Cambridge Law Journal, **61(3)**, November 2002, pp. 657–683
Printed in Great Britain

RECONCEPTUALISING THE EXPRESS TRUST

PATRICK PARKINSON*

I. TRUSTS AS A FORM OF PROPERTY OWNERSHIP

THERE can be no area of law in which there is more confusion about basic definitions than the law of trusts. Maitland, one of the greatest expositors of equitable principles, was reluctant to offer more than a "wide, vague definition".[1] The classic Australian text, *Jacobs on Trusts*, offers a description, but not a definition, noting that: "It is considerably easier to criticise the many attempts of others at definition than it is to venture a fresh definition which will meet the criticisms so made."[2]

In spite of all this uncertainty about the definition of the trust, there would at least be widespread agreement that in the law's taxonomy, express trusts are a species of property right.[3] This fundamental proposition about the law of trusts is reflected in its language. We talk of the "legal estate" and the "equitable estate", "legal ownership" and "equitable ownership".[4] The language of trusts is the language of property rights, not personal rights. Of course, there has been fervent debate about the nature of the beneficiary's interest under a trust.[5] There was a time when it seemed it could only be analysed by reference to the "deceiving dichotomy" between rights in rem and rights in personam.[6] However, the questions to which this attempt at classification gave

* Professor of Law, University of Sydney. This is a revised version of a paper given at the Law of Obligations Conference, University of Melbourne, February 2002. The author is grateful for the helpful comments of Michael Bryan, Fiona Burns, John Mee and David Wright on the earlier version of this paper. He is also in debt to Derek Davies for many useful discussions during the course of research for this article. All deficiencies remain the author's responsibility alone.

[1] F. Maitland, *Equity—A Course of Lectures* (Brunyate ed., 1936), p. 44.

[2] R.P. Meagher and W.M.C. Gummow, *Jacobs' Law on Trusts in Australia* (6th edn., Butterworths, 1997), p. 3.

[3] See *e.g.* P. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 U.W.A.L.R. 1, 19–20.

[4] The Privy Council has stated that "the distinction between the legal and equitable estate is of the essence of the trust": *Abdul Hameed Sitti Kadija* v. *De Saram* [1946] A.C. 208, 217, quoting with approval Lee, *Introduction to Roman-Dutch Law* (3rd edn. 1931).

[5] See for example the debate between Austin Scott and Harlan Stone in two essays both entitled "The Nature of the Rights of the Cestui Que Trust" at (1917) 17 Col. L.R. 269 (Scott) and 467 (Stone).

[6] D.W.M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can. B.R. 219, 221.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

rise received a pragmatic answer from the courts,[7] and the debate has largely passed into the mists of history.[8]

This understanding of the law of trusts in terms of property ownership reflects the origins of the trust. Although the origins of the use were in agreements which we might now recognise as contracts,[9] the law of uses came quickly to be understood as an aspect of conveyancing. This was reflected in the way that trust law was dealt with by textbook writers during the great work of systematisation which occurred in the nineteenth century.[10] For example, Thomas Lewin, who published the first of the modern treatises on trusts in 1837, defined the trust as "a confidence, reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which cestui que trust has no remedy but by subpoena in Chancery."[11] He noted that trusts could also arise in relation to chattels real and personal, and that the same principles were applicable,[12] but the trust of land provided the model. And it is this paradigm of the trust which has subsequently influenced the way in which rights under trusts have been conceptualised.

What do we mean when we characterise trusts as a form of property ownership? Two propositions are perhaps fundamental in the law concerned with express trusts.[13] The first is that in the nature of the trust, there is a separation of legal and beneficial ownership. The legal estate exists in the hands of the trustee or trustees, and the equitable estate is with the beneficiaries. The second proposition also seems fundamental. It is that for a trust to exist, there must be trust property. A trust without property is like

[7] The landmark decisions were perhaps *Baker* v. *Archer-Shee* [1927] A.C. 844 *and Commissioner of Stamp Duties* v. *Livingston* [1965] A.C. 694.

[8] The issue arises still in the interpretation of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. See *Webb* v. *Webb* [1994] 3 W.L.R. 801; *Re Hayward (deceased)* [1996] 3 W.L.R. 674.

[9] Maitland, *op. cit.* p. 28.

[10] D.W.M. Waters, "The Role of the Trust Treatise in the 1990s" (1994) 59 Missouri L.R. 121; J. Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale L.J. 625, 632ff; A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 Univ. of Chicago L.R. 632.

[11] T. Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (1837) p. 17.

[12] *Ibid.*, at p. 5.

[13] These propositions are reflected in the definition of the trust which is to be found in Hanbury and Martin's *Modern Equity*: "A trust is a relationship recognised by equity which arises where property is vested in (a person or) persons called the trustees, which those trustees are obliged to hold for the benefit of other persons called *cestuis que trust* or beneficiaries. The interests of the beneficiaries will usually be laid down in the instrument creating the trust, but may be implied or imposed by law. The beneficiary's interest is proprietary in the sense that it can be sold, given away or disposed of by will; but it will cease to exist if the legal estate in the property comes into the hands of a bona fide purchaser for value without notice of the beneficial interest. The subject-matter of the trust must be some form of property. Commonly, it is legal ownership of land or of invested funds; but it may be of any sort of property . . ." (16th edn. by Jill Martin, Stevens, 2001 at pp. 47–48).

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

a sea without water. Uncertainty about the identity or extent of the subject-matter of a trust will lead to a purported trust failing for lack of certainty.

The purpose of this article is to introduce some qualifications concerning these apparently self-evident propositions about the nature of the express trust, and to suggest that the law of trusts is better conceptualised as a species of obligation rather than being understood as a form of property ownership. The article goes on to consider the benefits of conceptualising the trust as a species of obligation and concludes by offering a new definition of the trust.

