there’s been an unjust enrichment, so you’re back to the conflation. You have to ask yourself whether that fiduciary relationship occurred and, same question?, has an unjust enrichment occurred, and how you answer that is the determination.
* To find if there are legitimate claims on the property: have to ask what the legitimate expectations of the parties are.
* In answering what their legitimate expectations are, you have to look at the facts: Gets you into question of by him having legal AND equitable title solely for himself, is this defeating the legitimate expectations of the claimant. If the answer is yes, then you’re engaged in this question of whether he has been unjustly enriched.

Determining if there has been Unjust Enrichment (Peter)

* Has there been an enrichment (has he acquired something), then has there been a deprivation (has she been deprived ), then is there a lack of juristic reason (that can explain why he has legal title and she has none).
* 2nd step goes back to discussion of legitimate expectations
* McLachlin: can’t actually point to a fiduciary relationship and instead they just have it all come down to unjust enrichment. The party with the title to the assets is clearly enriched, but is it unjust (is there a juristic reason why it should all be with one party)? So really, you’re making a policy decision about the absence of juristic reason
* Sounds like the CT will also be available in areas of unjust enrichment. Whereas before, like LAC, were talking about need to find a fiduciary relationship, that inquiry does not surface in this case and there is an assumption that it’s going to apply in unjust enrichment situations. (Petkus moved right to unjust too). Can infer then that the CT is applicable in areas of fiduciaries but also in areas of unjust enrichment and need to be careful not to conflate the two together.

Unjust Enrichment Test

1. What are the legitimate expectations
2. Has there been an enrichment (enrichment and deprivation almost always go together)
3. McLachlin: absence of juristic reason to explain the financial imbalance between the parties?

Remedy: Quantum Meruit and Quantum Valebat (Peter) – applying CT to unjust enrichment

* compensation or through an interest in property.
* Quantum merit for money, if we say you owe Peter $50,000.
* QV: Or can give her an interest in the property, must show a connection between her contribution and the property/ title that is being claimed to the land in question.
* Doesn’t find fiduciary duty, but finds this concept of quantum meruit and quantum valebat.
* Merit is the measure you’re giving for an assessment of the dollar value of the work
* Alternatively you’ll say that dollar value is the value that is surviving in that asset (QV), in which case you can do the constructive trust. You’re saying that this money is owed, it has to come out of this estate, and she gets it by virtue of this QV.
* QV: she’s entitled to the quantity of the work she performed, and that value survives in this assets, and so happens that that value roughly coheres with that of the property, so whole thing. She gets CT over that property and it becomes hers, as she can call for legal title.
* QV is thus something else that you can put CT on as there is nothing here about fiduciary relationship. Court is trying to deal with the problem of prior cases in conflating unjust enrichment with fiduciary relationship.
* For the CT to operate, you have to go through and see if there’s an unjust enrichment and show correlation between her actions and the piece of property in question in order to get a CT, can’t only show unjust enrichment, must show this correlation.

Tracing

* Tracing is an in rem right, discretionary, court will give it where a personal remedy is insufficient. Usual scenario is to get at a bankrupt or insolvent trustee.
* it stops with a bona fide purchaser for value and there can be circumstances where the court says no, discretionary, but misappropriated assets usually will flow back to you..
* recognizes the in rem characteristic of the equitable estate by allowing a beneficiary to basically follow through into other assets that the original asset has been flipped into. If misappropriated asset has been sold and another has been purchased, you are entitled to claim that other asset. Scott shows that you can not only get that other asset, but also at its enhanced value, any increase in value is good for you as a beneficiary. Follows from the fact that this happens to be a trust asset, which can improve in value.

Three conditions to be satisfied for tracing to be used:

1. There must be a breach of trust or at least a breach of fiduciary relationship. Chase Manhattan had no fiduciary relationship, and you can still claim the asset, clearly it’s helpful if you have a breach or fiduciary duty though. A lack of fiduciary relationship doesn’t mean that you won’t be able to trace, however, particularly where the trustee’s estate is insolvent or wherever this asset is located is in an insolvent estate.
2. Property must be in traceable form. Question of funds that have become mixed are the big issue here. If funds is unmixed, no problem, like if the trustee has taken the property and bought something else, as in Scott, the tracing just goes through to substituted asset – Re Hallet’s Estate shows this, that this new property is like a guarantee or security for losses you’ve suffered for this breach of trust.
3. No inequitable results should flow from the ability to trace.

More on Traceability

* Where the asset, has been moved into money but instead of buying a substitute asset, which you can go against, instead you take the money and mix it into your own personal funds. At this point, the CL won’t help you. Equity, however, says whole point of tracing is being able to follow through, and can do so in moneyed accounts.
* If it’s an account, under the rules of tracing, you can just go in and pull out the money that’s yours. If the money has been used to purchase another asset, you can get that asset.
* if money is put in and it is withdrawn and used to go on holiday? At this point, it’s not in traceable form and you lose it. Can no longer trace it.
* If there’s a bank account that consists of your money and his personal money and he takes money out of it and goes on holiday (mixed), he is assumed under laws of tracing to have taken his own money first and consequently whatever money is left in the fund, if it’s enough to pay you out what you’re owed, then you’ll get whatever is left.
* If there are creditors, this remaining sum cannot be claimed by them – it’s the beneficiary’s
* say $5000 are misappropriated. Beneficiary spends $4000 on an untraceable assets. The trustee adds another $4000 of his own money, then goes bankrupt. The beneficiary does not get the entire account, only what remained prior to the deposit. If the asset were traceable, you get that asset and whatever extra money needed to reach the $5000.
* But what if he is trustee of several trust accounts, so you get money coming in and out from different trust accounts. The rule was first in, first out (Clayton). The money that was first in the account is also the first out.
* Right to claim that asset only applies to volunteers, not bona fide purchasers for value without notice, in which case you’re only left with a personal remedy against the trustee.
* if the money has been taken out by the trustee, under Hallet, he is taken to have taken his own money out first.