**Topic 1 – Basics of Trusts**

**Introduction**

A trust is a legal instrument that is perhaps one of the most important instruments in law. Trusts derive their history almost entirely from equity – and it is equity that we look to for the primary creation of trust law.

In modern times, Trusts are primarily used for estate and tax planning due to the manner in which cash flows are distributed. A number of unique features exist in Trusts that will be explored throughout these notes – and where relevant – the taxation advantages of the structures will be highlighted.

**Language of Trusts**

Before Trust law is dived into – a consideration of the language used in Trusts is critical. The following terms are terms that must be understood by any person undertaking study into structure of Trusts and the relevant law surrounding their construction.

* **Settlor –** The person or persons who create the trust.
* **Trustee** – The person or persons who own or hold the trust property.
* **Beneficiary** – The person or persons for whom the trust property is being held and who has the greatest interest in the trust.
* **Testator –** A person who is deceased who has left a valid will and a trust is typically formed from the property in the will.
* **Object** – The primary beneficiary, or entities who benefit, under the trust by the trustee.
* **Trust Property** – This subject of the Trust and the relevant property which is being held for the beneficiaries.
* **Trust Deed –** The primary document that is used to create a trust (but as we shall find is not critical to the creation). If a trust deed does not exist, the trustees duties are stipulated under relevant equitable and statutory requirements.
* ***Inter vivos* Trust –** *Inter vivos* means ‘during ones liftime’. So a *inter vivos* Trust is one that is created during the settlors lifetime.
* **Testamentary Trust –** A trust that is created through the will of a testator on their death.

**Legal and Equitable Interests**

It is important to recognise from the outset that a person who holds the legal title to property and is also the beneficial owner of the Trust does not hold separate legal and equitable estates. This was made definitively clear in the case of *DKLR Holding CO (No 2) Pty Ltd v Cmr of Stamp Duties (NSW)* [1980] 1 NSWLR 510 at 518-20.

The creation or transfer of ownership typically always carried both legal and beneficial rights unless there is a circumstance which suggests that equity needs to impose a trust of some sort.

**The Basics of the Most Important Roles**

Before we explore the different types of trusts, an exploration of the most important roles in trust law will be examined.

*Settlor*

A settlor can be any legal entity – person or corporation – on the basis that they have the capacity to dispose of their property relevant to trust law. The settlor has no rights with respect to the trust property once the trust is created unless the trust specifically entitles the settlor to such rights. The settlor can also act as the trustee in certain trust structures – such as a trust by declaration or a trust-by-transfer.

*Trustee*

Any entity – person or corporation - can be a trustee, as long as they are legally entitled to hold property and are able to exercise the responsibilities that attach to the position of a trustee. Most Australian jurisdictions have legislated against allowing persons under the age of eighteen to become trustees.

It is impossible for a person to become a trustee until they benefit being conferred under the trust is held by them. If the trustee is unable to perform their duties as a trustee, whether through refusal or being unable to do so, the Court can appoint another trustee to replace them to ensure that the trust does not fail.

The trustees obligations are stipulated primarily from three sources:

1. The terms stipulated in the trust deed;
2. Statutory obligations; and
3. Equitable obligations.

The trustee-beneficiary relationship is a presumed fiduciary relationship under equity and therefore the fiduciary obligations of trust and confidence apply to trustees. This fiduciary relationship requires that trustees act in the best interests of the beneficiaries and must take reasonable and adequate care of the trust.

*Beneficiary*

Any entity – person or corporation – can be a beneficiary of a private trust. A private trust cannot be valid unless the beneficiaries are legally identifiable and they satisfy the certainty of object requirement of trust creation.

A beneficiary can be a trustee assuming that they are not the only beneficiary. This is done to ensure that the beneficiary(s) assuming the trustee position act in a fair and equitable manner in the distribution of the trust property. A settlor or testator can direct a trustee to confer certain interests to individual beneficiaries such that one beneficiary can take X property and another can take Y property.

**Express, Resulting and Constructive Trusts**

There are primarily three different types of trust in Australia that can be created in modern law. These three trusts each have different uses, purposes and different requirements and formalities surrounding their creation.

**Express Trusts**

An express trust is formed when the settlor actually intends on creating the trust and has used the relevant language and conduct to express their intention. Express trusts are typically categorised as either:

1. **Being created by an intentional act of the settlor or testator as imposed by the relevant Statute.**
2. **Arisen out of the operation of the law and are referred to as implied, resulting or constructive trusts.**

There is an important distinction that arises between express trusts and implied, resulting or constructive trusts in that the **intention of the settlor is not looked at in the later types of trusts.**

***Elements of an Express Trust***

An express trust can be created intentionally by *inter vivos* or by a will. The essential elements of an express trust include:

1. **The property or rights are those which can be the subject of a trust;**
2. **A trust declaration over the subject of the trust by a person who is able to legally make such a declaration;**
3. **The relevant certain of property and objects so the trust is administered correctly;**
4. **Evidence as to the trusts creation;**
5. **The trust cannot be created for illegal purposes or contrary to public policy.**

If all these give requirements are satisfied then equity will not allow the trust to fail. Express Trusts can be created in two ways:

1. ***Trust by Declaration*** *-* Firstly, by declaration of the trust in which the intentional act of the settlor declares themself to hold the property on trust for a beneficiary
2. ***Trust by Transfer*** *-* Secondly, through a trust by transfer of property whereby the **settlor makes a stated intention to transfer the property to the transferee who becomes the beneficiary.**
	1. A trust by transfer can be created by oral statements of the transferor to the transferee if the trust interest is a legal or equitable interest in land. However, for the trust to enforceable this oral intention must be evidenced in writing.
	2. In *Secretary, Dept of Social Security v James* (1990) 20 ALD 5 it was stated that oral evidence cannot be relied upon if it merely supplements rather than clarifies written evidence.

***Inter vivos and testamentary trusts***

These are types of express trusts that categorised in relation to the time they were created. *Inter vivos* trusts are express trusts which must be created during the settlers lifetime. In contrast, *testamentary* trusts are trusts which are derived from a testators will, and only arise on the death of this person.

*Fixed or Discretionary Trusts*

Each of these types of trusts are the most common and litigated express trusts. Fixed and Discretionary Trusts derive their differences from the manner in which the beneficiaries interests are categorised. As logic may suggest, the proportion of benefits which are “fixed” result in a “fixed trust” (A, B,C get 2 shares each) and benefits which have not been structured by the settlor are “discretionary” and therefore result in a “discretionary trust” (A,B,C are entitled to X,Y,Z) at the ‘discretion’ of the trustee.

*Public and Private Trusts*

As with companies, trusts can also be classified as public and private. Public trusts are trusts which the public can purchase units in and can also be chartable trusts. Private trusts are always for the benefit of a group of persons and their volume in Australia by far exceeds the number of public trusts.

**Examples of Express Trusts**

1. **Trust by Transfer** – ‘**hold on behalf of’**
	1. Settlor gives property to three trustees to **hold on behalf of** beneficiary
2. **Trust by Declaration – ‘declares self trustee’**
	1. Settlor declares themselves trustee of property to hold on behalf of beneficiaries.
		1. Fixed Trust – assumed, unless interest is specified, that all shares in the trust property are equal.
3. **Express Discretionary Trust by Declaration**
	1. Settlor declares themselves trustee with the power to select which objects shall receive trust property
4. **Fixed trust by transfer**
	1. Settlor transfers property to trustee to hold on behalf of stated number of beneficiaries.
		1. Fixed Trust – no necessity for beneficiaries to share equally and different interests can be fixed.
5. **Testamentary Trust for a life tenant and remainderman**
	1. Settlor leaves the residue of their estate to a trustee on trust for Beneficary A – for her life (life tenant) – and the remainder to Beneficiary B – on A’s death (remainderman).

**Resulting Trusts**

***Introduction***

As suggested previously, these type of Trusts do not depend on the intention of their creator rather they arise from the opposite – the lack of an intention to benefit another. This is most relevant for resulting trusts which are imposed by law in relation to a benefit.

**Resulting trusts arise when the settlor confers title to another person but seeks to retain the beneficial ownership of the property as a whole or in part.** This was made clear by the case of *Cossey v Bach* [1992] 3 NZLR 612. Importantly, resulting trusts cannot be imposed by the law if the imposition of the trust would go against the intention of the settlor – rather they seek to satisfy the presumed intention of the settlor.

***When will resulting trusts arise?***

The **two primary instances** that resulting trusts will arise include:

1. *Insufficient Intention -* When one party makes a voluntary payment to another, for a whole or part of a property, and a rebuttable presumption exists that the first party did not intend to make the transfer the property to the other and that it should remain on trust for the first party.
2. *Not correctly declare beneficial interest -* Where one party transfers property to another party but the first party does not correctly declare the beneficial interest and automatic resulting trust arises.

As is consistent with all trusts, resulting trusts must satisfy some of the three core requirements of trust creation namely being **certainty of subject matter and certainty of object.**

***Automatic Resulting Trusts***

Automatic resulting trusts typically arisen in a number of circumstances. The most common are listed below:

1. **Where an express trust has failed –** *Re Vandervells Trusts (no 2)* [1974] 3 All ER 205
	1. If an express trust fails, the trustees hold the property on resulting trust for the settlor. An express trust can fail (as discussed later) because of a lack of intention or because of uncertainty regarding subject matter, uncertainty of object, illegality, incomplete constitution or a number of other circumstances.
	2. A resulting trust will not arise when an express trust has failed and the benefit of the trust is an absolute gift.
2. **Where the settlor fails to dispose of the beneficial interest**
	1. When a settlor fails to dispose of an entire beneficial interest which is the subject of an express trust, the intended trustee holds the property on resulting trust for the settlor.
	2. For example, if party X transfers their property to another party Y - who is also the trustee – and party X does not name any beneficiaries - the trustee, Y, will consequently hold this property on resulting trust for the settlor until the said beneficiaries are named.
3. **Where the property is given for a specific purpose which cannot be effected**
	1. If money or property is to be settled according to an express trust but the purpose of benefit cannot be affected because of the terms of the settlement, then the beneficial interest is held on resulting trust for the settlor by the intended trustee.
4. **Where the property’s purpose exceeds all that is needed to fulfil that purpose**
	1. If money or property is held in an express trust, and the trust does not utilise all of the available benefit, then the unexpended money or property reverts back to the settlor under a resulting trust. This was established in *Re Gillingham Bus Disaster Fund* [1958] 1 All ER 37.
	2. The logic behind the decision is that it is always the presumed intention of the settlor that they do not want to part with their property absolutely but only to

the degree stipulated under the trust declaration.

***Presumed Resulting Trusts***

Presumed resulting trusts are trusts which arise in the favour of one party. They most typically arise when

1. **One party voluntarily transfers property to another party** – or a combination of joint parties – and this receiving party provides no consideration.
2. **One party purchases property in the name of another party** – or a combination of joint parties.

*Rebut the presumption?*

These trusts are presumed instances of resulting trusts which can be rebutted by evidence that the later party was intended to take a beneficial interest as per the decision in *Muschinski v Dodds* (1985) 160 CLR 583 at 590.

A Court would not favour the presumption of a resulting trust if it is inconsistent with the intention of the parties to whom the trust was intended as per the decision in *Russell v Scott* (1936) 55 CLR 440.

Thus, the presumption of a resulting trust should be rebutted by providing evidence that an intention existed between the transferor and the intended transferee, or transferees, that a beneficial interest was to be conferred as per the decision in *Stewart Dawson and Co (Victoria) Pty Ltd v FCT* (1933) 48 CLR 683. Such evidence could be the acts and statements of the parties before the transfer or purchase of property, or evidence which declares and express trust was to be created or such evidence which clearly provides that an express or inferred intention existed.

In order to establishing the beneficial interests under a resulting trust the Court will seek to look at the degree of direct financial contribution to the property in question as ruled in *Calverley v Green* (1984) 155 CLR 242. It is noteworthy that mortgages cannot be taken as direct financial contributions to the purchase price of property financed by mortgages as ruled in this same case

***Presumption of Advancement***

The presumption of advancement is effectively a safeguard to ensure that **if an intention existed between two parties to confer a gift, and the presumption is not rebutted, then equity steps in to ensure that a resulting trust would not occu**r. For example, a presumption is raised that a husband would always intend to benefit his wife, and therefore if he ever wanted to make a gift of money to his wife this would rebut any advancement of a resulting trust.

The presumption of advancement most typically applies to transactions including

1. **Husband and wife** – *March v March* (1945) 62 WN (NSW) 111
2. **Parent to Child** – *Shephard v Cartwright* [1955] AC 431
3. **Man to Fiancée** – *Moate v Moate* [1948] 2 All ER 486

*Rebutting the Presumption*

In order to rebut the presumption of advancement, **a person may present evidence which indicates that no gift was intended by the transferor at all**.

* *Onus of Rebutting -* The onus of rebutting the presumption of advancement always rests with the person alleging the existence of the resulting or express trust. This is consistent with the decision in *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353.
* *Cannot rely on fraud or illegality -* It is noted from *Tinsley v Milligan* [1994] 1 AC 340 that the presumption of advancement does not generally allow a party to rely upon fraud or illegality in order to rebut the presumption of advancement however there are notable exceptions to this rule.

**Constructive Trusts**

***Introduction***

Constructive trusts are typically imposed when **it is simply unconscionable for one party to gain ownership of property which would disregard another party’s rights in equity**. They arise when a person secures an interest in property or money and attempts to disregard other parties who also have an interest or a right to it. The constructive trust has been coined an ‘institutional’ trust since it is only formed when there is some sort of equitable wrongdoing.

**If the Courts find a person could not, in good conscience and in equitable terms, retain a benefit that they have gained in breach of their contractual or other such legal or equitable duties – they will impose a constructive trust**. As such, *constructive trusts can arise without the actual or presumed intention of the parties* – as ruled in *Muschinski v Dodds* (1985) 160 CLR 583 - and can be imposed even if they are entirely against the intention of the parties in dispute (refer *Koh v Chan* (1997) 139 FLR 410)

Accordingly, it is therefore apparent that constructive trusts are almost entirely ‘remedial’ in their purpose and will only be imposed if the Court sees if fit to do so. A purely remedial constructive trust arises only at the point the Court declares such a trust to exist and only from this point forward. This is discussed heavily in *Muschinski v Dodds* (1985) 160 CLR 583 which suggests that only when the common law and equitable interests of the parties are at odds – will a constructive trust be imposed by the Court as a suitable remedy.

***Imposition of a Constructive Trust***

To illustrate some circumstances when Constructive Trusts will be imposed, the following is a non-exhaustive list:

1. **Where an unconscionable claim of ownership of property arises when another party has contributed to it;**
2. **Where obligations are imposed upon a person through the sale or purchase of land;**
3. **Where a fiduciary is accountable for dishonest use of their fiduciary position to profit**
	1. *Where a fiduciary is accountable for the dishonest use of their position to profit – they will be held accountable for such.*
	2. If it can be established that the profit related to the property of the principal, then the fiduciary would hold this property on constructive trust for the principal and any profits derived from this property are immediately the principals.
	3. This was first established in *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223 and affirmed in the High Court case of *Chan v Zacharia* (1984) 154 CLR 178; 53 ALR 417. In this case, Chan and Zacharia were doctors in partnership who attempted to resign a lease for a property. Chan declined to do so and separately engaged in the lease by himself. The High Court ruled that Chans conduct formed a constructive trust on behalf of the other doctor as an asset of the partnership. Deane J stated that the obligations for a fiduciary in partnership were clear

*‘[a] conflict of personal interest and fiduciary duty or a significant possibility of such conduct derives a duty to inform the principal involved. To not account for any benefit or gain obtained or received by reason of or by use of this fiduciary position or of opportunity or knowledge resulting from it renders a breach of the fiduciary position’*

* 1. This case established the ruling that when a trustee obtains a lease for his own use which he previously held as a benefit for others, then there is an irrefutable presumption raised that it was obtained by the use of his fiduciary position. Where a fiduciary is in the same position – an automatic presumption is raised which can be rebutted.
1. **Common intention constructive trusts**
	1. These types of trust arises when the following three elements are satisfied:
		1. **A common intention exists between the parties as to the subject of an interest**
		2. **A party has acted wrongfully in claiming this interest**
		3. **It would be deemed unconscionable to claim ownership when another party has an interest.**

*Remedial Action*

The High Court stated in *Guimelli v Guimelli* (1999) 196 CLR 101 that a constructive trust should only arise when other lesser remedies are not suitable on the basis of the evidence presented. Such a ruling infers that constructive trusts should only be applied to cases where it is clear that such a device is needed as a last resort.

This is primarily because the law always attempts to preserve the intention of the parties at the foremost. Only in circumstances where the intentions of the parties should not be preserved - due to equitable misconduct or a breach of another area of the law – will the Courts impose a constructive trust.

If providing any remedy, the Court will consider the timing of the creation of a constructive trust and whether any parties are unjustly affected due to its imposition. This is a critical consideration of the Court and they will also look to third parties that may be injured as a result of the creation of the trust.

**Topic 2 – The Certainty’s of Express Trusts**

Express trusts are typically the most litigated and commented type of trusts due to their wide application and their unique peculiarities. There are typically said to be a number of required certainties with express trusts that must be satisfied before an express trust can be legally created. These requirements are absolute in their nature – that is, every element must be satisfied completely and without doubt otherwise the express trust will fail.

The core certainties of trusts include:

1. **Statutory Formalities**
2. **Trust is not illegal**
3. **Certainty of intention**
4. **Certainty of subject matter**
5. **Certainty of Objects**

These are also supplemented by other statutory requirements which must be satisfied for a trust to legally exist:

**If all these five requirements are satisfied, then a trust is created. In order to more fully understand the requirements under each – they will each be individually explored now.**

**Statutory Formalities**

For a trust to be valid, the first and most critical aspect is that it must comply with the statutory requirements of form.

The primary requirements be complied with or the trust will fail

1. **S53(1) of the Property Law Act**
2. **Valid Constitution of the Trust**
3. **Not illegal**

**What is assignment?**

In *Norman v FCT*  - Windeyer J explained what assignment means

*‘****assignment means the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee. Anything that in the eye of the law can be regarded as an existing subject of ownership, whether it be a chose in possession or a chose in action, can today be assigned, unless it be expected from the general rule on some ground of public policy or by statute****. A mere expectancy or possibility of become entitled in the future to a proprietary right is not an existing chose in action.’*

**Testamentary Trusts**

Different statue applies depending in whether the trust was established *inter vivos* or by will.

***Trusts by Wills***

Trusts which are established under wills must comply with the relevant statutory formalities concerning the making of wills. These formalities include the

1. **execution of the will by the testator; and**
2. **the witnessing of the will**

s 7 (1) of the *Will Act 1997 (Vic)* provides that a will is not valid unless

 *(a) it is in writing, and signed by the testator or by some other person, in the presence of, and at the direction of the testator; and*

 *(b) the signature is made with the testator's intention of executing a will, whether or not the signature appears at the foot of the will; and*

 *(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and*

 *(d) at least two of the witnesses attest and sign the will in the presence of the testator but not necessarily in the presence of each other.*

**Inter vivos Trusts**

Trust established *inter vivos* must comply with the statutory provisions that have been derived from old English Statute of Frauds 1667.

**To create a trust, property is vested in a party (the trustee) by another (the settlor), accompanied by a declaration of sufficient certainty and formality that the trustee is to hold the property on behalf of another.**

This is now incorporated into the *Property Law Act 1958 – s53 (1)*

*with respect to the creation of interest in land by parol-*

 *(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorized in writing, or by will, or by operation of law;*

 *(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;*

 *(c) a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will.*

*(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.*

The most important aspects of this section include

***Land and Equitable Interests***

1. *Land Only* – s53(1) (a) and (b) concern land only
2. *Equitable Interests* - s53(1) (c) concerns ‘subsisting equitable interests’. It is not limited to subsisting equitable interests in land.

***Writing and Signed***

1. *In writing, signed by the person* – s53(1) (a) and (c) require that the relevant transactions is in ‘writing, signed by the person’ transacting.
2. *By some person* – s53(1) (b) requires that only the declaration of the trust in respect of the land be ‘manifested and proved by writing by some person who is able to declare’ the trust.

***Agent***

1. *Creator or disposer’s agent* - s53(1) (a) and (c) permit the creator or disposers agent to sign the relevant document.
2. *No agent* – Subsection (b) provides no such allowance for an agent.

**Personal Property**

No formalities required for a declaration of trust over a legal interest in personal property

**S53(1)(a)**

**LAND**

S53(1)(a) requires that **creations or dispositions of interest in land be in writing signed by the person creating or conveying the same**.