II. The Separation of the Legal and Equitable Estates

It is assumed in many discussions of the law of trusts that the existence of a legal estate in a person or body which is designated as a trustee necessarily means that the beneficiary has a proprietary interest in it. This notion is, for example, expressed by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council*. He wrote: "Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property."[14] Likewise, Lord Millett's analysis of the nature of the Quistclose trust in *Twinsectra Ltd.* v. *Yardley*[15] proceeded on an assumption that it was necessary to locate the beneficial interest in property which is said to be held on a trust.

Does the fact that the trustee only has a legal estate mean that the beneficial estate must be located elsewhere? Must there be a symmetry between the legal and equitable estates? In the law of charitable trusts, there is no such symmetry of legal and equitable estates. Charitable trusts do not give rise to property rights in those who were intended to benefit from the settlor's largesse, and the responsibility for enforcement rests with the Attorney-General. However, charitable trusts have long been understood to be a sui generis type of trust. On this view, the principles applicable to charitable trusts therefore have no necessary implications for our understanding of private trusts, and trusts are only one legal form through which a charitable intention may find expression.

In the law of private trusts it may be thought to be axiomatic that if the legal estate is held on trust, there must be a corresponding equitable estate located elsewhere. Exceptions to that rule exist, but are regarded as anomalous and not to be extended.

[14] *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] A.C. 669, 705.
[15] [2002] 2 W.L.R. 802, 825ff.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

Examples are trusts for the maintenance of graves or to provide for the care of animals after an owner's death, trusts for the saying of masses, if they are not considered to be charitable, and a miscellaneous group of cases, of which perhaps the most well-known is a trust for the promotion of fox-hunting.[16] In the words of Harman L.J., these were all "occasions when Homer has nodded".[17] Of course there is nothing particularly Homeric about such exceptions, and one ought not to utilise these exceptional cases as an argument for a proposition that orthodox principles should be reconsidered.

A more substantial argument for reconsideration arises however, when one considers the nature of discretionary trusts. It is clear that beneficaries under a discretionary trust do not gain proprietary interests.[18] That may be so in terms of individual proprietary rights, but can it be said that the beneficial estate vests in the named beneficiaries collectively?

One way of answering this is to inquire whether the rule in *Saunders* v. *Vautier*[19] will apply to allow the beneficiaries of the discretionary trust if all adult and sui juris, to call for the legal estate to be vested in them. This has been applied in the context of discretionary trusts, in the circumstances where the class of beneficiaries was closed, and there was no power to accumulate income.[20] However, there will be many other discretionary trusts where such a rule could not practically have any operation. A prominent example is the trust which was involved in the Baden litigation. In *McPhail* v. *Doulton*,[21] consideration was given to the validity of a discretionary trust which listed the beneficiaries as officers, employees and ex-officers or employees of a certain company, together with their relatives and dependants. In the subsequent case, *Re Baden's Deed Trusts (No. 2)*,[22] the Court of Appeal, by majority, held that relatives meant "descendants from a common ancestor". Such a definition would include an enormous number of people who are distantly related to employees or ex-employees of the company. It would be impossible to say where the beneficial interest lay in the Baden trust.[23] Of course, one might

[16] *Re Thompson* [1934] Ch. 342.
[17] *Re Endacott* [1960] Ch. 232, 250. Roxburgh J. in *Re Astor's Settlement Trusts* [1952] Ch. 534, 547 described these cases as "concessions to human weakness or sentiment".
[18] *Gartside* v. *IRC* [1968] A.C. 653.
[19] (1841) 4 Beav. 115; 49 E.R. 282.
[20] *Sir Moses Montefiore Jewish Home* v. *Howell & Co. (No. 7) Pty. Ltd.* [1984] 2 N.S.W.L.R. 406. See also *Re Beckett's Settlement* [1940] Ch. 279, 285, *per* Simonds J.
[21] [1971] A.C. 424. *McPhail* v. *Doulton* has not been accepted in Ireland: *O'Byrne* v. *Davoren* [1994] 3 I.R. 373.
[22] [1973] Ch. 9.
[23] There is ample authority for the proposition that if the class of beneficiaries is too wide, then the trust will be void because it is administratively unworkable. Lord Wilberforce, in his

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

assert as a matter of dogma that the beneficial estate vests collectively in the group of potential beneficiaries even if they could never be ascertained, but it is difficult to see what practical reality this could have.

The rule in *Saunders* v. *Vautier* can only really have application to a discretionary trust if there is a fixed class, subject to a discretion to choose between members of that class, and the class is closed, or to a discretionary trust which, although initially open, becomes closed by subsequent events.[24] In such a case the beneficiaries should be regarded as collectively holding the equitable estate[25] and therefore able to wind up the trust if they are all adult and sui juris. If however, the class is so wide that no list of beneficiaries can sensibly be drawn up, then the rule in *Saunders* v. *Vautier* would not apply. Consequently, the legal estate would vest in the trustees without a symmetrical equitable right vested elsewhere, although the trust would need to be set up in such a way as to avoid perpetuity problems.

Another illustration of the proposition that the legal estate in property may be held on trust without a symmetrical equitable estate being located elsewhere is the well-known case of *Re Denley's Trust Deed*.[26] In this case, Reginald Goff J. upheld a trust, limited to the perpetuity period, to provide a sports ground for the primary use of the employees of a company, although the trustees might allow others to use it as well. Goff J. saw no infringement of the beneficiary principle in a situation where there are in fact, direct or indirect beneficiaries of the trust.[27] The decision has of course, been controversial. One response has been to try to interpret the decision as being consistent with the orthodox requirement that there must be beneficiaries of the trust. Vinelott J. in *Re Grant's Will Trusts*[28] defended the decision by treating it as a kind of discretionary trust. He saw "no distinction between a trust to permit a class defined by reference to employment to use and enjoy land in accordance with the rules to be made at the discretion of trustees on the one hand, and, on the other hand, a trust to

speech in *McPhail* v. *Doulton* [1971] A.C. 424, gave as an example a trust for the residents of Greater London. In *R.* v. *District Auditor ex p. West Yorkshire Metropolitan County Council* [1986] R.V.R. 24, a trust for the benefit of the inhabitants of West Yorkshire (about 2.5 million) people, was held invalid on this reasoning. While some trusts for a large number of potential beneficiaries may be struck down because of administrative unworkability, it is clear from the Baden litigation itself that it is possible to have a very broad and indeterminate class without infringing the administrative workability requirement.

