

LAW250 – Trusts (Summer 2013)  
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## Intro to Concept & History of Equitable Interests

- "trust" is a concept gen. enough to offer wide flexibility in defining the measure of obligations that may be imposed on a trustee or person entrusted w/ property transferred under a trust (esp. express trust)
  - **LEGAL TITLE** → held by trustee (use/ctrl/admin/mgmt interest/ius utendi)
  - **EQUITABLE/BENEFICIAL TITLE** → held by beneficiary (beneficial/enjoyment interest/ius fruendi)
- *Gillese v. Milczynski* → "...a trust arises whenever there is a split in legal & beneficial ownership to property...The person holding the legal title is termed the trustee...the person w/ equitable or beneficial entitlement is called the beneficiary."
- person initiating split in title to things designated to be held in trust is:
  - **INTER VIVOS TRUST** → settlor
  - **DISPOSITION PER MORTIS CAUSA** → testator
  - **AGMT TO CONSTITUTE A TRUST** → parties to that agmt
- historical reasons advanced for trust
  - family settlements
  - Franciscan friars
  - tax avoidance
  - charitable-purpose trusts
- reasons for trust today
  - tax avoidance or deferral
  - provision for family settlements
  - incapacity
  - corporate-joint ventures, REITS, debentures, insolvencies
  - investments
  - pension funds & RRSPs
  - estate administration on acct of death
  - charitable & non-charitable purpose trusts/foundations
  - enviro. protection
- person setting up trust has enormous but not limitless freedom w/in law to cast arrangement in a form that defines the scope of the fiduciary duty, pwr of trustee & circs under which the beneficial interest may be enjoyed
- role of trustee & beneficiary set out in settlement or deed of trust where transfer of assets is a gratuitous transfer/gifting from settlor to trustee → nature of duties & their scope can be set out in settlement or left to rules of equity to fill in gaps
- maxims of equity are principles that serve to reify conscience & righteous behaviour
  - equity will not permit a wrong w/o a remedy → concerned w/ substance & less w/ form
  - equity follows the law → absent unconscionable outcome
  - those who seek equity must do equity → clean hands doctrine
  - equity assists the vigilant & not the tardy
  - equity is equality
  - equity looks to intent rather than form
  - equity looks on that which ought to be done as being done
  - equity acts in personam → looks at personal situation
  - equity will not assist a volunteer → gen. need to give value to be protected
  - equity will not fail a trust for want of a trustee

- hallmarks of trust that help define it & explain its popularity
  1. **ability to split ownership** btwn ius utendi & ius fruendi & both having ius disponendi
    - fundamental to our econ. system that there be mechanisms for transfer of property, against pub. policy to restrict alienation
    - each piece is marketable & exists as property
  2. **in rem right** but w/ qualification for beneficiary, not for trustee
    - in rem characteristic of equitable interest (avails against the world) esp. imp. where trust assets misappropriated by fraudulent trustee (ex. bankrupt trustee may have lodged trust property in others, etc.)
    - owner of equitable title in trust asset can claim trust asset itself, except where thing is in the hands of bona fide purchaser for value w/o notice (equity's sweetheart)
    - nemo dat quod non habet → no one can give greater rights than they have
  3. **fiduciary obligation** that trustee has towards the beneficiary in respect of the trust asset(s)
    - expectation that trustee in all dealings w/ beneficiary apropos the trust asset(s) will act w/ utmost good faith & w/ strong duty of loyalty to beneficiary

## Express Trusts

- **express trust:** device in equity that enables separation of legal & equitable interest in properties or an estate, can be created inter vivos or per mortis causa by some kind of written or oral settlement → can be the outcome of a gift by a settlor/donor or part of a commercial arrangement under a K
- some typical app's of express trust
  - property held for those w/o legal capacity
  - devise under a will
  - superannuation/pension funds
  - unit trusts as in mutual funds that enable small investors to pool funds & participate in larger investment schemes to enhance opportunities
  - charitable & non-charitable purposes
  - tax avoidance or deferral
- fundamental req. of express trust is vesting (equity follows the law) → clothing the trustee fully w/ legal title in the property forming the subject of the trust
- equity follows the law (but will give effect to intent & won't be bound by total formality) → need to remember req's of common law w/ respect to gifting & enforceable Ks to ascertain whether vesting has occurred, req's familiarity w/:
  - settlor's **form of transacting the trust** or manner of constituting it/putting trust in place → ex. gift or K-ual arrangement?
  - **nature of the types of property forming trust assets** (ex. land, shares, choses in action)
  - **legal req's for respective transfers of title**
  - **indirect transactional devices** (ex. rule in *Strong v. Bird*)
- *Milroy v. Lord* rule as to formation of a valid trust → "in order to render a voluntary settlement valid & effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property & render the settlement binding upon him."
- express trust created by a settlor/testator can use 1 of 4 forms → to determine which has been used, must examine intent by reviewing all relevant ev. (ex. docs, context of writing w/ surrounding circs & who trustee is):

1. **SETTLOR'S PERSONAL DECLARATION OF TRUST**

- settlor changes his/her role to that of trustee & retains legal title to the property but for benefit of beneficiary
- since settlor is already the owner of trust property, no physical transfer necessary as title already vested in owner (*Elliott v. Elliott Estate*)
- a simple but manifest intention to give property to another in the form of beneficial title the legal title to which is retained by the donor is an effective gift of (equitable) property (ex. *Glynn v. Federal Commissioner of Taxation*)

2. **SETTLOR APPT'ING 3RD PERSON AS TRUSTEE OF PROPERTY & DIRECTING HIM/HER TO HOLD TRUST ASSET FOR NAMED BENEFICIARY**

- like common law rule applicable to effective gifting, donation is imperfect or incomplete w/ only stated promise to make gift
- in equity, gift of beneficial title in property only effective if legal title subject of donation transferred to 3rd party trustee
- diff. rules apply to diff. types of property forming trust asset (*Milroy v. Lord, Re Rose, Ratner v. LH Ratner Construction Ltd.*)
- division of property is often divided into real property & personal property w/ further division of personal property into "choses in action" (intangibles) & "choses in possession" (tangible items)
- even though equity will not perfect an imperfect gift at law, it will treat as effective an intended transfer where donor has done everything s/he personally able to do legally in the ordinary course of business & thereby lost ctrl that meets the conveyance req. for a perfected gift