**It is limited to express inter vivos trusts.**

1. *Agents can be signatories*
2. *Exceptions* –
	1. This section does not apply to interests in land created or disposed of by the persons will; or
	2. This section does not apply to interests created or disposed of by the operation of the law.
3. *‘Interest in land*’
	1. In *Adamson v Hayes* (1973) 130 CLR 276, the High Court were of the opinion of that this section applied to both legal and equitable interests in land.

Subsection (a) operates in cases of:

1. Creations or dispositions of legal interests in land;
2. Creations of equitable interest in land that are not created by way of declaration of trust, for example:
	1. The creation of an equitable mortgage over land, by deposit of deeds; or
	2. The granting an option to purchase land.
3. Dispositions of equitable interests in land (also covered by (c) )

**S53(1)(b) – ONLY FOR LAND OR INTEREST IN LAND**

S53(1)(b) operates to make **unenforceable a declaration of trust over land or an interest in land until such time as it is manifested and proved in writing by** a person able to do that.

1. *This does not invalidate the trust* ***created orally over land*** - it simply renders it unable to be enforced.
	1. *Wratten v Hunter* [1978] 2 NSWLR 367
		1. A brother promised to hold land on trust for himself and his siblings. After the brother died – one of the siblings declared that she had an interest in the trust and so did her children. The Court held the trust was not enforceable unless it was evidence in writing.
2. S53(1)(b) – **Has no application unless the subject matter of trust is land or interest in land.**
	1. *Trusts over other property* – Other property such as chattels and chooses in action can be created orally, and are enforceable without written proof.
	2. *No writing needed* – no particular form of writing is required, nor is it required that the writing be contained in a single document.

***Who can prove a trust under s53(1)(b)***

The person **who must manifest and prove the trust under this section is ‘some person who is able to declare such a trust’**. It makes no allowance for this to be done by an agent.

The settlor of the trust is the only person is able to manifest and prove the trust in writing. However, there are exceptions:

1. *Hagan v Waterhouse* (1991) 34 NSWLR 308 – land had been purchased in name of one of the trustees and it was alleged the land was on trust. Supporting letters signed by the trustee and his brothers. Court held that the letters acknowledged the existence of a trust and was written proof the trust.

**S53(1)(c) – Equitable Assignment**

S53(1)(c) invalids **dispositions of subsisting – already existing - equitable interests that are not reduced to writing and signed by the person disposing of the interest or that persons duly authorised agent**.

1. ***‘Subsisting Equitable Interests’***- There must be pre-existing equitable interest which is then disposed of. **Thus, it does not apply to the *creation of new equitable interests whether by declaration of trust or otherwise.***
2. ***‘Any Equitable Interest’*** – The section is not limited to land, but to any equitable interest which can be disposed of.
	1. *Chattels or Share* – In *Grey v Inland Revenue Commissioners* [1960] AC 1 – the provision was held to apply to the disposition of equitable interests in property such as chattels and shares.
3. ***Disposition of Subsisting Equitable Interests***– Disposition occurs when there is a change in the ownership of the interest.
	1. *The Comtroller of Stamps (Victoria) v Howard Smith* (1936) 54 CLR 614 – there are three methods of voluntarily disposing of an equitable interest
		1. *By declaration of sub-trust*
		2. *By manifestation of an immediate intention to give the interest away; and*
		3. *By a final direction given to the trustee to hold the interest for someone else.*
		4. *By valuable consideration as per – Hardoon v Belilios* [1901] CH 118.
4. ***Beneficiary gives Final direction or revocable mandate?***
	1. A method of disposing a beneficial interest in a trust is to give the trustee a final direction to hold the interest for someone else. However, questions arise as to whether the beneficiary actually gave a final direction, or merely empowered the trustee to deal with his or her interest.
		1. *Final Direction* – The direction is final and cannot be revoked, the beneficiary has disposed of the equitable interest.
		2. *Revocable Mandate* – The beneficiary has only given authority to the trustee to act in a certain way. That authority can be withdrawn if the beneficiary has a change of mind or circumstances.
	2. *The Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614
		1. *‘I request you as trustee to pay out my interest as residuary beneficiary’*
			1. Direction was not final because Howard-Smith did not intend the charities to take immediately so did not comply with s53(1)(c).
			2. The use of ‘request’ rather than ‘order’ was relevant.
	3. *Grey v Inland Revenue Commissioners* [1960] AC 1
		1. Hunter transfer shares to appellants who held them on resulting trust – his interest was equitable. Later he gave an oral direction to hold shares for his grandchildren.
			1. The final direction amounted to the disposition but it was oral, so did not comply with s53(1)(c). He would not have disposed of his shares until the trust was executed.

**Example**

Assume a father sends a letter to his daughter providing her with equitable ownership to her house signed with the words ‘love dad’. It can be argued that such a card would create an express trust in favour of the daughter so s53(1)(c) applies.

1. If house is unencumbered and the fathers interest in the house is legal, then the formalities requirements end.
2. If the car is already the subject of a trust in favour of the father, then the card – and the house given to the daughter – are a disposition under s53(1)(c) and are required to be evidenced in writing.

**Overlapping between the Provisions**

It is possible that a single transaction can be caught by more than of the provisions discussed:

1. *Over Land -* A declaration of trust over land might be caught by subsection (a) as well as by (b)
2. *Over an Interest in land* – A declaration of sub-trust over an interest in land might be caught by subsections (a), (b) & (c)
3. *Equitable Assignment* – Might be caught by an equitable mortgage over land might be caught by (a) and (c)

***Overlap of (a) and (b)***

* Subsection (a) applies to the creation of *legal or equitable interests* in land: *Adamson v Hayes* (1973) 130 CLR 276

When a settler declares a trust over land, an equitable interest in land is created – the beneficiaries title.

* Subsection (b) applies to declarations of trust concerning interests in land

(A) is given precedence than the less onerous (b).

* *Department of Social Security v James* (1990) 95 ALR 615
	+ Mrs James applied for aged pension and his assets were assessed. She claimed her house should not be taken into account as he held it on trust.
		- Subsection (a) does not extend to declarations of trust. Only subsection (b) applies to a declaration of trust over an interest in land. Its requirement of proof in writing could be satisfied by a combination of documents capable being read together.

***Overlap of (a) and (b) -*** *What is the potential overlap?*

1. Subsection (c) applies to dispositions of subsisting equitable interests. It requires that dispositions are done in writing.
2. Subsection (b) applies to declarations of trusts concerning interests in land. Most particularly, they concern sub-trusts and the beneficiary’s declaration of a sub-trust.
	1. *Disposition of an Subsisting Equitable Interest by Sub-trust* - When a beneficiary declares a sub-trust – that is, where a beneficiary of a trust over land declares himself or herself trustee of that beneficial interest for a sub-beneficiary - *The Comptroller of Stamps (Vic) v Howard-Smith* stated that declaration of a sub-trust is valid disposition.
3. A settlor can declare a trust over land orally, and later manifest it and prove it in writing (b); but if the beneficiary wants to declare a sub-trust trust over the interest, it must be in writing (c).

**Exceptions to the need to comply with requirements as to form**

There are a number of exceptions regarding the need to comply with form. These include:

1. **Creation or operation of resulting, implied or constructive trusts**
	1. Trusts created by wills have special additional formalities. The statutory provisions in s53(1)(a) and (c) – specifically the exempt creations and dispositions of land made by will.
2. **Where part performance has occurred**
	1. S55 of the *Property Law Act 1975 (Vic)* and its equivalents provide that nothing in the formalities provisions will affect the operation of the law relating to part performance.
3. **Where the interests in land created or disposed of by will**
	1. Section 53(2) provides that nothing in section 53 affects the creation or operation of resulting, implied or constructive trusts.
		1. Resulting and constructive trusts arise only through law – not the intention of the parties or those parties involved as per express trusts.
4. **Where the requirements of strict compliance would allow the statutory provisions to be used as an instrument of fraud**
	1. The courts will not allow the statutory formalities to be used an instrument of fraud.
		1. *Rochefoucauld v Boustead* [1897] 1 Ch 196

**Failure due to Lack of Constitution of the Trust**

The constitution of a trust is that a trust will not be valid unless the title to the property is vested in the trustee. A trust is not enforceable unless it is completely constituted.

1. ***Title Must have Vested & Be Completely Constituted***- A trust cannot be complete until the trustee has title to the relevant property and can hold it subject to the trust which has been declared. This is said to be *completely constituted.*
2. ***Legal Title? -*** Ownership of property that is cognizable or enforceable in a court of law, or one that is complete and perfect in terms of the apparent right of ownership and possession, but that, unlike equitable title, carries no [beneficial interest](http://www.answers.com/topic/beneficial-interest)in the property. Typically, legal ownership is conveyed by documents of title.

**\*\*\*\*\*\*\*\*\*\*\*\*Summary \*\*\*\*\*\*\*\*\*\*\*\*\***

Trusts must be completely constituted in order to be effective. When considering the constitution of a trust, the following need to be answered:

1. **Is a trust being establish by transfer or declaration?**
	1. ***Trust by Declaration***
		1. The trust by self-declaration involves a person retaining legal title and holding it on trust for another.
			1. *Satisfied Immediately -* Title to the property is already held by the declarant, and matters of constitution are immediately satisfied.
	2. ***Trust by Transfer*** *­*– What assets are being transferred?

**If it can’t be assigned at law, equity can still complete.**

* + 1. Are the assets legal or equitable (beneficial interest) property?
			1. Legal – Can they be assigned at law?
				1. Refer s53(1) and s134 PLA

Assigned ?

How is the asset assigned lat law?

How has this been done?

If done successfully, trust is constituted.

* + - 1. Cant be assigned at law- what about equity?
				1. How can it be assigned at law?
				2. Has this been achieved?

If done successfully, trust is constituted.

***Corin v Patton – Requirements for Equity***

**Trust by Self-Declaration**

**Trusts by self-declaration involves a person retaining legal title and holding it on trust for another.**

1. Title to the property is already held by the declarant, and matters of constitution are immediately satisfied and no problem of constitution arises.

Thus, a trust by oral declaration can be easily achieved:

1. **If a person has legal title to property and her self-declaration is effective** – **this is a valid trust.**
2. **If the subject matter is land, there are still no problems but the statutory formalities will apply.**

Equitable Interest

Where trustee of new trust has no active duties protecting the trust property – the self declaration amounts to a ‘disposition’ for the purposes of s53(1)(c) and must be made in a signed document

**Trusts by Transfer**

Trusts by transfer are more complex as the settlor has to ensure that the proposed trustee obtains title to the property.

1. ***Legal Property***– If the property is legal property, the trustee should hold legal title.
2. ***Equitable Property*** – If the property is equitable, then the trustee needs to obtain equitable title.

**The trust is not constituted (valid) unless the ownership of the property is sufficiently transferred to the trustee. This will take effect as a gift and not a contract of sale.**

*Anning v Anning* (1907) 4 CLR 1049

1. Mr Anning executed a deed in which he purported to transfer all his property to his family before his death.
2. Deed was held invalid to transfer a whole range of property as it was not suitable methodology of transferring legal title.

**Can a trust be constituted before transfer of legal title?**

**Equity will treat a settlement as binding in equity, if the settler has done ‘everything that is necessary to be done. If this test is satisfied, the settler will be treated as holding the property on trust.**

***Milroy v Lord* (1862) 4 De GF & J 264**

* The Court created the test of **- ‘everything necessary to be done’** is satisfied, then the settler will be treated as holding the property on constructive trust for the intended assignee.

This was upheld in *Norman v FCT* (1963) 109 CLR 9, where Windeyer J stated

*‘if a man, meaning to make an immediate gift of a chose in action that is his, executes an instrument that meets the requirements of statute and delivers it to the donee, actually or constructively, he has put it out of his power to recall his gift.’*

As different legal properties have different means of assignment, the test of whether ‘everything has been done’ will vary. The main types of property for which transfer of legal title is difficult includes

1. Legal chooses in action
2. Shares in a company
3. Land under the Torrens system
4. Future Property
5. ***Transferring Title in equity to a legal chose in action***

A legal assignment of a common law chosen in action MUST comply with statutory requirements in order to be recognised.

* 1. **Includes – general law land, choses in possession, shares sold off-market, insurance policies, cheques, other legal choses in action – PAGE 100**

Test to satisfy:

* 1. ***Has legal or statutory title passed to the trustee?***
		1. *Did they observe correct formalities for a thing in action? s134 Property Law Act (Vic)*
			1. The assignment is absolute;
			2. The assignment is in writing;
			3. The assignment is signed; and
			4. Express notice in writing has been given to the debtor or person from whom the assignor would have been entitled to claim the chose in action.
		2. If yes, then title will pass in law.

*Example*

1. A wishes to assign all their rights in money of a bank account to B. A completes a deed in which she states that she assigns the property and she hands the deed to the B. She does not give notice to the bank.
	1. The assignment fails at law as the requirements for assignment of a chose in action are not satisfied. A has not given notice to the bank.
	2. ***Has equitable title passed to the trustee ?***
		1. Must satisfy the tests for passing of equitable title:
			1. ***Corin v Patton -***
2. ***Title must have vested*** *-* The Donor must place the done in a position to have titled vested without further assistance.
3. ***Done all necessary to assist*** *-* The donor must have done all that is necessary to place vesting legal title within control of the done; and beyond the recall of intervention of the donor.
4. ***No consideration passed* -** but if the donor has taken sufficient steps to render the transaction binding their conscience, then equity will enforce that intention even in the absence of due consideration.
	1. ***Has the donor done all that is necessary to transfer legal title and give all title to the donee per Corin v Patton?***
		1. *If yes, then title has passed in equity.*
			1. *If legal document is lost* – doesn’t matter, the equitable title has already passed and it is irrelevant.
	2. ***Saunders v Voiter***
		1. The beneficiary has complied with the trust to do all that is necessary.

***Debts***

The assignment of debts requires the writing signed by the transferor and notice to the debtor or other party of the transfer per *Property Law Act 1958 (Vic) s134*.

In *Anning v Anning* – Griffith CJ stated that –

1. The donor only had to complete the steps that could only be completed the donor alone.

This was upheld in *Norman v FCT* –

* 1. In equity, if there is a valid gift of property transferable at law if the donor, intending to make, then and there, a complete disposition and transfer to the donee, does all that is necessary to give effect to the intention and provides the done with all means to complete the gift – the gift is an immediate gift.

*Contractual Limitations for DEBT*

In *Bluebottle UK v Deputy Commissioner of Taxation* (2007) 240 ALR 597, contractual limitations can be assigned to debts such that a payment of dividends to a company’s members must occur if the contract is between the members and the company and the contract stipulates it.

A contract between parties can affect the efficacy of an equitable assignment of rights to a third party. In *Bluebottle UK v Deputy Commissioner of Taxation* (2007) 240 ALR 597

*‘ in the context of equitable assignments for value of legal and equitable rights, the simple proposition is that equity follows the provisions of company law and the constitute of Virgin Blue which creates and defines the nature and scope of the rights which equity deals under the assignments’*

***Partial Choses in Action***

Partial choses in action are the conferment of part of chose in action such as

* ‘I transfer to Bill to hold on trust for my son, Fred, half of my right title and interest in funds in bank account XXXXX’

How to assign partial choses in action?

1. *An effective equitable assignment requires a clear expression of intention to immediately assign. The clearest manifestation of intention is the execution of a deed,*
2. *No common law method for partial choses in action* - There is no common law method for such assignments and only equity will recognise assignments which are *part choses in action* - *Norman v FCT* (1963) 109 CLR 9.
3. *Immediate intention is required -* An equitable assignment requires a clear expression of intention to immediately assign.
4. **Transferring title in equity to Torrens Land**

In *Corin v Patton* (1990) 169 CLR 540 – the High Court upheld Griffith CJs decision from *Anning v Anning* such that “*only the donor only had to complete the steps that could only be completed by the donor alone*.”

* In *Costin v Costin* (1997) 7 BPR 15 – it was held that the transfer was not complete, as the land was jointly owned by two people and the agent could not release the duplicate certification of title.
1. **Transferring title in equity to shares (PAGE 110)**

The statutory provisions only apply for choses in action that have no other recognised method of transfer at law.

Shares have a recognised method of transfer at law, and that procedure must be followed.

1. *Depends on Companies Constitution -* The method of transfer of shares depends on the companies constitution – which must be consulted to determine the exact method.

**The trust failed in *Milroy v Lord* because Medley executed a deed, and this was not the appropriate method of transferring shares.**

Has all be done of transferee to divest himself of the interest in the shares?

1. *Re Rose; Rose v IRC* [1952] Ch 499 – Mr Rose had executed certificates for shares and handed them to transferees and their agents. One transfer was intended as an outright gift, the other was a transfer to trustees to hold the shares on trust for Mrs Rose and their son. Mr Rose then died and the transfers were registered three months later.
	1. Gift was completed in equity because Rose had done all in his power to divest himself of his interest in the shares. However, legal title had not been transferred as this was vested in the company.
2. **Attempted assignment (for value) of FUTURE PROPERTY**
	* 1. Property is ‘future property’ if:
			1. The property exists but is not yet owned by the transferor – i.e. an inheritance.
			2. The property is not yet in existence.
		2. ***Is their intention?*** *–* The parties must make their intention clear per *Tailby v Official Receiver*
		3. ***Is the property identified?* –** The property must be clearly identified within the contract for assignment per *Tailby v Official Receiver* & *Shepherd v FCT*.
		4. ***Is their consideration?*** *-* Parties will be held to a bargain if the agreement to transfer is for valuable consideration and is able to be specifically performed. **MUST BE consideration i.e. contract**
3. **Must be the ‘RIGHT’ to assign – as the future property don’t exist yet – must EXIST to be assignable. Rights can be assigned but anything else can’t**
4. **Ok if for value & a RIGHT -** a contractual promise to assign expected future property recognised will be recognised in equity – *In Re Rule’s Settlement; Kennon v Spry*
5. **Not ok if voluntary** (i.e. gift): invalid at law and in equity – In re Rule’s Settlement; Kennon v Spry
	1. **Assignment must be presently effective**: will be invalid if it purports to take effect in the future – *Bluebottle*
	2. **Assignment of present right to income -** a subsisting right to future income is assignable, as long as it specifies only a proportion of the right, but not an actual monetary amount (since the latter is not yet in existence) – *Williams*
		1. 1. E.g. I can assign half of my present right to future dividends if I currently have that right; however I cannot assign the dividends themselves (which do not yet exist) or a specific amount of dividends, e.g. $500 worth, since the $500 worth of dividends do not yet exist.
6. **Assignment of a present right to future income is an assignment of a chose in action:**
	1. **Assignment of whole chose in action -** must comply with s134 of PLA (see above)
		1. **If equitable chose in action -** must also comply with s53(1)(c)
	2. **Assignment of part chose in action -** invalid at law under s134 of PLA, but valid in equity as an equitable assignment, and therefore must comply with s53(1)(c) of PLA (see above)
		1. ***Equity will bind the conscience*** *-* Equity will bind the conscience of the assignor once the property comes into existence or belongs to the assignor – equity will require the assignor to transfer the property to the assignee– *Holroyd v Marshall*

*Example*

If A attempts to assign presently existing property to B for valuable consideration, but does not complete the assignment at common law – equity will assist and acknowledge that an assignment has occurred if the contract is one which is capable

of being performed.

**Assigning property which only exists in equity**

1. **Are the statutory formalities required?**
	1. Yes, they are as above.
2. **How is equitable property transferred to a trustee?**

In *Halloran v Minister Administering National Parks & Wildlife Act* 1974 (2006) 229 CLR 545 – the High Court stated

*‘where an interest to be transferred is .... a creature of equity, equity requires a clear expression of intention to make an immediate disposition; that in the absence of an applicable statutory requirements, suffices’*

***How is intention manifested?***

In *Norman v FCT* (1963) 109 CLR 9

*‘in cases where value is not so required but a clear expression of intention is, the delivery of a deed couched in terms of present gift manifests, in the best possible way, the intention of the assignor to make an immediate and irrevocable transfer’*

The best way to do this is via a deed, but it is not the only way as it could be done via the form of a contract to sell.

* There must be an intention to immediately assign and not an agreement to assign the property in the future *– Norman v FCT* (1963) 109 CLR 9
* *Comptroller of Stamps v Howard-Smith* – The contents of a letter were ruled as a mere authorisation and had no dispositive effect as it was for future conduct.

*Example*

1. C owes money to A. A owes money to B. A directs C to pay B the money which C owed to A.
	1. ***Is A’s direction to C a manifestation of an intention to immediately transfer rights in property?*** – If yes, then it’s an assignment.
	2. ***Is A’s direction to C a manifestation merely regarded as an authority or revocable mandate?*** - If the direction is merely providing authorisation for future conduct, then there is no immediate assignment.

**Failure for illegality**

A trust which is created for an illegal purpose may fail or be set aside. Illegal purposes include those that are contrary to statute, general law or public policy.