[24] An example would be where the death of a person ends the possibility that future born children will enter the class of potential beneficiaries of the trustees' discretion.

[25] *Re Smith, Public Trustee* v. *Aspinall* [1928] Ch. 915.

[26] [1969] 1 Ch. 373.

[27] *Ibid.* at pp. 382–384.

[28] [1979] 3 All E.R. 359, 368.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

distribute income at the discretion of the trustees amongst the class, defined by reference to, for example, relationship to the settlor."[29]

Even still, it is difficult to see how there could be an equitable estate any more than there was in *McPhail* v. *Doulton*. The employees in *Re Denley* certainly had a sufficient interest to enforce the trust but the present employees could not have wound up the trust, sold the sports ground and divided the proceeds between them, if all adult and sui juris, since the terms of the trust clearly contemplated that all future employees within the perpetuity period would benefit from the trust. Secondly, it contemplated that those who were not employees might also be permitted to use the sports ground at the discretion of the trustees.[30] One could not say that there was any identifiable group in which the beneficial estate was vested. *Re Denley*, even as interpreted by Vinelott J., supports the proposition that a legal estate can be vested in a trustee without there being a symmetrical equitable estate.

A third example of the same phenomenon is the *Quistclose* trust, at least as it has been interpreted in certain cases in Britain. In *Re Northern Developments Ltd.*,[31] approved in *Carreras Rothmans* v. *Freeman Matthews Treasure*,[32] the primary trust under a Quistclose arrangement was treated as a kind of non-charitable purpose trust which was enforceable by those who were intended to be paid out of the funds so held on trust, but which did not give them a beneficial interest in those assets. This is analogous to the approach Goff J. adopted in *Re Denley*. This is of course, not the only possible interpretation of the *Quistclose* trust, and the purpose-trust analysis was subjected to significant criticism by Lord Millett in his obiter comments on the nature of the Quistclose trust in *Twinsectra Ltd.* v. *Yardley*.[33] In particular, he noted the difficulties of this approach where the purpose is an abstract one and there are no identifiable persons for whose benefit the purpose is to be carried out and who might therefore have an interest in enforcement.[34] However, the question remains whether the cases which purport to apply what is termed as the Quistclose trust are in fact homogenous in character. It is at least possible that the Quistclose trust will

[29] This distinction is well criticised by Moffat. He writes: "One form of discretion is of an administrative nature—'making rules for the use and enjoyment of land by all those employees able to benefit'—whereas the other—'discretion to distribute income among a class'—is plainly dispositive." G. Moffat, *Trusts Law: Text and Materials* (3rd edn., 1999, with G. Bean, J. Dewar. and M. Milner), p. 201.

[30] This was explained by Goff J. in *Re Denley* [1969] 1 Ch. 373 as a power in partial defeasance of a trust. I am indebted to John Mee for raising the question whether trustees can have powers which partially defeat the trust which they should be upholding.

[31] Unreported, 6 Oct. 1978, Ch. D.. (Megarry V.C.).

[32] [1985] 1 All E.R. 155.

[33] [2002] 2 W.L.R. 802.

[34] *Ibid.*, at p. 827.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

eventually come to be understood as an umbrella term for a variety of kinds of trust concerned with limitations of an equitable character placed on the use of money by lenders and which do not always share the same structural characteristics.

It seems clear from all these examples then, that there can be a valid private express trust even though there is no symmetry of the legal and equitable estates. Consequently, it is incorrect to think of trusts always in terms of legal and equitable ownership. Rather, the core idea of the private express trust lies in the notion of equitable obligations in relation to property, which in most cases will also give to beneficiaries commensurate property rights in equity.

For the scholar of equity, there is nothing particularly surprising or indeed, troubling, about this. In *Commissioner of Stamp Duties (Qld)* v. *Livingston*[35] which concerned the rights of legatees under an unadministered estate, Lord Radcliffe described as a fallacy the notion that "for all purposes and at every moment in time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable." Rather, equity "calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines."[36] As Prof. Kevin Gray has explained it:

> An equitable right of property finds its origin not as a pre-existing component of some larger interest which is then hewn free as a block of equitable entitlement; instead it represents the result of a doctrinally-driven movement which impresses new rights upon the pre-existing estate under the mandate of the controlled conscience of equity. Equitable rights of property thus derive from conscientious obligations to deal with an asset or resource in a certain way.[37]

It follows that equitable proprietary rights are commensurate with the relief available for the enforcement of the obligations to which equity gives effect.[38]

III. The Requirement of Trust Property

Even if it is not essential to the nature of the trust that there be an equitable owner of the property held by the trustee, it is at least regarded as necessary that there should be identifiable trust

[35] [1965] A.C. 694.
[36] *Ibid.*, at p. 712.
[37] K. Gray, "Equitable Property" [1994] C.L.P. 157, 165.
[38] As Isaacs J. said in *Hoysted* v. *Federal Commissioner of Taxation* (1920) 27 C.L.R. 400, 425, a person's "interest in the trust estate at any given moment is measured by the relief which equity is then prepared to give him, that is, by the rights which the due execution of the trusts as framed by the creator of the trusts will at that moment give him."

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

property. The requirement that there must be property in existence at the time the trust is created and to which the obligations of trusteeship attach is variously expressed by textbook writers. In England and Australia, it is usually dealt with as an aspect of the requirement of certainty of subject-matter. In the American literature, it is more commonly referred to as the res requirement.[39]

The argument might be that it is here that ownership and obligation can be clearly distinguished. Where there is a trust, there is a discrete and specific fund which is owned by the trustee, whether or not the beneficiaries as individuals, or collectively, hold the beneficial estate. The trustee does not merely have an obligation to use *some* money or *some* property for the beneficiaries or for the purpose given, but the obligation attaches to specific property. It is in this way, it may be argued, that the law of trusts can be classified as concerned with the ownership and use of property, rather than being understood fundamentally, as a species of obligation.

