THE TRUST: CONTINUAL EVOLUTION OF A CENTURIES-OLD IDEA

Donovan Waters QC[*]

INTRODUCTION

On this occasion I want to trace through history to the present century the gradual development of the common law trust idea, first in England and then in those lands over which England assumed sovereignty in the eighteenth and nineteenth centuries. This includes Singapore and Hong Kong, whose case-law plus respective Trustees Act and Trustee Ordinance retain a pervasive English influence.[1] In a case-law progression, new features of the trust have come with every passing generation. It is my overall purpose to show how the offshore-legislated[2] inventiveness between 1975 and today has built on to the case-law past. The result is a yet wider landscape of trust thinking. I also want to show on which occasions the offshore jurisdictions have simply made policy decisions having no particular impact on trust law doctrine. All law making is policy-inspired but these offshore decisions have sometimes been represented as being conceptually significant when in fact they add nothing to the conceptual elements of a trust. Finally, I will pose the question of where, within the predictable future, developments may take what we call, 'the trust'.[3]

In each stage of history, as we shall see, new features are introduced adding to the existing common law system's trust, and then later the recent features are themselves refined and further new adaptations for the purposes of current usage are made. The process continuously repeats itself.

In the nineteenth century, largely as a consequence of the Industrial Revolution, the full potential of the concept begins to become apparent. The trust is now employed for business purposes, principally investment and the holding of lenders' security,

---

* Counsel, Horne Coupar, Victoria, BC, Canada

1 This article is based on a paper presented to the STEP Asia Conference of Oct. 11–12, 2007, in Singapore.

2 See 'The Modern Epoch (1975 – the present day)', below.

3 The common law trust is in fact one model of the trust idea. See further D Waters, 'The Future of the Trust' [2006] JITCP 179 and [2007] JITCP 1.

by entrepreneurs in banking, finance and commerce. By contrast, it was ingeniously employed in the seventeenth and eighteenth centuries, carried into the nineteenth century, in 'strict settlements' devised by Orlando Bridgeman and his successors for the rural wealthy. But as land alone constituted wealth from the Middle Ages until the nineteenth century the trust was then in essence solely a conveyancing device. It is by the 1860s that for increasing kinds of property it was becoming a burgeoning management vehicle. This enabled urban wealth to be held in trust, and the investment of stocks and bonds by way of trust to become frequent. Before the statutory introduction of the limited liability company, business enterprise was frequently conducted by way of a trust, whether that business was of an individual entrepreneur or a 'company' of venturers and investors. Meanwhile, the trust taken by emigrating English people to the American colonies during the seventeenth century is playing out a similar, but distinct, course of judicial development. At the end of the eighteenth century local usage and expectations of the trust in those colonies (now independent as the United States of America) increasingly reflect the opening up of a vast new continent, of which experience the old European world knew little. In the USA, settlor autonomy is highly valued by the resourceful pioneer. The spendthrift trust, for example, which is conceptually different from the later English protective trust, is a typical product of the rugged independence of the early American property owner.

The interplay between the uses to which the trust idea is sought to be put, and adaptation of the trust as a concept to that desired usage, is constant. And whether we are concerned with the English form of the trust, later in the nineteenth century carried to all parts of the British Empire, or the trust with the same English origin but independently developed in the USA that fully broke from England in the late eighteenth century, the interplay is the same. The doctrinal development of the trust in the USA, historically and today, is a story of its own; this article is concerned with the English trust, both in its seventeenth century form, the earliest features of which were taken to the 'New World' of the American colonies, and in its later blossoming into what is known as the Commonwealth[4] form of the common law trust.

BEGINNINGS – THE 'USE' (1350–1600)

The common law system's trust has its origin around the middle of the fourteenth century, when the medieval Lord Chancellors began to enforce a 'use' against the transferee who subsequently and wrongfully claimed for himself land with regard

[4] England and Wales, Ireland, common law Canada, Australia and New Zealand, Hong Kong, Singapore and Malaysia, India, Nigeria, Ghana, Kenya, Zambia and other African states, Belize (formerly British Honduras) and the island jurisdictions of the offshore one-time 'Empire' in the Atlantic, Caribbean and South Pacific regions, as well as the Channel Islands and the Isle of Man.

to which on gratuitous receipt from the transferor he had made a solemn promise. The promisor had taken the common law title from the promisee with the undertaking to hold, normally land, solely for the benefit (ie, to the 'use') of the promisor, and probably the latter's heirs. The promisor had literally promised to deal selflessly with the property as instructed. Later he claims that he has an absolute legal title, and is not bound in courts of law by the promise. There is no generalised law of contract at this time in England, and the promise made was not enforceable in the common law courts by the promisee.[5]

At this time the Lord Chancellor was usually a senior cleric, versed also in canon law, and he intervened in the name of the Crown to secure justice between parties. But the precise reason for the intervention, as we can now see, was that the technicalities and the substantive shortcomings of the then common law did not confer remedy upon the disappointed would-be claimant. In doing justice the Equity jurisdiction enforced moral obligation.[6] It did not thereby replace but complemented the common law, and it did so with the justification that it was acting in the name of conscience. The Royal Chancery became the Court of Chancery, and the term 'court of conscience' as it was popularly described, meant what it said. Promise and breach having been proved, defendants at first were imprisoned until their moral wrongdoing was rectified by an undertaking to the court to perform. Remedy for breach of the moral (now lawfully binding) obligation was frequently invoked in the Court of Chancery during this century, and it was during this period that the curious English stand-off started whereby the common law courts ignored what the Chancery court was doing, and the Chancery court, where it chose, went its own way amending the application of the law of the realm by offering what were nicely described as 'supplementary' remedies. However, both sets of courts – Common Pleas, King's Bench and Exchequer on the one hand, and Chancery (or Equity) on the other[7] – were the courts of the Crown affording royal justice. Nevertheless, the effect was that the forms of action 'at law' applied as the remedies of Equity permitted. Indeed, 'equity'[8] managed to find its way into law's

---

[5] We now meet the phenomenon of unkept promises with estoppel (proprietary or promissory) against a background of a generalised concept of contract.

[6] The court order declared that X tenet ad opus of B (A held for the benefit of B). The translation of opus was 'to the use of' another.

[7] From the beginning 'Chancery' meant the Lord Chancellor's court, where he sat personally and as the sole judge. The Master of the Rolls of Chancery had by Tudor times became himself a judge in a lower court of this jurisdiction, appeal being possible to the Lord Chancellor, and these two courts were 'the Court of Chancery' until 1813, when legislation created a Vice-Chancellor's court in order to help with the volume of litigation, and – albeit it in vain – the interminable delays that had become endemic.

[8] In this article 'Equity' is always a reference to the jurisdiction (the other jurisdiction was common law), and 'equity' to the concepts of law that evolved in the Equity jurisdiction. 'Common law' (combining both common law and equity) also refers to the system of law, as opposed to civil law or shari'ah law.

precincts; there came into being, at first to protect the Crown's rights, an equity division within the Exchequer Court. Developed in a judicial isolation, but applied as a gloss on the received customary law in the care of the common law courts, Equity's doctrines in effect modified the application of the common law.

The enforcement of the 'use' (or equitable obligation) was built by the Lord Chancellors on the essential premise that the law should compel in the name of 'conscience'. This was an ethical approach that was its own justification in the age of faith; 'conscience' tests the conduct of the fiduciary. It gave rise in 'use' and trust law to the notion of selfless service – honesty and good faith – owed by trustee to beneficiary. Fiduciary duty was not the obligation of contract; that obligation emerged at law from *indebitatus assumpsit* with *Slade's Case* in 1602.[9]

What inspired and drove medieval equity was moral dictate. The feoffee's conduct breaching the promise was intolerable. 'Conscience' is still the backcloth of case-law equity,[10] but until the end of the sixteenth century it was everything.

THE TRUST'S FORMATIVE YEARS (1600–1830)

The Seventeenth Century

The hallmark of the 'use' was that, because the 'use' beneficiary took his enjoyment of the 'use' asset(s) through the feoffee (or transferee) to uses, he (the beneficiary) was fully exposed to the fates that befell the legal estate transferee. The feoffee took the legal estate to the property, normally land though not always so, and it was to the legal estate that common law burdens attached. The existence of a 'use' binding the feoffee to uses did not concern the common law, and therefore the feoffee's loss of the property was the loss of the 'use' beneficiary. The land would of course be lost to both feoffee and beneficiary if a third party could show a better claim to it, but, because the beneficiary took through the feoffee to uses, the land was also lost as a result of disseisin of the feoffee (the dispossessor acquired good title), escheat for conviction of crime to the superior landowner of the feoffee's interest, the inheritance rights of the feoffee's heirs, and the feoffee's creditors at law.[11]

---

[9] (1602) 4 Co Rep 92b.

[10] It is perhaps most apparent in the development in the late twentieth century of promissory and proprietary estoppel.

[11] The significance of the 'use' binding specific property in the feoffee's name led only slowly to the realisation that the specificity of assets (or segregation) bars claims against the fiduciary asset(s) that have nothing to do with the fiduciary administration itself. Conscience is concerned with the wrongful conduct of the fiduciary; there it stops.

What the 'use' did defeat was the Crown's feudal rights to the so-called incidents of tenure, which in modern terms means the power to tax the common law title holder. The title holder to 'uses' was in effect a nominee and in 1535 the Crown in the person of Henry VIII had had enough. He prevailed on Parliament in the Statute of Uses to abolish the most prevalent 'use', namely, the 'passive use' in which the transferee had to do nothing but hold the legal title to land while the 'use' beneficiary enjoyed the benefit. If the transferee (and promisor) had duties of a management kind to perform towards the 'use' beneficiary or perhaps towards the promisee's spouse and minor children, the Crown was required to tolerate the 'active' use. The 'active use' was not within the reach of the legislation.

However, 'passive' uses were by far the most popular, and the 1535 Statute appeared to have brought to an end a distinct concept of the fiduciary holding of property.

One of the best known tales in common law legal history is how by 1634,[12] after much skilful advocacy and decades of judicial debate, the courts were at length persuaded that, while there could be no 'passive use', there was nothing in the language of the Act to prevent a 'use upon a use'. That is to say, X transfers the common law title 'unto [Y and his heirs] and to the use' of Y and his heirs 'in trust' for Z and his heirs. Y acquires legal title by force of the Act (all beneficial passive use estates had been 'executed' by the Act; they were made statutory legal estates), but holds that legal estate on further 'use' (called 'trust') for the described beneficiaries. In modern language the essential question for almost 10 decades was whether on a literal construction the 1535 Act abolished solely the first 'use' to which alone it expressly referred, or on a purposive construction the Act's abolition embraced all passive 'uses'. It was a doctrinal debate but heavy with political overtones, and those tones by all means the courts, more than any other public institution, must avoid. Throughout the sixteenth century the final outcome always hung in the balance. However, while, until the Restoration in 1660, the trust was a somewhat tentative concept laden with all the dusted-off pre-1535 law concerning 'uses', the statutory abolition of military tenure (knight service) in 1660 and the disappearance, through Act of Parliament, of the last Crown prerogative right to levy dues from property owners, changed everything. The constitutional struggle between Crown and Parliament came to an end. Parliamentary grants to the Crown in lieu of its taxing powers became state policy, and after this there was no longer political reason for resisting the 'use upon a use'. The trust became thereafter a well-accepted conveyancing method.

The trust might have appeared to many litigating counsel of the early seventeenth century to be a resurrected 'use', but it was gradually to become apparent after its

[12] *Sambach v Dalston* (1635) Toth 188.

recognition[13] that Chancery courts had something in mind that was rationalised differently from the former 'use'. After the Restoration judicial attention swung from the conscience of the maker of the promise (now the 'trustee') to what it was the trust beneficiary obtained when land (or other property) was transferred 'in trust'. As Lord Mansfield was to confirm a century later, the 'use' was an agreement but the interest of the trust beneficiary is an interest in land.[14]

From this in the second half of the seventeenth century flowed acceptance of the idea that the trustee's personal obligations to his own creditors, heirs and family claimants do not involve the trust property, the benefit of which is in the beneficiary. The segregation of the trust property from all other of the trustee's property, established initially by the specific property that was held in legal title by the feoffee (and now trustee), was thus underlined. The trust was seen as a relationship between a trusted legal estate holder and the person who was to have the enjoyment of the property, but also a relationship concerning specific property in which the trust beneficiary had rights. It was concern with the nature of the interest of the trust beneficiary that facilitated the growth of case-law seeing the holder of common law title as one who had duties, and powers wherewith to discharge those duties. The holder of legal title (seisin or best possession), despite his status at law, was therefore correspondingly and increasingly a shadow. Moreover, though he was held to have no liability for his co-trustees unless he was personally at fault, as a fiduciary the trustee was denied in circumstances of his own fraud the right in Equity to invoke limitation defences.

To describe the quantum and character of beneficial estates, Chancery courts continued to adapt the common law doctrine of estates to the trust beneficiary's interest as it had done to describe beneficial 'use' interests in the medieval period. And the multiplicity of types of beneficial interests that sprung from this was prodigious.[15] To add to this plenitude, equitable interests could not be defeated or burdened as could common law estates;[16] all of this added to the distinctness of the beneficial property interest. During this period Chancery courts began to develop a conception of powers of appointment, particularly fiduciary (or special) powers.

It was with the Chancellorship of Lord Nottingham (1675–1681) that the first milestone was reached in the evolution of the trust. He reduced a mass of unorganised equity case-law to a systematised whole and, so far as trusts are concerned, demonstrated the principles of trust law that lay hidden in the reports of

---

[13] The first signs of acceptance by the courts took place in 1604.

[14] *Burgess v Wheate* (1759) 1 WBL 123.

[15] At Equity there were equitable executory interests (ie, shifting and springing estates), equitable contingent remainders and equitable executory devises.

[16] Eg, the disseisin, abatement or intrusion of *equitable* interests was never permitted.

decided cases and counsel's recorded comments thereupon. He showed how those principles constituted the foundation for a comprehensive statement of trust law. Equity in Nottingham's time was very much concerned with the loan and security analysis of mortgage law, and his judgments in mortgage law led to the evolution of the mortgagor's equitable right of redemption as a property right. He saw the equitable interest of the mortgagor,[17] like the trust beneficiary's interest, as marked by its proprietary character. So far as trusts law is concerned, this characterisation of the beneficiary's interest as being property, alienable inter vivos and passing by succession, is perhaps the hallmark of Nottingham's Chancellorship. His was the essential hand that emphasised the meaning and qualities of the beneficiary's interest. His analysis is less of the beneficiary having a *chose in action* and more of his having property rights comparable with those at law. As one author has said, with Nottingham 'the emphasis shifts rather to the beneficiary's interest with its increasingly proprietary tinge, from the relationship to the equitable right, from power to property'. One interesting consequence of this understanding of trust as a property concept was that the Crown and a corporation might each be the holder of title and a trustee. The 'use' was a remedial control of human duplicity, and the Crown as royal justice was not duplicitous.[18] Previously neither Crown nor corporation could be bound by a 'use'.