3. **SETTLOR & BENEFICIARY AGREE UNDER K THAT A TRUSTEE BE APPT'D TO HOLD THE TRUST PROPERTY FOR THE BENEFICIARY**

- if type of transaction used to create express trust is a term in a K btwn settlor & beneficiary promising transfer of property at future date, trust is constituted when beneficiary can enforce K/when K is immediately & unconditionally binding
- equity follows the law → K-ual covenants w/ consideration are outside volunteer category & so title to property in beneficiary becomes enforceable through sp. performance of K

4. **INCOMPLETE OR UNPERFECTED GIFT OF AN ASSET LATER PERFECTED BY ToT**

- indirect transactional devices may arise to vest title in trustee through transfer
- if an inter vivos gift is imperfect by reason only of the fact that the transfer to the intended donee is incomplete (non-vested), the incomplete gift will be perfected (vested) when donee subsequently acquires title to property in capacity of executor of donor/settlor's estate (*Strong v. Bird*), rule app's both to real & personal property

- broadly speaking, settlor can select 1 of 3 gen. forms for beneficiary appt (certainty of objects also a req. here)

1. **FIXED TRUST** → ID of each beneficiary incl. w/in a fixed group who must receive under the trust

- objects of trust must be ID'd in trust instrument w/ such precision that beneficiary can be individually named
- if there are multiple beneficiaries ID'd as a class of objects, then the class description should be precise enough to enable each member of the class to be completely listed by name (complete list or list certainty test)
- usually class defs of objects that create pbms, but even non-class identifiers can cause ambiguity
- test of certainty much more strict in the case of a fixed trust than it is in a pwr
- if trustee doesn't give to anyone & settlor is dead, trust corpus goes to heirs of estate
- sometimes gift over stipulated in the case of no appt being made w/in certain time pd

2. **PWR(S) OF APPT** → trustee (or donee of appt) is empwrd to act if they choose to do so, but they are not obliged to do so
    - meeting individual ascertainability test suff. to satisfy req. of certainty of objects
    - evidential uncertainty is likely not a req. as it is for trust pwrs
  3. **DISCRETIONARY TRUST** or **TRUST-PWR** as should be fully set out in the trust instrument → trustee (or donee of appt) must distribute to persons they choose drawn from a class of beneficiaries (both discretionary & mandatory aspect)
    - if the description of the class of objects in the trust doc meets the individual ascertainability or is/is not test (from lang. in the trust doc, can it be said w/ certainty whether any given individual is or is not a member of the class?) & the range of objects is not so hopelessly wide that the trust is administratively unworkable (cannot be properly supervised by a court b/c of evidential uncertainty), the test of certainty of objects is met
    - w/o a task that is ridiculously burdensome, can you say w/ certainty whether any given individual is or is not a member of the class of beneficiaries? if wording is clear enough to meet this test then instrument has complied w/ certainty of objects req.
- varied possible trust instruments all share the common feature that a person, group of persons, or recog'd charitable purpose needs to qualify as beneficiary in order to receive & enjoy the benefits of the trustee's administration of the trust property
  - **conceptual uncertainty**: occurs when words used by settlor in setting out criteria for ID-ing or selecting beneficiaries are inexact, making it unclear who is the intended recipient of the equitable estate in the trust property
  - **evidential uncertainty**: occurs where the def. of the group or class of potential beneficiaries is clear but there isn't enough factual info. to apply the settlor's def. of a beneficiary or object who may fall w/in the defined group
  - naming objects or beneficiaries can occur in a trust in a # of ways:
    - actually **giving the name(s)** of sp. individuals
    - ID-ing him/her/them by **description**
    - ID-ing him/her/them as **member(s) of a sp. group or class**
  - w/in a single trust settlement, trustee(s) may hold:
    - some of the property on a non-discretionary trust
    - other property on a discretionary trust
    - other property, the income from which is subject to a pwr to appt someone in a named group (a sp. pwr) → in a single trust instrument, the pwr of appt may be settled on a person who is not a trustee & is called the donee of the pwr of appt
  - **pwr**: that authority bestowed on a person to dispose of property that is not his/hers (to which they do not have legal title)
  - **pwr of appt**: refers to the ability of the donee of the pwr to enable the transfer of property that belong to another person to a beneficiary
    - often, the pwr to appt may be vested in the trustee of the trust assets, in which case, s/he does have legal title
    - where the trustee holds the role of appt'ing the beneficiary, it is imp. to know whether the trustee is acting under a mandatory trust or whether s/he has a discretion to appt b/c s/he is acting under a pwr → test of certainty & level of exactitude req'd of a trust to appt or pwr to appt a beneficiary may be strict or less strict respectively

- **donor of the pwr:** the person giving the pwr, in an inter vivos trust the settlor, in a will the testator
- **donee of the pwr to appt:** the person empwr'd to appt
- **admin pwrs:** imposed on trustee through trust doc → duties (actions that must be performed) & pwrs (actions that may be performed), admin pwrs gives trustees discretion to respond appro. to unforeseen & changed circs that may arise after trust settlement 1st set up
- trust-pwr mechanism for disposing property to beneficiaries in a flex. way gives trustee/donee broad pwrs to choose beneficiaries, sometimes from a widely defined group
- **trust pwr/discretionary trust:** occurs when, under the terms of the settlement, a trustee is req'd to exercise a discretion in selecting beneficiaries from a class &/or determine the quantum of interest to be enjoyed by members selected from that class
- distinguish trust pwr/discretionary pwr from pwr of appt by reviewing the terms of the appt provisions in trust doc → examine wording to:
  - determine whether trustees are compelled to act or whether wording enables them to act at their discretion
  - look for words like "shall" (mandatory obligation) v. words like "may" (permissive obligation)
- determine from trust instrument whether beneficiaries have an interest in trust property, whether vested, contingent, or vested subject to divestment
- for descriptive purposes, pwrs are classified as:
  - **GEN. PWR** → donee can appt anyone, incl. him/herself
  - **SP. PWR** → donee can appt only person(s) in or from named specified class of objects, extent of info about who is in the class does not have to be as detailed given the pwr holder's overall discretion around choosing a person to whom a distribution should be made
  - **INTERMEDIATE PWR** → donee can appt anyone at all except person or class proscribed by donor
- **list certainty test:** historical test for determining certainty of obj's held that trust was valid only if land. used in the instrument to describe the objects was clear enough to enable the trustee to draw up a complete list of obj's, app'd to both fixed & trust pwrs
- **is or is not (individual ascertainability test):** framed to determine whether cases of trust instruments w/ pwrs of appt given to a trustee/donee met the req. of obj. ID w/ suff. clarity, threshold of clear expression crossed if on the wording on obj. selection, the pwr enabled one to say of any particular postulant presented for consideration as a beneficiary that he/she is or is not a member of the class of objects set out by settlor/testator, app'd to pwrs of appt
- test for certainty of obj's in a discretionary trust or for trust pwrs now is whether a trustee is able to determine w/ certainty whether any given individual is or is not a potential beneficiary under the settlor's description of the class of beneficiaries
- trustees have a fiduciary duty to consider the most appro. way to exercise their discretion → must be fully informed about options under the trust & then consider those options & distribute accordingly
- **admin unworkability:** where class, thought precise enough to meet the is/is not test, is so hopelessly wide that it is beyond the mgmt capability of trustees