While it is true that the trust obligation must attach to identifiable property, the distinction between ownership and obligation is not as clear cut. I will argue that there is strictly no need for there to be identifiable trust property. It is enough that there is identifiable subject-matter within which the trust property may be located, by computation or otherwise. Furthermore, the trust estate does not need to be segregated from the personal patrimony of the trustee. I will also show that it is not necessary that the amount of property to be held on trust within a larger mass be specifically quantified. It is enough that the trust *obligation* is defined with sufficient clarity that a court can decide, in the event of dispute, how much money or property is held on trust or should be devoted to the purposes of the trust. That is, the requirement of certainty of subject-matter is, on closer analysis, a requirement of certainty of obligation.

A. The need for identification of the trust property

The terms "trust property" and "the subject-matter of the trust" are often used interchangeably, but as Scott has argued, the two concepts need to be distinguished. The subject-matter of the trust is the property of which all or just a portion may be subject to a

[39] The rule was well expressed in *Gough* v. *Satterlee* 52 N.Y.S. 492, 496, 32 N.Y. App. Div. 33, 40 (1898): "A subject or corpus of a trust is absolutely essential, not merely to the validity of a trust but also to its existence. Courts will supply a trustee; in England at times under the cy pres power, they will select beneficiaries, but in no country will they furnish a trust estate." For other US authorities see *Begier* v. *Internal Revenue Service* 496 U.S. 53, 62 (1990); *Salisbury Inv. Co.* v. *Irving Trust Co. (In re United Cigar Stores Co.)* 70 F. 2d. 313, 315 (2nd Cir. 1934); 1 *Scott on Trusts* 4th edn. (A. Scott and W. Fratcher) s. 3.1; J. Baron, "The Trust Res and Donative Intent" (1986) 61 Tulane L. R. 45.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

trust. The latter is the trust property.[40] Thus where X's life estate in land is held on trust for Y and Z, the land is the subject-matter of the trust and the life estate is the trust property. The distinction may seem technical and in most cases unimportant, but the distinction is of considerable importance in analysing the nature of the res requirement.

The Texas case of *Wilkerson* v. *McClary*[41] demonstrates the importance of being able to identify the subject-matter. A settlor declared an inter vivos trust of "a checking/savings account located at Home Savings and Loan Association" on trust. At the date of her death, she had four such accounts, and she had not indicated to the bank that any of these accounts were held as a trustee. Since the court had no way of knowing which of the four accounts was meant to be held on trust, the trust failed for uncertainty.

A trust may also fail because the trust property is not sufficiently defined within the subject-matter. Many of the well-known examples where trusts have failed for uncertainty fall into this category. For example, in *Palmer* v. *Simmonds*,[42] the testator left "the bulk of my estate" on trust. The estate was the subject-matter, but the trust property was not identified with sufficient certainty.[43] The classic case of *Boyce* v. *Boyce*[44] can also be analysed as a failure of certainty in relation to the trust property, rather than the subject-matter.[45]

Thus for any trust to exist, the subject-matter must be identified specifically. The requirement that there must be identifiable subject-matter within which the trust property is located distinguishes the equitable obligation which arises under a trust from other forms of obligation which need not be satisfied out of any specific property. If I declare myself a trustee of $5,000 for my child, it is not enough that I have general assets in excess of that value. Nor is it sufficient that I happen to have $6,000 in a bank account. For I have not identified any specific money as being held on trust, either by

[40] 1 *Scott on Trusts* 4th edn. (A. Scott and W. Fratcher) s. 3.1. A similar distinction is drawn in the *Restatement: Restatement (Second) of Trusts* (1957) s. 2, comment c.

[41] 647 S.W. 2d 79 (1983) (Texas Ct. App.).

[42] (1854) 2 Drew. 221.

[43] See also *Smullin* v. *Wharton* 103 N.W. 288 (1905) (Supreme Court of Nebraska) (alleged oral trust of property bequeathed absolutely in the will; the term "bulk of my estate" was too uncertain).

[44] (1849) 16 Sim. 476.

[45] In this case, the testator devised all his houses in trust to convey one of them to his daughter Maria and the remainder to his daughter Charlotte. Maria was given the choice of her house. She died in the testator's lifetime and consequently did not choose a house. It followed, according to the court, that the beneficial interest of Charlotte failed for uncertainty also, since without Maria making a choice, the court could not determine which houses should be owned by Charlotte. Glanville Williams has pointed out that this was a harsh application of the uncertainty doctrine. The court might have held that the gift was to Charlotte of all the houses save such one, if any, that Maria might choose. See G. Williams, "The Three Certainties" (1940) 4 M.L.R. 20, 24.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

segregation or otherwise, and nor have I identified specific subject-matter as being the locus of the trust property.

What then, are the requirements for sufficient identification of the trust property? Is it sufficient that a trustee declares a specified quantity of property within a larger fungible mass to be held on trust, without segregating that property, or must there be segregation in order to satisfy the requirements of certainty?

The issue of whether sufficient certainty exists when a trust is declared over unidentified property held within a larger and identified mass was considered in the much criticised decision of *Hunter* v. *Moss*.[46] In this case, there was an oral declaration of trust in respect of 50 out of 950 shares held by S in a private company. It was argued that the trust failed for lack of subject-matter, because S had not identified which parcel of 50 shares was subject to the trust obligation. Nonetheless, the Court of Appeal held that there was a valid trust.[47] A similar position has been adopted in the United States.[48] The debate on this case in the English literature is interesting, for it raises some important questions of principle.

In a note on *Hunter* v. *Moss*,[49] Prof. Hayton argued that Moss, the owner of the 950 shares could have validly given effect to his intention that he should be a trustee of 50 shares for the plaintiff Hunter, by declaring himself a trustee of all 950 shares and holding them for the plaintiff and himself as equitable tenants in common in the proportion of 1/19th and 18/19ths respectively. However, he could not declare himself a trustee of 50 shares without setting aside a specific parcel of 50 shares for the beneficiary. For until a specific parcel of shares is set aside, Prof. Hayton argued, Moss had not become a trustee since he had not yet divested himself of any beneficial interest in specific shares. In Prof. Hayton's view therefore, the creation of a beneficial interest in another out of property which one owns can only occur when that property is segregated so as to be capable of separate identification. A trust estate must be created. It is not sufficient that an owner should declare an intention to hold certain property on trust out of a larger mass.