***Trusts Contrary to Statute***

Statute-based illegality arises in two ways.

1. **The trust may be directly affected by statute;**
	1. *i.e. by s121(1) of the Bankruptch Act 1966 (Cth) makes void transfer to a trustee made to defeat credits*
2. **Some step required to constitute the trust might be affected by statute.**
	1. **Primary Authority -** *Nelson v Nelson* (1995) 184 CLR 583
		1. *‘the question of the effect of illegality had to be considered in the light of the underlying policy of the legislation in question. The Courts should not refuse to enforce legal or equitable rights simple because they arose out of or were associated with some unlawful purpose unless the statute concerned show an intention that such rights should be unenforceable, or where the imposition of the sanction was either not disproportionate or otherwise necessary in the circumstances’*
	2. Thus, it appears unless the illegal purpose is achieved in whole or in party, illegality will not be relevant per *Clegg v Wilson* (1932) 32 SR NSW 109 – upheld in *Nelson v Nelson.*

***Trusts Failure by Contract***

If the trusts creation is dependent upon a contract that is expressly prohibited by statute, then the trust is void unless there is also some provision allowing otherwise per *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410.

***Trusts contrary to public policy***

Trusts may be contrary to public policy if they promote an immoral or illegal purpose, although the range of purposes that are contrary to public policy are not restricted to immoral or illegal purposes.

1. *Re Edgar* [1939] 1 All ER 635 – Testator wanted his sons to work on his business and left the trust stating that their interests were void if *‘they became politicians or a person of public office.’*
	1. Court ruled that this was in violation of public policy as it was contrary to the interests of the state and was a void clause.
2. *Trustees of Church Property of the Dicese of Newcastle v Ebbeck* (1960) 104 CLR 394 – A testator stated that his wife and sons would inherent his trust as long as they declared christain faith. They were already married to Catholic women.
	1. Court ruled this was against public policy – it created a serious temporal interest of husbands and the wives were not prepared to change religion.

***Trusts contrary to general law***

At law, trusts that impose absolute fetters on the alienability of the trust property are contrary to public policy and are void – *Brandon v Robinson* (1811) 18 Ves 429

***The rule against perpetuities***

A trust is not allowed to continue indefinitely. In Victoria, *Perpetuities and Accumulations Act 1968 (Vic) s5* specifies that the vesting period cannot exceed 80 years.

There are rules which ensure that property subject to a trust will vest in someone who is entitled to deal with it absolutely within a reasonable time of creation of the trust.

* *Interests must vest in the Future -* The common law rule is that an interest that is to arise at a future time as a vested interest will fail unless it will vest no later than 21 years after a life in being at the creation of the interest – *Cadell v Palmer* (1883) 1 Cl & Fin 372.
* *Not vest in the future –* If there was a possibilitythat the interest would not vest within the period, the whole gift is void – *Congregational Union of New South Walves v Thistlethwayte* (1952) 87 CLR 375
* *‘vest’*
	+ An interest is regarded as vested if
		- The identity of the person who is to take is ascertained;
		- There is no condition precedent to vesting of the interest; and
		- Where the interest is part of a gift to a class, the members of the class are identified and the quantum of interest of each taker is ascertained.
* *‘creation of an interest’*
	+ The time of creation of the interest in the case of a testamentary trust is the death of the testator. With an *inter vivos* trust created by deed, the interest is created at the time from which the deed takes effect.
* *‘life in being’*
	+ Refers to a person named in the trust instrument who living. This person ceases to be ‘in being’ when they die
		- *i.e.* *Sue leaves her estate to her son Ben for life* – Ben is the life instrument
		- *i.e. Sue leaves her estate to her husband for life, and then to her nieces and nephews born during the life of her friend Julia .* – Julia is the life in being.

**Certainty of Intention**

The effect of creating a trust is that settlor is giving away all of their beneficial interest in their property to another. Because of this, the requirement of intention is critical to the creation of a trust.

A trust will not be imposed by a Court when it is not certain that the intention and language of the settlor was for a trust to be created in favour of the beneficiaries, or where the language used is contrary to any intention to impose a trust or indicate that a trust should be created as ruled in *Re Falkiner; Mead v Smith* [1924] 1 CH 88.

1. **Words of Conduct**

The settlor must indicate through words of conduct that they intend to create a trust, and this intention must be evidenced in words or in writing. Explicit words to indicate the intention to create a trust or not required as was seen in *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178 where it was ruled that using the word ‘trustee’ did not necessarily indicate a real intention to create a trust.

***Paul v Constance –* ‘its as much yours as it is mine’**

* Mr Constance told his partner ‘its as much yours as it is mine’
* Court stated that this was enough to create a trust, as there was sufficient intention and Mr Constance held the account on trust for himself and Ms Paul jointly
1. **Actual and Objective Intention**

The Court always seeks to determine whether the settlor *actually* intended on creating a trust, and this can be identified where the relationship between the parties would indicate that a trust should be created or in such circumstances that preclude any other instrument but a trust from being created. This was illustrated by *Re Armstrong* [1960] VR 202 Supreme Court of Victoria where it was ruled that George Armstrong did intend on creating two separate trusts for his sons and the words to the bank manager indicated this intention.

1. **Subjective Intention**

The law in Australia does consider that subjective intention is important, and even if it is clearly established that an actual intention existed to create a trust – the settlor may be able to prove through subjective arguments that they did not truly intend to create the trust.

* This was suggested in *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178 HCA
	+ The Court ruled that a husband was not allowed to deny he was the trustee of moneys in a bank account he had setup for his wife in order to avoid paying tax as no use of any forms of words could create a trust contrary to the real intention the person alleged to have created the trust. Since it was clear that *Jolliffe* intended to setup the account to avoid tax, this was the purpose of the trust and the Court held it wasa not to pass the monies to his wife.
1. **Intention insufficient**

In *Gill v Gill* a testator made his will and left his assets to his son,

*‘on the condition that he keep the homestead as a home and provide board and residence for his sisters and any other unmarried sisters who may wish to remain there, allowing them two separate bedrooms and a sitting room’*

One of the sisters contended that the son had breached the will and therefore forfeited his interest under it. The Court ruled that the conditions imposed were not meant to be conditions of forfeiture, rather they were conditions that meant the person taking the property had to carry out the obligations which did not impose a trust. This meant the obligations were enforceable but did not create a trust.

Consequently, if the property is not received correctly by the trustee because the transfer is incomplete in some way – a trust cannot be imposed.

* Equity **must be able to recognise a transfer of property** and this transfer must be deemed to be complete otherwise a trust will fail and the property will remain the settlors as the intention will not be sufficient to transfer it. This was established in *Milroy v Lord* (1862) 4 DE GF & J.
* The trust failed in *Milroy v Lord* because Medley executed a deed, and this was not the appropriate method of transferring shares.
1. **Onus of Proof**

The onus on establishing that there was an intention to create a trust rests on the person alleging that a trust did in fact exist as per the decision in above case as per *Herdegen v Federal Commissioner for Taxation* (1988) 84 ALR 271.

If language is used which may indicate a trust exists, then the other litigating party must prove that a trust did not exist as per *Stephens Travel Service International Pty Ltd (recs and mgrs apptd) v Qantas Airways Ltd* (1988) 13 NSWLR 331 at 340-3.

1. **Admissibility of Evidence**

Where a trust is created through a trust instrument, external evidence of the intention of the creator will be admissible in circumstances where

1. When the settlors intention to create a trust can be evidently established from oral evidence
2. When the terms of a trust are unclear and further evidence is required regarding the settlors or testators intention.
3. When a written document cannot be considered as complete evidence of the settlors intention in which case the parole evidence rule may prove that the declarations were never intended to create a trust.

Most evidence is relation to trusts is only admissible where it seeks to clarify or make clear the words or conduct of a person subsequent to the trusts creation as stated in the *obiter* of *Bentley v Mackay* (1851) 15 Beav 12. Evidently, the parole evidence rule will limit the degree of extrinsic evidence that is admissible into the Court.

1. **Immediacy**

***Intend to Create Trust Immediately*** - For the creation of a trust *inter vivos,* the settlor must intend to create the trust immediately. A declaration of a trust not intended to operate until some point in the future does not satisfy the certainty of intention and no trust will be formed when this future point arrives.

* This was seen in *Brennan v Morphett* (1908) 6 CLR 22; [1908] HCA 16 -
	+ where a person alleged to have held on trust for another person shares in any future company formed to develop a mine. There was no consideration in the making of such a promise and it was ruled that such a declaration was ineffective to create a trust. The only way in which such a future declaration can be effective is by way of a contract to settle the property in the future.
* In *Harpur v Levy* [2007] VSCA 128 -
	+ the Majority of the Court of Appeal held that an intention to create a trust in the future is unenforceable in the ‘absence of consideration’ because equity will not assist a volunteer to complete such a trust. Most poignantly, in *Pasecoe v Boensch* [2008] FCAFC 147 the Court stated that a settlor must intend an “immediately operative trust” in order for a trust to be effective.

However, if consideration is given for a declaration of a trust that is to be created at some point in the future, equity will treat that as done which out to be done so when that point arrives the trust will be in effect.

1. **Precatory Words**

Precatory words are words that are used by a testator as to how property being transferred should be used. The words typically provide some indication of how the testator intended to dispose of the property to another person and the words tend to be less directional than words imposing an obligation. The Courts have often ruled against language which is not deemed to fully impose an obligation and stated they are mere precatory.

* Any language such as
	+ **‘on trust’ or ‘on condition that’**
		- tend to indicate an intention to create a binding obligation and Court will immediately ruled that these words impose an obligation. In *Re Will of Logan* [1993] 1 Qd R 395 it was stated by the Court that professionally written legal clauses containing precatory words are usually unlikely to create a trust.
	+ ***‘absolutely, in the fullest confidence she will carry out my wishes’***
		- In *Re Williams* [1987] 2 Ch 12 the words ‘absolutely, in the fullest confidence she will carry out my wishes’ were ruled not to impose an obligation and were rather precatory in nature.

The factors which may assist in determining whether the disponor intended to impose a legally enforceable obligation include:

* the relationship (if any) of the disponee to the disponor: if the relationship is close and the disponee is a natural object of bounty of the disponor, the more likely it is that the disponee is intended to take beneficially;
* the relationship (if any) of the third person to the disponor: if that person is a natural object of the disponor's bounty it is more likely that a trust was intended.

***Quistclose Trusts***

A *Quistclose Trust* was the termed established from the case of *Barclays Bank Ltd v Quistclose Investments* [1970] AC 567. The case regarded a company called Rolls Razor who was in financial distress and sought to borrow further funds. A financier, Quistclose, was willing to lend additional funds but only on the basis that the company paid a dividend. A cheque was paid into a Barclays Bank account specifically for this purpose and before the dividend could be paid the company went into liquidation. Quistclose claimed that the monies were held on trust to pay the dividend and that the trust had failed and the money should be repaid to it. The bank stated the funds were part of the companies’ general monies and therefore Quistclose was just a standard creditor.

The Court ruled that the funds were infact held on trust for the lender and this gave rise to a relationship which was of fiduciary nature. That is, a primary trust fails and a secondary trust forms in favour of the lender. Lord Wilberforce stated that this was formed from the clear intention of the parties and the fact that the monies were never intended to form part of the general monies of the company.

Typically a trust is not created when lending monies and the intention of the parties is that the debtor is free to use the monies as they see fit and pay the monies in additional to any contractual duties at a later time. *Quistclose* changed this and suggested that a trust can be enforced on this relationship if the lender clearly specifies the manner in which the funds are to be used. If the money is or cannot be used for the stated purpose, then it is possible that the intention of the parties is that it will be held on trust for the lender. This was discussed in *Re Australia Elizabethan Theatre Trust* (1991) 102 ALR 681 FCA where monies donated by people to a trust which distributed them to different charitable organisations. People could direct these monies to particular charities when donating and it was suggesting that such a direction formed a *Quistclose Trust*. This was rejected by *Gummow J* in this case as he stated this was an express trust created and based on the intention of the parties.

English Courts have treated *Quistclose Trusts* as an example of resulting trusts as in *Twinsectra Ltd v Yardley* [2002] 2 AC 164. In this case, Lord Millet explanation of the resulting trust form of a *Quistclose* trust was that the lender retained ownership of the equitable interest in the loan moneys throughout the life of the transaction. This infers that the resulting trust would recognise that the lender had an equitable interest of the loan moneys until the borrower used them for a proper purpose. If the borrower did not use the loan monies correctly, then the resulting trust would recognise the continued equitable ownership on the part of the lender.

The decision in both *Quistclsoe* and *Twinsectra Ltd v Yardley* [2002] AC 164 suggest that the *mutual* intention between the parties must be that the borrower is not required to use the money advanced by the lender for any purpose – rather it is intended that the borrower can only use the monies in accordance with the specific instructions conferred by the lender. The intention of the lender is the key element – if the lender has given specific instructions on the manner in which to use the monies then the borrower is taken to have known of them in accepting the loan as per *General Communications Ltd v Development Finance Corporation of New Zealand LTD* [1990] 3 NZLR 406 at 433.

In *Re Kayford Ltd* [1975] 1 WLR 279 a mail order company put customer prepaid monies into a bank account it had established for normal business operations instead of a separate bank account as per the instructions by its accountants. The company went into liquidation and the issue was whether the account held the monies on trust for its customers or whether they formed part of the general assets of the company. The Court established that there was definitely an intention to create a trust – as directed from the company’s accountants – and therefore the monies were held on trust for the customers through unilateral trust creation. This case was explained in *Re Goldcorp Exchange* [1995] 1 AC 74 where the Court stated

*‘for this purpose it is necessary to show either a mutual intention that the money should not fall within the general fund of the company’s assets but should be applied for a special designated purpose, or that having originally been paid over without restriction the recipient has later constituted himself as a trustee of the money’*

Thus, it is evident from this commentary that without some clear indication that monies held for a client should be separated to create a trust – a trust will not form and the monies will fall into the standard operating account of a company. If a trust is valid, for the purpose of insolvency, it will be a void preference on the settlors insolvency. The trust monies must be used only for a particular purpose and if they do not then they are returned to the lender as either a resulting trust arises or an express trust arises in favour of the lender.

For further reading on *Quistclose Trusts*, I strongly recommend Professor Alastair Hudson’s detailed overview available here - <http://www.alastairhudson.com/trustslaw/Quistclose.pdf>

**Certainty of Subject Matter**

For a trust to be valid there must be some property conferred upon the trustee which the trust obligation attaches to.

***Trustees Personal Obligation*** - The trustee’s personal obligation to act for the benefit of the beneficiaries must incorporate some subject matter which vests in the trustee and can be sufficiently described such that it is ascertainable. This is applies to express, resulting and constructive trusts.

1. **Must be property**

A critical facet of trusts is that any item which can be treated as property can be the subject matter of a trust if the title to the item is sufficiently transferrable and the owner is not restrained from stating that they hold it on trust. Consequently, the primary requirement for the subject matter of a trust are:

* **‘a thing’ that exists in the real world** – whether tangible or intangible – which is recognised and capable of being owned under law; or
* **a legally assignable right.**

In *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 Lord Wilberforce stated that

*‘Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability’*

This statement is clearly authoritative towards the presumption that a Court must be able to recognise what the trustee is holding on trust and if it is unable to recognise what is being held – then the subject matter of the trust is unclear and the trust will fail.

1. **Must be transferable**

***Subject matter must be transferrable*** - Both of the above requirements fall under the general rule that if the subject matter is not capable of being transferred to another party – as is required when a settlor transfers property to a trustee on behalf of a beneficiary(s) – then it typically cannot form the subject matter of a trust. This is not an absolute rule in its entirety and as with all aspects of law there are always exceptions.

***Not transferrable, cant be subject*** *-* An item which is not transferable generally cannot be declared as the subject matter of an *inter vivos* trust if the holder of the item does not have the right to transfer it or declare themselves as the trustee. The Court will always look to the nature of the item being transferred and determine the legal validity of transferring the property.

* *Trusts by Transfer -* For example, an item may be thought to be transferrable but be made non-transferrable under general law.
	+ In *Re Bruynius* [1995] 1 Qd R 492 an equitable assignment of benefits was held to be invalid because of legislation which directed it was so. Separately, the item may also be untransferable because of a valid restraint clause attached to the property which prohibits it from being so. In these circumstances, it is impossible to create a trust *inter vivos* because it is not possible to transfer title.
* *Trusts by Declaration -* However, this poses a potential issue in trusts created by declaration since the property ‘does not’ have to be transferred.
	+ In these types of trusts it will depend on the construction of the instrument being transferred and whether only legal title is being restricted from transfer or whether both legal and equitable title are being restricted. If there is no intention to restrict an equitable interest by declaration or the subsequent transfer then it may be possible that such a trust is still valid. See *Don King Products Inc v Warren* [2000] Ch 291; [1999] All ER 218 for an example of this.
1. **Subject matter sufficiently described**

A valid trust must have property which can be held by the trustee at the time the trust has come into existence and the trust property must be adequately ascertainable otherwise, as per *Mussoorie Bank Ltd v Raynor* (1882) 7 App Cas 321

 *‘the Court does not know upon what property to lay its hands’*

It is a critical facet that trust property is adequately described and if the trust property is too vague in nature then no trust will arise.

* ***A trust is formed by declaration*** - on behalf of a beneficiary “for the majority of my shares” then it may be held that the trust is invalid as the Court cannot ascertain the exact subject matter of the trust.
	+ This was consistent with the rulings in *Herdegen v Federal Commissioner for Taxation* (1998) 84 CLR 271 FCA where the Court ruled that it was unclear what shares were to be distributed.
* ***Entirely Consume Trust Property -*** If a party is provided with the power to entirely consume the trust property then there a difficultly arises as to whether this party is in fact a trustee.
	+ It is possible to conclude that when one party has the power to distribute the trust property absolutely then no trust will arise as the subject matter of the trust is sufficiently uncertain as was argued in *Sprange v Bernard* (1789) 2 Bro CC 585.
1. **Future Property (Refer Property assigned FOR VALUE)**

***Future Property can be assigned*** - If a settlor intends to assign future property to be held on trust then a trust can come into existence at that future date assuming that the future property is appropriately described in the trust declaration at the time of trust formation and the intention of the settlor is clear.

* ***Typically contractually based*** - Future property assignments are often arguably contractually based since one party is promises a future right to another and in *Normal v FCT* (1963) 109 CLR 9 HCA the High Court suggested that valuable consideration must attach to future rights otherwise those rights are unassignable.
* *Courts tend to favour proportion of a benefit -* The Courts have tended to favour future assignments whereby benefit is described as a proportion of a benefit as opposed to an individual monetary figure as per in *Shepherd v FCT* (1965) 113 CLR 385 HCA.
1. **Unseparated Part of a Whole**

Certainty of subject matter is often difficult from the perspective of a declaration of a trust where the assignable benefit is described as part of a larger whole.

Typically in these cases the maxim “equity regards that as done which out to be done” cannot be used if valuable consideration has not been give for the declaration.

* *Example –*
	+ If one party declares a trust over a parcel of 1000 shares as part of larger parcel of 20,000 shares *inter vivos*, an effective trust would form immediately as there is no uncertainty regarding the subject matter as per *Tunley v FCT* (1927) 39 CLR 528.

***Example***

The modern law position, from the case of *Hunter v Moss* [1994] 3 All ER 214 of the UK Court of Appeal, suggests that if each part of the property is indistinguishable from the rest then specific description is not necessarily fundamental.

This logic was applied in the case of *White v Shortall* [2006] NSWSC 1379

* where a declaration of trust was made over 220K of shares out of total of 1500K and the shares were not numbered and were identical to each other. The Court rejected the argument that the trust was unsuccessful – instead stating that 220K were held on trust and the rest were held on resulting trust.

**Certainty of Object**

**Certainty of object** – infers that the beneficiaries or objects of a trust must be able to be identified with sufficient certainty. It is critical that a trust not only have certainty of intention and subject matter, but that it also has an identifiable object or objects which are ascertainable as per the settlor’s instructions.

1. The degree of certainty required depends upon the type of the trust
	1. ***Fixed Interest Trust***– Requires that beneficiaries can be listed exactly in a defined list.
		1. ***List Certainty*** *-* The trustee will not be able to perform the obligation conferred onto them if they do not know who the beneficiaries are, or what they are entitled too.
	2. ***Discretionary Trust***– Court is able to determine whether not an individual is within a class of potential objects.
		1. ***Criterion Certainty*** *-* The court will be able to determine whether or not an individual is within the class of potential objects.