## Certainties

- 3 certainties needed to constitute a valid trust
  1. **INTENT/WORDS** → intention to create a trust
    - usually done by using a formal doc headed as deed of trust/trust settlement/trust agmt

- in less formal doc, can have words "in trust" appear & directed to a person who purports to be a trustee
- also helps to have imperative lang. when giving directions to trustee about dealing w/ property in relation to beneficiary
- at min. the settlor's words and conduct must signify a clear intention to establish a trust and that the use of the word "trust", though advisable, is not necessary (*Hayman v. Nicoll*)
- law permits you to review the wording & intention of the parties from the surrounding circs in order to reach a conclusion as to whether or not there is a trust
- law looks at words, deals w/ 2 categories
  - all the words that make it look like it's a trust → something mandatory imposed on trustee, word "trust" also means "must", imperative quality to the word requiring the trustee to do something (obligation as opposed to a pwr)
  - all the words that don't make it look like it's a trust (precatory)
- if precatory words are used, courts look at the ordinary meaning of those words & then how they are operating in context of whole doc
- intention to simply benefit someone other than transferee receiving title is too gen. to create a trust → there must be suff. clarity of intention to create a trust (impose an obligation on transferee to hold property for benefit of third party beneficiary)
- imp. b/c when you're dealing w/ gratuitous transfer trusts, they are gifts & so the problem for the court is how do you distinguish an ordinary common law gift from a gift of only the equitable interest (trust)?

2. **SUBJECT** → trust assets/property

- anything recog'd by law as property can form the subject matter of a trust provided it is a thing (incl. collations of rights) of value that is legally capable of transfer
- to constitute a trust, the test of certainty that has to be met is that there is suff. clarity to enable ID, both as to the type of property & the amt of beneficial interest
- one must be satisfied that the provisions dealing with the trust assets enable "suff. exactness" to enable ascertainment of the beneficial interest (fixed amount or specified item of property) or a method that enables ascertainment (*Re Beardmore Trusts*)
- courts gen. lean in favour of finding certainty, but you cannot have a wait & see approach to see what the assets will be when the trust becomes effective (*Re Beardmore Trusts*)
- has to be clear what the subject matter of the trust is, b/c court has to be able to enforce it if need be & it can only do that if it knows what the trust assets are

3. **OBJECT** → identity of beneficiaries

- all trusts must have a person or group of persons (or recog'd charitable purpose if a charity) as a beneficiary to enforce the trust, if you're only furthering an obj. then there's nobody to enforce it (purpose trusts not permitted)
- valid charitable purposes enumerated under *Statute of Elizabeth I*
  - hospitals
  - education
  - religion
  - relief of poor
- lvl or deg. of certainty req'd to render trust effective → depends on the kind of appt'ing mechanism chosen by settlor/testator

## Perpetuities and Formalities

- **future interest:** presently held (real) rights in a thing (ex. defined parcel of land) which, after the passage of defined time & realization of described circs (events occurring in the future) will lead to possession of land (occupation and use/enjoyment) by person holding the future interest
  - qualifies as property if it is valid and meets certain tests → real right avail. against the world
  - especially valuable in an insolvent estate b/c the full value of the future interest is held in rem in preference to the claims of concurrent creditors
  - future interests as property can be held as vested interests or even, in appro. circs, as contingent (non-vested) future interests if they may vest in the future → indicative of flexibility, gives settlor/testator fair amount of ctrl over what grantee is going to get
  - settlor/testator can put conditions on future interests that have to be satisfied in order to enjoyment of that property to take place → usually predicated on econ. & social concerns
    - interests in a thing subject to a condition precedent (contingent remainder, indicated by "if")
    - interests in a thing subject to a condition subsequent (rights of entry, indicated by "but if", "subject to", or "on condition that")
    - determinable interests in a thing (possibilities of reverter, indicated by "until", "while", "as long as")
- 2 primary ex's of immediately vested, future interests:
  1. reversions
  2. remainders
- a remainder is vested if 2 conditions are satisfied → if not, then the remainder is contingent
  1. **person(s) entitled to interest is ascertained**
  2. **interest must be ready to take effect forthwith** & be prevented from doing so only by the existence of some prior legal interest(s)
- to be legally valid, contingent remainders must:
  - **comply w/ the modern RAP** → vesting of the contingent future interest must become a vested, presently held, future interest w/in the defined of time that the law does not regard as too remote
  - content of the contingent event described in the conveyance cannot
    - effectively **bar alienation** of the thing
    - use wording that is **vague & unclear**
    - **contravene pub. policy**
- under common law formulation of RAP, had to be able to say w/ absolute certainty at the outset of the trust that under its terms the vesting of equitable interests if they are to occur will do so w/in lives in being at the time of the creation of the trust +21 yrs
  - absolute certainty of vesting (if they are to occur) at the commencement of the trust → certainty of vesting req.
  - w/in lives in being at commencement of trust
  - + 21 yrs & if needed for conceived but unborn child, can add. 9 mths
- amelioration of common law RAP by *Perpetuity Act*, allows:
  - wait & see, ss. 8 & 9 → permits actual events to unfold w/in the allowed pd
  - reduction of age contingencies, recog. of nat. limitations on giving birth, class splitting/closing & gen. cy-pres
  - settlors/devisors to choose a straight 80 yr pd as a substitute for lives in being +21 yrs