[46] [1994] 1 W.L.R. 452.

[47] This decision was followed in respect of English, but not Australian law, in *Re Harvard Securities Ltd. (in liq.)* [1997] 2 B.C.L.C. 369. In Australia, the position was left open by Gummow J. in *Herdegen* v. *Federal Commissioner of Taxation* (1988) 84 A.L.R. 271, 279.

[48] *United States Trust Company of NY, Trustee* v. *Commissioner of Internal Revenue* 296 US 481 (1936). "An undivided interest in property may constitute the corpus of a trust" (*per* Hughes C.J., 487). See also *Rollestone* v. *National Bank of Commerce in St. Louis* 252 S.W. 394 (1923); *Matter of Estate of Berryman* 226 Kan. 116, 595 P. 2d. 1120 (1979).

[49] D. Hayton, "Uncertainty of Subject-Matter of Trusts" (1994) 110 L.Q.R. 335.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

Hayton argued that the property must be specifically identified, either by specifying a fraction of all the shares (in which case the beneficiary would have a fractional share in all 950 shares rather than a beneficial interest in only 50), or by separating out a parcel of shares. Moss could not achieve the intended result merely by declaring himself bound by a fiduciary obligation to hold 5% of the issued share capital in his company on trust for Hunter. He had to create a separate parcel of "property" (albeit only a separate certificate of share ownership or a list of share numbers), to which the trust obligation could attach. For this reason he regarded *Hunter* v. *Moss* as wrongly decided, a view which is shared by some other commentators on the case.[50]

B. Is there a need for segregation?

Is it necessary that there be segregation out of the assets of the trustee in order for a trust to be created? It is important here to distinguish between failure of segregation which is relevant to the question of intention and failure of segregation which may lead to failure of the trust for uncertainty of subject-matter.

The segregation issue frequently arises in cases of insolvency where it is claimed that certain property which apparently forms part of the general assets of an individual or company, was in fact impressed with a trust so as to take it out of the pool of assets available to the general creditors. Typically in such cases, there is a lack of clarity about the exact form of legal arrangement which was intended by the parties.[51]

In such cases, the purported trust will not fail for uncertainty of subject-matter per se. Rather, the lack of segregation helps to determine that a debtor-creditor relationship was intended rather than one of trusteeship. The principle is that stated in *Henry* v. *Hammond*:[52]

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money to be so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to

[50] See for example, P. Birks, "Proprietary Restitution: An Intelligible Approach" (1995) 9 Trust Law International 43; P.J. Clarke, "Land Law and Trusts" [1994] All E.R. Rev. 241, 249–251; M. Ockelton, "Share and Share Alike?" [1994] C.L.J. 448.

[51] *E.g. Walker* v. *Corboy* (1990) 19 N.S.W.L.R. 382; *Re Australian Elizabethan Theatre Trust* (1991) 102 A.L.R. 681.

[52] [1913] 2 K.B. 515, 521. See also in *Re Bond Worth Ltd.* [1980] Ch. 228, 260–261.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

> hand over an equivalent sum of money, then in my opinion, he is not a trustee of that money but merely a debtor.

The position will however be different where the intention to create a trust is clear. Where there is an identifiable fund which is subject to trust obligations, there will be a trust even though the fund is not held separately from the general assets of the trustee. This was made clear by the High Court of Australia in *Associated Alloys Pty. Ltd.* v. *ACN 001 452 106 Pty. Ltd.*[53] Gaudron, McHugh, Gummow and Hayne JJ. wrote that

> Where the existence of a trust is explicit, the absence of an express obligation to keep trust moneys separate does not deny the trust. Rather, there being a trust, it follows that equity will imposes various obligations and duties on the trustee. One of these is the obligation to get in the trust property and keep it distinct from the property of the trustee and from property held on other trusts.

It is not in all cases that the trustee will be under an equitable obligation to keep the trust property separate from other assets. This depends on the agreement or expectations of the parties. This is illustrated by the decision of the NSW Court of Appeal in *Stephens Travel Service International Pty. Ltd.* v. *Qantas Airways.*[54] An airline stipulated expressly in its contract with a travel agency that all moneys collected by the travel agent for airline tickets, less its commission, would be the property of the airline and held on trust for the airline. In fact, the commercial operation of the travel agency and the complexity of some transactions made it impractical to keep the money due to the airline in a separate account. Instead, the total amount owing was paid each fortnight.[55] Hope J.A. held that this did not invalidate the existence of a trust. He wrote that:[56]

> Prima facie trust moneys should be paid into a separate account, but if it is agreed between trustee and beneficiary that they may be paid into a general account, the trustee would be required to retain sufficient moneys in that account to cover his trust obligations ... I see no reason why effect should not be given to such an agreement or why it should result in a destruction of the trust.