**Considerations**

1. Does the clause in question impose an obligation to distribute but give no discretion as to selection of the object? **If so, a fixed interest trust is intended.**
2. Does the clause in question impose an obligation to distribute, and also give a discretion as to selection of object? **If so, a discretionary trust is intended.**
3. Does the clause in question not impose an obligation to distribute at all, but give a power to appoint? **If so, a mere power of appointment is intended.**
4. Is the description of the class (general, special or hybrid) valid, given the kind of obligation or power intended?
5. Has the class been described with sufficient certainty? **(list or criterion)**

**Obligations**

**Fixed Interest**

1. *Fixed Interest* - The trustee is **obliged to carry out the trust** and is provided no discretion as to what the beneficiaries will actually receive. The identity of the beneficiaries is clearly known and can be ascertained and the share in which they take are known
	* 1. ***Obligations to perform ? - Must perform the instructions in the trust***
		2. ***Discretion to select objects? – No discretion at all, must have list certainty***

***Trust Power***

1. *Discretionary Trust* – The trustee is under an obligation to perform the trust, the trustee is also given a discretion to choose among the beneficiaries in accordance with the trust power from *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226.
	1. i.e. *I give my trustees the keys to my house to hold on trust for whomever of my three children they deem fit to have it.*
		1. The trustees are under an obligation to hold the house for the class
		2. The trustees have the power to select the members of the class as to whom to give the house too
		3. The trustees must ultimately give the house to the children
2. ***Obligations to perform ? - Must perform the instructions in the trust***
3. ***Discretion to select objects? – Yes, has discretion as to objects***
4. ***Gift over in default? Can’t be a Trust Power***

***Mere Powers of Appointment***

1. A discretionary trust couples an obligation to perform the trust with a power or discretion in regards to the performance of the trust.
	* 1. *Mere Power -* A mere power of appointment has no formal obligation to be carried out and the holder of a mere power of appointment *can act* in a particular way *but does not have* to act in a particular way.
		2. *i.e. I give my mother power over my house to appoint whichever of my three children she shall select, and in default over appointment, it is to be held for all three in equal shares.*
			1. My mother does not have to perform this obligation but she does have the power if she wants to use it.
			2. If it is used, she must appoint a member of the class – being one the three children.
2. ***Obligations to perform ? – No, obligations to perform the instructions***
3. ***Discretion to select objects? – Yes, has discretion as to objects***
4. ***Gift over in default? Can be a mere power***

**Determining obligations**

Typically, determining obligations is a construction of a provision in an attempt to determine the actual intention of the settler. In order to determine whether an obligation is imposed and there is a trust power, or whether no obligation is imposed and therefore is a mere power – the following must be taken into account

**Is a definitive obligation imposed?**

1. ***Capricious Language***– The language used by the settler or testator is critically relevant. Mandatory language suggests an obligation is being imposed, whereas permissive language indicates discretion.
	1. *‘Shall’ means ‘may’* – In *Re Gulbenkians Settlement Trusts* [1970] AC 580, the term ‘shall’ was interpreted to actually mean ‘may’**. Not impose an obligation.**
	2. *‘to pay the same’* – *Re Hays Settlement Case* – ‘any persons or persons or any charity as the trustee thought fit’ and this was interpreted as **trust obligation.**
	3. *‘relatives, old friends, dependants or persons with moral claims’* – *Schmidt v Rosewood* – Privy Council suggests that such words provide doubtful legal efficacy (effectiveness) and **NOT impose obligation.**
2. ***Contrast Language*** *-* It is permitted to contrast the language used in other provisions of the trust deed or will, to construe the meaning of a particular provision.
3. ***Gift over Default***– A gift over default of exercise of the discretion conclusively establishes that the provision is a mere power. The fact that the donor of the power expressly allowed for its non-use shows that no obligation to exercise the power was imposed.
	1. Absence of a gift over default does not expressly suggest that a trust power was intended.
4. ***Inclusion of a Mere Power***– The inclusion of a mere power in a document creating a trust does not automatically convert the mere power into a trust power at any time.

**Categorization of Power**

The degree of power related to the trust provision is classified relevant to the nature of the power and according to the type of the class described by the power. It is critically important to be able to classify the power given in a trust instrument.

**Classification by Class**

1. ***General Power*** – A general power is a power to **appoint any in the world** including the holder of the power. This type of power is treated **as the person having full ownership over the property.**
	1. *Example* – I give my house to John to appoint whomever he wants.
2. ***Special Power***– Is a power where the class of potential recipients is **stated by** inclusion.
	1. *Example* – I give my house to John to appoint to Mary, Sue and Bill as he selects.
3. ***Hybrid Power***– Is a power where the class is defined by exclusion.
	1. *Example* – I give my house to John to appoint anyone except Mary, Sue and Bill.

**Ramifications on Trust Powers and Mere Powers**

***Trust Powers***– Powers which are coupled with an obligation to exercise the power. The holder of a trust power is obliged to exercise it. **If has GIFT OVER, not trust power.**

If the power is a trust power:

1. **Must satisfy the criterion certainty test**
2. **Must not, perhaps, be capricious.**
3. **Must not authorize appoints to anyone in the world (Re Hays Settlement)**
4. **Must not authorize appointments to anyone in the world, with exceptions**
5. **Must not otherwise be administratively unworkable. (criteria certainty)**
6. **Courts will insist on trust obligations being performed**. In *Morice v Bishop of Durham* (1804) 9 Ves 399 – ‘there can be no trust over exercise of which this Court will not assume a control’
	* 1. *Fixed Interest –* For a Fixed Interest trust, the Court will insist that the trust is performed relevant to its terms.
		2. *Discretionary Trust –* The Court will insist that the trust discretion is exercised at the suit and with the benefit of one of the potential beneficiaries. Although a beneficiary cannot insist that discretion is exercised, the Court will ensure that it is as required.
7. **Proprietary interests of potential objects.**
	1. *Fixed Interest Trusts* – The beneficiaries have an equitable proprietary interest in the trust property and the trustee is obliged to perform the trust.
	2. *Discretionary Trust –* The potential objects of a discretionary trust have no individual vested interest and no proprietary rights in the trust property unless the trustee provides them one.
		1. However, it is suggested that until the trustee confers the benefit, all potential trust objects have a proprietary interest in the trust.
8. ***Is the Power Valid***– If the class is a special class since a trust power imposes an obligation on the trustee that the trust power is exercised and done so properly.
	1. This is not possible with a general or hybrid power.
		1. ***Anyone in the World*** *–* Simply too wide a class to allow the trust to be enforceable per *Re Carville* [1937] 4 All ER 464; *Re Hollole* [1945] VLR 295; *Re Hays Settlement Trust*
		2. ***Self Appointment*** *–* A trustee cannot appoint himself or herself as it would be contrary to any fiduciary obligations placed on the trustee. Self-appointment of a trustee would be in breach of the profits and conflicts rules per *Re Carville* [1937] 4 All ER 464.
		3. ***Hybrid Power*** *–* A trust power expressed as a hybrid power would also be invalid since the class ‘anyone in the world but Mary, Sue and Bill’ would still be too wide as to be enforceable.

***Mere Powers***–

No obligations and do not have to exercise the power. The holder of a mere power is not obliged to exercise it and unless they are also a fiduciary, they are not obliged to exercise the power.

**TESTS - If the power is a mere power:**

1. **Criteria and Certainty Tests** – *Galbenke Settlement case*
	1. DONT NEED IF GENERAL POWER “appoint to the world”
	2. The test is whether it can be said whether or not they can be a member of the class.
	3. do we really know what this means ? Is it quantifiable ?
		1. *Boranga v Flintoff case* – any basis to determine what is meant ? If cannot find what it means – then Court would rule that clause is uncertain and void.
2. **Must not, perhaps, be capricious**.
	1. is this capricious? Can only execute this in a way that is capricious. Could always advertise in the paper for more than 2 middle names asking to prove appointment – too many results?
3. **May be general, special or hybrid**.
4. **Administratively unworkable?**

ALSO –

1. ***No Court Intervention for Mere Power*** *–* The Court will not intervene to force the exercise of a mere power because it is not necessary that the power is exercised. A ‘power’ is an authority to act and it carries with the ability not to Act.
	1. *Mere Power and Fiduciary* – If the holder of a mere power is also a fiduciary, such as a trustee, the Court will insist that the fiduciary holder considers whether or not to exercise the power.
2. **The objects of a mere power have no proprietary interest in the property**. If the holder of a mere power does not exercise the power, ownership of the property depends on whether or not there is a *express gift over in default*.
	* 1. *If there is* – Then the taker has a vested interest in the property which the divested if the power of appointment is exercised.
		2. *If there is not* – In the absence of express words, the Courts are prepared to find an implied gift over in default and order equal distribution among the objects – *Queensland Trustees Ltd v Commissioner of Stamp Duties (Qld) (1952) 88 CLR 54.*
			1. *No Default Provision* – If there is no attainable default provision, the property would return on resulting trust to the settler or the testators estate – *Lutheran Church v Farmers Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628
3. ***Is the Power Valid***– When the class described in the power is *general* or *special*.
	1. *Hybrid Powers* – In *Re Hays Settlement Trust* [1981] 3 All ER 786, and in *Re Manistys Settlement* [1973] 2 All ER 103 – the English authorities contend that Hybird powers are valid powers.
		1. *Inte vivos –* Some states require that the powers are only valid inter vivos – however in Victoria, s48 of the *Wills Act 1997* provides that they are valid in wills.

**The Certainty Tests**

Once a Court has determined whether the clause in questions creates a

1. Fixed Interest; or
2. Discretionary; or
3. Mere Power.

It must apply the relevant test for certainty. Unless the class can be described with sufficient certainty – the clause will be held invalid and the trust will fail.

**Fixed interest trusts: list certainty**

In fixed interest trusts, the amount that each beneficiary is stipulated from the outset. This can be because the trust instrument itself has specific shares.

1. *I leave my shares in X Pty Ltd to my trustees on trust and appoint my son 50 percent and my daughter 50 percent*
2. *I leave my shares in X Pty Ltd to my trustees on trust for my three children in equal shares.*

In these examples, the shares in the trust are clearly specified – however, if it is said

1. *I leave my shares in X Pty Ltd to my trustees on trust for my three children.*

The settler has not specified the relevant proportionate breakdown, and the Court will assume that they are to be shared equally. However, what is common in each of these examples is that the objects are specified.

***List Certainty***

For a fixed trust, the trustee **must** be able to make a ‘list’ of names so that the trustee can effectively distribute the property to them.

1. *Cannot make a list? Trust will fail* - If such a list cannot be made, the trust will fail per *Kinsela v Caldwell* (1975) 132 CLR 458 & *Commissioner of State Revenue v Viewbank Proprieties Pty Ltd* (2004) 55 ATR 501.
2. *Time of distribution* – The list of beneficiaries must be compiled at the time of distribution, not at the time of creation – thus, unborn children can be beneficarie *Re Bowles; Amedroz v Bowles* [1902] 2 Ch 650

**Discretionary Trusts – Criterion Certainty- \*\*\****Re Gulbenkians Settlement Trusts*\*\*\*

The test for certainty of objects for discretionary trusts is ‘criterion certainty’.

1. ***Criterion Certainty***
2. ***Evidential Uncertainty***
3. ***Administrative Uncertainty***
4. *Criterion Certainty -* That is the court must be able to determine whether or not a person is within a class of objects described in the provision or not per *McPhail v Doulton* [1971] AC 424 and *Commissioner of State Revenue v View Bank Properties Pty Ltd* (2004) 55 ATR 501.
	1. *Semantic or Linguistic Uncertainty* – This is the type of uncertainty which exists if the trustee is not provided enough information to allow them to perform the trust. **If the provision is uncertain, the provision is void.**
		1. *Re Blyth* [1997] 2 Qd R 567 *–* Blyth included a trust to distribute assets to various organisations and ‘organisations formed for the purpose of raising the standard of life’ but didn’t not specify shares or proportions. Court held that this was sufficient uncertainty.
		2. For provisions to be held certain, the **trustee must be able to sufficiently identify the members of the class**
		3. Held Certain
			1. ‘relatives, dependants, employees, ex-employees’ – *per Re Baden’s Deed Trusts (No 2)* [1973] Ch 9

‘relative’ is interpreted to mean ‘blood relative’ - *Re Baden’s Deed Trusts (No 2)* [1973] Ch 9

* + 1. Held Uncertain
			1. *‘my old friends’* – *Whishaw v Stephens* [1970] AC 508
			2. *‘persons to whom a moral obligation is owed’* - *Re Baden’s Deed Trusts (No 2)* [1973] Ch 9
			3. *‘Persons who have rendered services meriting considering by the testator’* - *Tatham v Huxtable* (1950) 81 CLR 639
			4. *‘Deserving journalists’* - *Perpetual Trustee Co Ltd v John Fairfax & Sons Pty Ltd* (1959) 76 WN (NSW) 226
	1. *Evidential Uncertainty* – Provisions are not invalidated by reason of evidential uncertainty alone.
		1. *Not Invalidated* – A provision is not invalidated on the basis of evidential uncertainty alone, and it may not be necessary for the trustee to list all members of a class. It is sufficient that the trustee can determine whether or not a person is within the class.
			1. *Re Badens Deed Trusts (No 2)* [1973] Ch 9 – Trust was establish to give ex-employees or ‘any relatives or dependants of any such persons’ – such a clause did not render the trust void and it was sufficiently certain.
				1. *‘once the class of persons to be benefited is conceptually certain it then becomes a question of fact to be determined on evidence whether any postulant has on inquiry been proved to be within it’*
	2. *Administrative Uncertainty*
		1. *Sufficient Semantic certainty but too wide? -* Even if a conceptually certain class of beneficiaries is specified in the trust instrument, the trust is void if the **definition of the beneficiaries is so wide that it is *administratively unworkable* or simply that it cannot be executed OR enforced** per ***McPhail v Doulton*** [1971] AC 424.
			1. ***Can a beneficiary enforce the trust?* If no, then it’s not valid.**
			2. *‘Hopelessly wide’* – A discretionary trust for *‘all the residents of greater london’* would be void - as stated in *McPhail v Doulton* [1971] AC 424 – as the class of beneficiaries is ‘hopelessly wide’ and infers that there are simply too many members in the class.
				1. *R v District Auditor* [1986] RVR 24 & *Re Hay Settlement* – The trust was declared *‘administratively unworkable’* since there were 2.5 million residents in the class and it was ‘hopelessly wide’

**Charitable Trusts**

Trusts that have purposes as their object, rather than identifiable beneficiaries are void. If the trust is not for identifiable beneficiaries then there is no one who has standing to enforce the trust.

**\*\*\*It is a trust for persons or purposes?\*\*\***

1. promotion or advancement of social purposes rather than a trust for individual beneficiaries

**The Beneficiary Principle**

In *Morice v Bishop of Durham* (1804) 9 Ves 399 – the *‘beneficiary principle’* was first stated that

*‘every other (non-charitable) trust must have a definite object. There must be somebody, in whose favour the Court can decree performance’*

**A Charitable Trust will be valid if**

1. **its object is a valid charitable purpose; and**
2. **its for the public benefit.**

The general requirements for charitable trusts are from *Latimer v Inland Revenue (New Zealand)* [2004] 1 WLR 1466:

1. ***Promotion or Advancement of Social Purposes*** *-* It is of the essence of a charitable trust that it is a trust for the **promotion or advancement of social purposes rather than a trust for individual beneficiaries**
2. ***Individuals cannot be beneficiaries*** *-* Individual may benefit from the application of trust moneys, but they are not, as individuals, the beneficiaries of the trust and may not enforce its terms
3. ***Purpose must be Charitable*** *-* If the purposes of the trust are charitable, they may be enforced by the Attorney-General. If they are not charitable, then, with certain exceptions they are not enforceable and the trust is not valid
4. ***What is the Purpose of the Trust Monies?***– doesn’t depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not: what was the settlor intention in establishing the trust? But: what are the purpose for which the trust money may be applied

**Differences between private trusts and charitable trusts**

The differences include:

1. ***Beneficiaries enforcing the trust*** *-* Private trusts can be enforced by their beneficiaries. Charitable trusts have no identifiable beneficiaries to enforce the trust.
2. ***Certainty Tests***– In express trusts, the certainty tests apply. In charitable trusts, the test for validity is whether the trust is for a charitable purpose and for public benefit.
3. ***Trusts cannot be changed***– Unless the trust instrument directs, beneficiaries of private trusts cannot be changed. The doctrine of The doctrine of *cy-pres* allows the Court to vary charitable trusts.
4. ***Rule against perpetuities***– Private trusts cannot extend to perpetuity. Charitable Trusts are not subject to this rule.
5. ***Taxation*** – Private trusts and charitable trusts have different taxation implications.

**Requirements:**

*Purpose -* The charitable purpose must be for public benefit and this must be positively established. These are two distinct elements:

1. ***‘A Charitable Purpose’***
	1. The *Statute of Charitable Uses 1601* has been accepted as law in Australia in addition to the generals head unders *Income Tax Special Purposes Commissioenrs v Pemsel* [1891] AC 5531 –
		1. **The relief of Poverty**
		2. **The advancement of education;**
		3. **The advancement of religion; and**
		4. **Other purposes beneficial to the community**
2. ***‘A Section of the Public’***
* *Re Income Tax Acts (No 1)* [1930] VLR 211
	+ ***YES - Large groups of persons***– Typically called a ‘section of the public’ because of the size of the group
	+ ***NO - Very Small Groups of People***– Unlikely to be held as ‘section of the public’ per *Re Compton; Powell v Compton* [1945] Ch 123
	+ ***NO - Members of groups such a clubs etc***– Not a section of the public because their group is defined by memberships which place a bar on membership.
	+ ***NO - Personal relationships***– Not sections of a public, regardless if its relationship with charity as the scope is not sufficiently ‘public’ enough.
* *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297
	+ Lord Simonds described ‘section of a trust as’
		- The potential beneficiaries must not be numerically negligible
		- The point of distinction between the potential beneficiaries and the rest of the community must not be their relationship to a particular individual.
		- There must be a nexus between a group of potential beneficiaries and a section of the public. No nexus, no ‘section of the public’
1. ***The Relief of Poverty***

Trusts for the relief of poverty must typically support the

* Aged
* Disabled
* Unemployed
* Refugees
* Indigenous Australia
* Defence Force Families
* Child Care
* Natural Disaster Relief

*Re Segelman* (DECD) [1996] Ch 171

* Will established discretionary trust for ‘21 years for the poor and needy of the persons set out in the Second Schedule still living’. Second Schedule was members of the testators own family.
	+ It was a valid charitable trust for relief of poverty.
	+ *‘basis for disqualification as a charitable gift must be that the restricted nature of the class leads to the conclusion that the gift is really a gift to the individual members of the class ... not the case here’*

*Trust Aim must be Apparent*

The aim of reliving poverty need not be spelled out in the trust instrument but must be clearly apparent.

* *‘for amelioration of the conditions the dependants’* – Was held to be sufficient language to state the intention of the trust per *Downing v Federal Commissioner of Taxation* (1971) 125 CLR 185
1. ***Trusts for the advancement of education***

The purposes must be for advancing learning and the dissemination of knowledge. The dissemination of the knowledge is important knowledge for its own sake is not enough. This includes

* Formal and informal education
* Scholarships and prizes
* Educational facilities
* Drama
* Fine Arts
* Moneys for Research

*Not Charitable*

In *Re Pinion* [1965] Ch 85 – a painter left his studio and contents to the National Trust to be kept as a museum but the contents were worthless. The Court held it was not a charitable stated that

 *‘no member of the public will ever extract one iota of education from the disposition’*

*‘A section of the public’*

Education trusts must be for the public or a section of the public. In *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 – a trust for the children of employees and former employees of British-American Tobacco was held to be invalid as it was not for a section of the public.

1. ***Trusts for the advancement of religion***

The object of the trust must concern a ‘religion’.

*The Church of the New Faith v The Comissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 210, the High Court adopted an expansive view of the concept of religion, albeit in a taxation context.

*Definition of Religion*

The High Court in, *The Church of the New Faith v The Comissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 210 at 173-5, defined religion such that it must satisfy

1. *The collection of ideas and practices involve beliefs in the supernatural*
2. *The ideas related to mans nature and place in the universe and his relation to things supernatural*
3. *The ideas are accepted by adherents as requiring or encouraging them to observe particular standards of conduct or to participate in specific practices having supernatural significant*
4. *The adherents constitute an identify group or groups*
5. *The adherents see the collection of ideas/practices as constituting a religion.*

*‘Advancement of Religion’*

For a trust to be a charitable trust, it must be for the advancement of religion otherwise it will fail. The is demonstrated in *The Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1:

* Testator purported to establish a trust to ‘found a Catholic daily newspaper’ – the trust was ruled not be for the ‘advancement of religion’

*‘The charitable purpose has to be directly and immediately religious, involving the spreading or strength of spiritual teaching’*

This was upheld in *McCracken v Attorney-General for Victoria* [1995] 1 VR 67 where the Court stated

* *‘the trust must be for the advancement of religion, rather than the religious institutions that advance the religion’*

*‘Public Benefit’*

The public benefit element of trusts for the advance of religion is usually taken to be a positive influence on human conduct per *The Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1.