Part of the move to secure recognition of the nature and implications of the beneficiary's interest are Nottingham's efforts to underline that that interest must be protected from the rights and obligations of the trustee in his personal capacity. And, by the same token, that trust assets representing the beneficiary's interest must be available to meet claims against the beneficiary. The trust assets could not be called upon to meet the trustee's debts, but those assets must be available to meet the trust beneficiary's claims for breach of trust.

One of his most famous decisions in trusts law is that of *Cook v Fountain*[19] where he introduced the first classification of trusts. He distinguished between private and public (or charitable) trusts, and within private trusts he further distinguished express trusts, implied trusts (or intended trusts arising by construction of language) and so-called presumptive trusts. The latter, today named 'resulting and constructive trusts', were those trusts that the law imposes because in equity in the

---

[17] Described as an 'estate' at this time, only later as an 'interest'. 'Estate' and 'interest' in this context are interchangeable.

[18] DEC Yale (ed), *Lord Nottingham's Chancery cases* (Selden Society, 1957), Vol 1 and (Selden Society, 1961), Vol 2, Introduction, at pp 90, 91. It is argued that, because Equity always employed obligation to secure proprietary results, we should think of the 'proprietary interest' of the beneficiary not in terms of the beneficiary having rights *in* trust property, but instead rights *in* the rights of the trustee in trust property: L Smith, 'Trust and Patrimony' *Revue Générale de Droit*, Forthcoming.

[19] *Cook v Fountain* (1672) 3 Swan 585.

particular circumstances the legal title holder ought to be regarded as holding for the benefit of another. It is surely remarkable that the distinction between trusts arising from intention and trusts imposed by process of law was so clearly made at this early date.

If all this has a very modern ring, something which can be said of all Nottingham's work, it will be understood why he has been known to generations of lawyers as 'the father of modern equity'. His Chancellorship also marked a watershed in his particular approach to the relationship between the common law and equity principles. 'Conscience' was the motivation of equity, he said, but both law and equity operate with rules and principles. The lawyer's task, he inferred in all his judgments, is to balance the need for certainty in the application of equity with sensitivity towards the circumstances of the particular litigant; and at root equity is a science, not the arbitrariness of any individual's perception and decision. He was very deliberate in emphasising that no great divide separated the administration of the common law and of equity. The 'conscience' of equity lay in the manner of applying principles and rules; he saw the rules and principles of common law[20] and of equity as interwoven, and this very much set the path of Equity courts for future years.

A good example of the above is his judicial work on the rule concerning the bona fide purchaser for value without notice. Equity regards as bound the conscience of the wrongdoing trustee and each sequential acquirer of the property (ie, third, fourth or fifth party, etc) who knew or reasonably could have known of the original wrongdoing or his own transferor's knowledge of that wrongdoing. Only at the point of the bona fide purchase, even if a yet later acquirer of the legal title knew or had reason to know of original wrongdoing, does the legal title prevail over the equitable interest. At that point, said Nottingham, the holder of the legal title is not bound by the equity and is entitled to enjoy a good title, something that he can also transfer free of all trust claims. Nottingham would not have found humour in the contemporary (and enduring) quip that equity is 'the length of the Chancellor's foot'.

The Statute of Frauds in 1677, requiring writing for proof of the existence of an express trust of land, was another element that encouraged the classification of trusts. Nottingham advised on the draft Bill, and drafted it. The question there arose as to what constituted an express trust, and what was the scope of the clause that made the Statute inapplicable to trusts imposed by the law, essentially the constructive trust. In the closing quarter of the century the resulting trust is applied

---

[20] Nottingham was not merely an 'equity' lawyer who might be thought to have little appreciation of common law doctrine. He had practised at the common law Bar for many years. That he was well versed in, and had considerable respect for, the common law was widely recognised in the profession.

to situations where A buys in B's name, and B later claims that a gift was intended. A's creditors or his heirs challenge that A had such an intention. The presumption of advancement in favour of a son vis-à-vis his father, where A is the father and B the son, is also an issue in the reports of case-law in Chancery during this period, and in what circumstances the power sets aside the resulting trust. Indeed, trust law is mainly invoked at this time, and throughout the next century, in connection with family matters. The family settlement of land as the wealthy family's asset base is, of course, the principal situation in which trust principles are employed, but property and the married woman, marriage, infancy and guardianship all come to involve trust employment in one way or another.

The characteristic of a trust that is apparently most valued by wealthy clients today is the degree of autonomy it allows to the settlor in creating the dispositive and administrative provisions that the settlor wants (as opposed to what case-law, or statute, might otherwise dictate that he shall have).[21] Choice also permits the settlor to construct the governance he wishes, and to make free use of the wide variety of beneficial proprietary interests that equity affords the settlor for his dispositive clauses. From the mid-seventeenth century Equity always emphasised the importance of fulfilling the settlor's intent. The word was frequently on Nottingham's lips. This was an aspect of the *ad personam* character of equity, and it was this factor that most distinguished the law of that century and the next from the technical rules and procedural approach of the common law courts. This emphasis upon settlor intent has survived to the present day; it is highly valued in the USA where in almost the whole of the 50 states the principle of *Saunders v Vautier* is totally rejected.

The first 60 years of the seventeenth century were marked by the upheavals of political confrontation between Parliamentary forces seeking power for an elected legislature, and the absolutist monarchical convictions of the then occupants of the throne. The common law courts, though also originally a royal introduction, were associated in the public mind with the Parliamentary cause, but Chancery was a direct later emanation of the Crown's Chancellor, and that it survived the eventual victory of the Parliamentarians and the 11 years of the Puritan-dominated Commonwealth is more than surprising.[22] With the restoration in 1660 of a more constitutionally minded royal personality and the solving of the clash between

---

[21] The seventeenth and eighteenth centuries made extremely little use of statute in moulding trust law. Property was felt by the upper and middle income groups to be the sphere of private affairs that Parliament left alone. Lower income groups lived in accommodation that was provided by the 'big house' as a remuneration benefit for services rendered, or was rented. Not being property owners they would then have no Parliamentary vote.

[22] The Star Chamber was another Crown court, more closely associated with 'policing' the state and the enforcement of royal interests. In 1641 with civil war in the offing this was indeed abolished by Parliament, as was the Court of Requests.

Divine Right of Kings and Parliamentary democracy, the Chancery court no longer feared for its continued existence and was confidently able to develop the trust ideas that, despite the political tension, had emerged during the pre-Civil War period.[23]

> 'For historians, one of the most difficult balances to get right is between the objective forces in history, whether economic or ideological, and the individual decisions that send nations or peoples down one road or another.'[24]

Was it social and economic forces that essentially wrought the rebirth of the common law's trust idea and the character it would assume in nineteenth century Commonwealth history, or did a handful of outstanding intellectuals as Lord Chancellors, in particular Nottingham, send England, and ultimately the Commonwealth, down the road of the modern trust? Having in mind the American colonies' seventeenth century inheritance of the 'use' and the early trust concept, American legal scholars would probably claim it was social and economic forces. Nevertheless, from the English perspective it would be difficult not to point to Nottingham as the prime influence.

Lord Nottingham was a scholar vis-à-vis the law who had both an intellectual vision of equity's role and the ability to bring order to an inductively produced inheritance of disparate equity and trust law decisions. So far as trusts law is concerned, it was in defining the proprietary basis of the trust beneficiary's interest, and in distinguishing trusts arising from intent and those from imposition of law, that he made his main contribution. It was his achievements in the years after the Restoration of 1660 that saw equity and trust law assume much of the shape that we recognise today.[25]

The Eighteenth Century to the Retirement of Lord Eldon in 1827

This period largely constitutes a time of consolidation of the trust structure and steady elaboration of the doctrine that Nottingham had introduced or significantly developed. However, two occurrences particularly stand out. The first is the work of Lord Hardwicke as Lord Chancellor (1737–1756), and the second in the last half of the period is the gradual movement of the Chancery court towards a pattern of rules, sub-rules and mandatory procedural details that characterised the then common law. All of this directly affected the trust and its distinct remedies. What

---

[23] Leading Parliamentarians, comfortably placed, would also live on estates held in trust settlements.

[24] Margaret MacMillan, book review, 28 July 2007, *The Globe and Mail*, Toronto.

[25] Op cit, n 18, for an in-depth discussion of Nottingham's judicial contribution to trust and equity law.

might not unfairly be described as a form of *stare decisis* was embraced by equity during the last years of this period.

Lord Hardwicke, a very capable jurist, was the outstanding Chancellor of the eighteenth century. His 19 years of tenure of the office are particularly marked by the doctrinal development that took place in the area of charitable or public trusts. This included the court's inherent jurisdiction to agree to cy-près schemes and most of the case-law that we have today regarding cy-près schemes came into existence during this period. Also, the line was explained between the third party contract unenforceable by the third party, and an express or implied trust binding the promisor to act for the benefit of the third party. Furthermore, the remedy of tracing, still in an earlier stage of development, was examined in terms of what was required to constitute a continued identifiability of trust property. Hardwicke was concerned that Equity might too easily be prepared to find a continued identifiability in the handling and mixing of monetary funds. He appears to have seen the direction of the cases as driven by policy rather than by doctrine. He carried further the concepts of resulting trusts and constructive trusts, and precatory trusts now began to be a distinct type of implied trust. Holdsworth[26] points out that Hardwicke was responsible for establishing firmly the distinction between executory and executed trusts that is found in present day textbooks on trust law. Additionally, the ethic of compelling adherence by the promisor to a promise made, and relied upon, continues to be a driving force in Chancery courts. If X gives an undertaking to a testator that property left to X will be conveyed as a gift to Y, X is held to his undertaking after the death of the testator.

However, it is with regard to the law concerning the duties, powers and liabilities of the trustee, doctrinal infrastructure that Nottingham had shaped, that Hardwicke's particular contribution can be said to have been made. Hardwicke enumerated and explained the powers that facilitate the carrying out of duties, the type and scope of the trustee discretion that might be conferred and held that the court would not interfere with the trustee exercise of that power. This was later to be a consistent theme of twentieth century courts. In various cases he described the acts and omissions that constitute breach of trust and, like Nottingham, he was always concerned to see that equity was just but reasonable in judging the conduct of the trustee. Offering us a reminder that professional fee-charging trusteeship was a twentieth century introduction, Hardwicke emphasised the gratuitous nature of the trustee office.[27]

---

[26] WS Holdsworth, *History of English Law* (Sweet & Maxwell, 1938), Vol 12, at p 272. Now more than half a century old, 'Holdsworth' is a mine of information on the history of Chancery, and this article is indebted to its pages.

[27] Trustee liability as an issue was to acquire a much higher profile in the twentieth century when trust corporations, lawyers and accountants would be the appointed trustees, and trusteeship meant active

In his decisions he consistently emphasised the default nature of trust rules; the settlor should be left to create provisions that he chooses. It followed, said Hardwicke, that though it later appears that provisions were not made that might have been made, a court would not vary the terms of a trust. The autonomy of the settlor or respect for the settlor's intent operated both ways; barring illegality and public policy concerns, the settlor could provide as he wished, but he was not to expect that the court would rescue his trust should his trust instrument not have foreseen an event that occurred.[28]

Trustee standards of conduct that we recognise today were established at this time. A trustee is liable for imprudent and negligent, as well as dishonest, conduct and this implies a standard of care. Agents could be appointed if that was in accordance with business practice and, if they were appointed with care and were supervised, the trustee was not liable for the agent's failure. Moreover, the beneficiary who instigated or requested the trustee to act in a manner that was a breach of trust had no right of redress from the trustee for loss arising from the breach. A trustee who is prudent and sagacious does not, of course, in any event entertain pleas or pressure from a beneficiary that the trustee act in breach. Here again we have the equity notion of principled behaviour, reflected today in the estoppel defence; these are the overtones of morality. Between trustees, who must act unanimously in order to exercise any power, their liability was joint and several. No trustee might say that he was a silent partner in any trustee action.[29]

Today, for those engaged in estate planning, marriage breakdown and the response of family law are ever more a concern of trust lawyers. Separation and divorce, with their attendant property settlements, followed, in the case of divorce, by the parties' remarriage to others and the birth of further children to form 'mixed' families, is an occurrence that was practically unknown to Hardwicke's century. Wealth and trusts during his time concerned the titled classes and gentry who had land; marriages, once entered into, lasted for better or for worse, as the prayer book had it, until the death of the first to die. Children of these marriages were frequently numerous. The family settlement would be built around land inherited absolutely, purchased or acquired by way of gift for public or private service, and 'settled' on the family members, ie, the present generation and their children and grandchildren. Provision

---

management. In Hardwicke's time the role of 'gentlemen' trustees was mainly to hold the legal title to family estates. The family 'ran' the estate.

[28] What Hardwicke would have made of the *Re Hastings-Bass* [1975] Ch 25, decision and its subsequent interpretation is an interesting speculation.

[29] Trustees authorised to act by a decision of the majority is a doctrine of corporation law that was far removed from eighteenth century thinking.

would be made in these trusts for the surviving dowager,[30] unmarried daughters of the marriage and sons junior to the eldest. The first son or the oldest surviving son became the life tenant on his father's death. The income from these estates would comprise the rents from farms and the sale of produce, such as cattle, timber and crops.[31] This was all grist for the mill with Lincoln's Inn practitioners. The perpetuity rule, which the House of Lords – when Nottingham sat as Lord Chancellor – had fashioned in the 1670s, necessitated that the family trust be re-settled every two generations, and this added to Lincoln Inn's welcome workload. Attainment of adulthood by children, and further marriages, were the occasion for the marriage settlement between the young people of different landed families. A new family settlement was created. The settlement was funded by the bridal pair's independent assets, present and future, as well as by their respective families. It was intended to provide, not only for the pair themselves, but their children, the grandchildren and later successors. For the exigency that the direct line dies out, lateral heirs were included, often in abundance to meet every possible turn of events. These lengthy trust instruments, fascinating to present day eyes, need take no cognizance of taxation as there was none, at least none that faintly affected these settlements.[32]

Several of Hardwicke's decisions in trust and family law set equity on a more firm course as to how the trust would impact upon differently situated persons within the established, or new family, situation. The elderly, the minors, children yet to be born, the incapacitated – all of these were particular concerns to equity courts. The skulduggery of the period included the wastrel who positioned himself to marry the guileless woman, unmarried or widowed, whose considerable funds were inherited; following marriage, he then steadily deprived her of her assets. Another confidence trick was to lead young innocents, with considerable property interests that would vest in possession on living life tenants' deaths, to enter into ruinous settlements of which the fraudster was in fact the principal beneficiary. This defrauding act, preying upon those who were desperate to have cash in their pockets before inheritance brought it, was known popularly in Lincoln's Inn as 'catching bargains with expectants'.