It should be noted that in this case there was no trust fund as such. It was sufficient for the trust to satisfy the requirement of certainty of subject-matter that the amount of money held on trust at any time was capable of calculation in accordance with the terms

[53] (2000) 202 C.L.R. 588.
[54] (1988) 13 N.S.W.L.R. 331.
[55] *Ibid.*, at pp. 341–342.
[56] *Ibid.*, at p. 349.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

of the contractual arrangements between the parties and the course of trading in a particular period. That is, it sufficed for there to be a valid trust that the *obligation* was clear, and from this obligation, the extent of the property in the general funds of the travel agency which was held on trust at any given moment was capable of computation.[57]

Of course segregation is desirable, even if it is not necessary for the validity of a trust. One consequence of a failure to segregate is that the trust moneys may be dissipated. A lack of segregation can also create difficulties in tracing the trust property in the mixed fund. This was the basis of a number of objections raised to the decision in *Hunter* v. *Moss*. Critics argued that without segregation, it is difficult to know which shares are owned by the beneficiary.[58] What if some, but not all, of the shares are sold? In such circumstances, does the trustee sell the trust property or his or her own property? What if, after declaring the trust, the trustee transfers the shares by way of gift to two other persons? Against whom will the beneficiary be able to exercise the right of tracing? These are difficulties, and they point to the desirability of having a segregated fund as an administrative requirement. However, there are no great legal difficulties involved in answering these questions if the fund is not segregated. As Jill Martin has pointed out,[59] these difficulties are readily resolved by application of tracing rules concerning the mixing of trust funds with the trustee's own property.[60] Certainly, the High Court of Australia found no difficulty in tracing shares into a larger mass even when the shares subject to tracing were not specifically identifiable.[61]

C. Principles for identifying the trust property within an undifferentiated mass

What then are the requirements for the existence of trust property within a larger mass? It is submitted that the requirement of certainty can be achieved in one of three ways. Firstly, where property within a mass is identified by subtraction or by identifying a proportion of the mass; secondly, where the trustee subsequently identifies the trust property by segregating that property out of the mass; thirdly, where property is impressed with a trust before it is mingled with a larger mass.

[57] As Hope J.A. pointed out, any uncertainty could only arise from the inadequacy of the records kept by the travel agency, not from anything provided for or envisaged by the agreement: *ibid.*, at p. 342.
[58] See *e.g.* Hayton *op. cit.*, Clarke, *op. cit.* and Ockelton, *op. cit.*
[59] J. Martin, "Certainty of Subject-Matter: A Defence of *Hunter* v. *Moss*" [1996] Conv. 223.
[60] *Re Hallett's Estate* (1880) 13 Ch. D. 696; *Re Oatway* [1903] 2 Ch. 356.
[61] *Brady* v. *Stapleton* (1952) 88 C.L.R. 322.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

(i) Property identified by subtraction or proportion

The English authorities suggest two ways in which the trust property may be sufficiently identified within the subject-matter of the trust.

The first is by subtraction. This is illustrated by Megarry J.'s decision in *Re Kayford*.[62] In this case a mail order company which was in financial difficulty was advised to safeguard the interests of customers by placing their payments in a separate bank account pending the mailing of the goods purchased with the intention that the money should belong to the customer until the order was filled. Instead of doing so, it placed the money in an already existing bank account which was dormant, and which contained nearly £50. Megarry J. held that payment into a separate bank account was useful as an indication of the company's intention to create a trust but it was not essential.[63] The money held on trust could be sufficiently identified within the bank account by subtracting the amount of money which was in the account before the funds which were subject to a trust obligation were added.

The second, for which *Hunter* v. *Moss* is the authority, is by identifying the proportion of the mass held on trust. In this case, the declaration that 5% of the share capital of a private company was held on trust was sufficient to make it certain. This equated to 50 shares.

How can this decision be reconciled with the cases concerned with the identification of chattels held in bulk, where no such trust was found? In discussing this issue, it is important to distinguish between trusts in relation to goods in bulk, and contracts for the purchase of goods stored in bulk. As Sarah Worthington has demonstrated, the legal principles are not the same.[64] The creation of property rights in equity pursuant to a contract for purchase depends on the requirement of specific performance. No such requirement arises where a trustee declares himself or herself a trustee of an amount which is located within a larger mass. The only question is whether the trust property has been identified with sufficient specificity.

The case which has been most discussed on goods stored in bulk is *Re London Wine Company (Shippers) Ltd.*[65] which was endorsed by the Privy Council in *Re Goldcorp Exchange Ltd. (in rec.)*.[66] A

[62] [1975] 1 W.L.R. 279.
[63] *Ibid.*, at p. 282.
[64] S. Worthington, "Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts" [1999] Journal of Business Law 1.
[65] [1986] P.C.C. 121. See R. Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 L.Q.R. 433.
[66] [1995] 1 A.C. 74.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

company sold cases of wine for investment purposes to the general public and as part of its service, stored the wine on payment of a fee. The company issued a "certificate of title" to the wine and indicated that the customer was the "sole beneficial owner" of that wine. The language of equitable interests was thus quite clearly invoked, but at no stage were any specific bottles or cases of wine of the requisite type allocated to each customer. Rather, they were stored in bulk in a variety of different warehouses. There was enough wine in stock in total to satisfy the claims of all the customers should they decide to withdraw their wine. When the company's business collapsed, the entitlement of the customers to the wine was in competition with the claims of a bank which had a floating charge over all the assets of the company. Oliver J. held that legal title in the purchased cases of wine had not passed to the customers and that the company was not a trustee because the subject-matter of the purported trust was uncertain.

Hunter v. *Moss* has been distinguished from *London Wine* on the basis that shares are intangible and fungible assets.[67] Bottles of wine are not fungibles. A bottle might, for example be corked or badly stored,[68] and in the case of wine of a scarce vintage, it might be irreplaceable if broken or otherwise rendered imperfect. Each bottle of wine is a distinct entity. Therefore owning 20 bottles out of 100 in stock is not in itself a sufficient identification of the property.

However, a further ground for distinction is that in these cases also, there was a fluctuating mass, and so one could not identify the assets owned in equity by each customer by reference to proportions. In *London Wine*, for example, the mass of which the purchased bottles usually represented a portion was subject to fluctuation and change. It so happened that in some cases a customer or customers between them had purchased the entire company stock; but there was no reason why the company should not at some later stage purchase more wine of that vintage and also no reason why it should not satisfy the customers' contracts out of newly purchased stock. It was thus not possible to say either that certain bottles or cases were held on trust or that a particular customer owned a definite percentage of the company's entire stock. This might not matter perhaps if the bottles stored increased in number but it could matter very much if the numbers decreased. This is illustrated by *Re Goldcorp*.[69] In this case, the levels of

[67] *Re Harvard Securities Ltd. (in liq.)* [1997] 2 B.C.L.C. 369.
[68] This was an argument utilised at first instance by Colin Rimer Q.C., as he then was, in *Hunter* v. *Moss* [1993] 1 W.L.R. 934.
[69] [1995] A.C. 74.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

bullion held by the company varied from time to time. Thus not only was it impossible to say what bullion each customer owned but it was also impossible to know what fraction of the total bullion each customer owned especially since the amount purchased exceeded the gold bullion which was stored.