Trusts for groups linked by religion are taken to be for a ‘section of the public’ per *Re Income Tax Acts* (No 1) [1930] VLR 211.

1. ***Trusts for the advancement of other purposes beneficial to the public***

Types of trusts valid under this arm include

* Trusts for public works such as bridges and libraries
* Disaster relief
* Animal welfare

In *Incorporated Council of Law Reporting of the State of Queensland v Federal Commissioner of Taxation (1971) 125 CLR 659 HCA* – the Court stated that the Trust was for the production of law reports

*‘the law could not be administered properly without the availability of reported decisions. The sound administration of justice is therefore a valid purpose under the fourth charitable head’*

**Not a Charitable Purpose**

***Trusts for Political Purposes***

In *McGovern v Attorney-General* [1981] 3 All ER 493 – the High Court (UK) stated

*Trusts for political purposes which are not charitable purposes are trusts of which a direct and principal purpose is either:*

* *To further the interests of a particular political party; or*
* *To procure changes in the law of this country; or*
* *To procure changes in the law of a foreign country; or*
* *To procure a reversal of government policy or of particular decisions of governmental authorities in this country; or*
* *To procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country.*

Political trusts are not valid because there is a lack of public benefit. In *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396 at 426 – Dixon J stated

*‘when the main purpose of the trust is agitation for legislative or political changes, it is difficult for the law to find the necessary tendency to the public welfare, notwithstanding that the subject of the change may be religion, poor relief or education’*

In *Bowman v Secular Society Ltd* [1917] AC 406 at 442 it was stated that

*‘the court has no means of judging whether a proposed change in the law will or will not be for the public benefit and therefore cannot say that a gift to secure the change is a charitable gift’*

*Political Parties*

In *Bonar Law Memorial Trust v Inland Revenue Commissioners* (1933) 49 TLR 220 it was stated that

 ‘*purported trusts for political parties are usually invalid’*

***Trusts for Sporting and Recreation Purposes***

Trusts that are only for the purpose of sport or recreation are traditionally not to be for valid charitable purposes.

*Valid Sporting Trusts*

In *Kearins v Kearins* (1956) 57 (NSW) 286 – it was held that a testatrix providing a benefit to a Uniserty Rugby team was a charitable gift since the participation in sporting activities of the uniserity was an important element in students development.

*Invalid Sporting Trusts*

In *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, it was held that a trust for improving the breeding and racing of homing pigeons was not within the spirit and intendment of the Statute of Elizabeth.

**Mixed Charitable Purposes**

Trusts for mixed charitable and non-charitable purposes are invalid. Inclusion of a non-charitable purpose invalidates the entire trust pero *McGovern v Attorney-General* [1981] 3 All ER 493.

*Charities Act s1978 (Vic) s7M*

*(1) A trust is not to be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which that trust directs or allows the trust funds or any part of the trust funds to be applied.*

*(2) A trust referred to in subsection (1) is to be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part of the trust funds to or for the non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.*

*Attorney-General (NSW) v Henry George Foundation Ltd* [2002] NSWSC 1128

1. Trust was established *‘for the purposes of promulgating and spreading knowledge of the teachings and economic principles elaborated by Henry George’* – some of which were to change the current taxation system
	1. Court Held –
		1. The trust was one in which the dominant purpose is education, although the ultimate purpose of the education may only be fully realised by legislation. Therefore, there is a valid charitable trust.
		2. *Could have severed the trust -* Had the trust not been for a charitable purpose, it would have been possible to sever the political aspects of the trust, leaving in force the educational aspects.

**Schemes and Charitable Purposes**

***Doctrine of Cy-Pres***

If the charitable purpose has failed in totality, a *cy-pres* – ‘as near as possible’ - scheme can be appropriate.

* If the purpose has not failed in it’s totally, but insufficient instructions have been given as to carrying out the purpose, the Court might need to order an administrative scheme.
	+ In *Re Slatters Will Trust* [1964] Ch 512 – the residual of an estate was left to a tuberculosis hospital which, prior to the textatrix death, had closed due to a lack of demand for a dedicated facility.

*Charitable trusts can continue to perpetuity – so requirements can change over time*

In *Re Anzac Cottages Trust* [2000] QSC 175 – a trust established in 1918 became impractical after the war as the trust sought to protect Anzac cottages but these became part of the National Trust as a historical building.

*Statute – Charities Act 1978 (Vic) Part 1*

Allows for a *cy-pres* scheme to overcome these difficulties, if at all possible, so that the charitable trust can either take effect or continue. The general policy is to replace the original charitable purpose with one that is broadly similar in nature.

Before a court can order a *cy-pres* scheme – it must

1. It must be able to find a reason why the trust will fail in totality
2. It must be able to find that the settlor had a general charitable intention.
	1. The focus must be on the general nature of the settlors or testators charitable intention, rather than on its charitable aspects – *Public Trustee v Attorney-General (NSW)* (1997) 42 NSWLR 600.

*Re Lysaght* [1966] Ch 191 – a testator left money for a scholarship to the Royal College of Surgeons as trustees must stipulated the scholarships could not go to Jewish or Catholic applicants. College rejected the gift due to the exclusion but would accept without exclusion.

* Court held that a *cy-pres* scheme be order otherwise the intention of the testator would not be fulfilled and the trust would fail.
	+ Paramount intention was to provide a scholarship, thus a general charitable intention was able to be found.

*Practical Considerations*

The Court will take into account the practical considers of the settlor or testator when considering a scheme of *cy-pres.*

In *Attorney General NSW v Fred Fulham* [2002] NSWSC 629 – the original trust had been for a soldiers memorial hall, the Court took into account the views of the war veterans association and considered a *cy-pres* scheme in this regard for ‘war veterans generally’.

***Administrative Scheme***

An administrative scheme may be called for where the settlor or testator has not sufficiently specified the means of administering the charitable gift.

* *Purpose -* An administrative scheme ‘fills in the gaps’ so that the charitable purpose can be achieved.
* In *Re Simpson* [1961] QWN 50, the residue of an estate was left to three named institutions for ‘cancer research’. The gift was in favour of cancer research and was therefore for charitable purposes.

**Trustee Powers**

**Appointment, removal etc of trustees – refer “variation of trusts”**

**Trustees Powers**

Trustees powers are sourced in

1. The trust instrument, if any;
2. Statute; and
3. Order of the court if any.

A Court can enforced the performance of a trust obligation, but will not enforce the exercise of a discretion that is given to a trustee.

*Re Hays Settlement Trust* [1982] 1 WLR 202 –

Settlor gave a power of appointment to her trustees for such ‘persons or purposes’ as the trustees in their discretion should appoint, with a gift over in default to her nieces and nephews if the power was not exercised within 21 years. Trustees exercised the power 11 years later and appointed themselves as trustees of a new trust.

Court stated that this was improper exercise of the power. The original power had been to appoint the fund for ‘persons or purposes’.

* 1. ***The Power in the Settlement is a power to appoint to persons and not to nominate those who will select person who benefit.***

A Trustee must consider -

* **Whether or not to exercise the power;**
* **The range of objects of the power; and**
* **The appropriateness of individual appointments.**
	+ A trustee who does not turn his or her mind to the exercise of the power will have failed in that duty per *Turnver v Turner* [1984] Ch 100 – where trustees were selected without knowledge of their duties and they made 3 appointments which were ruled in valid.

**\*\*\*The trustees powers must be exercised in -\*\*\***

* **Good faith;**
* **For the purpose for which they were given; and**
* **Not for an ulterior purpose.**

***Court’s jurisdiction as to examine exercise of discretion***

The Courts inherent jurisdiction examines the trustees exercise of discretion is limited to cases in which

1. **The trustees have given reasons for the exercise; or**
2. **Where the beneficiary can assert an exercise of discretion in bad faith or for an improper purpose; or**
3. **Where the beneficiary can attack the exercise as not having been a real and genuine consideration of the exercise.**

*Karger v Paul* [1984] VR 161 –

* The exercise of discretion will not be examined by the Court if the discretion is exercised in good faith upon real and genuine consideration and in accordance with the purpose for which the discretion was conferred
* *The Court will only look to*
	+ *evidence of the inquiries made by the trustees,*
	+ *the information they had, and*
	+ *the reason for, and manner of, exercising their discretion ensuring that these three essential components are present’*

*Meat Industry Superannuation Fund Pty Ltd v Pertrucelli* [1992] MC 148 –

The limits of the Courts review function are:

1. ***Relate to Discretion being exercised*** *-* Whether the reasons relate to or are relevant to the discretion being exercised.
2. ***Arrived at in Good Faith*** *-* Whether the reasons were arrived at in good faith and without ulterior purpose
3. ***Reasons support conclusion*** *-* Whether the reasons reasonably support the conclusion
4. ***Information available to the Trustee*** *-* It is open to the Court to look at evidence of the inquires made by trustees and the information they had and the manner of the exercise of their discretion, but only so far as to assess the viability of the exercise, not to impugn or replace it.
5. ***Cannot examine reasons for exercising discretion*** *-* It is not open to the Court to examine the reasons for the purpose of exercising its own discretion. It is not open to the Court to examine the factual situation for the purposes of substituting its own discretion for that of the trustee because the Court might consider the trustee unwise or imprudent.
6. ***Can only review the exercised discretion*** *-* The reviewable discretions that which was exercised the trustees at the time.

**Trustees Duties**

The trustees duties are found in the

1. **The trust deed, if any;**
2. **Equity; and**
	1. *A trustee is a fiduciary and there is subject to the ‘conflicts’ and ‘profits’ rules – Chan v Zacharia (1984) 154 CLR 178*
3. **Statute.**

The most important duties can be subdivided into the following groups

* **Duties relating to the trust and trust property; and**
* **Duties relating to the nature of the office of the trustee.**

These duties are designed to ensure that the trustee performs the trust properly and loyally, and that the property passes to the person who is entitled to it.

1. **Duties relating to the trust and trust property**
2. **Duty to seek advice**
3. **Duty to get in the assets**
4. **Duty to keep and render accounts**
5. **Duty to Transfer Trust Property to those entitled to it**
6. **Duties relating to the office of trustee**
	1. ***Duty of Care***
	2. ***Fiduciary Obligations***
7. **Duty to act gratuitously**
8. **Duty to act personally – *‘cant delegate powers’***
9. **Self-dealing Rule - *‘trustee cannot purchase trust property’***
10. **Duty to act impartially between beneficiaries**
11. **Preservation of other duties**
	1. ***Best Interests of present and future beneficiaries – ‘no moral duty’***
	2. ***Duty to act impartially towards beneficiaries and between different classes of beneficiaries***
12. **Duty to Invest Trust Funds**

**Duties relating to the trust and trust property**

The primary duty of a trustee is to adhere to the terms of the trust. A trustee who fails to adhere to the terms of the trust will be in breach.

1. The trustee must abide by the terms of the trust instrument as well as the responsibilities imposed on the trustee by statute.
2. *Pikos Holdings (NT) Pty Ltd v Territory Homes Pty Ltd* [1997] NTSC 30 –
	1. *‘It is a trustees duty to adhere rigidly to the terms of the trust deed under which it was appointed, and that duty modifies all other duties. A trustee departs from the provisions of the trust deed at its peril of afterwards having to satisfy the court that its departure was necessary or beneficial’*
3. Statute
	1. *Trustees Act 1958 (Vic) s4 – 12F* provides statutory authority that a trustees duty is of loyalty to adhere to and carryout the terms of the trust as set out in the trust instrument or otherwise authorised by the Court.

**Duty to seek advice**

A trustee has a duty to seek advice on matters outside the trustees expertise, such as the making of investments – *if the advice is needed*. i.e. a trustee who is a stockbroker might not need advice on stockbroking etc.

*Trustee Act 1958 (Vic)* – s 7(2)(d), s 7(4)

S8(2) – Allows trustees to take investment advice but does not direct it.

**Duty to get in the assets**

All trusts have some subject matter as there can be no trust unless there is trust property.

1. ***Getting in the trust assets* - A trustees first duty concerning the trust property is to take control of it**
	1. Failure to do this is a breach of trust & if there is a loss the trustee is liable to reconstitute the trust estate.

*Caffrey v Darby* (1801) 6 Ves 488

1. *Caffrey* lessed a hotel and left it to his widow and their children. The widow settled the property on trust to herself, and then her children for $800 and then remarried. New husband leased hotel at $100 per year but became bankrupt and children sued for the $800.
	1. Court held they were entitled to monies from trustees as they should have repossessed the building when the payments stopped.
2. ***Responsibility***– The responsibility for getting in the assets includes taking control of any documents that are the property of the trust. This extends to a duty to retain possession of title deeds to the trust property per *Platzer v CBA* [1997] 1 QD R 266.

**Duty to keep and render accounts**

Creation of a trust is a substantial investment of faith.

1. ***Duty to Keep Proper Accounts*** – Duty to keep proper accounts at all times and be ready to render them to the beneficiaries whenever they call for them per *Re Craig* (1952) SR (NSW) 265.
	1. *Owed to all Beneficiaries* – This duty is owed to all beneficiaries, regardless of their status. Including
		1. Beneficiaries with limited interests
		2. Life Tenants
		3. Beneficiaries with Remainder Interests
		4. Objects of a discretionary trust
	2. *Beneficaries who are Sui Juris – ‘able to manage ones own affairs’* – the trustee is obliged to information a beneficiary who is *sui juris* of his or her interest in the trust per *Hawkesley v May* [1956] 1 QB 304.
2. ***Benefit of Third Parties*** *-* A settlor may transfer title in property to a trustee for the benefit of third parties – as far as the common law is concerned the trustee is the legal owner of those assets and can deal with them at will.

**Duty to Transfer Trust Property to those entitled to it**

The trustee has a number of duties to the trust property and those entitled to it. The primary two are

1. ***Benefit of the Settlor or Testator*** *-* The trustee holds the property for the benefit of another and must account for it to that person
	* *Re Diplock* [1948]1 Ch 465 – trustees distributed Caleb Diplocks estate and the beneficiaries successfully challenged the trust distribution.
		+ Trustees were personally liable for all distributions made from the trust.
2. ***Must Transfer to those entitled*** *-* The trustee must transfer the trust property to those who are entitled to it and only to those entitled to it.
	* *Must distribute to those entitled -* The trustee must distribute the capital and income to the beneficiary entitled to it without demand. It is a breach of trust to fail to make the payment per *Hawkesley v May* [1956] 1 QB 304.
3. ***Trustee Act 1958 (Vic) s32*** *-* This is statutory duty and is absolute.

**Duties relating to the office of trustee**

1. ***Duty of Care***

**The trustee must act with an appropriate level of care in relation to the trust otherwise they will be in breach.**

1. This obligation has both equitable and tortious obligations.
2. ***Standard of Care of a reasonable trustee* –**
	1. **The standard of care is not that of a reasonable person but rather of a ‘standard of a reasonable person acting as a trustee’.**
		1. *Speight v Gaunt* (1883) 22 Ch D 727 –
			1. *‘ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee’*
		2. **This indicates a higher standard of care is owed.**
			1. *Standard of Care of a Person Investing -* When the trustee is investing, the standard of care is that prescribed by statute as being appropriate for that trustee; and
			2. *Standard of a Reasonable Business Person* - In relation to the management of the trust not concerning the investment of the trust fund, the trustee must take the care an ordinary prudent business person would take in managing his or her affairs.
		3. ***Negligent Breach*** *-* A breach of the standard of care is not a fiduciary breach, but rather a negligent breach.
3. ***Fiduciary Obligations***

The most important obligation a trustee has is their fiduciary obligation.

1. ***Fiduciary Relationship*** *-* The trustee-beneficiary relationship means that the trustee is subject to the profits and conflicts rule.
	1. ***Profits Rule*** *–* The profits rule forbids the trustee making an undisclosed profit from the trustees position.
		1. *Benefits gained from the trust -* Trustee must account to the trust for any benefit gained in breach of the profits rule.
			1. *Tasmanian Seafoods Pty Ltd v Kossman* [2005] TASSSC 5
				1. Both parties held abalone licences together, the defendant was trustee of the licences for both parties and then subsequently went out on his own in breach of trust agreement

Court ruled that the defendant held licences on trust for plaintiff and had to account for profits.

* 1. ***Conflicts Rule*** *–* Conflicts rule forbids the trustee allowing a conflict of duty and interest or duty and duty to continue.
		1. *Breaches of Conflict* – Breaches of the conflicts rule that result in loss to the trust expose the trustee to a claim for equitable compensation per *Target Holdings Ltd v Referns* [1996] 1 AC 421.
			1. *Boardman v Phipps* [1967] 2 AC 46 –
				1. A solicitor and others acted for the trustees of a deceased estate and inappropriately purchased shares on behalf of the trustees which raised a profit.
				2. The plaintiffs were the trustees and claimed they had been inadequately informed and wanted an account for profits.
				3. The Court ruled in favour of the plaintiffs and found that while the defendants acted honestly they were in a fiduciary position and did not adequately disclose the nature of the transaction.
			2. *In the Will of Margaret MacPherson* [1963] NSWR 268 –
				1. Trustee mixed his personal funds with trust funds in order to secure a higher rate of interest.

Court stated while this may have benefited the trust – Trustee was still in breach by mixing personal interests with trust interests.

**Duty to act gratuitously**

**The fiduciary, if they act, must act wholly for the benefit of the other person, and not for their own benefit otherwise they will be in breach.**

* ***Precludes any benefits*** *-* This precludes the trustee taking any benefit, unless that benefit is authorised by the trust instrument.
* ***Court can awarded remuneration* -**
	+ *Re Moore* [1956] VLR 132 – A trustee devoted all his time to a trust. It made a profit of over $170K. He wanted remuneration.
		- Court awarded remuneration but less than sought by the trustee.
* ***Trustee Act 1958 (Vic) s77***– Allows trustees to request remuneration for managing a trust.

**Duty to act personally – *‘cant delegate powers’***

**A trustee is required to act personally and is not able to delegate its powers and discretions without express authority, except in cases of necessity per *Trustees Act 1958 (Vic)* – s 30**

* ***Trustee must make all decisions*** – A trustee must make all decisions regarding the trust and must exercise any discretions given to them personally.
	+ ***Implementations may be delegated***– The implementation of those decisions and exercise of discretions can be trusted to agents.
		- *Statutory Delegate Authority* – A trustee can delegate authority to appointed agents to implement the trustees decisions per *Trustees Act 1958 (Vic)* – s 28
		- *Trustee must take care to supervise* – The trustee must take care to only select suitable persons as agents and to supervise the proper performance of their functions as far as possible per *Dalrymple v Melville* (1932) 32 SR (NSW)

**Self-dealing Rule - *‘trustee cannot purchase trust property’***

**The self-dealing rule forbids a trustee to purchase trust property otherwise they are in breach of trust.**

* ***Legal Owner***– This is self-dealing as the trustee is the legal owner of the property and the trustee is effectively selling themselves.
* ***Risk of Misuse***– The risk of the trustee using information concerning the property for personal advantage or being swayed by self-interest is too great.
	+ *Sale made in breach of the self-dealing rule* - is liable to be rescinded at the suit of a beneficiary even though the trustee has paid market value for the property & beneficiaries can insist on an account of profits – *Clay v Clay* (2001) 202 CLR 410
* ***Trustee cannot borrow or sell from/to the Trust***– The self-dealing rule also applies to prevent the trustee borrowing money from the trust, and to prevent the trustee selling property to the trust.
	+ *Tanti v Carlson* [1948] VLR 401 –
		- *‘The absolute bar against a trustee purchasing trust property is based on the fiduciary duty not to permit a conflict. It is so strict a rule that the question of fairness of the transaction is not allowed to be raised. Such a transaction is voidable at the instance of a beneficiary.’*
	+ *Defence* – If the trustee can establish that they were not acting as a trustee then they sold or borrowed then this is ok

***Fair Dealing Rule***

**The fair-dealing rule is concerned with the trustees purchase of the beneficial interest of the beneficiary, rather than the trust property itself otherwise they will be in breach.**

* ***Difference between fair-dealing and self-dealing* –**
	+ ***Beneficiaries interest can be sold*** *-* The sale of the beneficiaries interest can be set aside if the trustee cannot show he dealt fairly with the beneficiary, but it is not automatically voidable. The beneficiaries interest can be sold as long as the trustee deals fairly with them.
	+ ***Set aside sale of beneficiaries interest***– The sale of the beneficiary’s interest can be set aside if the trustee cannot show that he dealt fairly with the beneficiary, but it is not automatically voidable.
		- *Tito v Waddell (No 2)* [1977] Ch 106 – trustee deals fairly with the beneficiary when the following conditions are met:
			* The trustee must have taken no advantage of the trustees position
			* Full disclosure must have been made to the beneficiary
			* The transaction must have been fair and honest

**Duty to act impartially between beneficiaries**

**A trustee must act impartially between individual beneficiaries and fairly as between groups of beneficiaries otherwise they will be in breach.**

* ***Duty to the Trust, not beneficiaries*** – The trustee has a duty to the trust first and foremost and then a duty to the beneficiaries per *Trustee Act 1958 (Vic)* s7(2)(c)
	+ *Total Beneficiary Benefit, not singular -* It may be impossible to act in a way that is advantageous to each individual beneficiary, but the duty of impartiality will be performed if the trustee acts in the interests of all beneficiaries.
* ***Different Classes of Beneficiaries*** *–*
	+ *All beneficiaries benefited equally* – A trustee must ensure that they exercise their trust powers in a way that is beneficial to all beneficiaries and not one particular class of beneficiaries.
		- *Re Mulligan* [1998] 1 NZLR 481 –
			* Trust was worth $108K in 1965, life tenant wanted trust funds invested in income-producing assets. Trustees didn’t do this and remainderman sued. In 1995, was only worth $102K.
				+ Trustees were in breach – needed to balance all interests of life tenant and remainderman – Trustees only listened to life tenant.
	+ *Tanti v Carlson* [1948] VLR 401
		- Testators daughter was married to the trustee and was permitted by the trustees to purchase a house from the estate at a bargain price. Other beneficiaries had offered the same price but were rejected.
		- Court ruled that the purchase was void and that
			* *‘the trustee is under a duty to act fairly in respect of these different classes and cannot prefer one group over another’*

**Preservation of other duties**

*Trustee Act 1958 (Vic) s 7* – requires that rules and principles of law or equity that impose duties upon trustees exercising the power of investment continue to apply, except to the extent that they are inconsistent with the Act or are overridden by the trust instrument.