The eighteenth century was also the century of Lord Mansfield. He was Chief Justice of King's Bench between 1756 and 1786, and his name has rung down

---

30 The widow of the life tenant in possession moved into 'the dower house', as Jane Austen readers will recall.

31 These settlements rarely created adequate powers for the life tenant, or were they endowed with the financial means to exploit mineral wealth. This was a significant criticism of them in the nineteenth century.

32 The so-called 'strict settlement' might take the form of successive *legal* estates (the 'use' having been 'executed' by the 1535 Act and the legal interest transferred to the 'use' beneficiary), or of successive *equitable* estates (the executed use is followed by a 'trust' for trust beneficiaries – the use upon a use).

through the years. He was also an equity lawyer and at one time a pupil of Lord Hardwicke. We remember him today for his observations on the futility of implied contract reasoning, and his counter-rationalisation of 'unjust enrichment', a thought way ahead of his common law times. He was a Denningesque character, and his well-known dissenting judgment in *Burgess v Wheate*,[33] read together with the judgments of each of the majority judges, offers an interesting insight into the relationship of law and equity doctrine as seen at this time. The issue was whether, on the trust beneficiary's intestate death without heirs, there was an escheat of that beneficiary's equitable interest, absolute or entailed, to the superior lord of the fee simple. Mansfield concluded that it did so escheat; the majority members of the court decided it did not. All members of the court agreed that, while the 'use' beneficiary in his lifetime had only a personal right against the trustee, and therefore his interest was in that respect a chose in action, the trust beneficiary has also a real right, 'analogous to a right of property in a corporeal thing', as Holdsworth puts it.[34] Nevertheless, said the majority, accepted reasoning was that, unless inequity thereby is done, equity follows the common law. The superior lord as a stranger to the trust looked to the title holder *at law* and, therefore, if the holder (the trustee) had not demised without heirs, the trustee continued to retain his legal interest and the lord had no right to an escheat. Mansfield considered that, as the legal proprietary right escheats to the superior property claimant, an equitable proprietary right should do the same. That is, it escheats to the same superior lord. In 1884, in the century of reform, legislation in England[35] effectively adopted Mansfield's decision, thus abolishing the authority of *Burgess v Wheate*, and in this way Parliament chose to underline the proprietary right of the trust beneficiary rather than the technical dominance of a legal title over an equitable interest that the common law ignores.

Throughout the remainder of the century secret trusts, mutual wills, precatory trusts and charitable trusts were before Chancery. These issues concerned Lord Loughborough LC (1793–1801), and he also explored circumstances in which specific restitution would be ordered by Chancery. The meaning of domicile in connection with the devolution of an intestate's personal property came before his court and the recognition of intangible property now became apparent. Goodwill among other rights was listed as intangible property, and therefore capable of being held in trust. But these are early days for developments that within 50 years will lead to a legal conceptual lexicon the eighteenth century could hardly have imagined. It is the mid-nineteenth century that is the age of industry; the agrarian world is then in decline. And in any event the eighteenth century was not

---

[33] (1759) 1 WBL 123.

[34] Op cit, n 26, at p 586.

[35] The Intestates Estates Act 1884, 47 & 48 Vict, c 71.

particularly one of equitable innovation, as had been its predecessor. One cannot say the parameters of trust law were very much moved forward in its last 30 years.

The period between 1800 and 1830, so far as trust law is concerned, is marked by two outstanding names. Lord Eldon who was Lord Chancellor between 1801–1806 and 1807–1827, and Sir William Grant who was Master of the Rolls between 1801–1817. Eldon was a man of considerable knowledge in the law of equity, and was able intellectually to bring depth to doctrine in any part of the subject. He brings to a close the 'formative years' of the trust through a range of definitive judgments he gave on practically every aspect of fundamental trust law. Modern textbooks almost invariably cite his decisions in introducing trust topics, and on occasion they continue to discuss his milestone judgments.[36] It is difficult to pick out particular judgments meriting mention, but perhaps two of the most celebrated are *Ex parte Lacey*[37] and *Morice v Bishop of Durham*.[38] In the first he developed the conflict of interest and duty rule that flows from the fiduciary element in the trustee/beneficiary relationship imposed by the medieval Chancellors, and discussed its scope and applicability. In the second, while considering a testamentary gift that failed as a charitable trust because of the uncertainty that it was solely for a charitable purpose, he launched the famous 'beneficiary principle' that, to this date, has been an inhibition to any Commonwealth mainland jurisdiction recognising the validity of non-charitable purpose trusts.[39] He also developed the concept of the nature of certainty required by charitable objects. He was not slow to recognise secret and precatory trust intentions in the language of 'wish' and 'desire', something from which Nottingham might have demurred. In any event, modern courts have drawn back from construing trust intent from such donative language as readily as Eldon was prepared to do.

---

[36] At the same time a more convoluted and prolix style of expression than his it would be difficult to imagine. And to this he brought an evident inability to make a final decision. Slow discharge of the case load, and adjournment for further consideration, were bywords in his court throughout the whole, it seems, of the three decades that he held office. The delay and the procedural complexities of Eldon's court inspired in the 1840s Charles Dickens' *Bleak House*. In the memorable opening chapter of that novel a dense fog is creeping up the river Thames, and it ultimately envelopes Lincoln's Inn with its eminent Lord Chancellor. The symbolism is graphic. Then there is the divorce litigation (the fictional *Jarndyce v Jarndyce*) that, many years after commencement and still without solution, outlives the parties to the contest.

[37] (1802) 6 Ves 625.

[38] (1805) 10 Ves 522.

[39] There must be *somebody*, Eldon said, to enforce the trust, and by that he meant someone with a proprietary beneficial interest. This involves a corresponding right to enforce accountability, plus the proper discharge of his duties is by the trustee.

Grant was both an exceptional trusts and equity authority, and a lucid explainer of the law. In bankruptcy law, the rule in *Clayton's Case*[40] emanated from his pen and vibrates today in modern judgments. In *Morice v Bishop of Durham*,[41] which was appealed to Eldon's court, as we have seen, Grant distinguished 'charitable' from 'benevolent' purposes, a marked turn away from the more general approach to what is 'charitable' that is to be found in the civil law system. And he would have nothing of the argument that a donation by way of a trust but for an illegal purpose (ie, the practice of a then prohibited religion, Roman Catholicism) could be applied to another purpose because the testator had shown a 'general charitable intention' in favour of the advancement of religion. It was he who emphasised that equity will not perfect an imperfect gift, and decided that the absence or inadequacy of a would-be transfer is not cured by categorising the failed gift as a declaration of trust. The question and his response as to whether, for the purposes of a marriage settlement, children (or grandchildren), adopted or dependant persons, are within marriage consideration, was to echo down the years of the nineteenth century, the last in which a society would exist that called for such settlements. His distinction between a power and a right of property[42] was a clarification upon which the nineteenth century would build.[43]

A CENTURY OF REFORM AND OF SUBSEQUENT INERTIA (1830–1960)

The Nineteenth Century

With the end in 1830 of the old-style Tory Governments, a modern liberalism came into office, bent on reform of the law and of society's institutions. Much change was indeed to come. However, despite the evolution in Victorian England of a propertied commercial and industrially funded middle class, with different interests, lifestyles and values from the country-based, landed society of the aristocrats and gentry, whom by the end of the century the middle class were to replace, the interesting fact is that the law of trusts did not change. The old order had commissioned their lawyers to draft settlements of land and of family money that would provide during, and after, the initial life tenant's life and for the

---

[40] *Baring v Noble, Clayton's Case* (1816) 1 Mer 572.

[41] (1804) 9 Ves 399.

[42] *Holmes v Coghill* (1802) 7 Ves 499.

[43] During the years of the 'use', and subsequently the trust's formative years, the courts do not appear to have considered whether the trust fund constituted segregated property. The fact that the trustee held legal title to necessarily specific property, and that it was this property that was subject to the trustee's obligations towards the beneficiary, would itself have suggested segregated property. This no doubt assisted in the seventeenth century argument that the beneficiary had rights of his own in that property.

generations of the family, present and to come. Each family member was likely to have needs different in some way from others. Also commissioned were settlements of the bridegroom's assets and the bride's dowry on the occasion of marriage. Again there was provision to the living and those who would follow, so long as the perpetuity period would permit. These settlements of land that was to be retained for the trust's duration would gradually be replaced throughout the Victorian and Edwardian years by middle class 'trusts for sale'[44] of investments. The urban town house was a place wherein to live; it was not the rural 'seat'. But the fundamentals of the trust – trustees, duties and powers, segregated trust property, trust objects, and certainty as to each – were applicable to both kinds of trusts. Trustees continued to be friends of the family, but now advised by professionals because the family was looking to the trustees for more than holding title. They were starting to be what we would know as property managers.

However, the Chancery court that emerged from the old Tory world, doctrine aside, was not an attractive one. Afflicted by pressure of workload, too few judges and in most cases hopelessly prolix, it was desperately in need of reform. And, perhaps most to be regretted, it had modelled itself for the past quarter of a century on the old, as yet unreformed, common law process. Lord Chancellors, as we have seen with Nottingham, were always sensitive to the dinner table humour that painted the Equity court as a licence to the judge to do as he thought best while common law was impliedly the genuine thing. During this quarter century Equity moved ever closer to the common law courts' doctrine of binding interpretations and practices and their absorption with procedural concerns. It was thought appropriate by Lord Eldon in Lincoln's Inn that Equity should be understood by no one as being a forum of benign judicial discretion.

What this involved for the judicial administration of equity was far-reaching. Both common law and equity courts were handling uncodified law where the creative power of the judge or judges is considerable. Especially in Equity, this permitted the court to consider what we would call the substance of the law. The question for Equity was how far existing common law decisions called for adjustment having regard to the circumstances of the parties. However, the common law courts for their part saw law as rule applied to facts, and such was the character and expression of rules containing the substance of the law, that the law was dominated by a strictly required adherence to mandatory procedural requirements. Judicial skill was determined by the ability of the judge to master and apply the complexity

[44] These trusts were drawn in terms of obligating the trustees to sell but retaining for them a power to postpone sale. This power enabled the trust instrument to avoid being classified as a settled land trust, which was increasingly seen in the nineteenth century simply as 'freezing' land for the generations. Trustees for sale by contrast were enabled by the trust instrument to invest and reinvest in absolute and leasehold interests in land, as they would all movable property.

of rule and procedure. A modern mind might have seen litigation before these common law courts as calling, during this period, less for knowledge of the substance of the law than for the skills of the chess player or the mathematician's grasp of algebraic formulae. Whether applied law is best understood as rule or discretion, and therefore whether law or equity is the preferable approach, will always be debated. The point to be underlined in the present context, however, is the difference of approach and technique that the two jurisdictions of law and equity possessed at the close of the eighteenth century, and how between 1800 and 1830 the increasing application of equity principles in the manner of the common law courts' approach was producing simply two similarly-operating jurisdictions with little reason for their separate operations other than a centuries-old tradition of their twin existence.

Nevertheless, not many in 1830 would have recognised or appreciated the solution of introducing a single judicial jurisdiction. The pressure was for administrative change in Chancery and within a few years the Lord Chancellor hearing appeals from himself, as Eldon frequently did, was gone; an appeal court with three judges was created for Chancery. More Vice-Chancellors were appointed to provide an adequate number of trial courts. Finally, in the 1870s, all the Courts of Chancery were abolished, together with the ancient common law courts of King's Bench, Common Pleas and Exchequer. By 1880 they were gone. Law and equity for the future would be pleadable before all judges of the one High Court, although those judges would be assigned to 'divisions' dealing with separate areas of practice and law.[45] Whether law and equity were to be doctrinally one or remain distinct from one another, though administratively amalgamated, was an issue then that is still debated to this day. The fact that the restructuring legislation could leave such a question open is, it may be thought, a pointer to what Victorian England saw itself as doing. So far as equity and trust law was concerned, this was essentially an era of administrative reform.

Trust case-law remained as the formative period had fashioned it; Victorian courts continued to develop its principles and rules, and their application. Lord Westbury was one of the most highly regarded of the Lord Chancellors and sat as a judge during this closing Court of Chancery period.[46] He is remembered for his decisions in three areas: the principles governing the enforcement of the secret trust; the liability of the trustee as a fiduciary for the breach of his co-trustee; and the position of a stranger who receives trust property knowing, actually or constructively, of the trustee's breach in alienating the property to him. There is a significant number of able judges of equity and trust law during the Victorian years whose names are

[45] The Chancery Division would hear among other matters succession, trusts, and administration of estates issues. There would be one civil law Court of Appeal, and a Court of Criminal Appeal.

[46] Lord Westbury sat as a judge from 1861 to 1865.

known to every scholar of the subject, and also through their judgments the received trust law was deepened in texture across the board. This law was also taken abroad to become what is now Commonwealth trust law. It was the English trust law of the late eighteenth and the nineteenth centuries that was taken to colonies in Canada, Australia and New Zealand. It found its way to Hong Kong, Malaya and Singapore, India and Ceylon (as it then was). A number of states in Africa, and the Atlantic, Caribbean and Pacific offshore islands of the then British Empire, were further recipients of this law. It is illustrative of Chancery's influence that in the trusts texts of these long-since independent countries the English judicial precedents of this and previous periods are still footnoted and their doctrinal significance as milestones is underlined.

Four particular features of this period come to one's attention. The first is the publication in 1837 of the first textbook on the common law trust. Thomas Lewin of Lincoln's Inn, London, barrister at law, took it upon himself to bring order to the mass of unstructured and often disjointed material that the reports, and generations of counsels' notes, had left behind in his time as 'the law of trusts'. Using Nottingham's classification of trusts as the basis for its own classification, Lewin's work started a nineteenth century industry of producing text books on trust law. This, several years later, extended to the USA. It has continued to this day, and new editions of works, now in all the major Commonwealth jurisdictions, are a reminder of that first ground-breaking, comprehensive and descriptive work in 1838. For Lewin, in his Lincoln's Inn chambers, the trust was then simply a conveyancing device for the private client, the charity, the trade association or gentlemen's club.