(ii) By subsequent identification or desegregation

Secondly, there may be certainty of subject-matter by subsequent identification or segregation. This emerges from the judgment of Scalia J. of the Supreme Court of the United States in *Begier* v. *Internal Revenue Service*.[70] At issue in this case were excise taxes collected from persons making payment for facilities and services, and insurance contribution taxes withheld from the wages of employees. The Internal Revenue Code stated that the amount of taxes "collected or withheld" is held to be in a special fund in trust for the United States.[71] In this case, the bankrupt company had paid some money to the Internal Revenue Service (IRS) out of a trust account established for the purpose, and other money from its general funds. When it went into liquidation, the trustee in bankruptcy sought to recover tax funds paid to the IRS within 90 days before filing for bankruptcy as a voidable preference. The argument was that such funds were "property of the debtor" at the time they were paid, rather than trust property. The Supreme Court was unanimous in holding that the money which had been paid to the IRS, whether out of the trust fund or the general accounts of the company, was not "property of the debtor" for the purposes of the Act. While the majority reached this view on the basis of an interpretation of the legislative history,[72] Scalia J. delivered a concurring judgment which relied on fundamental trust principles. He held that Congress could not deem a trust to exist where the basic requirements for a trust were not met.[73] In deciding whether a trust existed on general principles, he distinguished between collected and withheld taxes. He stated that where the taxes subject to the trust-fund provision are collected taxes the statute plainly identified the res—the collected taxes. Where, however, the taxes are withheld, the statute provided no clear identification.[74] He concurred in the result because by paying the amount due out of general funds, the company had thereby designated that amount of

[70] 496 U.S. 53 (1990).
[71] 26 U.S.C. sec. 7501.
[72] Marshall J, who wrote the opinion of the court, dealt with the absence of identifiable property held on trust (in relation to the payments out of general funds) by stating that the statute created a trust which was different in kind to the common law trust. The statutory trust was created in an abstract dollar figure which was not tied to any specific assets.
[73] 496 U.S. 53, 70 (1990).
[74] This aspect is considered below.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

money to be the trust property to which the statute refers. He interpreted the intent of the statute to be that the trust property should be deemed to have existed from the time of the initial collection or withholding, and consequently it was not a voidable preference as a result of having been paid within 90 days of the bankruptcy.

Scalia J.'s reasoning is consistent with that of the Court of Appeal in *Re Diplock*,[75] which indicated that property impressed with a trust, once mixed with the general assets of a trustee, may become unmixed if the trustee withdraws the property from the mixed fund for the purposes of identification as trust property.

(iii) Where property is impressed with a trust before mingling

There is sufficient certainty of trust property also if property is impressed with a trust before it forms part of a larger mass, for then the principles of tracing apply to its location. This is illustrated by *Stephens Travel Service International Pty. Ltd.* v. *Qantas Airways*[76] and *British Columbia* v. *Henfrey Samson Belair Ltd.*[77] In both cases the courts indicated that where money paid for the purchase of goods or services was impressed with a trust either wholly or in part, then there was trust property at the point of collection. In *Stephens Travel*, the trust property was the amount owed to the airline from the purchase price of a ticket after taking out commission and any other proper deductions. In *British Columbia* v. *Henfrey Samson Belair Ltd.*, the trust property was sales tax at the point of collection. A motor vehicle vendor which went bankrupt had collected sales tax under the provincial *Social Service Tax Act* 1979. The Supreme Court of Canada had to determine whether sales tax which was deemed to be trust property under the provincial law was trust property for the purposes of federal bankruptcy legislation. The court held it was not. One ground for decision was that while at the point of collection from the customer, the money was held on trust, by the time of the bankruptcy no trust property remained identifiable because it had been dissipated.[78]

Scalia J.'s judgment in *Begier* v. *Internal Revenue Service* illustrates the fundamental difference between collecting and withholding. If I collect a tax which is subject to a trust obligation,

[75] [1948] Ch. 465, 551–552.
[76] (1988) 13 N.S.W.L.R. 331.
[77] 59 D.L.R. 4th 726 (1989) (Sup. Ct. Canada).
[78] Another ground for decision was that a provincial legislature cannot change the order of priorities in the federal bankruptcy law by defining certain obligations as giving rise to a trust. For discussion of this and subsequent cases see A. Grenon, "Common Law and Statutory Trusts: In Search of Missing Links" (1995) 15 Estates and Trusts Journal 109.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

then it is impressed with that obligation immediately. However, if I merely withhold a sum of money, no specific money or property is identified, even for a moment, to which the trust obligation can attach. As Scalia J. wrote: "When I pay a worker $90 there is no clearly identifiable locus of the $10 in withheld taxes that I do not pay him."[79] The same reasoning underlies the decision of the Court of Appeal in *Mac-Jordan Construction Ltd. Brookmount Erostin Ltd. (in receivership)*.[80] In this case it was held that retention moneys under a building contract were not impressed with a trust despite the terms of the contract to that effect, because no fund was set aside for this purpose. Since it was a case of money *not being* paid, there was no moment at which specific sums were impressed with a trust. The decision of the New Zealand Court of Appeal in *Fortex Group Ltd. (In Receivership and Liquidation)* v. *MacIntosh*[81] is to like effect.

D. Certainty of trust property and certainty of obligation

To summarise the argument so far then, cases of the highest authority stand for the proposition that an express trust may exist even though there is no corresponding equitable estate held individually or collectively by a group of beneficiaries. Furthermore, it is not necessary for the validity of the trust that there is a "legal estate" which is held separate and apart from the property of the trustee. It is sufficient that there is certainty of subject-matter within which the trust property can be identified or from which it is subsequently segregated.