***Best Interests of present and future beneficiaries – ‘no moral duty’***

The term ‘best interests’ in the context of investment means ‘the best financial interests’ of the beneficiaries per *Buttle v Saunders* [1950] 2 All ER 93

* *Buttle v Saunders –* Trustees were selling a freehold to Mrs Simpson, and then another bidder made a higher bid. The trustees felt obliged to contract with Mrs Simpson.
	+ Court stated that *‘the trustees overriding duty to obtain the best price they could for their beneficiaries’* and they owed no moral duty.
* *Cowan v Scargill* [1984] 2 All ER 750
	+ *‘The paramount duty of trustees under a trust to provide financial benefits was to provide the greatest financial benefits for the present and future beneficiaries’*
		- The Court was concerned with a trust for individual beneficiaries. Charitable trusts different from trusts for persons in that they are for particular charitable

*No Personal views or Preferences* –

* Trustees must not be swayed by their personal views and preferences if investments contrary to their own views return greater rewards for the trust.

***Duty to act impartially towards beneficiaries and between different classes of beneficiaries***

* Where there is more than one beneficiary of a trust, the trust cannot show partiality to one of them at the expense of another.
	+ *Tanti v Carlson* [1948] VLR 401
		- Testators daughter was married to the trustee and was permitted by the trustees to purchase a house from the estate at a bargain price. Other beneficiaries had offered the same price but were rejected.
		- Court ruled that the purchase was void and that
			* *‘the trustee is under a duty to act fairly in respect of these different classes and cannot prefer one group over another’*

**Duty to Invest Trust Funds**

**Trustees are under a duty to invest trust property – the trustee is expected to effectively manage the property on behalf of the beneficiary otherwise they may be in breach.**

1. *Trustee Act 1958 (Vic) s 5 –*
	1. Allows a trustee to investment trust funds in any form of investment and at any time.

***Investment***

The word investment is not defined in the legislation or in the general interpretative statutes such as the *Interpretation of Legislation Act 1984 (Vic).*

Investment has been accepted to mean ‘modern portfolio theory’ and this allows a range of investments to be adequately balanced in a portfolio.

***Standard of Care when Investing***

The standard of prudence required of a trustee investing trust funds is

* ***Reasonably Prudent Business Man*** *-* That of a reasonably prudent business man investing for those whom he felt morally obliged to provide – *Barlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515.
* ***Professional Trustees have a higher standard*** – In *Bartlett v Barlcays Bank Trust Co Ltd (No 1)* [1980] Ch 515, it was stated that professional trustees have a higher standard of care than ‘amateur’ trustees.

*Trustee Act 1958 (Vic) s 6 –*

* States that a trustee must, under 6(a) and 6(b)
	1. *‘if the trustees profession, business or employment is or includes act as a trustee or investing money on behalf of other persons, exercise the case, diligence and skill that a prudent person engaged in that professional, business or employment would exercise in managing the affairs of other persons’*
	2. *‘if the trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons’*

Some important points exist under statute:

* ***Standard of Care can be Altered****-* Under statute, the standard of care expected of the trustee can be altered from the statutory default position by the trust instrument.
* ***Standard lower 6(b) for non-professionals*** *-* The standard for non-professional trustee appears to be lower than was the case at common law.
* ***Statute doesn’t consider professional and non-professional trustees***– The statute doesn’t really consider this instance and in *Re Mulligan* [1998] 1 NZLR 481, it seemed that a different standard was applied to each which was inconsistent with other trust duties.

***Modern Portfolio Theory***

*List & ‘Line-by-Line’ Investments* – Guaranteed a portfolio that was prudent and risk-averse, but they also resulted in a portfolio that might not keep pace with inflation and so real value was eroded per *Nestle v National Westminster Bank* [1994] 1 All ER 118.

*Modern Portfolio Theory* –

1. *Aim ­*– The aim of modern portfolio theory is to maximise growth while minimising risk through a diversification of investments.
	1. Investments should be spread between –
		1. *A range of investments* - Land, shares, bonds and cash; and
		2. *A range of risk profiles* – higher and lower risks must be balanced.
2. *Trustee Act 1958 (Vic)* –
	1. *S7(2) –* Duty not to invest in speculative investments.
	2. *s 8(1)* – Viewed in its entirety seems to encourage modern portfolio theory, however s7(2)(b) – *reviewing individual investments annually -* seems to favour line by line. Implies that as long as trustee keeps portfolio balanced – can used either.
	3. *s 12C* – Regular review and formulation of investment strategy encourage modern portfolio theory
	4. *s 12D* – The extended set-off jurisdiction also supports portfolio theory.

***Review of Investments***

*Trustee Act 1958 (Vic) s 6(3)* – There is a positive duty to make regular reviews of investments as imposed by Statute. This can be altered by the trust declaration.

* *‘a trustee must, at least once in each year, review the performance of trust investments’*

*S8(1)(m)* – Requires a trustee, when investing, to take into account the results of a review of existing trust investments.

**Matters to which a trustee must have regard when investing**

***Trustee Act 1958 (Vic) s8(1)* does not permit avoidance by the trust instrument and the s8(1) provides the minimum checklist of matters a trust must have regard to when investing.**

1. *S8(1)(a) -* Primarily the most important is (a) since it is the purpose of the trust and the needs and circumstances of the beneficiaries.
	1. Also important and common to all trusts – (a), (b) and (c).

*(1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee must, so far as they are appropriate to the circumstances of the trust, have regard to-*

 *(a) the purposes of the trust and the needs and circumstances of the beneficiaries; and*

 *(b) the desirability of diversifying trust investments; and*

 *(c) the nature of and risk associated with existing trust investments and other trust property; and*

 *(d) the need to maintain the real value of the capital or income of the trust; and*

 *(e) the risk of capital or income loss or depreciation; and*

 *(f) the potential for capital appreciation; and*

 *(g) the likely income return and the timing of income return; and*

 *(h) the length of the term of the proposed investment; and*

 *(i) the probable duration of the trust; and*

 *(j) the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment; and*

 *(k) the aggregate value of the trust estate; and*

 *(l) the effect of the proposed investment in relation to the tax liability of the trust; and*

 *(m) the likelihood of inflation affecting the value of the proposed investment or other trust property; and*

 *(n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment; and*

 *(o) the results of a review of existing trust investments.*

**Defences to Breach of the Power of Investment**

***Breach of Trustees Power of Investment***

***Trustee Act 1958 (Vic)* s 12C – The section raises a number of issues regarding defences and relief provisions with regard to investments**

1. ***Wide Discretion***– The section confers a wide discretionary power upon the Court when considering the factors in the section and in its consideration of ‘liability’.
2. ***Court can relieve total liability*** – The Court is able to relieve a trustee from total liability and therefore it is assumed can relieve in part.
3. ***Investment Plan per s 12C (c)***– Allows the Court to consider whether the trustee has formulated an investment plan ‘in accordance with the duty of a trustee under this Part’.
	1. *No positive duty -* No other provision refers to an investment plan – therefore the trustee is not under a positive duty to formulate one.
	2. *Prudent to have one* – s8 of the *Trustee Act 1958 (Vic)* lists a wide range of consideration and it seems s12C provides additional protection to having an investment plan – so it should be considered.

*Trustee Act 1958 (Vic)* s 12C –

*In proceedings against a trustee for breach of trust in respect of a duty under this Part relating to the trustee's power of investment, the Court may, when considering the question of the trustee's liability, take into account-*

 *(a) the nature and purpose of the trust; and*

 *(b) whether the trustee had regard to the matters set out in section 8 so far as is appropriate to the circumstances of the trust; and*

 *(c) whether the trust investments have been made pursuant to an investment strategy formulated in accordance with the duty of a trustee under this Part; and*

 *(d) the extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice.*

***Sett-off***

**S12D of the *Trustees Act 1958 (Vic)* provides statutory set-off powers to the Court to set-off investments.**

1. *All or part* – All or part of the loss can be set off against all or part of a gain.
2. *Right to set-off ­*– Right to seek set-off is limited to gains made by investments. This supports the argument that the trustee is permitted to apply modern portfolio theory to trusts investments.

*Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515 –

*‘The general rule is that where a trustee is liable in respect of distinct breaches of trust, one which results in a loss and the other a gain, he is not allowed to stet of the gain against the loss unless they are in the same transaction’*

**Specific Investment Powers**

***Purchasing a dwelling for a beneficiary***

*Trustee Act 1958 (Vic) s11* –

The trustee has power to purchase a dwelling for a beneficiary.

* ‘Beneficiary’ is not defined in the Act so it appears that any beneficiary with a vested interest (as opposed to a mere object of a discretionary power) could be favoured by the trustees provision of a dwelling house.

**Trustees Rights and Liabilities**

**The trustee is the one who has a legal interest and is responsible for expenses to be paid. Thus, the trustee must ensure prudent operation of the trust otherwise they can be personally liable.**

**Personal Liability**

1. ***Contractual Obligations***– The trustee and the other contracting party can agree that the trustee will haven o personal liability for payment and that recourse can only be had to trust assets.
	1. ***Clear Intent***– Such an operation must be expressed in the document and state a clear intent for this limitation to apply.
		1. *Sign ‘as Trustee’* – Insufficient wording to exclude liability since the wording is merely descriptive of the contracting capacity and does not limit liability – *Muir v City of Glasgow Bank* (1879) 4 App Cas 337.
		2. Sign *‘as Trustee Only’* – It is sufficient to sign as ‘as trustee only’ per *Gordon v Campbell* (1842) 1 Bells App 428.

**Trustees Right of Indemnity**

**\*\*\*\*The trustee does not hold the property for their own benefit, but for the benefits of others, and equity states that the trustee should not be obliged to bear these costs out of their own pocket.\*\*\*\***

* ***Reimbursed***– If the trustee has paid a liability, the trustee has a right to be reimbursed from the trust property.
	+ *Trust Pays* – The trustee should have not have to pay, rather liabilities can be paid directly out of the trust assets.
* ***\*\*\*‘Trustees Right of Indemnity’\*\*\**** – The right of the trustee to be indemnified for expenses incurred in the administration of the trust.
	+ *National Trustees Executors and Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268 –
		- Beneficiaries sued trustees for failing to get in the balance of the purchase money of an asset on a due date. Court ruled trustees were not in breach.
		- *Costs of Litigation -* The Trustees could be indemnified out the trust for their costs as they were costs properly incurred by them as an incident of their administration.

***Statutory Indemnity***

*Trustee Act 1958 s 36(2)* –

* *A trustee may reimburse himself or pay or discharge out the trust premises all expenses incurred in or about the execution of the trusts or powers*.

*Scope of Indemnity*

Expenses must be ‘properly incurred’ in the execution of the trust in order for the right of indemnity to arise.

* *Nolan v Collie* (2003) 7 VR 287 –
	+ *‘what is ‘proper’ and what is ‘improper’ must be answered by reference to the circumstances and in particular by reference to the duty with which a trustee was obliged to comply or the power which a trustee is intending to exercise.’*

***Consequences of trustees right of indemnity – trustee and beneficiaries***

The trustees right of indemnity create enforceable rights in the trustee and competes against (and takes priority over) the beneficiaries right to the fund. These rights are proprietary.

* *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226 –
	+ *‘The trustee has a right of exoneration or reimbursement for liabilities incurred by the trustee to third parties in the course of administration of the trust. The trustee cannot be compelled to surrender the trust property to the beneficiaries until that claim is satisfied. The trustee obtains priority over the trust fund’*

\*\*\*A trustee obtains a charge over the trust property until the right of indemnity is satisfied back to the trustee. \*\*\*

* Regardless of how the trust operates – including even if the beneficiaries seek to wind up the trust under the rule in *Saunders v Vautier* – the trustee’s right of indemnity must be satisfied before any other person can be satisfied from the trust.

***Can the right of indemnity be excluded by trust deed?***

Yes, it can per *Trustee Act 1958 (Vic) s2(3)* and *RWG Management v Commissioner for Corporation Affairs* [1985] VR 385

* *‘it would be a wholesome principle if the right of indemnity could not be ousted’.*
* A trustee can agree to accept office without a right of indemnity.
	+ *Trustee Act 1958 (Vic) s2(3)* – provides that it can be done beyond doubt.

***Is the Right of Indemnity Lost as a Breach of Trust?***

Yes, the Trustee will lose the right of indemnity for a proper expense if the trustee is otherwise in breach of duty, at least to the extent that the trust has not been compensated for loss caused by the breach of duty per *RWG Management v Commissioner for Corporation Affairs* [1985] VR 385.

* This approach favours trust beneficiaries over external creditors as it performs set-off between the trustee and beneficiaries first.
* Creditors rely on the right of indemnity to claim against trust assets, and this ensure that beneficiaries are not left without an unsatisfied compensation claim against an insolvement trustee, while creditors are paid.

Upheld in *CB Darvall and Darvall v Moloney (No 2)* [2007] QSC 337.

***Personal Liability of Directors and Trustee Companies***

**S197(1) and (2) of the *Corporations Act 2001* – specifies how directions are liable for debts and other obligations incurred by corporation as a trustee.**

The section makes directors and trustee companies

1. ***Personally Liable***- Makes a director of a corporate trustee personally liable if the trustee company has incurred liabilities for which it has no right indemnity against assets, cannot pay the debts.
2. ***Have no claim to right of indemnity*** *–* It endorses the view of *RWG Management v Commissioner for Corporation Affairs* [1985] VR 385 such that a breach of duty will reduce or completely destroy the trustees ability claim the right of indemnity.
3. ***Requires a precondition*** *–* The imposition of personal liability on directors is that the right of indemnity is unavailable either fully or party per s197(1)(b)

***Trustees Right of Indemnity and Third Parties***

The extent to which a trustee has an unsatisfied right of indemnity, the trust consists of property owned by the beneficiaries and property owned by the trustee.

 **\*\*\*A trustee obtains a charge over the trust property until the right of indemnity is satisfied back to the trustee. \*\*\***

* ***Trustee gets first right***- The trustee with an unsatisfied right of indemnity obtains an equitable charge over the trust property to the extent of the unsatisfied right. This property falls outside the definition of *‘trust property’* in the *Bankruptcy Act 1966* (Cth) s 121 and the beneficiary property becomes available to creditors.
* ***Creditors can subrogate – stand in the shoes of – the trustee***– Creditors are entitled to recover their unpaid debts out of the assets held on trust, to the extent that there is an unsatisfied right of indemnity held by the trustee. The creditors can subgrogate the trustees right and sue directly.
	+ *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360
		- Coastline Distributors Pty Ltd acted as a trustee of a trust which beneficiaries included *Octavo* and Coastline when into liquidation owing money to *Octavo* and the liquidator obtained an order voiding any payments to *Octavo*.
			* *‘The assets of a trading trust could not be simply described as ‘trust property’ as the trustee had a right, which could be described as proprietary right, to be indemnified out of those assets for debt incurred in the business, giving him a beneficial interest in those assets which took priority over any claim by the beneficiaries’*

***Trustees Insolvency – ‘Property subject to trustees lien is not trust property’***

*Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 explained that property subject to the trustees lien for unsatisfied expenses is not trust property.

* The decision in *Octavo* that the trustee has a beneficial interest in assets has led to a number of decisions on the issue whether
	+ **The liquidator or trustee in bankruptcy is entitled to use the trust assets to satisfy claims of all creditors; or**
	+ **If the trustees right over trust assets can only be used to satisfy debts.**

*Re Enhill Pty Ltd* [1983] 1 VR 561 – upheld in *Collie v Merlaw Nominees Pty Ltd* (2001) 37 ACSR 361.

* The issue was whether the liquidator could be paid out of the proceeds of the realisation of trust assets?
	+ The liquidator could be paid. The right of lien is a personal asset of the trustee and in the trustees insolvency is available for distribution amongst all the trustees creditors.

**Right of Indemnity against Beneficiaries personally**

***Trust can exclude beneficiaries*** *-* A trust document can provide that the trustee has no rights against beneficiaries, and that the right of indemnity is limited to trust assets only.

***If doesn’t exclude, beneficiaries can be liable*** *–* If the trust deed does not exclude an indemnity against beneficiaries personal, they may become liable to cover the trustees expenses.

***When can a trustee claim against beneficiaries?***

1. ***Request of the Beneficiaries*** *-* When a trustee has accepted office at the request of one or more *sui juris* beneficiaries, the beneficiaries are liable to personally indemnify the trustee per *Matths v Ruggles-Brise* [1911] 1 Ch 194.
2. ***Single sui juris – ‘able to manage ones own affairs’ - beneficiary –***
	1. A trustee should seek indemnity against assets, and only then seek indemnity against the beneficiaries personally per *Hardoon v Belilios* [1901] AC 118.
	2. *Hardoon v Belilios* [1901] AC 118
		1. ‘*A trustees right to indemnity included a right in personam against the beneficiary as well as a right in rem against the assets of the trust, as so far as the beneficiary is sui juris and absolutely entitled’*
		2. Court explained that a beneficiary should bear the burden if he or she obtains the benefit from the trust.

1. ***Multiple sui juris beneficiaries –***
	1. *Broomhead v Broomhead* [1985] VR 891 –
		1. Trustee went into liquidation. Trustee claimed unit holders in trust had to indemnify the trust.
		2. *Court* - The principle from *Hardoon v Belilios* applied and all *sui juris* beneficiaries had to indemnify the trustee in respect of a liability incurred by the trustee in the course of carrying out the trust to the extent of each unit holders proportion of the beneficial interest in the trust.
	2. *Blakin v Peck* (1998) 43 NSWLR 706 –
		1. Settlor established a trust giving sister a life interest with remainder to the children. Trustees purchased a flat in London for the sister, and was sold on her death and proceeds distributed to the children. Trustee was then taxed on the sale.
			1. The beneficiaries were required to reimburse the trustees.
			2. The principle from *Hardoon v Belilios* did not prevent recovery of the moneys and is applicable to multiple beneficiaries.

***Remaining limitations on the principle from Hardoon***

In *Hardoon v Belilios* [1901] AC 118 – the Court explained that a beneficiary should bear the burden if he or she obtains the benefit from the trust.

1. *Discretionary Trust* – Objects under a discretionary trust who may or may not bear the benefit, will not be liable.

***Trustees Right of indemnity against assets and beneficiaries***

1. ***Right of indemnity does not give the trustee any property rights***- The right of the trustee to seek indemnity against a beneficiary is a personal right against the beneficiary arising from the trust and is not a property right.
2. ***Creditors can to stand in the shoes of the trustees right of indemnity against assets is well-established***– This was clear from *Octavo Investments Pty Ltd v Knight* to the extent that the trustee has a claim against the assets, the creditors can directly enforce the claim.
3. ***Creditor must exhaust a claim against trustee before a beneficiary***– In *Belar Pty Ltd v Mahaffey* [2000] 1 Qd R 477, the Court held that a creditor must exhaust a claim against the trustee before claiming against beneficiares, and that the claim against the beneficiaries is limited to

*The extent to which the trust assets are available to satisfy the claim’*

***Right to Impound a Beneficiaries Interest***

***Trustee Act 1958 (Vic) s 68*** *-* A trustee who has committed a breach of duty instigated by or consented to by a beneficiary may be able to impound the beneficiaries’ interest to satisfy the right of indemnity.