The second is the arrival of the first legislation specifically concerned with trusts. In the 1850s the first Trustee Act was enacted in England, beginning a succession of such Acts,[47] and their adoption later in Canada, Australia and New Zealand. The earliest colonial and dominion legislation literally copied large sections of the counterpart English legislation. It is worth noting the title of this legislation; it is concerned not with the entire sweep of trust law, but with the *trustee*. It was introduced not to codify or mandate rules for trusts, but to facilitate the administration of trusts; it sought to eliminate, so far as possible, the effects of poor drafting of private trusts. The statutory sections could be adopted by the settlor or testator at his or her choice; they contained trustee powers that a well-drawn instrument ought to contain and, on occasion, enabled testators and settlors to include within their instruments the statutory power by mere reference to the Act. It also extended court powers beyond the limited inherent jurisdiction intending, like

[47] Legislation commenced with the Trustee Act 1850, 13 & 14 Vict, c 60, followed by the Trustee Act 1852, 15 & 16 Vict, c 55. These statutes were substantially amended by the Trustee Act 1888, 51 & 52 Vict, c 59, which itself was repealed and the earlier Acts further amended by the Trustee Act 1893, 56 & 57 Vict, c 53. Most Canadian Trustee Acts still possess provisions of the 1893 Act.

the inherent jurisdiction itself, to assist trustees in the administration of express trusts. It was in this tradition that the courts' authority to consent to the variation of trusts was statutorily introduced in the mid-twentieth century.[48] Trustee Acts remain a feature of almost all Commonwealth common law jurisdictions to this day.

The third is that during the later nineteenth century, in addition to restrictive covenants, the courts notably developed the law regarding powers of appointment. Mere powers and 'powers in the nature of a trust' had been distinguished in Eldon's court, but now they, and in particular fiduciary (or special) powers, were expanded upon. The distinction between general powers and fiduciary powers for the purpose of the applicability of the perpetuity period was explored by the courts. They also examined validity in different common law jurisdictions as to the creation and the exercise of powers. Lord Justice Farwell's *A Concise Treatise on Powers* was one of the hallmarks of later Victorian legal scholarship.[49]

The fourth is the growth and maturity of English trust law in overseas territories, a law that had taken root with late eighteenth century settlers, or was to take root at various times within the nineteenth century. This was a reflection of the settlement and acquisition of foreign land as a result of the rapid expansion of British colonialisation during this period. To Canada, Australia and New Zealand, as to all the other territories in question, went a trust law that was formed very much as it was known in England when Lord Eldon resigned the Woolsack in 1827.[50] By that time, it will be recalled, the years of putting in place the distinctive characteristics of the trust were complete.

1918–1960

The European world that emerged in 1918 from the destruction of the First World War was different sociologically and economically from the world that went into the War 5 years earlier. England, like other combatant states, had lost a generation of male lives on the battlefields and seen its wealth dissipate in the financing of the conflict. Trust law decisions still came from English courts, and the Trustee Act 1925

---

[48] Ie, the Variation of Trusts Act 1958 (6 & 7 Eliz II, s 53). In England also charitable trusts legislation sought to strengthen the operation of such trusts; in the second half of the nineteenth century commissioners were appointed for this purpose.

[49] The first edition was published in 1874. The law concerning powers goes back to Nottingham, as we have seen, and in that respect it is important not to overlook JJ Powell's *An Essay on the Learning respecting the Creation and Execution of Powers*, published in London in 1787, followed by a 2nd edition in Dublin in 1791. Lord Sugden's *A Practical Treatise of Powers*, was first published in London in 1808, during Eldon's early period of office, and received the accolade of the century for its scholarship and depth. It went to an 8th edition in 1861.

[50] Despite having already sat for nearly 30 years as Lord Chancellor, he continued to sit as a Chancery judge until 1835. He died in 1838.

was an update and consolidation of the 1893 trustee legislation. Although trustee powers and court powers still largely reflected trusts of land to be retained, the investment authority in that Act began to suggest the considerations of portfolio investment trusts. But interest in doctrinal innovation had evaporated. Trust work in chambers and solicitors' offices between the Wars was mostly concerned with the administration of settled land trusts that had been created often long before the War. Trusts for sale drafted in the 30 years before the War were the other concern. This was still the era of fixed interest trusts, and of life tenancies, single or in succession, followed by vested remainders or contingent remainders with gifts over, with powers of appointment exercisable in each generation. Among the main Commonwealth jurisdictions, also exhausted by the War, the trust drafting practices of the late nineteenth, early twentieth, centuries in England continued to be followed.

However, as with the marked disappearance of English family country estates settled land legislation steadily declined in significance, the 'legal list' (or investments permitted to trustees) from which the settlor and testator departed at peril became dominant as the first trustee concern. Also the conferment upon trustees of distribution discretion received statutory approval and assistance. The protective trust becomes prominent when the precedent life estate is determinable on the occurrence of a possible future event. On the life estate's determination a discretionary trust arises in favour of the former life tenant and his or her immediate family or expectant heirs. This discretion endures for the remainder of the former life tenant's life, unless the settlor has provided otherwise.[51] These trusts, protecting the dissolute from their own spending follies, were familiar already in private trust drafting prior to 1914, and the Trustee Act 1925, facilitated their use by including them within the Act.[52]

Though not popular with Canadian settlors or legislators, protective trusts took root in Australia and New Zealand, very much in the English statutory form, and were ultimately adopted in Trustee Acts there. Indeed, the practice throughout the Commonwealth was to follow the broad lines of English trust practice, and to legislate in line with England's successive Trustee Acts.

The Second World War brought any doctrinal innovation that there was to a further halt and again between 1945 and 1960 interest in equity was at a low ebb. During that period in England it was common to hear that equity was 'past child bearing'.

[51] The settlor may provide that the discretionary trust shall terminate during the lifetime of the former life tenant, when a further determinable life tenancy will be granted to the former life tenant, with a further discretionary trust in favour of a similar class to follow, should determination again occur.

[52] The Act provided that the words, 'on protective trusts', should be enough in any trust instrument to bring the statutory protective trust into being.

Nothing was done that was new, and this situation was accepted because there were no demands for anything else but the familiar. Then trust drafting began increasingly to be influenced by the post-War high levels of income and death taxes. The momentous Variation of Trusts Act of 1958, introduced as a private member's Bill because government was not prepared to spend cabinet time on the issue, was a direct result of high taxation. Those trust instruments which failed to confer any amendment or termination power upon the trustees (and few instruments of this period did) were 'sitting ducks' for steeply progressive rates of estate or legacy duty as each life tenant died. The Act introduced for the first time a power in the courts to agree to an amendment or termination of the trust, acceptable to the *sui juris* and capacitated beneficiaries, should the court find the particular proposal for variation or termination 'beneficial' to those beneficiaries who could not consent for themselves, notably the minors and the unborn. The legislation was such a significant response to need that it was rapidly enacted in common law Commonwealth jurisdictions throughout the world. For example, in Canada never in living memory had there been such a 'sea-to-sea' enthusiasm to adopt English legislation.

The decade of the 1950s ended as it began. Legislation continued to steer the recovery of the economy, and equity and trust law was part of no one's agenda for change. The law of trusts doctrinally had been fashioned by 1830 and powers of appointment were developed in depth by 1900. In England the Trustee Act 1925 had largely consolidated nineteenth century trustee legislation facilitating the drafting of trust instruments and extending court powers. In Canada, Australia and New Zealand, as independent countries, it was the English case-law of trusts that continued to be discussed and followed. The Trustee Acts of Canadian provinces were, for the most part, a reproduction of various nineteenth century English Trustee Act provisions,[53] while the state trustee legislation of Australia and of New Zealand reflected, in the main, the 1925 English legislation. From jurisdiction to jurisdiction, in Canadian provincial legislation and Australian state legislation, there was variation in how far trust legislation also contained provisions concerning the administration of deceaseds' estates, and that was a direct influence of mid-nineteenth century English practice.

The majority of trust instruments, as noted earlier, contained fixed interests, with powers of encroachment on capital for the lifetime advancement of one or more particular income beneficiaries, and vested or contingent capital interests in remainder. Contingent interests were followed by further gifts should the contingency in each situation not occur. Trusts were more often testamentary, and the express trust was adopted because the testator wished to provide for a

[53] Op cit, n 47.

succession of family beneficiaries. A life interest in the surviving spouse might well be the sole income interest, but frequently the trust provided for successive life interests in children or nephews and nieces, with alternative life interests to children of predeceased children, nephews and nieces. Though, not infrequently, an unmarried adult child of the marriage was given a life interest with a general power to appoint to whom the child chose, powers of appointment were more often mere powers, granted to the surviving spouse, to appoint among a class made up of children of the marriage. Default of appointment gifts normally took the form of equal distribution among the children of the marriage, children of predeceased children, if any, taking in the parent's place. Perpetuity periods, particularly for the exercise of fiduciary or special powers, were a constant concern for drafters. The same consideration affected accumulation trusts which were a popular modus of provision for beneficiaries who were infants or minors. The vesting of the capital interest was delayed in most instances to an age during the beneficiary's 20s or until marriage, but percentage distributions of capital over a period of time to the one beneficiary usually took place between the ages of 20 and 45. During the 1950s and 1960s a more patriarchal tradition existed among testators and settlors of inter vivos trusts, and this was noticeable in the manner in which older males were not hesitant to interfere from the grave in the lives of the surviving spouse and adult children. Clauses stipulating loss of benefit to the widow on remarriage, and conditions attaching to the vesting and divesting of adult children's interests, were frequently included.

THE RENAISSANCE OF EQUITY (1960–1975)

What changed the indifference of the post-War period to equity[54] seems to many, in retrospect, to have been the impact of the divorce actions that came before the courts during the 1960s. Throughout the Commonwealth women in divorce proceedings were, or certainly felt themselves to be, at a disadvantage because the property of a married couple at this time, and indeed traditionally, was in the name of the man. It therefore fell to the woman to argue that part of the property that was in her husband's name was fairly and justly to be regarded as hers. This was not an easy task in societies[55] that, because of the nineteenth century Married Women's Property Acts, had become accustomed to the position that a married woman would own her own property before, during and after the marriage. The allegation was soon frequently heard in argument that an intention existed between the particular

[54] If it was not the frequent invocation of equity concepts by Lord Denning, perhaps the best known of the century's common law Commonwealth judges. Denning sat in England as a High Court, Court of Appeal, and House of Lords judge, thereafter completing his career by occupying for 20 years the position of Master of the Rolls.

[55] Canada, Australia, and New Zealand, in addition to England itself.

husband and wife during the marriage that, were their relationship to end, the parties would regard themselves as owning in equal shares assets used, or savings drawn upon, by them during the marriage. In other words, resulting trust was argued.

The difficulty with this position was that, should the court conclude that no such intention existed, the woman was left, in the absence of legislation, with nothing of the shared assets. To meet this situation the alternative argument was put by counsel that to secure justice between the divorcing or separating parties the court should impose a constructive trust in the wife's favour. This would confer upon the wife an appropriate percentage, or particular items, of the assets of the husband. English courts rejected this argument entirely, saying this was a matter for the legislature; New Zealand courts were pulled in both directions; Australian courts were prepared to hold that a theme of constructive trust is the prevention of unconscionability, but not to go further.[56] Only Canadian courts proved willing to see the constructive trust both as rectifying unjust enrichment, and also as a proprietary remedy at the discretion of the court. Even in Canada, however, it was not until 1980 that the Supreme Court of Canada embraced the remedial trust, and the debate among the Commonwealth jurisdictions, which started in the 1960s, is by no means settled today.

But equity had revived, and trust law theory had sprung into new life in an area – the constructive trust – that was still, even in the first half of the 1960s, a backwater of limited interest to any practitioner.

What also began to change during this period was a client concern with what later became known, to borrow the US term, as estate planning. Persons with wealth were increasingly concerned with high tax rates, and this was happening in almost all mainland jurisdictions. Everywhere, it seemed, death duties in the form of tax upon the deceased's estate or succeeding heirs, often supported by an inter vivos gift tax, not only existed but were at high levels. In England the particular concern at this time was estate duty (a death tax levied on the deceased's estate). This tax could be avoided only if the owner of wealth disposed of it at least 7 years prior to his or her death,[57] necessarily on a donative basis, and without retaining any personal benefit. This encouraged the wealthy to think in terms of inter vivos trust dispositions to their intended testamentary beneficiaries. It was such a scheme, involving the exercise of a power of 'advancement or benefit' in an existing trust in favour of an adult beneficiary's 5-year-old daughter, that was the issue in the

---

[56] See HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson), at para 22000 et seq.

[57] In the apparent opinion of the tax authorities this dispensed with the need for a gift tax.

famous case of *Pilkington v Inland Revenue Commissioners*.[58] A substantial sum of capital was advanced from a trust and resettled for the child, whose only 'benefit' at that stage in her life could be the saving of significant estate duty, levied on the existing trust's capital, that would otherwise have been payable on her father's death. The Commissioners of Inland Revenue (as they then were) challenged this exercise of the power, but the House of Lords upheld the argument that a power to 'benefit' an appointee includes anything that confers upon the appointee advantage that otherwise would not have existed. The tax saving that would ultimately impact upon the child's financial wellbeing was precisely that, a benefit.[59]

This at once led all trust drafters creating capital encroachment powers to ensure that powers of advancement were expressly for the 'advancement or benefit' of appointees.[60] And the *Pilkington* case led to further developments. Powers of advancement or maintenance in existing trust instruments might permit capital to be distributed from a main trust by way of a so-called 'sub-trust'. This took the distributed capital beyond the reach of estate duty, but kept in place restrictions on the beneficiary's enjoyment. The appointee acquired the equitable interest in the distributed capital but was subject to the terms or conditions of a trust distribution, and this allayed the pressing fears of older relatives that appointees would receive capital absolutely at too early an age. Another possibility existing trust instruments might offer was for provision of support by way of a sub-trust not for the appointee alone, but for the appointee and his immediate family (spouse and children). 'Benefit' accrued to the appointee in that, since he had a legal obligation to provide for his immediate family, the trust fund discharged that obligation. With regard to what appointors could do with these encroachment powers, much depended on how older trust instruments had been worded in earlier years, when these instruments had been drawn and these modes of exercise had not been present in anyone's thinking. This was obviously a matter of chance and, in some instances, applications were made to the court under the new variation of trusts legislation for a widening of powers that in the trust instrument were restrictive. So the question arose as to whether such applications could be entertained by courts. Was tax saving a recognisable reason for applications to the court for variation? The answer given was, yes. A new world was dawning.