- law relating to perpetuities & accumulations does not apply to pensions plans & trusts, retirement allowances & annuities
- where RAP does apply, there are 4 principal aspects of remediation under *Perpetuity Act*:
  1. s. 8, **possibility of vesting beyond pd**
  2. s. 99, **presumption of validity**
  3. s. 7, **80 yr perpetuity pd permitted**
  4. s. 3 → **organizational approach** to perpetuity clauses found to have violated the common law rule & seeking remediation under the Act
    - s. 14, capacity to have children
    - s. 9, wait and see
    - s. 11, age reduction
    - s. 12, class splitting
    - s. 13 general cy pres
- all future interests created under a will are equitable (*Re Robson*)
- rules are somewhat convoluted, looking at validity of express trusts & future interests are common features of express trusts → what are the pbms that can arise?
  - what is the subject of the trust? do an inventory of all the trust assets
  - have they been transferred?
  - who is the beneficiary that gets the present interest & who gets the future interest? under certainty of objects, there are certain criteria that have to be met, these vary depending on whether it's a fixed trust, a pwr, or a trust pwr/discretionary trust
  - apply appro. test for certainty
  - make sure there is an appropriate investment strategy that does not deplete the capital by favouring the person w/ the present interest & leaving nothing or very little in the future → duty of impartiality means that you have to keep an eye on both classes of beneficiaries
  - are people who are getting in the future getting a vested or contingent right?
  - irrespective of whether it's vested or contingent, is the quality that the settlor/testator has imposed legal?
  - if legal, turn attention to contingent future interest, is that contingent future interest valid b/c it complies w/ perpetuity rules? (combination of modern RAP as complemented & remediated by *Perpetuity Act*)
- formality req. in part explained by the fact that:
  - certain property rights are very valuable → formalities emphasize this fact to the transferor who is divesting
  - proof of the transfer of those rights should be clearly evident
- situation w/ formalities diff. depending on whether dispositions are inter vivos or per mortis causa (compliance w/ formalities imp. to avoid intestacy)
- under *Wills Act/Wills, Estates & Succession Act*, a testator must manifest his/her intention to leave property to persons in a will → failure to comply invalidates the will & the rules of intestate succession apply
- 2 exceptions by equity → take effect on testatrix's death despite a failure to comply w/ provisions of *Wills Act*
  - **FULLY SECRET TRUST** → intention to benefit a beneficiary w/ a legacy not disclosed in the will
    - will names another person "beneficiary" who is not intended to benefit but to act as trustee
    - req. that beneficiary/trustee named in the will knows that s/he is taking under the will as a trustee & not personally & beneficially as an ordinary heir or legatee

- must be established that knowledge of above occurred before the death of testator
- if testator has not made a will, it is only the reliance that the beneficiary under intestate succession has assured the testator that the inheritance will be used by the person succeeding to the estate on intestacy for the benefit of the secretly named object intended by the testator to be financially provided for
- req's for fully secret trust, testator A must:
  - intend that the beneficiary named in the will, B, is to hold the legacy in trust for the real beneficiary, C
  - during A's lifetime, communicate to B that A intends B to receive A's property on A's death as trustee in a trust for C, the real beneficiary
  - B must accept or acquiesce to A's proposal
- legal issues that arise:
  - avoiding *Wills Act*, is this legitimate?
  - no ev. of the agmt
  - if C not a party to K, can s/he enforce it? is this an enforceable trust? no vesting has taken place → courts have said it's okay if it vests later on
  - court caught btwn req's to follow formalities & helping a fraudulent party → can get around this b/c in effect, court is saying is that the moment B agrees to accept as beneficiary but really as trustee, trust has come about (hiatus on vesting)
  - courts won't assist A to defraud but they don't need to, there is already a pre-existing trust & court is merely enforcing
  - in order for there to be a pre-existing trust, B needs to know who beneficiary is
- **HALF SECRET TRUST** → will reveals the person named in will as beneficiary is actually receiving the property as a trustee for a real, but undisclosed beneficiary
  - other details of trust (ex. who beneficiary is) is not revealed
  - cannot be created w/ intestacy
  - req's for half secret trust, testator A must:
    - communicate to B that s/he is to hold property in trust for C before will is made
    - communicate to B the identity of C before the will is made
    - B must indicate acceptance before or at the time the will is made
- for express trusts, settlor may incl. pwrs in express trust for amendment or revocation of the trust, otherwise s/he falls out of the picture

## Resulting Trusts

- **resulting trust:** where legal title in a thing is effectively transferred, but some or all of the equitable title continues to abide w/ transferor
- 2 main categories of situation in which resulting trust arises (Megarry in *Re Vandervell's Trusts (No. 2)*):
  1. **AUTOMATIC RESULTING TRUSTS** → surplus trust assets from an express trust that has failed to take (ex. uncertainty of objects) or do not exhaust all avail. beneficial interests in the trust property
  2. **PRESUMED RESULTING TRUSTS** → gratuitous transfer of property creates presumed (rebuttable) intention to transfer only legal & not equitable title
- courts trad. accepted implied intention of transferor to give legal but not equitable title in property as the basis for resulting trust → fairly recent judicial discourse has qu'd this basis

## Automatic Resulting Trusts

- arise from a "gap" in the equitable title of property; w/o mechanism of resulting trust they would appear ownerless
- common situations where automatic resulting trusts occur:
  - transfer of legal title to trustees in a trust that turns out to be void → ex. b/c of non-compliance w/ 1+ of 3 certainties (*IRC v. Broadway Cottages*)
  - transfer of legal title in property to a trustee w/o disposing fully of the equitable interest in it (*Re West*)
  - transfer of property to another w/ a sp. limitation which has not occurred (Quistclose trust) → usually arises in context of loans (*Barclays Bank Ltd. v. Quistclose Investments Ltd.*, *Twinsectra Ltd. v. Yardley*)
  - surplus of funds after a trust-purpose has been achieved → where trust exhausts only some of the trust property, an automatic resulting trust for transferor/settlor arises in respect of the surplus (*Re British Red Cross Balkan Fund*, *Hanchett-Stamford v. Attorney General*)

## Presumptive Resulting Trusts

- PF, rebuttable presumption that in a transfer of property situation, the equitable title in that thing is retained by the transferor on proof of certain specific facts or circs
- presumption rests on understanding of likely intention in the context of certain social facts → in our society, gratuitous transfers of property usually signify a self-interested, econ. motive rather than out & out gift
- presumption of resulting trust will yield to clear ev. of intention by grantor to transfer the benefits (fruenti) of title as part of the use (utendi) of property
- in certain circs, a court may preclude production/render inadmissible even though rebutting ev. is avail.
- presumed resulting trust occurs when there is:
  - a purchase of property in the name of another (purchase money resulting trust) or a voluntary transfer of property to another (gratuitous transfer resulting trust)
  - no clear ev. concerning the actual intention of transferor about who is intended to benefit from the transfer
- gen. onus is on transferee to rebut presumed resulting trust & show that transferor intended the passage of beneficial title w/ legal title