*Re Somerset* [1894] 1 Ch 321 –

1. *‘Statutory protection afford to trustees in breach of trust which entitles them to an indemnity from a beneficiary where the breach of trust is committed at the instigation, request, or consent in writing of the beneficiary does not apply to some act or omission which is not in itself a breach of trust but only becomes one by reason of want of care on the part of the trustee.’*

**Co-Trustees right of contribution or indemnity**

*Trustees liability is joint or several* – Where there is more than one trustee, all of them are liable for each other’s acts.

* If one trustee pays the liability for all of them, then the normal rule is that this trustee can seek contribution from other trustees.

*Innocent Trustees –*

* An innocent trustee will have a right to be indemnified by a trustee who has wrongfully obtained the trust funds for his or her own benefit.
	+ *Goodwin v Duggan* (1996) 41 NSWLR 158 – One of two trustees used trust money for his own benefit but both were held liable even though one was innocent.
		- *‘Where two or more trustees have committed breaches of trust, all are equally liable even though one was more active and one has received the trust money or misapplied it. However, if the co-trustee has obtained the benefit of the breach, the other trust has an equity to be indemnified.’*

**Creditors and Insolvent Trustees**

*Liquidator appointed* - If the trustee is an insolvent corporation and a liquidator is appointed, the liquidator can exercise the trustee’s right of indemnity against the beneficiaries.

*Trustee Bankrupt* – If the trustee is bankrupt, then his or her trustee in bankruptcy can exercise the right against beneficiaries.

**Beneficiaries Rights**

The basic rights of a beneficiary:

1. **Right to Compel Performance**
2. **Right to restrain a breach of trust**
3. **Right to information concerning the Trust**
4. **Right to Call for Trust Property - *Saunders v Vautier***
5. **Beneficiaries Right to Transfer of a Share**
6. **Right to Possession of Trust Property**
7. **Right to Follow the Trust Property**
8. **Right to sue a Third Party who has assisted in a Breach**

**‘Beneficiary’**

1. *Discretionary Trust* – Objects of a discretionary trust are in a much more precarious position than is the case with beneficiaries of a fixed trust.
	1. *Trustee retains absolute discretion* – The trustee has a discretion to select among a group of objects in a discretionary trust. Thus, these objects only have a potential interest in the trust.
	2. *Rights of Objects of a Discretionary Trust* – Generally, their rights are limited to seeing that the discretion is properly exercised, and to have the right protected by a court – *Sainsbury v IRC* [1970] 1 Ch 712.
		1. Objects not have a proprietary interest
		2. The sum of their interests does not amount to one whole proprietary interest.
2. **Right to Compel Performance**

*Any beneficiary can institute proceedings to compel performance of the trust* - It does not matter whether the beneficiaries interest is vest or contingent – *Spellson v George* (1987) 11 NSWLR 300.

1. **Right to restrain a breach of trust**

*Injunction -* A beneficiary can seek an injunction from the Court to restrain a breach of the trust.

* *Fox v Fox* (1870) LR 11 Eq 142 –
	+ A testator left the residue of his estate to be divided amongst his children – including a daughter whom just married. If the residue exceed a certain amount, the testators two sons were to receive the larger proportion. Trustees wanted to know whether daughters marriage should be paid first then trust distributed which would have affected the sons proportion
		- Court held that sons were correct and granted an injunction against the trustees favouring the daughter.
1. **Right to information concerning the Trust**

*Right to Information -* Beneficiaries, including the object of a discretionary trust, are entitled to certain information concerning the trust. This includes:

1. **Documents such as the trust instrument itself;**
2. **The trust accounts;**
3. **Information concerning distributions.**
4. **If the trust deed allows it, then documents can be requested.**
	1. *Tierney v King* [1983] 2 Qd R 580 –
		1. *‘a beneficiary has a proprietary interest in and therefore a right to inspect trust documents. However, the trustees are not required to give reasons for the exercise of their discretions, and sometimes this must be balanced agsinst the beneficiaries right to infromation’*

***\*\*\*BENEFICARY IS NOT ALLOWED TO REQUEST:***

1. **Documents that are prepared by the trustee for its own purposes;**
2. **Documents which state the reasons for the exercise of their discretion;**
	1. *Tierney v King* [1983] 2 Qd R 580 – a beneficiary has a right to inspect documents must be valance with the rule that trustees do not have to disclose reasons or information which may bear upon those reasons.
3. **Documents which the beneficiary has no proprietary interest in and are confidential;**
	1. *Hartigan Nominees Pty ltd v Rydge* (1992) 29 NSWLR 405 –
		1. Court held that

*‘The beneficiaries rights are limited to documents and information which are the property of the trust. Documents in which the beneficiary has no proprietary interest are not able to be requested. The right does not extend to documents which have been given to the trustee on the basis they will be kept confidential. Nor must information be disclosed where the result would make known the reasons why a discretionary power has been exercised’*

1. **Right to Call for Trust Property - *Saunders v Vautier***

**The *Saunders v Vautier* principle recognises the rights of beneficiaries who are *sui juris* and absolutely entitled to the trust property to exercise their proprietary rights to overbear and defeat the intention of the testator or settlor.**

* As the settlor or testator retains no interest in the property, the Court is more concerned with the wishes of those who do have an interest in the property.

*Saunders v Vautier* (1841) 4 Beav 115 -

* Testamentary trust provided that the trustee was to hold the trust fund until the beneficiaries 25th birthday. There was no ‘gift over’ provision to dispose of the property if he died before his 21st birthday. Beneficiary wanted trust property on 21st birthday.
	+ The beneficiary could require the trustees transfer the property to him, regardless of the direction in the will to the contrary.

***a. Right to Terminate the Trust not within scope of Saunders***

The rule in *Saunders v Vautier* cannot be used by beneficiaries to force the trustee to accede to their wishes or follow their orders.

If the beneficiaries are not happy with the trustee, beneficiaries can terminate the trust by:

1. Putting an end to the trust; or
2. Continuing to put up with the trustees performance of the trust.

In *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882 –

*‘the beneficial interest holders are not entitled to direct the trustees as to the particular investment they should make of the trust fund’*

***b. Single or Multiple Beneficiaries***

The rule in *Saunders v Vautier* applies to both a single beneficiary and multiple beneficiaries – *CPT Custodians Pty Ltd v Commissioner of State Revenue* (2005) 221 ALR 196.

However, they

1. Must be all *suir juris*; and
2. Must together be absolutely entitled to the trust property.

*Different Classes can end a trust together -* Life tenants and remainder who are unanimous and *sui juris* can join together and put the trust to an end, because together they are entitled to the trust property per *Hayman v Equity Trustees* [2003] VSC 353.

***c. Cannot reduce the interest of any beneficiaries***

In *Teague v The Trustees, Executors and Agency Company Ltd* (1923) 32 CLR 252 –

*‘the rule in Saunders v Vautier cannot be invoked where the result would be to deprive a living person of a possible interest or to cut down the interest of a living person in the property in question*

***d. Discretionary Trusts***

Discretionary trusts do not have beneficiaries *per se*.

1. *Classes of Objects* – They have a class of objects, and discretion is given to the trustee to select amongst those objects.
2. *None absolutely entitled* - None of the objects are individually absolutely entitled to an interest in the property.
3. *Discretionary beneficiaries are collectively entitled to terminate the trust –*
	1. *Re Smith* [1928] Ch 915 –
	2. *Where the class of objects have closed -*
		1. *Sir Moses Monteriori Jewish Home v Howell & Co (No 7) Pty Ltd [1984] 2 NSWLR 406* –
			1. *‘Where the objects of a discretionary trust constitute the entire range of persons entitled to call for due administration of the trust, they can collectively invoke the rule in Saunders v Vautier*’

***e. Effect of Trustees Right of Indemnity – Must be satisfied***

*Trustees indemnity unsatisfied -* The existence of a trustee’s right of indemnity that remains unsatisfied prevents the beneficiaries terminating the trust under the rule in *Saunders v Vautier*.

* *CPT Custodian Pty Ltd v Comissioner of State Revenue* (2005) 221 ALR 196 –
	+ *‘The formulation of the rule in Saunders v Vautier did not give consideration to the right of the trustee to reimbursement or exoneration for discharge of liabilities incurred in the execution of the trust.* ***The rule in Saunders v Vautier does not apply while the trustees right of indemnity remains unsatisfied.****’*

***f. Incapacity***

A beneficiary must be *sui juris - ‘able to manage ones own affairs’ –* and thus beneficiaries who are not

1. Of full age; or
2. Lac the capacity for other reasons

cannot terminate the trust.

In *Perpetual Trustees (WA) Ltd v Naso (1999) 21 WAR 191 –* it was stated that invocation of the *Saunders v Vautier* rule amounted to an assertion that the beneficiary has full capacity.

***g. Rules does not apply to Trusts created by Court Order***

In *Perpetual Trustees (WA) Ltd v Naso (1999) 21 WAR 191*, the Court held that the rule in *Saunders v Vautier* does not apply to trusts created by Court Order.

* If a beneficiary of a such a trust wishes to terminate thet rust, a variation or discharge of the Court order must be sought.

***h. Avoiding the Saunders v Vautier Rule***

The rule in *Saunders v Vautier* can be avoided by, according to *In the Estate of Lee; Perpetual Trustee Company (Canbeera) Ltd v Rasker,* by

1. The creation of an intervening discretionary trust; or by
2. Provision of a gift over in the event of a contingency taking place.

A third rule could be

1. If the trust is a discretionary trust, inclusion of a general charitable purpose amongst the objects would effectively stop the other objects joining together to terminate the trust.
2. **Beneficiaries Right to Transfer of a Share**

***Entitled to Transfer of a Share*** *-* When one or more beneficiaries are absolutely entitled to their interest, a beneficiary is entitled to terminate the trust with respect to their share and call for the share to be transferred even though the interests of other beneficiaries may not yet have vested.

1. *Example –*
	1. A grandfather sets up a trust for his grandchildren which vests when the reach 20. They get nothing unless they reach 20. Two grandchildren are already 20 and two are newborns. The two old grandchildren are entitled to call for their interest to be transferred.
2. ***Must be Readily Divisible otherwise can’t do it*** *–* If the trust property is not easily divided, the beneficiary has no right to insist on transfer of a share because that may reduce the value of the remaining shares – *Manfred v Maddrell* (1950) 51 SR NSW 95. The Court will only order that the beneficiary share be transferred if the beneficiary can show the transfer will not prejudice the remaining shares.
	1. *Australian Olympic Committee Inc v Big Fights Inc (No 2)* (2000) 176 ALR 124
		1. Rights to reprinting and sale of edited films of the 1956 Olympics was held by Australian Olympic Committee and Benson and Talbot - who assigned their rights to ESPN.
			1. EPSN could not call for assignment of its 2/3 interest in the rights. Assigning part of the interest would make dealing with the remaining share impossible.
3. **Right to Possession of Trust Property**

If the beneficiaries are *sui juris* and altogether entitled to the equitable title, they are entitled to possession of the trust property.

*Turner v Noyes* (1903) 20 WN NSW 266 –

1. *‘When a beneficiary is absolutely entitled to the trust fund, they may institute proceedings for delivery’*

This principle applies even where there is an intermediate interest, so long as the life tenant is in agreement with the remaindermen per *Quinton v Proctor* [1998] 4 VR 469.

*Part of the Property Transferred -* Transfer of possession of part of the trust property all the beneficiaries has the effect of terminating part of the trust (relating to the transferred asset) while the trust remains on foot as to the balance of the trust property.

1. **Right to Follow the Trust Property**

Refer to Breach of Trust

1. **Right to sue a Third Party who has assisted in a Breach**

A plaintiff would sue a third party because the trustee is insolvent or has escaped the jurisdiction.

***Nature of Liability***

*Knowingly Breaches -* A person who knowingly receives trust property or knowingly assists in a breach of trust is liable as a constructive trustee. This liability as a third party is personal liability and attaches to the person who assist or committed the breach.

*Bona Fide Purchaser*

Third party liability must be distinguished from the rules which apply when a beneficiary seeks to trace property into the hands of the defendant.

If the beneficiary is attempting to trace trust property, this is so that he or she can assert a continuing equitable title to that property. The beneficiary cannot trace trust property to the defendant if the defendant is a *bona fide purchase of the legal estate for value without notice.*

***The rules for Third Party Liability***

*Barnes v Addy* (1874) 9 Ch 244 –

* A trustee acting under a power in the trust deed appointed a third party trustee of some of the trust property. Solicitors whom the trustee had instructed advised both the trustee and the intended beneficiaries this was unwise. They did it anyway and the third party misused the trust funds. Sued Solicitors.
	+ *‘Strangers are not to be made liable as constructive trustees merely because they acted as agents of trustees in transactions within their legal powers unless*
		- *they received and became chargeable with some part of the trust property, or*
		- *unless they assisted with the knowledge in a dishonest and fraudulent design on the part of the trustees.’*

*Rule extended to any person who becomes sufficiently implicated in a fiduciary duty breach*

Any person who deals with a fiduciary can be liable. Examples include:

1. Bank liable for receipt – *Stephens Travel Service International pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331
2. Solicitor not liable for assistance – *Twinsectra Ltd v Yardley* [2002] 2 AC 164.
3. Spouses of fiduciaries (held liable for receipt) – *Lurgi (Australia) Pty Ltd v Gratz* [2000] VSC 278

***First Limb – Assistance***

The first requirement is that the acts of the defendant must ‘assist’ the breach of duty. The assistance must be rendered with some ‘*awareness’* that the conduct involved breaches of fiduciary duty.

In Australia, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 236 ALR 209, the High Court endorsed *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 where –

*‘Knowledge of a dishonest and fraudulent design by a trustee did not extend to constructive knowledge and that, apart from actual knowledge of the breach of trust, or a wilful shutting of the eyes to the obvious, a stranger to the trust would only liable as a constructive trustee if he had knowledge of the circumstances telling of a breach of fiduciary duty.’*

In *Farah* *Constructions*, the court indicated that breaches of trust and breaches of fiduciary duty may be ‘dishonest and fraudulent’, but not all breaches will be so classified. *Farah Constructions* had not breached its fiduciary obligations because it had made sufficient disclosure and obtained consent to what might otherwise have been a breach.

*Example*

A defendant or solicitor or accountant could become liable for ‘assisting’ in a breach of duty if, for example:

* He or she prepared documents enabling a sale of company property to proceed; or
* He or she enabled a trustee company to acquire property in the breach of duty.

***Second Limb – Receipt***

In order to make the defendant liable, the plaintiff must prove three things:

1. The defendant has received trust money;
2. The defendant knew the moneys paid were trust moneys; and
3. The defendant knew of circumstances which made the payment a misapplication of trust moneys.

Most complications have been caused by the knowledge requirement. Questions of knowledge are:

1. Actual knowledge;
2. Wilfully shutting eyes to the obvious;
3. Wilfully and recklessly failing to make the inquires that an honest and reasonable person would make;
4. Knowledge of circumstances that would indicate the facts to a reasonable, honest person;
5. Knowledge of circumstances which would put an honest and reasonable person on inquiry.

This was **abolished** in favour of the *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, where it was replaced with *dishonesty* – which was upheld in *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

In *Farah Constructions*, the High Court said at [173] that

*as a matter of ordinary understanding, and as reflected in the criminal law in Australia (Macleod v The Queen (2003) 214 CLR 230 at 242 [36] – [37]. A person may have acted dishonestly, judged by the standards of ordinary common decent people, without subjectively appreciating that the act in question was dishonest by those standards”*

**Variation and Termination of a Trust**

**Preservation of trust property** – The most important policy behind removal of trustees and appointment of news ones if the preservation of trust property in the interests of beneficiaries – *Porteous v Rinehart* (1998) WAR 495.

**Appointment of Trustees**

**No one can be forced to accept the trustees role – if the named trustee is unable or unwilling to act in that role and disclaims the trusteeship, the trust will not fail – rather, the person with the power to appoint new trustees must.**

1. ***Look to the Trust Instrument***– The trust instruments usually contain provisions for the appointment of replacement trustees.
	1. *Loughnan v McConnel* [2006] QSC 359 – The trust instrument expressly provided from the removal of a trustee.
2. ***Proper Power***–
	1. The appointment of new trustees pursuant to a power in the trust instrument will be good so long as the power is exercised properly for the purpose for which it was given.
		1. *Improper Power* –
			1. *Loughnan v McConnel* –
				1. Loughnan and Mrs McConnel were executors and trustees of Mr McConnels estate worth $30million in assets and $10mil in another family trust. The trustee of the family trust was a company called Duckett of which Mr McConnel and her were Directors.

Mrs McConnel removed Duckett as trustee and appointed a new trustee of a company which she was sole director.

Court ruled that Mrs McConnel was in a position of conflict, she had adhere to the terms of the trust and had acted in breach as the executors and trustees could only do this.

1. ***Statute*** *–* The specific instructions in a trust instrument take precedence over any associated statute. Statute is the ‘fall back’ in the event that no instructions are detailed and generally a Court is not required for this, although the Court can appoint new trustees if required.
	1. The legislation sets out a hierarchy of person given the task of appointing new trustees;
		1. A person nominated by the instrument, and, failing that;
		2. The surviving or continuing trustees, and, failing that;
		3. The personal representatives of the last surviving or continuing trustee.
	2. *Trustee Act 1958 (Vic)* – s 2(3); s 41

*Subject to the restrictions imposed by this Act on the number of trustees-*

1. *the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or*
2. *if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee-*
3. ***Power of the Court to remove a trustee*** *-*
4. *Bankruptcy* –
	1. Bankruptcy usually means the immediate removal of a trustee, however the Court will not always remove a bankrupt trustee when called upon to do so in exercising its statutory inherent jurisdiction per *Re Matheson*
	2. *Court must be satisfied otherwise wont remove –*
		1. Where the Court is satisfied the tustees bankruptcy will not interfere with the performance of the trust then they may not remove the relevant trustee.
5. ***Court relies on person qualified to appoint trustee*** *–*
	1. The difference between appointment of new trustees outside of Court and an order for removal of a trustee by the Court seems to be that, if the person qualified to appoint a new trustee forms the genuine belief that the trustee is unfit to act, the Court will not interfere.
6. ***Trustee Act 1958 (Vic)*** – s48
	1. The Court can appoint new trustees under this section of the act

*‘if it is found inexpedient difficult or impracticable so to do without the assistance of the Court’*

* + 1. *Re Tempest* (1886) LR 1 Ch App 485 -
			1. One of two trustees nominated in the will had died during the deceased lifetime. The deceased will had provided that 2 of the existing trustees had the right to appoint a new trustee, but they could not agree. The beneficiaries wanted Petrie.
				1. Court provided 3 tests

*‘First, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected from it’*

*‘Second, is that the Court will not appoint a person to be a trustee with a view to the interests of some of the persons interested under the trust in opposition either to the wishes of the testator or to the interests of other beneficiaries’*

*‘Third, the Court will have regard to the question whether the appointment will promote or impede the execution of the trust’*

**Removal of Trustees**

**Preservation of trust property** – The most important policy behind removal of trustees and appointment of news ones if the preservation of trust property in the interests of beneficiaries – *Porteous v Rinehart* (1998) WAR 495.

1. ***Removal in the absence of a breach of trust***
	1. ***Trust Instrument or Statute***– Powers to remove trustees in the absence of a breach can be sourced in the trust instrument itself, or in statute.
	2. *Trust Instrument –* Trust instruments typically provide an express power allowing removal of the trustee and appointment of a replacement.
		1. *Such removal cannot create a conflict* – The removal a trustee cannot place the new trustee in a position of conflict per *Loughnan v McConnel*.
		2. *Re Matheson* (1994) 121 ALR 604 –
			1. Matheson was the trustee of a family trust, who became bankrupt and the right of indemnity passed to his trustee in bankruptcy would sought to remove him.
				1. *Court* – Court has inherent and statutory power. The power to remove trustees should be exercised if the Court is satisfied that the trustee continuing would prevent the proper exercise of the trust.

*There were no material before the Court as to Mathesons fitness, or as to how the was to be managed in the future, therefore the power to remove the trustee would not occur.*

* 1. ***Statute***– *Trustee Act 1958 (Vic)* s 41(1) & s48 – as above.

***Removal of Trustee when Breach of Trust***

The Court has inherent jurisdictionto remove a trustee from office, where the removal is in the best interests of the trust.