---

[58] [1964] AC 612. The view of the first instance judge, Danckwerts J, agreeing that the power could be used in this way caused quite a stir at the Bar. The trial judge was reversed by the Court of Appeal which was itself reversed, and the trial judge's opinion was restored in the House of Lords.

[59] Powers of advancement had previously been used to assist financially young people in their mid-teens, or with university attendance, and career furtherance. Where the trust instrument included it, this power was now a tax planning tool.

[60] A statutory power of advancement (Trustee Act 1925) could be adopted by the settlor, if he so desired, but the section extended only to a moiety of the capital entitlement of the beneficiary. This was the *Pilkington* power. But settlors often preferred an expressly drafted power over the entire capital, and differently worded.

A further development, beginning to take shape, was the move of equitable interests from being fixed to being discretionary. Testators, as well as settlors of inter vivos trusts, could see an advantage in delaying the selection of beneficiaries, or the determination of what quantum of interest selected beneficiaries should receive. Both aims could be achieved with the use of powers. These, as we have seen, might be:

(1) powers that allow the donee of the power to appoint or not appoint as he or she pleases;[61]

(2) powers which the donee of the power has no obligation to exercise but where the donee must consider in good faith whether the power should be exercised;[62] and

(3) powers that obligate the donee of the power to exercise the power.[63]

The first type of power may be a general power (ie, to appoint anybody) or a special power (ie, to appoint among a described class of persons or among named persons).[64] The second type of power may be general but is usually a special power; the third will always be a special power. The point to be emphasised here is that these distinctions were made by Lord Eldon in the early nineteenth century; powers, he said, were either mere powers or trust powers. Drafters in the 1960s and 1970s were in fact applying earlier ideas, but for different reasons from those in the nineteenth century. The courts themselves in that century, and the next, were largely expanding upon the circumstances and manner in which powers of all kinds might be employed or exercised.

The nature of powers was often the subject of extended court judgments during the 1960–1975 period. This was true, for example, at the highest appellate level in the determination of what certainty of objects means for powers and discretionary trusts. The decision of the House of Lords in *Re Gulbenkian's Settlement Trusts, Wishaw v Stephens*[65] moved the law from the existing requirement that all the possible objects of a mere power must be known to a decision that a mere power is valid provided it can be said of any person that that person is included within, or

---

[61] These powers may be released to permit default beneficiaries to take.

[62] These powers, if not exercised, will enrich the default beneficiaries, but because the donee is a fiduciary may not be released.

[63] These are trust powers, sometimes called powers in the nature of a trust. They must be exercised. The familiar estate planning discretionary trust, in favour of spouse and children, is an instance of this power.

[64] Eg, 'my grandchildren' or 'my wife, Mary, my daughters Anne and Barbara, and my son, Charles'.

[65] [1970] AC 508.

excluded from, the beneficiary description. This sort of reasoning assisted considerably the flexibility for which settlors and testators were looking. Two years later, in *McPhail v Doulton*,[66] by a majority of one, the House of Lords extended this decision in a landmark authority to discretionary trusts also.

Professional trustees also became more familiar during this time and, aside from their more frequent usage for tax planning, inter vivos trusts were now more likely to be investment or security property management vehicles, calling for professionals. Commercial employment of the trust, little appreciated at the time, apart from pension plans, was obviously a phenomenon that might well become of significance. With professionalism came concerns about trustee exculpation and indemnity clauses.

THE MODERN EPOCH (1975 – THE PRESENT DAY)

By the 1970s tax was on its way to becoming the most serious concern in onshore estate planning, and this dictated a trust instrument that was as flexible and therefore potentially as responsive to tax changes as possible. Distribution would be left to powers of appointment, including trust powers. Trustee administrative powers would be comprehensive of all possible exigencies. For the older practitioner this was often a hard pill to swallow; all previous training had emphasised fixed beneficial interests, and trustees with powers limited in type and expression to what was needed for the particular trust.

However, though powers of appointment in particular were the concern of mainland courts in the 1970s and 1980s, the period from 1975 to the present day has belonged, so far as trust law is concerned, to the so-called offshore jurisdictions. The Channel Islands, the Isle of Man, Bermuda, the Bahamas, and the islands of the Caribbean, the islands of the south Pacific, particularly including the Cook Islands, and Mauritius in the Indian Ocean, were beginning in 1975, one after another, to form 'financial centres'.[67] These would concentrate their services for the wealthier private client on investment, and on the gratuitous distribution of wealth between generations of the family. Principally these island jurisdictions were expanding the use of the inter vivos trust, and their interest, of course, given their own diminutive populations, was in foreign (mainland) clients. In the next quarter century the 'offshores' were to introduce a new trust world.

---

[66] [1971] AC 424.

[67] Hong Kong and Singapore form part of an older nineteenth century English foreign port tradition. It is only in the present century that they have begun to see themselves as being in competition with the island offshore jurisdictions, and indeed with each other.

Mainland jurisdictions made little change during this period, though the occasional change there has been, as with the Trustee Act 2000, in England. Australian legislation, which is to be found in the provisions of each of the six states and the Northern Territory, has also overall changed little from the Trustee Act 1925 (England), which was the model in each Australian jurisdiction, as previously noted. In most Commonwealth jurisdictions perpetuity legislation has taken much of the sting out of the older perpetuity case-law, but, investment and legislative adoption of the modern portfolio theory of investment aside, trust doctrines have remained largely as they were in 1975. There has been the familiar accrual of case-law that little by little contributes to doctrinal growth, as the courts tackle issues mostly arising out of new applications of the trust idea encouraged by tax considerations. Doctrinal change has been almost exclusively wrought by the offshore jurisdictions.

The legislative enactments that during the last 20 years have passed into what has become known as offshore trust law – change following on change in one jurisdiction after another – has been described many times in international conferences, and this allows the writer to go straight into the question of how thereby trust doctrine has developed.

The Mainland Trust

If the offshore contribution is to be understood, however, it is of value first to take note of what was already possible under mainland trust law when the offshore jurisdictions began significantly to provide estate planning services to mainland clients.[68]

Commonwealth mainland jurisdictions required only that the intention to create a trust be demonstrable, that some item of value that constituted property was identified and vested in a trustee, and that there existed at least one beneficiary or one charitable purpose. The settlor might be a nominee. The duty of the trustee, if nothing more was said, constituted an obligation upon the trustee to hold the property until the beneficiary called for transfer of the legal title. The one item of property might be a gold or silver coin, or a note or coins of any currency. Later the intended assets are added. The sole beneficiary might be a person who took an interest in possession if a power of appointment was not exercised conferring that interest upon another or others. But who were to be the beneficiaries, whether by name or description, might remain at trust creation to be ascertained. If these three

[68] 'Mainland' or 'onshore' clients are those resident within the USA, the British Isles, Canada, Australia, New Zealand and, traditionally, Hong Kong, but increasingly from civil law continents, such as South America and the mainland of Europe. The Middle East (the shari'ah tradition) and India are increasingly interested in the planning and investment opportunities the offshore jurisdictions have to offer.

elements – intent, trust property, and trust objects (beneficiaries or charitable purposes) – were in place, a trust had been created.

An originally named beneficiary or a later appointed beneficiary could be removed under a power to do so which the trust – almost always in documented form in order to provide evidence – conferred upon someone. That power was usually joined with an authorisation that the donee of the power might add a further beneficiary or further beneficiaries. Power to remove a trustee could be conferred upon a beneficiary, or a non-beneficiary. No reasons for the dismissal need be provided. Property could be added to the trust fund by the settlor or others, and the settlor or the trustees could be authorised to withhold consent to any such addition. Persons could be beneficiaries who were mentally incapacitated, minors or as yet unborn. A beneficiary might also be a corporation or trustees of another trust.

Every trustee had a duty to account to the beneficiary for his (the trustee's) management of the trust property. The default duty of the trustee was to act, not only in good faith (objectively and impartially) and to avoid feathering his own nest, but with 'prudence, vigilance and sagacity'[69] on behalf of the beneficiaries. Any duty, administrative or dispositive, could be introduced that was lawful and not against public policy, and any powers might be granted for the carrying out of those duties that met the same minimal test.

The flexibility of trust law that permitted the settlor to confer beneficial interests upon persons who were infants (or minors) and those not yet born (eg, the children of a person at present an infant, or the children of unborn persons) was also existent in the settlor's freedom to choose trust governance rules. The settlor might devise his own rules. Frequently, unless local taxation was thereby attracted, he reserved for himself both administrative powers (eg, to consent to trustee investment decisions), and dispositive powers (eg, the power to appoint beneficiaries or to remove existing beneficiaries). Anyone with capacity might be an express trustee, whether or not a court would regard the appointed person as having any competence to perform the role and however unwise such an appointment might be. The trust instrument could excuse the trustee from the obligation not to pursue his own interests rather than those of the beneficiaries, and not to utilise his office for his own private advancement.[70] The trust instrument may provide when and how the trustee is to account to the beneficiaries. The accounting obligation can be,

---

[69] A description of the trustee's duties employed by Dickson J in *Fales v Canada Permanent Trust Co* [1977] 2 SCR 302.

[70] This was done in positive language by authorising the trustee to do a certain thing, eg, to make a personal selection for his own benefit among certain trust assets ahead of all other beneficiaries, or to employ his own business enterprise to carry out trust work that required the hiring of a remunerated agent.

as the settlor chooses, demanding or minimal; it may be by court passing, or a periodic audit. Since the obligation of the trustee towards the beneficiary, and the right of the beneficiary to enforce the discharge of that obligation, is at the heart of the trust concept, mainland trust law requires that the beneficiary be informed by the trustee of the trust documents and kept informed of the current trust accounts.

However, save for the trustee's breach of trust by way of wilful wrongdoing or fraud, the instrument might not only exonerate the trustee but indemnify him in all circumstances.[71] By exoneration and indemnification equity allows the settlor, whatever he has in mind by so doing, to throw the total risk of negligent trustee conduct and its consequences upon the beneficiary. The risk can be heightened by permitting the trustee freely to delegate trustee duties. The trustee himself selects the delegate; it is not usually the settlor or the beneficiary. However, subject to the instrument's provision, under case-law the trustee is only liable for the delegate's conduct if the appointment of the particular delegate was not reasonable and if the trustee failed adequately to monitor the delegate's performance. If both appointment and monitoring meet the standard of what the average business person would do, the trustee is not liable for the delegate's wrongdoing.[72]

All the same, it must be said that, while the settlor should always have a good reason for granting extensive trustee exoneration and generous indemnity clauses, the move of mainland legislation to reverse the traditional policy has much to commend it. This reversal makes the delegation option available to the trustee unless the instrument withholds the authority to delegate. A trustee today is often a professional working alongside other business people, and modern property management, especially investment, may well require a range of skills that one person or group of persons does not have.[73] It seems not unreasonable today that, for example, with the hiring of investment managers, the beneficiary should assume the risks involved. The property manager hired by a client is not expected by the business person to assume personal liability for all the faults of, and losses caused by, the delegate, anymore than the manager is for the ministerial agent. Why should the trustee be in a different position? Nor does the trust concept require of the trustee that he insured against loss at his own cost. As a fiduciary, default rules require of him integrity and attentiveness, with a level of competence that the average business person would show.

---

[71] Ie, despite the fact that the trustee's conduct was negligent.

[72] How searching should be the investigation of performance, or what level of expertise the trustee is expected to bring to bear, is not clear. Equity always uses the test of what the reasonable person with average skills would have known, or done, in the circumstances.

[73] The advantage of a corporate fiduciary is that it will normally have its own investment department, and the same is true of the 'family office', a trust corporation private to the particular trust.

In 1975 the most celebrated feature of the mainland (or traditional) trust concept continued to be the property right it conferred upon the beneficiary. This property right is the basis of the right to trace, both at law and in equity. Provided the item of trust property in question, in relation to which trustee breach has occurred, remains identifiable, the beneficiary on behalf of the trust can trace and recover it. If the trustee has the property item, the beneficiary can claim it ahead of the wrongdoing trustee's personal creditors. If it has passed to a stranger, a third party, who knew or ought to have known of the breach, the beneficiary can claim it ahead also of that third party's personal creditors. Only receipt by a bona fide purchaser for value without notice denies the beneficiary the right to follow the identifiable item and recover it. In those circumstances there is no justification for equity to deny the effect to the third party of his having legal title. The advantage of express trust, or resulting or constructive trust, in the insolvency or bankruptcy of the possessing defendant was very considerable. It does not exist in civil law jurisdictions.

This is mainland trust law doctrine as it was in 1975. And it is the same today. Given the very few mandatory rules[74] and the extreme flexibility, when compared with other property management devices known to the law, it must surely pose the question as to what room there was in 1975 for yet further development of the trust concept.

The Offshore Trust

Over centuries, in the case of England, and from their eighteenth and nineteenth century beginnings, in the case of Australia, New Zealand and common law Canada, the trust's role has been to meet the property holding needs of the local people. In the common law mainland jurisdictions an express trust is essentially drawn with assets or people in mind in the jurisdiction in which it is created. It was and is part of the domestic (or internal) mainland property law, and the impact of its use was and is felt socially and economically within that mainland jurisdiction. In an incremental manner it develops slowly from generation to generation as societies and economies themselves evolve. The offshore jurisdictions on the other hand are in a very different position. For each of these small territories the object is to build a domestic estate planning industry. The appeal is to a foreign resident. Foreigners constitute a clientele seeking international investment and money management that, among other things, aims to avoid the disadvantages associated with a mainland domicile, such as high taxation, 'forced heirship' laws and exposure to 'deep pocket' tort claims. For their part the various offshore jurisdictions vis-à-vis each other, as

[74] See for English law, D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (OUP, 1996), at p 47. For the law in the USA, see the Uniform Trust Code, s 105(b), now widely adopted among the states.

one would expect, are very competitive; in all likelihood a new doctrinal twist in one jurisdiction will soon be introduced into the laws of other jurisdictions. In this offshore climate the trust is more of a marketing tool. The question posed by the onshore domiciliary is whether the trust of the particular offshore jurisdiction can provide what that potential client is after. The owners of wealth in all places and centuries have asked the same question and this is what has driven conceptual evolution. The difference in this instance is the fact that within each offshore jurisdiction, there is little or no domestic market. Trust inventiveness for the non-resident is crucial in the offshore competitive environment. That is the new element.

The new trust ideas generated by the 'offshores' reflect the concerns of internationally investing clients anxious to get away from the local mainland scene. Trustees on the mainland are likely to be locally living relatives or friends, or local branches of banks or national trust (or trustee) companies. These trustees are personally known and readily available to the beneficiaries. The settlor with reserved powers is in the same position. The trustee of an offshore trust, vested with the mainland client's property, and literally 'trusted' to carry out the duties it has assumed with the powers conferred upon it, is invariably professional and physically remote from the mainland settlor.