## Presumption of Advancement

- effect of presumption of advancement is that the beneficiary as transferee owns beneficially (as well as legally) w/o the need to rebut presumed resulting trust, in vintage common law used to operate in transfers from:
  - **fathers to children** (*Madsen Estate v. Saylor*, *Pecore v. Pecore*) → has been broadened to include mothers but has been curtailed to only operate in respect of dependent children (under 19/disabled)
  - **husbands to wives** → has been abolished by stat. in most Cdn jurisdictions, in BC & Manitoba presumption still applies where relationship is very trad. (*Mehta Estate v. Mehta Estate*)
- presumption of advancement is a presumption of a meaningful (beneficial) gift to the transferee & is presumed b/c of the sp. relationships btwn transferor & transferee → may be rebutted on ev. of the real intention of the transferor
  - timing & relevance
    - everything that happens to explain the transaction prior to the transaction taking place & contemporaneous w/ that transaction (res gestae) is relevant
    - anything after res gestae becomes less & less relevant the more distant in time from event; too remote & has the potential for being manufactured (*Shepard v. Cartwright*)
  - admissibility & illegality

## Illegality & Presumptions

- maxim of ex turpi causa (no action can arise out of a base/wicked cause) → can't lead ev. of intention to defraud creditors b/c court will not assist in an illegal transaction (*Scheuerman v. Scheuerman*)
- exclusionary rule admitted an exception under the doctrine of locus poenitentiae (place of repentance) that enabled the production of ordinarily excluded ev. to rebut the presumption → app's where parties never actually carry out their illegal scheme & repent of it (transferor withdraws)

## The Beneficiary

### Nature of Title & Interest in Equitable Property

- beneficiary (cestui que trust), w/ equitable title in thing, is entitled to benefits flowing from mgmt of property by trustee → imp. of real right in trust property under an express trust usually surfaces in a situation of insolvency (often the trustees)
- durability & intensity of scope of equitable interest as a real right relates to the resilience of the interest → by whom & in what circs it can be terminated/defeated
- beneficiary does not have legal capacity to exercise admin (& often dispositive) pwrs over property in the trust (*Schalit v. Nadler*)
- holding of equitable title to fund is real in the sense that the beneficiary holds priority over fund assets if other operative principles of equity prevail
- in English law, the beneficiary has a distinct equitable interest in individual items of property that make up the trust fund as opposed to having an interest in the proper administration over trust fund as a whole (*Baker v. Archer-Shee*)

### Transfer of Equitable Interest to Third Party

- as property, the beneficial entitlement can be disposed of as a chose in action → formalities involved w/ assignment set up in *Law & Equity Act*, s. 36
  - for an effective transfer or assignment of equitable estate from B1 to B2 (subtrust), need a written doc. signed by a beneficiary, delivered to the trustee
- 4 ways in which beneficial interest in equitable title can be disposed of by beneficiary (Romer in *Timpson's Executors v. Yerbury*):
  1. **ASSIGN TO 3RD PARTY DIRECTLY** → writing req'd
  2. **DIRECT TRUSTEE TO HOLD PROPERTY IN TRUST FOR 3RD PARTY** → writing req'd
  3. **K FOR VALUABLE CONSIDERATION TO ASSIGN EQUITABLE INTEREST TO ASSIGNEE** → writing prudent but not clear if it's necessary, as vendor holds equitable estate on a constructive trust for the buyer as soon as K is effective & binding
  4. **DECLARE HIM/HERSELF BENEFICIARY TO BE TRUSTEE FOR THE TRANSFEREE OF SUCH INTEREST**

### Priority among Assignees

- if there are several claimant assignees, priority to be determined by time w/ the earlier being preferred in law (*Re Wasdale*)

### Restraints on Alienation & Protective Trusts

- **protective trust:** purports to terminate the beneficiary's right to income in circs where s/he shall have committed or suffered or does or attempts to do or suffers to be done any act or thing or until any event

happens whereby if the said income were payable to him/her absolutely s/he would or might be deprived of the right to receive the same or any part thereof

- after the happening of any such event, both the capital & income of the beneficiary under the trust is shifted to a new set of beneficiaries → usually the children of the erstwhile beneficiary
- at the heart of the mechanism for creating an effective protective trust is the determinable interest such that when the limitation is reached, the equitable interest vests → equity followed the distinction of the common law btwn interests subject to divestment under a condition subsequent & a determinable interest (can't be in the form of a conditional interest)

### Termination of Trust by Beneficiary

- a beneficiary can terminate the trust by directing the trustees to direct legal title to the beneficiary provided:
  1. s/he has attained the **age of majority** (19 in BC)
  2. s/he is **compos mentis**
  3. s/he is **absolutely entitled to the trust property (vested)**
    - will often not be the case in a discretionary trust, esp. where class is wide, but where it is feasible for beneficiaries to combine, they can call for the trust
- there may be severe econ. cons. (income tax related) that make a resettlement disadvantageous
- rule in *Saunders v. Vautier* → provides for termination of trusts by acts of beneficiary who are sui juris (of full legal capacity) & absolutely entitled to the beneficial interest, permits ignoring of the postponement of enjoyment
  - law has preference for outright ownership (as opposed to trust ownership) b/c of a policy preference for freer use of property
  - desire to treat adults as autonomous agents able to care for themselves & reluctance to allow ruling by dead hand
  - beneficiary's interest is absolute in that there is no one else who has any beneficial claim to the property & so in reality this should be effective
  - enjoyment of property, reflected in the equitable title, is the really sig. component of ownership → lies in beneficiaries & they should decide how they want to enjoy the property
  - rule concerned w/ accumulations of income in perpetuity

### Variations of Trusts

- 4 exceptions to gen. inability of courts to vary trusts:
  1. **ADMINISTRATIVE TERMS** → can be varied if there is an unforeseen emergency such that the trust is threatened & circs unanticipated by settlor (ex. alternations to heirloom property)
  2. **MAINTENANCE JURISDICTION** → allows courts to direct payments to beneficiaries if they need money to live in a manner appro. to trust expectations
  3. **CONVERSION JURISDICTION** → allows conversion of infant's trust property from realty to personalty & vice versa
  4. **COMPROMISE JURISDICTION** → enables a court to give approval for those not sui juris in any judicially sanctioned compromise of a dispute
- major pbm w/ variation is that all parties needs to be in agmt → some might not be sui juris, some might not even be born; termination of trust might be necessary
- gaps in law have now been filled by variation leg. in most common law jurisdiction → in BC, the *Trust & Settlement Variation Act* deals w/ contingent interests & sui juris beneficiaries
- "benefit" is construed broadly, not just econ. benefit