**Most importantly, per *Re Wrightson* [1908] 1 Ch 789 -**

*The Court must be convinced that the trust property will not be safe, or the trust will not be exercised in the interests of the beneficiaries.*

1. ***Welfare of the Beneficiaries*** – As stated in *Elovalis v Elovalis* [2008] WASC 141 *Miller v Cameron* (1936) 54 CLR 572. In that case, Latham CJ observed (575):

*‘in determining whether or not it is proper to remove a trustee,* ***the Court will regard the welfare of the beneficiaries as the dominant consideration (Letterstedt v Broers). Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of the trust estate. Accordingly, even though he has been guilty of no misconduct, if a trustee is in a position so impecunious that he would be subject to a particularly strong temptation to misapply the trust funds****, the Court may properly remove him from his office as trustee.’*

1. ***Breach of Trust***– Not every breach will result in the removal of the trustee, particularly in circumstances may outweigh the effects of a trivial or technical breach.
	1. *Re Wrightson* [1908] 1 Ch 789 –
		1. Francis Wrightson left the residue of his estate to two trustees on trust to pay annuities to his wife and nine children for the wife’s life, and then to the nine children. Nine years later, the window and five children claiming the trustees had breached the trust – the trustees admitted a mistake, but it hugely favoured the beneficiaries. The wife died and the children continued to the litigation
			1. The Court ruled that the wife had died, and the it was no longer necessary for the welfare of the trust to remove the trustees.
				1. *The Court must think that the trust property will not be safe, or the trust will be exercised in the interests of the beneficiaries.*
2. ***Position of conflict of interest or serious offence*** – Appropriate removal for a breach of trust or a serious offence such as fraud – *Millard v Eyre* (1973) 2 Ves 94. The key is that
	1. *Porteous v Rinehart* [1998] WASC 270 – Plaintiff wanted the defendant to step down as trustee due to conflict of interest. The parties were already in litigation concerning the estate settlement.
		1. Court stated that
			1. *‘the alleged conflict of interest in this case is real and has potential to imperil the interests of the beneficiaries interests and is sufficient to warrant the removal of the defendants as executors and trustees*’
			2. However, the Court held that the plaintiff had not pursued the proceedings diligently, and new trustees would not be able to do anything effective to advance those interests pending the outcome of the estate settlement litigation. The trustees were not removed.

**Variation of the Trust**

***Trust Terms cannot be varied, Unless settlor allows for it*** *-* Once a private trust has been established, its terms cannot be varied unless the settlor has reserved a right to effect a variation.

Statutory powers of amendment, and through the Courts inherent power – trust terms can be amended. This infers there are three ways in which to vary a trust:

1. The trust instrument itself; and
2. Statute.

***Variation pursuant to the trust instrument***

*Provision must be in the trust deed -* A clear provision in the trust deed will allow the instrument to be varied. This power can be invested in any party, such as the settlor, the trustee, the beneficiaries, or even a complete stranger to the trust.

* 1. *Variation to remove beneficiaries* – All kinds of variations can be made under a power given by the instrument itself, even a power to remove certain beneficiaries or classes of beneficiaries and add others – *Kearns v Hill* (1990) 21 NSWLR 107 & *Loughnan v McConnel*
	2. *Clauses can be constructed broadly* – Clauses were required to be strict, but can now be constructed broadly per *Kearns v Hill* (1990) 21 NSWLR 107

***Variation Pursuant to Statute***

Statute confers powers on a Court to vary trusts in relation to administration of the trust in the absence of such a power in the trust instrument.

*Trustees Act 1958 (Vic)* – s63

* Powers of the Court to authorize dealings with trust property
	+ *Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the* ***opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by******law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions*** *(if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.*

***Variation of Beneficiaries interests***

In Victoria, s63A provides that the a court is allowed to approve any arrangement varying or revoking trusts, on behalf of four classes of persons:

1. Infants or adults under an incapacity who are unable to assent to the variation;
2. Persons who may possibly become entitled to an interests under the trust at a later time, or on the happening of an event;
3. Unborn children;
4. Persons with a discretionary interest under a protective trust, where the interest of the principal beneficiary has not failed or determined.
* *Re Westons Settlements* [1969] 1 CH 223-
	+ Trustees wanted to move a trust to a new jurisdiction to avoid tax. They sought to have existing trust liabilities discharged and reincorporated in a trust in Jersey, outside of England. Some of the beneficiaries were unborn children.
		- Court stated that
			* *‘The court should not consider merely the financial benefit to the infants or unborn children but also their educational or social benefit. There are many things in life worth more than money. I do not believe it is for the benefit of children to be uprooted from England ... simply to avoid tax’*

**Termination of the Trust**

*Automatic Trust Termination -* **Trusts come to an end automatically when one beneficiary becomes entitled to the entire legal and equitable interest in the trust property. This is because the beneficial estate is extinguished.**

* *Re Cook; Beck v Grant* [1948] Ch 212
	+ Husband and wife owned a house as joint tenants in trust. They husband died and then the wife died. Her will gave all her personal estate to her nieces and nephews – if the trust continued to the wife then it would form part of personal estate, if it did not – the house would form part of the real estate of the wife.
		- Court stated that on the death of the husband, the testatrix became the absolute owner and no trust subsisted after that date.

A trust must be terminated when, under its new terms, the trust property is due to be distributed.

A trust can also be terminated by:

1. ***Exercise of a power contained in the trust instrument itself;***
	1. *An express term* - contained in a trust instrument can give a right of revocation and termination to the settlor, trustee or some other person.
	2. *Revoke a power in the trust -* It is common for a settlor to reserve a power to revoke the trust.
		1. If it is revoked then the trust property will be returned to the settlor.
			1. *Power to a Trustee* – If the power to revoke is given to a trustee, then typically this infers that the assets are to be distributed to the beneficiaries because a distribution to any other party would be a breach of fiduciary duty and it would not be proper for a trustee to consider any other person as an object of distribution.
2. ***Order of the Court***
	1. Courts exercising a statutory power can vary or terminate the trust. This is discussed above.
3. ***Termination by agreement of beneficiaries***
	1. The rule in *Saunders v Vautier* (1841) 4 Deav 115 – which gives beneficiaries who are in agreement the ability to terminate the trust.

**Breach of Trust**

**Locus Standi** *(the ability of a party to demonstrate to the court sufficient connection)*

***Suing a Trustee***

**A trustee may be sued for breach of a private trust by a beneficiary, a co-trustee or a successor in the role of trustee.**

* ***Successor trustee suing*** *-*
	+ *Young v Murphy* (1994) 13 ACSR
		- The respondents were appointed by The Supreme Court of NSW as new trustees of a trust. The previous trustee had become insolvent and gone into liquidation. The respondent’s commenced proceedings against person formerly involved the administration of the trust alleging breach.
		- *Court -* The new trustees had standing to sue the former trustee. A defaulting trustee can be sued by a beneficiary, co-trustee or successor trustee.

*‘The successor trustee is, in fact, potentially committing a breach of duty itself if it does not take action against a defaulting former trustee.*’

* ***Beneficiary Suing*** *–*
	+ Where on beneficiary is suing a current trustee for breach of trust, it is usual for all other beneficiaries to be joined as parties – *Hughes v NM Superannuation Pty Ltd* (1993) 29 NSWLR 653

***Suing a third party***

A third party can be sued by the trustee or the beneficiaries in different situation. There is a distinction to be drawn between suing a third party against whom the trust has a cause of action because the third party owes some duty to the trust, and suing a third party who is alleged to have assisted in a breach of trust.

*Third parties who owe a duty of trust*

Where a third party is sued in respect of a breach of some duty owed to the trust – the trustee is usually the plaintiff.

* *Trustee fails to sue -* If the trustee fails to commence a suit, that failure may itself be a breach of trust, which will allow the beneficiaries to sue the trustee.
* *Beneficiaries suing in their own name* – In exceptional circumstances, beneficiaries can sue the third party in their own names.
	+ *Must join the trustee as a party* – Beneficiaries who are permitted to sue in their own names must join the trustee as a party – *Lamru Pty Ltd v Kation Pty Ltd*
	+ *Multiple beneficiaries* – If there are multiple beneficiaries, all other beneficiaries must be joined to the action.

**Defences to Breach of Trust**

There are three core defences which are relevant to breach of trust. These include

1. **The trust instrument itself**
2. **Statutory defences**
3. **Equity**
4. ***Defences provided by the trust instrument***

It is now very common for trust instruments to contain clauses limiting or excluding the trustees liability for breach of trust. The key authority is ***Armitage v Nurse****:*

* *Armitage v Nurse* – Trustees liability was limited from a clause which exempted the trustees from liability for any loss or damage to income or capital of the fund except in cases of fraud. Beneficiaries appealed against his.
	+ Mittlet LJ stated that

*‘I accept the submission made on behalf of the plaintiff that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust.* ***If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence****. The duty of the trustees to perform the trusts honestly and in good faith and for the benefit of the beneficiaries is the minimum necessary to give substance to the trust and is, in my opinion, sufficient’*

* ***Walker v Stones***– Trustees made certain worthless investments and the plaintiffs claimed that the investments were made with the primary intention of benefiting. Trustees relied on exemption clause which stated that they were not liable for anything except ‘wilful fraud or dishonesty on the part of the trustee’
	+ **Court explained that no reasonable trustee-solicitor would consider it to be in the beneficiaries interest to act with the specific intent of benefiting persons known not to be objects of the trust**. Trustees were liable.

***Dishonesty***

In *Armitage v Nurse*, the term ‘dishonesty’ operated not to exclude liability based on dishonesty and bad faith.

* *Trust must suffer loss or damage* - A precondition to the operation of the clause is that the trust suffers loss or damage. If the clause is not in respect to ‘loss or damage’ then the protection cannot be invoked.
* *Contra proferentum* – Trustee exemption clauses are always construed *contra proferentum ­–* or against the person relying on them per *Green v Wilden Pty Ltd*.
* *Onus falls on trustee to prove* – The onus falls on the trustee to demonstrate that the breach complained of falls within the ambit of the exemption clause – *Reader v Fried*
1. ***Statutory defences and limitations upon liability***

***General***

In Victoria, *Trustee Act 1958 (Vic)* s67, s12C and s12D all provide similar to s67 that

***67. Power to relieve trustee from personal liability***

*If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the* ***transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions*** *of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same.*

If the trustee uses this defence, they must:

1. ***S12C and s12D* – The court can take into consideration for a breach of trust,**
2. *the nature and purpose of the trust; and*
3. *whether the trustee had regard to the matters set out in section 8 so far as is appropriate to the circumstances of the trust; and*
4. *whether the trust investments have been made pursuant to an investment strategy formulated in accordance with the duty of a trustee under this Part; and*
5. *the extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice*
6. ***Onus on the trustee to show*** *-* The onus is on the trustee to show that they have acted honestly and reasonably – *Re Stuart* [1897] 2 Ch 583
7. ***Acted both honestly and reasonably*** *-* The trustee must show that they have acted both honestly and reasonably. Honesty on its own is not enough – *Dalrymple v Melville* (1932) 32 NSW 596
8. **‘*Honesty and Reasonableness’ will depend on the circumstances*** –
	1. *Honestly* – Means acting in good faith and in the interests of the beneficiaries – *Cotton v Dempster*
	2. *Reasonably* – judged by what is reasonable for a trustee; a trustee who has been egligent will not have acted reasonably – *Pateman v Heyen* (1993) 3 NSWLR 188
	3. *Professional trusts favoured less* – A court will tend to set a higher standard for a professional trustee than a non-professional one.
9. ***In whole or in part*** – The court can relieve the trustee from liability in whole or in part per *McMahon v Cooper* (1904) 4 SR (NSW) 433.

***Specific Defences***

1. ***Agents Defaults***– *Trustee Act 1958 (Vic)* s36 - provides implied indemnity of trustees for agents acts.

*(a trustee) shall be answerable and accountable* ***only for his own acts****,*

*receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss unless the same happens through his own wilful default*

***Statutory Limitations of Actions***

1. *Limitations of Actions Act 1958 (Vic)* – s21 provides no limitation period for beneficiaries under a trust taking action against a trustee for
	1. *Fraud or fraudulent breach of trust to which the trustee was privy*
	2. *To recover from the trustee trust property or proceeds in the possession of the trustee, or previously received by the trustee*
2. ***Equitable defences***

***Consent***

The Australian case of *Spellson v George –*

* *Spellson v George –* A discretionary trust was established and the trustee was a company. The trustee retired and was replaced by the settlors wife who transferred the assets to a family trust. The beneficiaries of the discretionary trust alleged breach of trust. The defendant alleged that the beneficiaries consented to this action.
	+ *Court –* Knowledge of a pending breach of trust without protest is not operative consent to or participation in the breach until the beneficiary is called upon to make some election. This was not express in this case, and therefore the defendant cannot engage in the action.

**Remedies to Breach of Trust**

**Proprietary Remedies**

**Proprietary remedies are much more favourable than personal remedies as they give the plaintiffs right to property, rather than just a right to be paid money. The plaintiff must demonstrate a pre-existing proprietary right to the property.**

* ***How to prove*** *-* To establish a proprietary base, the plaintiff has to say that the property in the hands of the defendant belongs to the plaintiff.
	+ *If cannot prove* - If the plaintiff cannot prove the pre-existing proprietary base, they need to assert a claim to a remedial proprietary interest, usually relying on the claim of remedial constructive trust.

***Why use a proprietary claim ?***

1. ***The property right being asserted is that of a beneficiary under the trust***– There are two main reasons for this.
	1. *Equitable Tracing* – Equity provides better tracing rules that the common law. Equitable tracing rules are necessary where the plaintiffs money has moved through a bank account in which the plaintiffs money is mixed with money belonging to another.
2. ***In Specie*** –
	1. Equitable claims provide *in specie* restitution and the common law does not provide such remedies. Where the plaintiff prefers a proprietary remedy, the plaintiff needs to look to the laws equitable jurisdiction.
3. ***Barclays Bank v Quistclose Investments*** *­*–
	1. If the money was characterised as a loan only, the lenders would have been unable to recover their money, as the bank was exercising its right of set-off over the money remaining the Rolls Razors account.
		1. However, because he money was held to be impressed with a trust due to the limited purpose of the loan, and thank was held to have notice of the trust, the bank was unable to exercise its right of set-off and the investors were able to recover all of their loan.

**Personal Remedies**

**The trustee is the legal owner or holder of the property; but this is not for the trustees personal benefit. The property belongs, in equity, to the beneficiary and the primary obligation placed upon a trustee is to account for the trust property when called upon to do so.**

The most useful remedy available for breach of trust in many cases is the order of account.

***Order of Account***

* *Account* – This is distinguished from remedy of ‘account of profits’. An *order to account* requires the trustee to account for the trust property itself, and its management. The remedy of account of profits is used to strip unauthorised profits from the trustee.
	+ *Boardman v Phipps* – A trustee may have made personal profits, while increasing trust property – an account of profits or constructive trust is required to strip these profits from a trustee.
* *Beneficiary can call at any time –* A beneficiary can call for an account at any time, whether or not there has been a breach of trust. The trustee must product accounts showing receipts and disbursements.
	+ *Breach of trust* – if the beneficiary can establish that the trustee has committed a breach of trust, the trustee is usually ordered to account ‘on the basis of wilful default’ – *Perpetual Executors, Trustees and Agency v West Australian Trustee, Executor and Agency*

*Once account is made –*

* The beneficiary can either accept, surcharge or falsify the account
	+ *Accepts* – If the beneficiary ‘accepts’ the account, they agree that the trustee has performed the trust and properly account for the trust property.
	+ *Surcharges* – If the beneficiary surcharges the account, the beneficiary indicates dissatisfaction with the trustee’s management. The trustee must then account for the trust fund as if it were properly managed.
	+ *Falsifies* – If the beneficiary ‘falsifies’ the account where they believe that some of the trust moneys have been misapplied. The trustee must then account for the full amount of the misapplied funds.

***Account of Profits***

The accounts of profits is a **personal remedy** in equity and is one of the most important remedies in equity’s exclusive jurisdiction. Typically, the purpose of the account of profits is to make the defendant account for profits that should have gone to the plaintiff. Equity’s attitude is that which is done ‘ought to have been done’ – and therefore the account of profits becomes a suitable remedy – this also infers that all profit made by a defendant must be put back in the plaintiffs hands.

Accounts of profits are usually in support of equitable rights and they can include

1. Breaches of Trust – *Boardman v Phipps* [1967] 2 AC
2. Relationship of confidence (i.e. principal and agent) - *Asset Risk Management Ltd v Hyndes* [1999] NSWCA 201
3. Partnership dissolving - *Fry v Oddy* [1999] 1 VR 557
4. Fiduciary Relationship - *Magafas v Carantinos* [2007] NSWSC 416
5. Intellectual Property - *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25

When a plaintiff seeks to remedy of an account, they must prove that the plaintiff is entitled to a sum from the defendant. Whether the account was made with or without intention, honestly or dishonestly is disregarded in equity’s eyes – it is merely whether it not it occurred as per

*Boardman v Phipps* [1967] 2 AC. Thus, if profit is made and accounted for – all profit made by a defendant is placed back into the hands of the plaintiff minus any allowances to the defendant *(see next page)*.

***Not to punish the defendant***

Importantly, equity never seeks to punish – it has never been equities function to punish. Any profit made, which should have been the plaintiffs, is simply redirected to the plaintiff from the defendants conduct. The defendant will not suffer a ‘loss’ under an account of profits, rather the defendant must redirect those profits made to the plaintiff. Compensation can be claimed by the plaintiff – but this is not a concern of an account of profits.

As stated before, a plaintiff cannot be enriched from both a compensation and account of profits remedy – they must choose either one or the other. This was made clear in the *Tang Man Sit (Dec’d) (personal representative)* v *Capacious Investments Ltd* [1996] 1 All ER 193. Importantly, the plaintiff does not have choose before the judgement is provided – inferring that a plaintiff can choose that remedy which provides the most appropriate economic returns or greatest advantage.

***Causation***

Most commonly, account of profits are taken in circumstances involving breach of confidence, trust or some fiduciary duty that was owed to the plaintiff. A defendant is not able to argue or contend that not *all of the profit* should be redirected to the plaintiff because some of the profit would have been made by the defendant regardless of whether or not the breach occurred.

This was shown clearly in *Murad v Al-Saraj* [2005] EWCA Civ 959 where is was argued that the defendant was entitled to some of the profits despite having breached its fiduciary duty. The Court ruled that the *entire profit was to be stripped* and that an account of profits would only allow monies for the defendants skill and time etc.

***Profits ACTUALLY made***

Accounts of profit in equity are limited entirely to real profit – that is, profits which are tangibly identifiable because otherwise – the Court would be punishing the defendant by imposing unrealised profit which may or may not be realised.

In *Dart Industries Inc v The Decor Corporation Pty Ltd* (1993) 179 CLR 101, the High Court stated this principle and commented that equity would also prevent the defendant from being unjustly enriched.

***Allowances to the defendant for time and skill put in***

To ensure that equity does not punish a defendant, equity will allow a discretion for the defendants time, skill and effort in making a profit. If the defendant is honest in his account of profits – then equity typically provides more allowance than it would have otherwise as per *Murad v Al-Saraj* [2005] EWCA Civ 959. However, the reverse is not true – a fraudulent defendant will still be provided an allowance although, arguably, the Court will not be as generous.

Most notably, in *Victoria University of Technology v Wilson* (2006) 68 IPR 597 it was established that if the profit was entirely the result of the defendants work – it is permissible for the Court to order a proportion of the profit to go to the defendant. Of note, the Court stated that this was an ‘allowance’ and did not violate the account of profits principle in that wrongdoers cannot profit from a breach of a duty.

***Unruly Delay***

In circumstances of delay on the plaintiffs behalf, a plaintiff can be excluded from an action of seeking profits. In *Electrolux Ltd v Electrix Ltd* (1953) 70 RPC 158, the plaintiff took ten years to file a claim and the Court denied the plaintiff from seeking redress due to the length of time it took the plaintiff to claim.

***Breach of Contract***

In Australia, account of profits are not available in response to a breach of contract as per *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157.

***Equitable Estoppel***

There are no known cases where an account of profits as a remedy as been sought in a equitable estoppel case since the plaintiffs usually are attempting to enforce the representation that was made to them.

***Proprietary Remedies and Account of Profit***

The remedy of account of profits is typically always taken against **the person** who committed the wrong. It cannot attach to property or even create an interest in property in relation to an account of profits. This infers that no priority is given to plaintiffs in the event that a defendant is insolvent.

This is usually why constructive trusts and equitable charges are provided for plaintiffs in this regard and not an account of profits. It is noted that Courts can secure an equitable charge *as an account of profits* as per *Warman International Ltd v Dwyer* (1995) 182 CLR 554.