Third party intervention – the 'protector'

No doubt for this reason one of the earliest offshore developments was for trust drafters to reintroduce the idea, first seen in early nineteenth century English legislation, of a third party inserted between the trustee and the beneficiary. That third party was given a governance role of his own. The occupier of this role might be an individual who is a stranger to the trust relationship, or a group of persons (probably adult beneficiaries) acting together.[75] In the 1970s and 1980s the third party in the offshore jurisdictions would have the power to remove and replace trustees, and to monitor the trustee's conduct of the trust affairs. This was the 'protector'. The task of the protector was to ensure that assets were maintained securely, to receive regular accounting from the trustees, to keep the settlor of an inter vivos trust abreast of trust affairs, and to assist when relations between trustee and beneficiaries were in difficulty. Later other powers were introduced, such as the authority to change the governing law of the trust. Indeed, the powers granted have steadily become more extensive.[76] While a protector as a group of persons will

[75] See, for an early example of a third party intervener, *Re Rogers* [1929] 1 DLR 116 (Ont CA). It is the writer's surmise that, traditionally, mainland courts have been unenthusiastic about persons empowered to come between the trustee's right of control and the beneficiary's right to compel performance.

[76] Section 81 of the Trustee Act of the Bahamas contains a listing of the type of powers that nowadays are associated offshore with protectorship.

usually be made up of adult beneficiaries or other persons known to the settlor or beneficiaries, the protector today as an individual will frequently be a corporation resident in the trustee's jurisdiction, incorporated by the settlor's law firm in that same location.

The appointment of 'protectors', 'advisers', 'committee', or whatever descriptive term is applied, is now becoming familiar in mainland jurisdictions. Mainland trustee (or trust) legislation ignores the institution. On the other hand, usage in practice, typically to monitor trustee performance and to remove and appoint trustees, is growing.[77] The reason for the popularity of the protector (or third party) role is that it does add something to the governance of an express trust. There is a gap between trustee and beneficiary because there is no mediation process within the relationship when trustees and beneficiaries have 'got across' each other. On the mainland the settlor more often drops out of the picture when the trust is created, and the protector is able to see not only that the intentions of the settlor are being met, but that reasonable beneficiary complaints are being handled promptly, dispassionately and fairly. The protector will also be able to do something about it, other than commence litigation, if they are not.

However, whether onshore or offshore, care has to be taken in the introduction of protectors into the trust instrument. In the absence of legislation in the particular jurisdiction – and such legislation very seldom exists – the drafter has to bear in mind the removal, retirement, and further appointment of protectors. The drafter must also consider the powers to be given to the protectors and the range of their duties. What shall happen when there is no protector in office, or the protector cannot be located? What happens if trustee and protector just cannot agree? Suppose there is an issue whether and, if so, how protector duties are to be enforced or the exercise of protector powers be 'policed'. Then there is the liability of protectors. Is it to be the beneficiaries who enforce protector duties, and, if so, what remedies are to be available to the beneficiaries? If there is to be protector liability, there is a question as to whether exculpation should be introduced. The offshore protector is probably a professional, and a protector, like a trustee, will have expenses. Is he to be indemnified out of the trust fund? If so, does the trustee have the obligation to make this payment, and to be satisfied of the reasonableness of the expenses claimed? But even before drafting takes place, the drafter has to consider two pretty basic issues. At what point would a court say that a protector, with his particular duties and powers, is in law a trustee and therefore to be regarded as a trustee? If the protector is not a trustee, is his ability to determine, increase or lessen the rights, in particular the property rights, of beneficiaries enough to make the protector a fiduciary? And, if so, what legal responsibilities and liabilities for the

[77] Leading trust textbooks in mainland Commonwealth jurisdictions will nowadays include an account of this functionary's role.

protector does this involve? Courts, both mainland and offshore, have yet to answer these questions. In the writer's opinion legislation in some offshore jurisdictions has compounded the problem by decreeing simply that the protector is not a fiduciary.

In short, the embryonic idea of a third party intervener in a trust situation is not new, but its potential in development is considerable. The need for careful and exhaustive drafting is evident. This is a doctrinal idea that Lord Eldon was not asked to consider and the later Victorians did not develop, either in case-law or statute.

Trusts whose object clause sets out a private purpose (or purposes)

Non-charitable trusts (or trusts of imperfect obligation, as they are known in mainland jurisdictions) caught the offshore jurisdictions' attention early. To one who is an outside observer of the common law system it must surely be curious that, although mainland law recognises trust objects as being either persons or purposes, in order to be valid purposes must be charitable. Even the not-for-profit purpose object is not conceded by case-law to have an enforceable purpose status. Only a few miscellaneous non-charitable purposes have been recognised as being valid, each being permitted a mere 21-year period of duration. What is the difficulty, thinks the foreign observer.

Commonwealth mainland courts have followed English authority on this subject, and there is no agreement in the few cases as to what is the objection. Most courts say that a trust other than a charitable trust must be in favour of a human beneficiary, which puts the emphasis upon enforceability, but some say that a non-charitable purpose trust fails for uncertainty as to the nature of the purpose to be pursued by the trustee.[78] Yet another objection is that trusts for other than charitable purposes, which are enforced by the Crown, are simply not recognised as valid. In the USA s 409(1) of the Uniform Trust Code (UTC) authorises the creation of a non-charitable purpose trust 'without a definite or definitely ascertainable beneficiary', but states that it may not be enforced for longer than 21 years. Section 409(2) provides that the trust terms may appoint a person to enforce the trust object and that, absent such an appointment, an enforcer may be appointed by the court. Bermuda was the first offshore jurisdiction to introduce a trust that was not merely for a non-charitable public benefit purpose, but for a private purpose or purposes. The essential difficulty was seen as one of enforcement and the Bermuda legislation, like the UTC, provides for appointment in the trust instrument and, failing that, an alternative mechanism securing enforcement. This legislative

[78] In Canada three common law provinces and the two territories possess perpetuity legislation providing that, if the non-charitable purpose trust is for a 'specific' purpose, it takes effect as a power. See *Waters' Law of Trusts in Canada* (Thomson), at pp 632, 633.

innovation has now been copied in one form or another in all the major offshore jurisdictions. But each, save one, has legislation validating a trust whose sole objects are one or more non-charitable purposes; Cayman, the exception, permits the settlor to have dispositive clauses in the same trust instrument in favour of persons and also any type of purpose, charitable or otherwise.

Provided the enforcement mechanism created by the introductory legislation effectively provides for default situations (some offshore jurisdictions mandate that in described circumstances the state shall be the enforcer), it is difficult to see what practical problems can arise with a private purpose trust. Clearly the chosen purpose must be sufficiently specific, and the manner in which the trustee is to achieve the purpose must be demonstrable. The term 'purpose' must be defined. If the trustee is merely to hold specific property until it is instructed otherwise (ie, no person is ascertainable as a person who may demand its transfer to himself or another person), a bare trust in favour of the settlor(s) seems to have been created. The holding of title in the shares of a holding company, or of a private trust corporation, by the trustee of a purpose trust appears to fall into this bare trust situation.

Fears have been expressed onshore that private purpose trusts lend themselves to abuse. There being no requirement of public registration such a trust would not be registered in public records and, in fact, would enjoy complete privacy unless the settlor(s) chose to reveal its existence. The absence of a beneficiary who can assert breach in the courts completes the undesirable picture. Evidently, it is said, the enforcement of a private purpose trust can be lawful only if the enforcement is done by public (or state) officials, and any purported nomination of another as enforcer leads to the invalidity of the trust.

Conceptually it seems that, if there is a call for it, this is a feasible trust development. It is a doctrinal change of sorts, but enforcement of purpose has for so long been familiar. From their point of view – ie, setting aside the beneficiary principle, and the unique parens patriae involvement of the Crown with respect to a public purpose – it is ultimately a matter of policy for mainland jurisdictions as to whether they will adopt the development. And it will probably require legislative action if this is to occur. Onshore courts everywhere are reluctant, it seems, to make that move.

Separating enforcement of the trustee obligation from the beneficiary enjoyment

The Cayman Islands have carried the provision of an 'enforcement' machinery for non-profit and private trusts into beneficiary (or person) trusts. The so-called STAR

trust[79] enables the settlor to appoint an 'enforcer' of the beneficiary's rights who is someone other than the beneficiary himself, even if that beneficiary is ascertained, adult and mentally capacitated. Whether, if the trust instrument is otherwise silent, such a beneficiary can be said to have 'rights' is a nice question.

This is perhaps the most significant doctrinal change that any offshore jurisdiction has made. It not only directly challenges the beneficiary principle,[80] it challenges the conclusion of the seventeenth century that an equitable interest in the trust assets is a proprietary interest. It negates the obligation of the trustee to account to the beneficiary of the enjoyment element in the trust property. The trustee continues to be obligated to account, but that accounting is to be to a person disinterested in the enjoyment derived from the beneficial interest.

No doubt Cayman is seeking to accommodate the client/settlor of an inter vivos trust who during his own lifetime does not want information about the existence or contents of the trust to be provided to the beneficiaries. Maybe the settlor does not wish to have the beneficiaries 'interfering' in the investment or administration of the trust assets.[81] However, there is no clear cut response from the onshore jurisdictions regarding this information issue; mainland trust law itself has problems. The law of the entire Commonwealth as to whether, and if so when, a beneficiary is entitled to information concerning the existence, the terms and the current accounts of the trust is everywhere in a state of flux, it seems. Without a beneficiary's clear right to such information, the right of enforcement of the trust, even on the mainland, is to some degree a fiction.

It was the view for many years that, because the beneficiary has a proprietary right in his beneficial interest, he has a proprietary right in information about the trust. There were exceptions to this right, but the general principle was full access. The principle applied to the beneficiary with a fixed interest, vested or contingent, and it was applied also to the discretionary trust beneficiary.[82] Another view was that there is no proprietary right to information; it is an in personam obligation of the trustee to disclose, and the beneficiary sues for due and proper performance of that obligation. Without that right of action the beneficiary's right to an accounting is largely meaningless. All of this was thrown into doubt when the Privy Council decided that any right of a trust beneficiary to information is within the discretion of

---

[79] Trusts Law (2001 Revision), Part VIII Special Trusts-Alternative Regime (ss 95–109).

[80] Ie, that there must be someone, even an unborn person, with an interest or other right in the trust property that enables that person to enforce the trust.

[81] If the trust owns all the shares of a family corporation of which the settlor is the founder, chair of the board and chief executive, his anxiety will be to keep the business away from his children's legal influence. 'Their time will come', is his philosophy.

[82] But not the potential beneficiary who is a member of the class associated with a mere power.

the court as part of its inherent jurisdiction with regard to trusts.[83] But Privy Council decisions are now at most but persuasive in Canada, Australia and New Zealand. It is therefore arguable that this rather overall confusing situation calls for a new legislative look at the entire issue. The present time is one of uncertainty, and wherever the Privy Council decision is followed every trust beneficiary seems reliant upon the discretion of the courts whose decision will turn upon the court's assessment of the particular set of facts.[84] Litigation and discovery are what Commonwealth law appears to require from beneficiaries.

While Cayman has not dealt with the wider law of beneficiary access to information, at least, it can be said, the settlor of a Cayman STAR trust knows, and can plan accordingly, what will be the position as to information and the situation of his actual and potential beneficiaries.

Limiting the trustee's duties

There are two opinions as to whether the trustee may rely upon a provision in the trust terms to the effect that the trustee shall have no responsibility on some specific matter that would otherwise fall within the scope of his fiduciary duties. This is a central doctrinal matter; it goes to the heart of what is mandatory about the common law trust.

The issue currently arises in the following manner. The settlor transfers all the issued shares in the family business corporation to the trustee of the family trust. This trust is to be the vehicle for distribution among present and future members of the family wealth that the corporation represents. However, as the entrepreneur who built up the business, the settlor does not wish to have the trustee involve itself in the conduct of the business. His children in senior executive positions may share that wish. The settlor considers that while a trust corporation knows the business of administering trusts it has no particular skills in operating a construction or trading company which, we will suppose, is the nature of the family corporation. The trust therefore contains a clause saying that, despite its ownership of all the corporation's shares, the trustee has no responsibility or liability for the conduct of the family corporation. Alternatively, it may expressly provide that the trustee has no duty to concern itself with or to intervene in corporate matters. This may be the explicit wish of the settlor as to how

---

[83] *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709. On an appeal from the Isle of Man appellate court, the Privy Council was concerned with whether the possible appointees under a mere power have any right to information. So the decision's relevance to fixed interest beneficiaries is strictly obiter dicta, which compounds the problem of whether any beneficiary claim must come before the courts when the right to information is asserted. JD Heydon and MJ Leeming (eds), *Jacob's Law of Trusts in Australia* (LexisNexis, 7th edn, 2006), at paras 1713–1717.

[84] Around the Commonwealth *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918, also is no longer as persuasive a precedent as it was previously. Times have changed.

things shall be. Now suppose a reasonable business person, with power to do so, would have intervened when losses are threatened or are already being experienced. The trust beneficiaries also may be questioning the trustee's inaction. Can the trustee rely on the language of the trust instrument as his defence?

One opinion is that the trustee can rely implicitly upon the exemption from responsibility in the trust instrument; the trust terms are the settlor's provision, and it is he who creates the duties the trustee is to discharge or not discharge. Indeed, the settlor may have named a 'protector' who is to intervene in corporate affairs if that party considers his intervention is required. This opinion essentially looks at the question from the angle of settlor autonomy. The settlor cuts the fiduciary cloth. The other opinion is that a trust is a relationship; the trustee is a fiduciary vis-à-vis the beneficiaries of the trust, and the common law tradition leans over backward to protect the beneficiary. This is principally evident in the proprietary interest that equity confers upon the beneficiary; the interest enables the beneficiary to trace. Wherever a reasonable business person would have intervened, a trustee – knowing actually or constructively of the circumstances and the real possibility of loss to the beneficiaries – would also intervene. He would regard as invalid whatever the trust instrument purports to provide to the contrary. This opinion, for its part, regards the trustee as the quintessential fiduciary, one whose obligation to be concerned for the benefit of the beneficiaries is inseparable from trusteeship.[85]

In order to deal with the two conflicting interpretations that arise from the case-law, offshore legislatures have stepped in. Statute now provides in Cayman and the British Virgin Islands, and renders the conflict in the case-law irrelevant. The Cayman STAR trust legislation is to the effect that the duty of the trustee is solely to carry out those tasks that are assigned to him. This is read as an indirect provision that, whatever the case-law, no additional obligation attaches to the trustee though he is a fiduciary acting for the sole benefit of others. The British Virgin Islands' VISTA trust legislation is direct. It states that the trustee as shareholder has no responsibility and no liability in connection with the conduct of the affairs of the underlying corporation. These jurisdictions have evidently chosen to endorse settlor autonomy rather than underline the trustee's fiduciary status.