## The Trustee

### Appointment, Retirement & Removal of Trustee(s)

- trustee is the administrator of the trust property identified in the settlement as trust assets
  - must gain ctrl of property & then manage them in the capacity of a fiduciary, exercising utmost good faith towards beneficiary
  - trust instrument usually sets out appt which must be accepted → settlor has wide freedom to choose who & how many persons will act as trustee(s); if trustee refuses, will/settlement usually sets out alt. trustee or court has inherent pwr of appt (equity will not allow a trust to fail for want of a trustee)
  - settlor/testator may choose individuals to sophisticated business associates or even large trust corps
  - corporate trustee (aka trust corp.) empwrd by its memo & articles to engage in trust admin & mgmt
  - b/c of impersonality of many trust corps, a large family trust established w/ a corporate trustee may also have a protector/guardian → serves to personalize a corporate trust or in commercial trusts, provide for unexpected events
  - settlor/testator may provide circs under which trustee removal can occur → usually given to designated person, protector/guardian
- if several individual trustees are appt'd they usually hold as joint tenants so that if 1 dies, the surviving trustee(s) continue → when the last dies, the trust passes to his/her personal reps who then become trustee
  - unanimity is req'd for all decisions unless trust deed provides otherwise
  - useful thing to do is appt sev. trustees & make them joint tenants
- *Trustee Act s. 27* deals w/ trustee appts → ensures mechanism for trustee appt that in the normal course, minimizes apps to court to make appts (but court retains an overriding pwr & jurisdiction over trustee appts)
- *Trustee Act s. 36* → beneficiary, trustee, and others w/ a beneficial interest in the property have standing to apply to court
- *Trustee Act ss. 29-34* → deal w/ the pwr of the court to order the vesting of trust properties in new trustees
- *Trustee Act s. 31* → clarifies scope of court's pwr to appt trustees where it is expedient to do so
  - in *Re Tempest*, guiding principles for the court to consider included:
    - **wishes of settlor/testator** → esp. in respect of characteristics set out as undesirable
    - persons who **do not have an axe to grind** → towards settlor or beneficiary
    - persons who **will promote & not impede the execution of the trust**
- *Trustee Act s. 28* → deals w/ retirement of trustee, provides that:
  - where there are 2+ trustees, a trustee using a deed may declare a desire to be discharged
  - that declaration must be served on the other trustees
  - if accepted, s/he will cease to be trustee & divested of the trust property
- *Trustee Act s. 30* → provides that a sui juris beneficiary (w/ support of majority in interest & #) can apply to court to have a trustee removed
  - governing criteria that will guide courts on trustee removal are welfare of beneficiaries
- continuation of trust occurs through trustees appt'd by:
  - an express pwr
  - a gen. stat. pwr
  - the beneficiaries under principles of *Saunders & Vautier*
  - the court on app. by beneficiaries (*Trustee Act s. 36*)
- trustees rights are broadly those relating to mgmt of trust assets incl. disposing of them → correlative to 3 substantive duties:

1. **take & get ctrl of trust property**
2. **protect the value of trust fund** through prudent investment decisions that also are compliant w/ other trustee obligations (ex. to be impartial among the beneficiaries, esp. those in succession)
3. **distribute income fairly** according to the distribution req's under the trust settlement

## Investment Management

- 2 broad aspects to trustee investment:
  1. **duty to invest** so that the capital fund is **preserved from risk**, but at the same time **yields a reasonable return**
  2. investment must be made by the trustee in a way that is **even handed btwn diff. classes of beneficiary**
- *Trustee Act* s. 15.1 → governs scope of the type of investments in which trustee may invest; trustees must invest according to s. unless settlement provides otherwise
- *Trustee Act* s. 15.2 → enacts a duty of care of trust assets by a trustee following the standard of an ordinary prudent person taking care of his/her investments, being mindful that those investments are to benefit person(s) for whom s/he is morally obliged to provide for (affirms *Fales v. Wohlleben Estate*)
- *Trustee Act* s. 96 → can relieve & thus act remedially in favour of trustees needing sp. consideration in terms of standard of care
- *Trustee Act* s. 15.3 → exempts a trustee from liability if losses were the result of the implementation of a plan or strategy for the investment of trust property & that plan reflected reasonable assessments of risk & return that a prudent investor would adopt
- re: exclusion of investments, overriding duty of trustee is an undivided loyalty to beneficiaries (*Cowan v. Scargill*)
- failure to act appro. will result in breach of trust, however:
  - trustee is not bound to avoid all risks → s/he is not an insurer of the trust fund
  - trustee not liable for errors of judgment while acting w/ reasonable care, prudence & circumspection (*Re Godfrey*)
  - exoneration of technical breaches may be excused under conditions prescribed in s. 96
  - today, investments in medium to large-sized trusts are made in line w/ portfolio theory in which investments are diversified & considerations of risk are made from the perspective of the entire portfolio rather than share or item of investment taken in isolation → req's trustee to review investment from perspectives of yields, capital appreciation & risk

## Ousting Court Jurisdiction

- attempts by settlors/testators to oust court jurisdiction w/ trust terms that the trustee is empwrd to make exclusively "binding & conclusive" decisions will be treated by courts as against public policy
- pwr to adjudicate can be given exclusively to a trustee in relation to matters of fact, not law

## Delegation

- at common law there is a gen. duty on trustee to act personally in admin & mgmt of trust property, but today trustees are entitled to appt agents to personal many acts of admin in respect of trust (both in *Trustee Act* & at common law)
- *Trustee Act* s. 95 → sets out an implied indemnity for trustees; a trustee not liable for breach of trust when others are in ctrl of trust monies properly delegation (to solicitors or bankers) unless the trustee is proven to have been in willful default

## Duty of Loyalty

- defining obligations of fiduciary, must:
  - act in good faith → not personally profit at the expense of the trust
  - not place him/herself in a position where his/her duty & personal interest may conflict (no conflict rule)
  - not act for his/her own benefit or that of a 3rd person w/o informed consent of principal/beneficiary
  - only K w/ his/her principal/beneficiary in transactions that are fair & in which there has been full disclosure of all matters material to the transaction
- 2 situations in which a trustee might personally engage trust property:
  - **SELF-DEALING RULE** → duty of loyalty where trustee purchases trust property for personal use; trustee both selling & purchasing
  - **FAIR-DEALING RULE** → purchase of the beneficial interest; beneficiary sells the beneficial interest to the trustee; req's full & frank disclosure from trustee to beneficiary

## Duty to be Impartial

- trustee has duty to be impartial btwn diff. classes of beneficiaries (life estate & remaindermen), but settlor/testator's intention is paramount (may actually want partiality btwn classes)
- rule in *Howe v. Lord Dartmouth* describes circs in which a trustee's duty to sell trust assets arises → prescribes that where a testator leaves residuary personalty to persons by way of succession & the residue includes a wasting (incl. unauthorized or reversionary), the trustee must:
  - sell the personalty that is a wasting (& unauthorized or reversionary) asset
  - invest the proceeds in authorized investments
  - the income of which is for the benefit of the life tenant beneficiary, the corpus of the fund accruing for later use by the persons holding the remainder interest
- **wasting assets:** those that deteriorate (ex. mortgages, cars, ships, watches, copyrights)
- **unauthorized investments:** speculative shares (ex. in a South American gold mine)
- **reversionary interests:** interests in property in the estate which are not immediately avail. (i.e. are not in possession) on the death of the testator & which will only be avail. in the future (e.g. a remainder in shares, an insurance policy on another's life, debts payable to the testator in the future) → remainders gain at expense of life tenants
- app. of rule in *Howe v. Lord Dartmouth* is subject to a contrary intention indicated by:
  - express provisions in the will → may permit partiality either by express provision or asserting that *Howe v. Lord Dartmouth* does not apply
  - directions that can be implied, such as:
    - a direction that the residue be kept or "retained"
    - authorization for the trustees to maintain unauthorized investments
    - a direction that the life tenant beneficiary is to receive income in specie

## Disbursements

- income received prior to the sale of the personalty that are wasting or hazardous income-producing assets & which trustees under *Howe v. Lord Dartmouth* must sell is not to be paid in specie → must be apportioned according to formula:
  - if the shares are sold w/in a yr of testator's death, the value of the shares is assessed at the date of sale. If not sold w/in a yr, the value is taken at the 1st anniversary of the testator's death.
  - if the duty is to apply in an inter vivos trust, the value of the trust assets are assessed at the date of the trust

- if the income received pending sale is less than 2-7% of the value of the property, the life tenant receives all of the income produced. If the income 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 sale of the asset, the life tenant can get it made up from the proceeds of sale.
- case of *Earl of Chesterfield's Trust* supports apportionment after the sale of non-income producing assets for reversions, remainders, life-insurance policies, etc. → trustee must calculate what portion of the sale price, had it been invested at the date of the testator's death, would have produced income 2-7% (compounded) per yr & risen to the sale price
- income-producing assets that diminish/waste away (e.g. mortgage income) must be apportioned to give the life tenant 4-7% income & the balance put into asset base
- if there is a trust to sell or convert the initial trust assets, that ordinarily implies an intention that the testator desires impartiality among the beneficiaries & so that duty is burdened on the trustee
- **pwr to postpone:** implies inevitable conversion; but as a matter of construction, a pwr to postpone unaccompanied by a trust for sale implies an intention by testator that the life-tenant beneficiary enjoy the asset in specie
- **pwr to retain:** ordinarily implies an intention of partiality btwn beneficiaries; may also imply an ability to enjoy in specie, but less so than a trust to retain
- trust for sale or a duty to convert usually signifies an implied duty on the trustee to act impartially
- *Trustee Act s. 10* → abolishes rule in *Allhusen v. Whittel*, unless testator expressly states otherwise, all income is avail. for payment of debts, etc. & is to be treated as part of the residuary estate, primarily concerned w/ life tenants getting paid

### Providing Information

- on reasonable notice, beneficiary has right to see trust accts, portfolio of investments, trust doc & all reasonable info concerning mgmt of trust property
- courts have generally held that there is not a full right to info, actual internal workings amongst trustees have got to be kept secret, otherwise you're not going to be getting good decision making made
- beneficiaries not entitled to reasons indicating why trustees came to a decision/docs covering trustee's exercise of a discretionary pwr (*Re Londonderry's Settlements* → agenda, correspondence btwn trustees & trustees/beneficiaries, minutes of trustee mtgs)
- not entitled to information as of right, but if there is a purpose/feeling that there is a breach of trust & you're sufficiently close to the trust as beneficiary, then the court can order the giving of information but won't do it as a matter of course → court acting in supervisory role
- if you're a discretionary beneficiary or a beneficiary under a pwr, you don't have a proprietary interest; your interest is so inchoate that it's not property

### Duty to Account

- *Trustee Act s. 99* → in a deceased's estate, the trustee ordinarily has 2 yrs from date of appt to file accts

### Indemnity & Remuneration of Trustee(s)

- rule of equity is that a trustee acts voluntarily & services are unpaid → remuneration of trustee should & is advisedly regulated in trust instrument, can also be under K w/ sui juris beneficiaries (but not advisable as arrangement vulnerable to an undue influence attack)
- *Trustee Act s. 88* → allows for fair & reasonable remuneration of trustee
- relevant factors in assessing care & mgmt fee (*Re Pedlar*):

- **value** of estate assets administered
- **nature** of assets administered
- **deg. of responsibility** imposed upon trustee by terms of will or other instrument, incl. length/duration of trust
- **time expended** by trustee in care & mgmt of estate
- **deg. of ability** exhibited by trustee in care & mgmt of estate
- **success or failure** of trustee in care & mgmt of estate
- whether or not some **extraordinary service** has been rendered in the care & mgmt of estate
- trustee's right to indemnification → basic principle of equity is that beneficiary who gets all of the benefit of the property should also shoulder its burdens
- rule that trustee should be indemnified modified only if there is a good reason why the trustee as legal owner should personally bear the burdens incurred in carrying out their duties