Trustee control and the agent-trustee

Another doctrinal problem that has arisen onshore and offshore is how far duties and enabling powers can be granted to a protector, or reserved by the settlor for himself, before the trustee, instead of being an active trustee, becomes merely a custodian of legal title in the trust asset. As the holder of legal title and having no other duty, the trustee is then but a bare trustee for the settlor. If the trust

---

[85] *Froese v Montreal Trust Company of Canada* (1996) 137 DLR (4th) 725 (BCCA).

instrument evidences a declaration of trust by the settlor (ie, over assets to which he already has legal title), the would-be trust is invalid. The trustee and the beneficiary (the settlor) are one and the same person.

Mainland courts, which since Lord Eldon's time have accepted that certain powers may be validly reserved by the settlor for himself, have never said more than that powers may to some extent be reserved. The 'extent' has not been spelled out. Some have argued that the trustee must be left, at least, with 'significant' independent legal duties and powers. Otherwise the 'trustee' duties and powers are those of an agent, the agent holding title on trust for the purposes of the agency. It does not matter whether the principal of the 'agent-trustee' is the settlor or a protector.[86] What an asset transferor who reserves for himself powers intends as between trust and agency is a question of fact, and several offshore jurisdictions have legislatively listed a number of particularised powers that are not to be interpreted as being incompatible with a trust. It was possibly the offshore intention with this legislation that an inter vivos disposition conferring any of these powers should not be held to be in fact a testamentary disposition. However, it is not clear whether the legislation is saying that none of these listed powers shall be evidence of the absence of an intention to create a trust, or it is stipulating that, regardless of the transferor's intent, these powers may exist in an inter vivos trust.[87]

No particular development of trust doctrine could be said to have come about in the offshores on this matter. Among onshore jurisdictions the question as to what 'significant', independent powers means has yet to be answered, and at the moment the rather unhelpful advice is that it all depends on the facts. The offshore jurisdictions that have listed powers that may be reserved, or be granted to a person other than the trustees, without violating case-law trust rules, have at least focused attention on the question. In an age when settlors are often well informed and fully able to make decisions of their own it may be thought that it is not enough for mainland jurisdictions to leave in place case-law that limply provides that 'certain powers' may be reserved by the settlor.[88]

Asset protection

Protection of the foreign settlor's assets from attachment by his creditors, family members or inheritance claimants, has been a deliberate policy of several of the

---

[86] The protector would have such extensive control powers that he becomes a principal by his receipt of an office that carries an owner's authority. The trustee has become his agent.

[87] For the October 2006 Jersey legislation on settlor reserved powers, see P Matthams, 'Jersey amends its Trust Legislation' [2007] JITCP 109, at pp 114–116.

[88] Language that the Hague Conference felt compelled to adopt in the common law trust-descriptive Art 2 of the Trusts Convention.

leading offshore jurisdictions. Other jurisdictions have been content to leave in place statutory measures received from England or have replaced the received legislation with local legislation making the same or almost identical provisions. These received measures protect the creditor from the debtor's alienation of his assets with the idea of putting those assets beyond the reach of the creditor. The principal such measure received from England is the Fraudulent Conveyances Act 1571, and the Bankruptcy Act 1914 was also later copied by these jurisdictions.

The jurisdictions that have actively changed policy on this 'protection' describe themselves as creating more of a balance, an even treatment, between the debtor's protection aims and the creditors' interests.[89] The 1571 Act provided that for a court to set aside a feoffment (or transfer) to 'uses' it was enough to show an intent to defeat creditors. A settlement in favour of spouse and children could be set aside under this Act if it was created shortly before the settlor entered upon a business enterprise where the risk arose from what he knew to be his lack of skill, and it was later creditors of that enterprise who were left unpaid when the settlor became insolvent or bankrupt.[90] At the time of settlement the settlor may have been solvent; indeed, he may then have had no creditors, let alone no unpaid creditors. The new offshore policy of greater leniency towards the debtor is usually reflected in provisions requiring that:

(1) the settlor was rendered insolvent by the gratuitous or undervalue transfer to the settlement trustee, and the transfer actually took place;[91]

(2) the claiming creditor was a creditor at the time of the settlement, or – even more narrowly confined – that the then existing creditor now asserting his claim had already made claim when the settlement was entered into;

(3) the settlor knew of the pre-settlement creditor's claim when he transferred his assets to the settlement trustee, and

(4) the settlor wilfully intended to avoid the particular creditor in transferring assets to the trustee.

It is familiar also for the offshore asset protection jurisdictions to reduce the limitation period within which the creditor must make his claim in the particular jurisdiction. Not all do this, but some reduce the period to 2 years from the date of

---

[89] In current usage 'asset protection' is an ambiguous term. In the sixteenth century the concern was the protection of the creditor's interests. Nowadays what often is meant is protection of the assets from seizure by the creditor.

[90] *Re Butterworth; Ex parte Russell* (1882) 19 Ch D 588.

[91] This provision may also be found in traditional jurisdictions. Hong Kong is such an instance.

the debt becoming due for payment, and a 1-year period exists in some legislation. Claimants may also be family members. Almost all offshore jurisdictions refuse to recognise foreign forced heirship rights of spouse and children; some will also deny effect to foreign spousal community property rights and marriage termination property rights. As might be expected, this policy also extends to foreign court orders.[92]

However, from the writer's perspective there is no doctrinal significance in these offshore legislative provisions. They merely implement policy by blocking family claims and compelling other creditors of the settlor or of the beneficiary to 'jump more hurdles'.

The conflict of laws

The Hague Trusts Convention of 1985 is concerned, as we have seen, with how non-trust and trust states are to determine the applicable law of a trust, and what recognition of a trust is to involve for Convention-ratifying states.[93] It was ratified by the UK for England, Wales and Scotland shortly after it was signed by the participating states in the Hague Conference trust sessions, but not all jurisdictions still constitutionally associated with the UK – principally 'dependent territories' in the Caribbean – chose that the UK should also ratify for them. Those territories that opted out may have formed the view that the Convention had particular appeal for populous mainland states seeking comity with other such states and that, as is evidenced by the Articles of the Convention, comity involves a recognition of the forced share and matrimonial property rights of other legal systems.[94]

Several offshore jurisdictions that have not sought ratification of the Convention have since independently adopted statutory conflict of law rules for trusts. In any event most offshore jurisdictions, whether or not they have adopted the Convention, have expressly legislated to the effect that foreign forced share rights, and similar inter vivos rights, will not be enforced against the assets of trusts created in their jurisdictions by settlors who are foreign domiciliaries. Normally this

---

[92] Mainland family and divorce courts are now 'going after' these offshore trust assets. Orders are being made against mainland sited assets, taking into account the wealth that is maintained offshore; orders are also being made against the spouse with foreign trust assets to bring those assets into the mainland jurisdiction. US courts have made such orders against mainland debtors in favour of commercial creditors.

[93] The Hague Conference sessions that put together the Convention were concerned primarily, until the eleventh hour, with the common law model of the trust, and those states whose internal (or domestic) law does not know this trust. At the final session the applicability of the Convention was extended to all forms of trust, notably the obligation model, provided that the form of trust in question satisfies the Convention's Art 2, describing the required elements of a trust.

[94] Nevertheless, that a ratifying state may effectively decline recognition of foreign forced heirship rights appears to be possible under the Convention's 'public policy' exception.

right of exclusion is denied, perhaps rather cynically, to residents of the offshore jurisdiction permitting the exclusion. Judgments of the courts of those domiciled elsewhere will also not be recognised in these offshore courts, as we have noted with asset protection trusts, and claims in these courts made by foreign would-be heirs against the offshore executors or trustees will not be entertained. As for onshore jurisdictions, forced heirship is not, by any means, confined to the laws of civil law or shari'ah jurisdictions. Almost all mainland (or traditional) jurisdictions possess laws as to who within the immediate and wider family of the testator (or sometimes intestate) shall have forced heirship rights. These laws prescribe whether there shall be allocations under authority of law from the estates of deceased persons for family members on the basis of relationship, or there shall instead be maintenance provision for dependants. They also lay down what form (ie, fixed shares, or entitlement within the discretion of a court) those allocations shall take, and what amount or quantum of the deceased's estate shall be set apart to meet the claims of heirs. Onshore jurisdictions will also firmly uphold the rights of parties with matrimonial property entitlements or court orders. Almost all of the jurisdictions of the Western cultural tradition on an inter vivos marriage termination will allocate assets between the formerly married parties. It is indeed the religious and social culture of the jurisdiction that largely dictates the responses to these forced heir and matrimonial questions.

The non-recognition of foreign forced heirship, matrimonial property claims or foreign judgments is equally a policy matter.[95] It is in step with contemporary offshore attitudes, but is not a doctrinal development in trust law.

SUMMARY

Mainland

Though flexibility was not exploited until the later nineteenth century, this attribute of the common law (or traditional) trust has considerably enhanced the trust as a property management concept. It has allowed the trust to be applied to many private and commercial situations, and left much to the settlor as to both the structure of the particular trust and the instrument's disposition of benefit in the holding or management of property. Some would say the limited liability corporation best earns that title because of the advantage brought to trade and commerce, since the nineteenth century, by the statutory limitation of the company's liability to the extent only of its own capital. But to the common law

[95] Nor is it solely an offshore policy. New York State also provides in its Estates, Powers and Trusts Law, para 3–5.1(h), that the testator, though a foreign domiciliary, may choose to have the local law apply to assets of his within the state. This has the effect of excluding the forced share laws of the testator's domicile, and case-law so holds.

lawyer's eyes what the courts had been able to do with the generalised trust and confidence idea over six centuries is fascinating. This article has attempted to demonstrate the adjustment facility which during that time the trust has afforded courts and law practitioners.

In the medieval and Tudor periods of history the 'use' afforded a remedy against the legal title holder for breach of an obligation of conscience, and between the seventeenth century and 1830 the consistent availability of property remedies to both trustee and beneficiary caused the express trust to develop into a conveyancing technique. The trust was still seen as giving rise to personal obligation, a legally enforceable relationship of duties and rights as between a fiduciary and the beneficiary. But the emphasis of conceptual thinking was now changed; the courts concentrated upon the nature of the interest the beneficiary obtained. The medieval idea of *estate* as the measure of the beneficiary's interest, followed by Equity in the later Middle Ages, led to the rationalisation that the beneficiary's equitable estate is in the trust asset itself. Express trusts now took the form of the 'strict settlement' of land, a complex conveyance on terms,[96] and their duration was limited by a newly composed vesting rule. Trusts imposed by law (the resulting trust and the constructive trust) were not remedial, but the response of the law in given circumstances to require one party to hold for another. These circumstances were: (1) transfer to another for no consideration; or (2) fraudulent inducement or conduct. Already in the seventeenth century the fiduciary character of the trustee's position, prohibiting much as to a trustee's possible conduct, led to the conclusion that what the express trustee may properly do in discharge of the 'trusts' he had undertaken, and the liabilities the trustee has to the beneficiaries for what he does (or has omitted to do), must be spelt out. The eighteenth century concentrated on these issues and additional court powers were assumed for the relief and furtherance of charitable purposes.

Between 1830 and 1960 powers of appointment became the hallmark of sophisticated trust instruments; the trust turns from being solely a conveyance of land for family retention to include safe-keeping, namely, business loan security provision and public investment. During the last quarter of the nineteenth century, and the early twentieth century, the settled land trust markedly declined in usage in favour of the trust for sale – an investment portfolio trust. The impact of the Industrial Revolution and the resultant emergence of a well-heeled middle class were now being felt. In the 1960s (the start of the contemporary world) high death taxation in the mainland jurisdictions becomes the bane of estate planning for settlors and beneficiaries alike and the tax tail begins to wag the trusts dog. Over the next 40 years tax planning assumes command of the terms in which estate planned

[96] Op cit, n 32.

trusts are drafted. Meanwhile, contemporary express trusts created to advance corporate business and facilitate commerce were seen as being obvious property management vehicles; the roles of settlor and trustee, and the perception of what might be trust objects, were clearly significantly different from those associated with the traditional private settlement of wealth upon family. In commerce trust springs from contract, trusteeship is corporate professionalism and object is frequently conceived of as something more akin to corporate purpose.

However, less dramatic things are also happening. In the Commonwealth jurisdictions the constructive trust has undergone a doctrinal upheaval in the years since the 1960s. It is slowly emerging in the hands of the court as a discretionary proprietary remedy for unjust enrichment and energetic debate continues, as these lines are written, as to whether this development is conceptually correct or desirable. Then in the mid-1970s emerged the start of the offshore questioning of everything: enforcement of trust is separated from beneficiary enjoyment; the private purpose trust is launched as a business furtherance measure, and the settlor defines his intended scope of fiduciary obligation.

Offshore

In 2008 the traditional mark of mainland trust law catering to a resident population is conservatism while the offshore jurisdictions pursue a contrasting liberalism, frequently changing their legislation as they serve a mainland client base. One might indeed be tempted to say that two models of the property concept of the trust have emerged, namely, a mainland common law trust and an offshore common law trust. However, that response may be something of an overstatement because, as the above account shows, much of the development in trust law that has taken place offshore has been simply to accentuate the flexibility of the mainland's trust model. The trust elements do not differ, but are perceived in a different light. In the offshore jurisdictions greater emphasis has been placed upon settlor autonomy than common law mainland jurisdictions[97] appear willing to follow, either in their courts or in legislation.

Where offshore the opportunity has been available to enhance the settlor's interest, that opportunity has been taken. And when jurisdictions are marketing the trust to non-resident settlors, that is to be expected. By the same token, the mainland's historic and continuing concern with its own residents' use of the trust could explain its reluctance to depart from pre-1975 trust theory. The trust arose in England to protect the beneficiary, and that enjoyment benefit has crystallised into a property right. Mainland courts and legislatures seem to have been more concerned

[97] England and Wales, Australia, New Zealand, and the USA.

after 1830, when the trust concept was all but complete, and throughout the twentieth century, with the workability of the balance between management duties and powers, and the beneficiary's enjoyment rights.