### Control of Trustee(s) by Beneficiary & Court

- beneficiaries have limited deg. of ctrl over trustee → but sui juris beneficiaries can call for trust if unsatisfied w/ mgmt
- court has wide supervisory pwrs over trustees but often don't want to get too involved, court can & will intervene where trustee acting outside trust purposes, breach of trust, etc.
- *Trustee Act* s. 86 → trustees can apply to court in chambers for an opinion, advice, or directions on a qu. of mgmt & administration of trust property
- *Trustee Act* s. 87 → absolves trustees of responsibility where they are acting under court authority, except where trustee guilty of fraud, wilful concealment, etc. in applying for direction from court

## Fiduciaries and the Constructive Trust

### Fiduciary Relationship

- characteristics of actionable fiduciary relationship (Wilson in *Frame v. Smith*) → but not all have to be present for a fiduciary relationship to be recog'd:
  1. the fiduciary has **scope for the exercise of some discretion or pwr**
  2. the fiduciary can **unilaterally exercise that pwr or discretion so as to affect the beneficiary's legal or practical interests**
  3. the **beneficiary is peculiarly vulnerable** to or at the mercy of the fiduciary holding the discretion or pwr

### Constructive Trust

- value & usefulness of constructive trust to P that court qualifies as beneficiary → provides property which enables in rem relief against D in whom legal title resides & whom court regards a faithless fiduciary; court recognizes equitable title of P in things that are under dispute
- remedial constructive trust only app'd where there is an existing asset to which the court declared trust can attach, bringing benefits to P (retroactive effect)
- **institutional constructive trusts**: long-recog'd situations of court-imposed trusts, judicially sanctioned sp. situations in which constructive trusts will be recog'd, most w/ ancient pedigree (ex. wrongs of faithless directors, delinquent agent in principal/agency relationships, overreaching partners, etc.)
- more recently, Cdn courts have extended the app. of good conscience & equitable maxims to persons who have been unjustly enriched

- *Guerin v. The Queen*: "it is the nature of the relationship, not the sp. category of actor involved that gives rise to the fiduciary duty"
- **remedial constructive trust**: trust construed on grounds that b/c the dependence or vulnerability of one of the parties or unjust enrichment, curial relief in the form of asset or property reassignment from D to P is req'd; depends on exercise of discretion by court to declare an equitable title in P; rep. the ability of court to respond to changing social needs (ex. palimony situation in *Pettkus v. Becker*)
- criteria in which a constructive trust app'd if ev. supportive (*Dickson in Pettkus v. Becker*)
  1. **enrichment** by D
  2. **corresponding deprivation** by P
  3. **absence of any juristic reason** explaining or justifying the enrichment
- for constructive trust to apply to actual objects of unjust enrichment, there must also be some causal connection btwn acquisition of property & corresponding deprivation
- existence of K does not preclude existence of fiduciary obligations & fiduciary law not confined to matters that involve only econ. interests

## Remedies for Breach

### Personal Remedies

- in equity, courts have been favourably disposed to enforce duties of trustee under a trust through an order for specific performance or injunctive relief
- trustees' liability for breach of trust is based on full compensation → in equity that means it is based on full restitution (equitable compensation), beneficiary must be put in a position s/he would have been in had breach of trust not occurred
- **restitution**: in gen. terms, means that the trustee must be compensated fully for any loss caused by breach of trust
- extent of the trustee's liability for compensation of trust is not for the most part restricted by common law principles governing remoteness of damages (need not be foreseeable at time of breach) in tort or mitigation in K
- causation considerations (the need to show a causal connection btwn loss & trustee's actions) in breach of trust actions for compensation are very generously & easily found, although there are limits (*Canson Enterprises v. Boughton & Co.*)
- 2 personal remedies avail., beneficiary can elect 1 or the other (mutually exclusive):
  1. **COMPENSATION FOR LOSS**
    - in breach of fiduciary duty cases where remedial constructive trust cannot be app'd, court will award compensatory remedy intended to be restitutionary or restorative to beneficiary (*Guerin v. The Queen*)
    - courts today are courts of both law & equity & have the ability to make a comparison w/ damages (monetary payments) that may be awarded for an invasion of a right at common law
    - equitable remedies are very elastic & policy considerations should apply (McLachlin):
      - losses stemming from P's unreasonable act should be barred
      - "common sense" causation could circumvent P's claim
    - common law has been amended to allow for set off profit from one breach of trust against loss resulting from another (*Re Deare, Trustee Act s. 15.4*)

- **set off:** a potential defence against an action in damages in tort or K, can set off against pre-existing moneys owed
- equitable compensation somewhat different from compensation in tort & K → there, the basic mission is to try & make good what has been lost as a result of the breach, in equity, what you're trying to do is put the individual in the position that s/he was in before the breach took place (looks at your position as of the date of trial, looks to see what has happened in the interval of time btwn breach of trust & claim for damages)

## 2. **ACCT/ING FOR PROFIT**

- acct'ing for profit remedy ("disgorgement of profits") remedy arises when:
    - the primary duty of a trustee is to acct for his/her stewardship of the trust by disclosing to beneficiary his/her dealing w/ trust property & the court of investment decisions → fiduciary/trustee as part of his/her administration of the trust assets must assemble the accts & distribute them to the beneficiaries & can be compelled by court order to do so
    - a person in a fiduciary position is not entitled, unless expressly authorized, to make a personal profit in dealing w/ trust assets → must avoid conflict of interest, where this has been breached the trustee must acct for any unauthorized profits s/he has received & is attributable to fiduciary position
    - becomes relevant for ex. where there has been a breach of trustee by a trustee taking over a business & converting trust assets into his/her own assets (*Boardman v. Phipps*)
  - basis of acct'ing for profit remedy is to prevent unjust enrichment via deterrence, esp. in situation where delinquent fiduciary has invested money or dvlpd business w/ misapp'd funds on an ongoing basis
  - defences to an app. for acct'ing are avail. & they are equitable in scope → estoppel, laches, acquiescence & delay
  - trustee cannot retain profits from a reinvestment → where a profit is made w/ a combo of trust money & trustee's personal money, the beneficiary is entitled to profits at least in proportion to the trust contribution
- defences
    - **CONSENT** → the free & informed consent of all affected beneficiaries to a proposed act will exonerate trustee for action for breach, extends to fair-dealing purchase of equitable estate by trustee
    - **TRUSTEE ACT S. 96** → trustee will be exonerated for breach of trust if s/he can establish that:
      - s/he acted honestly
      - s/he acted reasonably
      - it would be fair to excuse him/her in these circs (*Fales v. Canada Permanent*)
      - court has wide discretion but app's rarely & esp. not for sophisticated, pro trustees & businesspeople