The flexibility of the trust idea and settlor autonomy are the factors that fostered the offshore interest in *asset protection trusts* and in *conflict of law rules* denying effect to foreign succession rights. Though the time-honoured understanding is that the settlor drops out of the picture after setting up and funding the trust, reservation by the settlor of a personal interest and of powers was already a well-established occurrence in mainland trusts when several offshore jurisdictions legislatively spelt out settlor-reserved trust administration powers. These, it was provided, if adopted in the trust instrument, were not to be interpreted as being incompatible with a trust. The mainland concern with reservation is whether the trustee's ultimate control (ie, despite the appointment of agents and delegates) is a trust principle and, if it is, whether it is enough to satisfy the principle – after the reservation of powers is in place – that the trustee possesses at least some important powers and discretions that the trustee is to exercise independently of others. The apprehension, of course, is that a trustee subject to consent requirements or direction on every matter is not a trustee at all, but an agent. Offshore jurisdictions have not tackled that issue, and mainland lawyers have too often muddied the waters by speaking vaguely of 'sham trusts'.

The *conferment of trustee-like powers upon a third party*, ie, normally not a beneficiary but a stranger to any benefit conferred by the instrument, was an interesting revival of an old idea that, since 1975, has been developed considerably by the offshore jurisdictions. Initially it allowed the physically removed settlor to monitor the trustee's conduct of the safekeeping of funds, investment practice and the exercise of discretionary powers. But that innovation, introduced by drafters without legislation, has broadened mainland thinking about an element that is mostly left unattended in the governance of trusts – who is checking on how the trustee and the trust design are working out? Who can do something if they are not? Like mediation, the 'protector' offers a medium through which the breakdown of the trustee/beneficiary relationship and the expense of court proceedings may be avoided. In an age of professional trusteeship, often bureaucratic in nature, an appropriate individual as 'protector' is a gain. It is not without interest that one sees 'protectors' have now found a place, limited or more extended, in the leading texts on English trust law, and in Canadian, Australian and New Zealand trust texts.[98]

[98] For a contemporary opinion as to the manner in which trusts law should be handled by the courts and presented by text writers in the future, see P Parkinson, 'Chaos in the Law of Trusts' (1991) 13 Sydney LR 227.

The development of the *private purpose trust* in the offshore jurisdictions, as for example in Bermuda, has been studiously ignored by courts and legislatures in the Commonwealth mainland jurisdictions. Indeed, English law has been almost hostile to this trust object since the nineteenth century. The reason for this disinterest, and why other Commonwealth mainland jurisdictions have maintained the inherited law of recognising charitable purposes only, is not at all clear. Different conceptual explanations for this unwillingness to recognise private purpose trusts have emanated from the courts, but it is apparent there is no public policy objection.[99] Unless there is no particular demand for a private purpose trust (and this could well be the case), it seems it must be a matter of time before mainland jurisdictions recognise this trust.[100]

CONCLUSION

There are several offshore developments that directly challenge trust principles that were (and are) common to all Commonwealth mainland jurisdictions. These seem to reflect the offshore preference for settlor autonomy rather than seeing the trust as a relationship between a trustee and a beneficiary. Mainland jurists would concede settlor autonomy is a feature of flexibility and that this feature is a distinctive characteristic of the common law trust, but they would not give it primacy.[101] The mainland seeks to establish a balance between settlor autonomy and a traditional trust relationship. Autonomy in determining the manner of governance of the trust is one thing; autonomy in terms of yet more default powers, ousting what mandatory rules there are, is another. Too few mandatory rules and, in its practical usage, a concept loses shape and reliability.

This brings us to the first offshore change of central conceptual importance and that is, the *separation of beneficial enjoyment from the right to enforce trustee duties*. The separation is totally explicable in the case of public or private purpose trusts; a purpose, being without personification, cannot have a right or enforce a benefit which the trust terms create aimed at the furtherance of the purpose. Also someone else must have the right of enforcement when the beneficiary is mentally incapacitated, a minor or as yet unborn. But the Cayman legislation makes a giant leap. It implies that the provision to a third party of that right in circumstances of

---

[99] The Uniform Trust Code 2000, s 409, which validates trusts for 'non-charitable' purposes, is an embryonic provision, needing much expansion if a state were to adopt it. But the National Uniformity Commissioners have included it in the Code.

[100] See further on the subject of these trusts, *Jacob's Law of Trusts in Australia*, op cit, note 83, at paras 1106–1108.

[101] While mainland jurisdictions are driven by local tax concerns, the offshore jurisdictions are not concerned with tax issues. So far as trust law development is concerned, this makes a considerable difference, onshore and offshore.

beneficiary incompetence can also be put in place when the beneficiary is adult and capacitated. However, extending the right of enforcement to third parties, other than as an exception based on necessity produced by incapacity, is seen by critics as a direct strike against the essence of a trust. A trust is a relationship between trustee and beneficiary. The trustee has to account and the beneficiary has the right to compel both accounting and the trustee's adherence to the terms of the trust.[102]

The counter argument made in the Cayman Islands is that if a distinction can be made at all between the provision of enjoyment to X as a trust object and the right of enforcement of that provision being in Y, and handling incapacity in this way has been done for years, why should it not be employed in other circumstances. Here the settlor chooses to keep his donees uninformed and so prevent them from intervening in the administration of trust assets. No court appears to have said that to withhold information from a trust beneficiary concerning his beneficial interest is either unlawful or contrary to public policy. Indeed, in mainland trust law there is no trust law obligation upon a trustee to notify a beneficiary of a trust gift until the moment for distribution has arrived or possibly when a power of appointment has been exercised. Whatever notification duty an executor and trustee may otherwise have under probate rules is irrelevant. Essentially, says the counter argument, it is a matter of policy as to whether incapacity legal techniques should be (not, can be) extended to circumstances other than incapacity.

The second offshore change which involves the trust concept itself is the legislative provision that *a trustee only has those duties which it has been given by the settlor.* Alternatively expressed, the trust instrument can relieve a trustee of a duty of responsibility, and therefore liability, for the fate of an underlying corporation whose shares are held by the trust wholly or as a majority holding. Trust law in the Commonwealth appears to support two opposing ideas. First, that the settlor's intention takes effect save where the law provides otherwise and, secondly, a trust being a relationship that exists for the benefit of the beneficiaries, no settlor language can relieve a trustee of the duty to intervene when he knows or should know that his beneficiary's interest is in jeopardy. This is another manifestation of the settlor autonomy or trustee/beneficiary relationship controversy.

Whether the Commonwealth mainland jurisdictions will accept the Cayman law that there may be enforcement by A of an interest owned by capacitated beneficiary B, or that a trustee can be effectively relieved of a duty and the liability otherwise involved with that duty, whatever befalls the trust assets, are doctrinal questions of the twenty-

---

[102] The report, 'Trust Laws for the 21st Century', released in April, 2007, by the Joint Committee on Trust Law Reform (Hong Kong Trustees Association and STEP, Hong Kong Branch) recommends the introduction of 'the role of an Enforcer not merely for Purpose Trusts but *in a wider context to benefit Beneficiaries*', Annexure III, B.1(iii) [emphasis added]. See also paras 3.3 and 11 (final point) of Annexure III. It is contemplated that the Enforcer will be appointed by the adult and capacitated beneficiaries.

first century. If it were just a matter of inter vivos or testamentary estate planning trusts, it is likely that the mainland jurisdictions are some years from allowing the settlor effectively to stipulate when a fiduciary shall not be liable for loss that its efforts might have avoided. To bring about this separation dramatic circumstances will be needed, such as the inability of the court to relieve of liability a prudent and vigilant trustee when it had been instructed in the instrument in unambiguous terms not to intervene, and later, loss having occurred, a minor or unborn beneficiary on the earlier occasion sues the trustee as the sole shareholder for fiduciary breach. Nevertheless, the law of trusts also applies to commercial trusts, such as debenture trusts and public investment trusts, where the answer to the question may become urgent for business reasons. Because of this, mainland attitudes may change more quickly. Of course, we may very well see discrete legislation for commercial trusts, as we have already seen with pension trusts. In that event estate planning trusts by themselves will not generate the same urgency. However, we shall see.

Now to something the offshore jurisdictions have not tackled. A more immediate challenge to present doctrinal trust law (or trust principles) is likely to come from those who seek to personify the trust. In an age of professional trustees and commercial trusts it is unlikely that the pressure for statutory limited liability in express trusts is far away.[103] Also the law as to the liability of company directors and their right of indemnity is more clear and up to date. Any liability of trustees for transactions entered into in the performance of duties on behalf of the statutory entity trust, as well as any tort liability arising when they are so acting, would be comparable to the corporate situation. Beneficiaries will seek the indisputable protection that is available to the corporate shareholder. And once the relationship of trustee and beneficiary is replaced by personification of 'the trust', the beneficiary like the shareholder is never involved in the trust's transactions with third parties.[104]

The analogy between trust and corporation in terms of possible usage is ever more obvious in modern life, and the principles of corporate law are better understood by the public than are those of the trust relationship. Twenty-nine US states already possess statutory entity trusts, used solely for commercial and business trusts. There the trust is an entity short of personification, but acting as if it were a person, being liable as 'a trust'. It can sue and be sued, and it owns its own funds. It conducts its own transactions with third parties. The acts of the trust entity are the acts of the

---

[103] The attraction is that trust transaction creditors are able to look solely to the trust assets, and will otherwise be able to sue trustees personally in those circumstances only when the trustee's conduct gives independent right of action to the third party.

[104] The liability of the trust beneficiary to indemnify the trustee who has personally paid a third party in discharge of his (the trustee's) trust duties (*Hardoon v Belilios* [1901] AC 118) will no longer be the law. The third party looks to, and assumes the risk associated with, the funds of the personified trust. The trustee has no obligation to commit his personal resources. In addition, the beneficiary has the protection of limited liability.

trustee which is the entity's agent, and the entity employs the personnel who constitute its executive staff. The beneficiary as a unitholder looks to 'the trust' to provide the stipulated benefit, and sues 'the trust' for breach of that duty. The fraudulent, self-acquiring or negligent trustee causing loss to the trust, or caught without authorisation feathering his own nest, will be sued by 'the trust'. The advantage in the USA of the entity trust over the corporation is explained largely by the jurisdictional tax laws, and 'flow through' is usually a prime attraction of the trust structure. But the flexibility available to the settlor in designing the governance of the trust has considerable importance and for estate planning purposes trust beneficial interests can be deferred in time, their commencement triggered at the chosen moment and, if not absolute, their ending made determinable or defeasibly contingent on events. Infants, minors and the unborn can be beneficiaries.

It would be preferable if the statutory entity trust is seen as an available alternative and not a replacement for the case-law trust. Its principal appeal is likely to be to commercial lawyers, but it could well catch on with the private client if he feels its characteristics better accommodate his estate planning designs. Of course, much will turn upon how the trust and the common law corporation are doctrinally merged in any statutory entity designed for estate planning. Clients and law practitioners will ask whether flexibility of usage and custom-drawn governance – emblems of the trust – still remain. They will also be interested in how far the entity enables settlor control to be retained, and whether in the merged model beneficiaries can be excluded from knowing of entity trust documents or seeing entity accounts. Some astute redesigning of the corporate modus will be necessary in order to meet this last concern.[105]

Six hundred and fifty-seven years is a remarkable lifespan for a legal concept in an inductive system without it having undergone at any time an instantaneous or gradual transformation into another legal character. In the twentieth-first century merger with other property concepts seems most likely. But the trust will probably retain its generalised usage element and high level of settlor autonomy. Merger is also a strong likelihood with local concepts in other legal systems, particularly the civil law and shari'ah law. The legal systems many are no doubt watching are those of China – with its existing quasi-agency Trust Law – and Russia. The attraction of personification in those two countries will be trade.

The STAR trust of the Cayman Islands, and the VISTA trust of the British Virgin Islands, are directly in line with the historic development pattern of the trust concept, whether or not mainland legislatures and courts ultimately come to adopt these developments themselves. But merger of concepts is something of which even

[105] This subject is considered in fuller detail in D Waters, 'Property Management Concepts and the Entity Trust in a Common Law Setting' [2007] JITCP 73.

the offshore jurisdictions have been shy. Yet it remains the case that merger itself is nothing more than the introduction of new elements into the trust; in this case the elements are personification and limited liability. And this for the trust has been the historic pattern of the centuries.[106]

This article has not considered the distinct characteristics of the trust as employed in corporate business and in commerce since the Second World War. Settlors – if that word in this context has still very much meaning – are the interested commercial parties or their nominees. The asset(s) are likely coming from a third quarter, the trustees are banks or corporations specialised in the area of commercial finance in question, and the trust objects – if benefit is not readily to flow to persons – come as close to private purpose trusts as in Commonwealth mainland jurisdictions it is possible to be. Offshore this restraint does not exist. Trust instruments may take the trustee's role to the brink of agency with the 'settlor' or beneficiaries being the parties making the crucial business decisions. The issue of whether the trustee must have 'control' of the trust assets is a governance question arising mostly out of trusts in the commercial and corporate sectors. Governance is corporate modelled, adjusted to the particular facts and requirements.

By way of comparison the total value of all private client trust funds is a small fraction of the trust fund values in business and commerce. Many would say that it is in the context of business and commerce that the most innovative 'evolution of a centuries-old idea' has occurred. Public investment trusts, security trusts in support of huge development loans and holding trusts of insurance policies, have proliferated in the last 30 years. Some day the story of the international development of this phenomenon will also be told.

---

[106] No offshore jurisdiction has sought to combine trust and corporation, as the USA has done, but some offshores, thus hoping to make their estate planning facilities more popular with residents of civil law countries, are 'translating' the civil law foundation into common law terms. The Bahamas and St Kitts, have so legislated, and two others, Anguilla and Jersey, are poised to introduce such legislation. The civil law foundation is personified; to the exclusion of others it therefore owns the foundation property. A principal attraction of this concept is that the foundation, like the *privatstiftung* of Liechtenstein which is being used as the model, does not accord rights to beneficiaries. Beneficiaries are not 'members' as in common law non-profit corporations. Legal action against the *privatstiftung* cannot therefore be brought by beneficiaries, and beneficiaries are not entitled to information about the *privatstiftung*. The dominant personalities with regard to the foundation are the Founder, the personified foundation, and the board of directors (usually two or three), of which the Founder may be one. Another apparent attraction is that the management is not in the hands of a trustee. Each council member (ie, board director) is merely an agent of the foundation. Whether common law replicas of the civil law foundation will lessen interest in estate planning entity trusts has yet to be seen. See also D Waters, 'Private Foundations (Civil Law) versus Trusts (Common Law)' (2002) 21 ETPJ 281.