One might further observe that there are some kinds of trust where the requirement of certainty of trust property is best characterised as a requirement of certainty of obligation. An example of this phenomenon is where a person holds property subject to an obligation to make provision for someone else out of that property. So for example, a husband may leave property to his wife with an obligation to provide for the maintenance and education of the children. Such obligations are variously categorised as trusts, charges or other forms of obligation.[82] Sometimes, the purpose is regarded simply as a motive in conferring unconditional beneficial interests.[83] Invariably, where the obligation is characterised as a trust, the extent of the property which is to be used for the benefit of the beneficiaries is uncertain. In these circumstances, if uncertainty is fatal to the validity of a

[79] 496 U.S. 53, 71 (1990).
[80] [1992] B.C.L.C. 350.
[81] [1998] 3 N.Z.L.R. 171.
[82] *Countess of Bective* v. *Federal Commissioner of Taxation* (1932) 47 C.L.R. 417.
[83] See, *e.g.*, *Re Andrew's Trust* [1905] 2 Ch. 326; *Re Osoba* [1979] 1 W.L.R. 247.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

trust it will usually be because the uncertainty concerning the extent of the property to be devoted to the stipulated purpose provides an indication that the testator did not intend a trust at all.[84]

However, there are numerous cases where there has been considerable uncertainty about how much property is subject to a trust but where the obligations of trusteeship have been defined with sufficient clarity to allow for the court to resolve the issue. A well-known example of this is *Re Golay's Will Trusts*.[85] In this case, a bequest was upheld which provided that the executors should allow a person to "enjoy one of my flats during her lifetime and to receive a reasonable income from my other properties". Ungoed-Thomas J. held that this was not void for uncertainty. He considered that since courts are constantly involved in making objective assessments of what is reasonable, the court could define a reasonable income if need be.[86]

This reflects a much older body of authority that uncertainty about the extent of the property held subject to a trust obligation does not invalidate a trust. The issue has arisen frequently in relation to trusts for the maintenance and advancement of children. However, Wigram V.C. in *Thorp* v. *Owen*[87] indicated that the principle was one of broader application. He said:

> Whatever difficulties might originally have been supposed to exist in the way of a court of equity enforcing a trust, the extent of which was unascertained, the cases appear clearly to decide that a court of equity can measure the extent of interest which an adult, as well as an infant, takes under a trust for his support, maintenance, advancement, provision or other like indefinite expression, applicable to a fund larger, confessedly, than the party entitled to the support, maintenance or advancement can claim, and some interest in which is given to another person.

It follows from analysis of the requirements of certainty in relation to trust property that at the heart of the doctrine, it is the *obligation* which must be described with sufficient certainty, not the trust property. It is enough that the subject-matter of the trust can be ascertained, that is the pool of property from which the trust

[84] See, *e.g.*, *Curtis* v. *Rippon* 5 Madd. 434 (1820); *Mussoorie Bank* v. *Raynor* (1882) 7 App. Cas. 321 (P.C., on appeal from India).

[85] [1965] 1 W.L.R. 969.

[86] To similar effect is the decision in *State for Use of Woodlands Cemetery Co.* v. *Lodge* 41 Del. 125, 16 A. 2d. 250 (1940). A trust was upheld where the testatrix directed the executor to pay to the Woodlands Cemetery "a sum sufficient to keep in perpetual care, out of the interest therefrom," the family burial lots. The Superior Court of Delaware held that it was sufficient that the amount of the legacy be made determinable upon some reasonable basis of computation.

[87] (1843) 2 Hare 607, 610. For an application of this by the Supreme Court of the United States see *Colton* v. *Colton* 127 U.S. 300 (1888).

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

fund must come, and that the trust obligation with respect to that property is defined with sufficient clarity. This is the thread which runs through all the cases concerning uncertainty of subject-matter which have been discussed. If, as in *Hunter* v. *Moss*, a trustee declares that 50 shares out of a parcel of 950 shares are held on trust, that is a sufficient definition of his obligation with respect to the parcel of 950 shares. If the trustee indicates that all the money in a particular bank account, less £50, is held on trust, that is a sufficient definition of the obligation. And if there is an obligation to collect sales taxes as a trustee or to account as a trustee for the proceeds of sale of airline tickets, then it is sufficiently certain if the obligation is defined clearly enough to provide a proper basis for computation of how much money which has been collected from customers is impressed with a trust.

IV. The Trust as Obligation

Perhaps this review of the requirements for a valid trust demonstrates no more than that there is a family of trust concepts at different stages of development, and not a single entity.[88] Charles Rickett has written that the trust concept abides "in a legal matrix of tension. Whether the emphasis is placed on obligations owed by the trustee or property rights owned by the beneficiary depends on the type of trust in question."[89] This may be so, but the significance of the analysis in this article is that it challenges *a priori* objections to certain decisions based upon the proprietary nature of the trust,[90] and it opens up the possibility of accepting developments in the law without the need for tortuous attempts to reconcile these cases with pre-existing assumptions and definitions of the trust.[91]

This classification of the trust in terms of obligation rather than ownership also opens up other fruitful lines of inquiry. What difference would it make to the analysis of whether a trust exists in hard cases if we were to focus on the obligations assumed by the

[88] J. Heydon and P. Loughlan, *Cases and Materials on Equity and Trusts* (6th edn., Butterworths 2002), pp. 449–450, P. Parkinson, "Chaos in the Law of Trusts" (1991) 13 Sydney Law Review 227.

[89] C. Rickett, "The Classification of Trusts" (1999) 18 N.Z. Universities L.R. 305, 309.

[90] Mr. Paul Matthews has offered a spirited defence of "a truth about trust law, which is that fundamentally it is based on there being an equitable owner of the property or interest given" (P. Matthews, "The New Trust: Obligations Without Rights?" in A. Oakley, (ed.) *Trends in Contemporary Trust Law* (1996) 1, at p. 18). This analysis relies on criticising a number of cases of high authority as wrongly decided or to be construed in a way which is reconcilable with the proposition being defended but which is inconsistent with the reasoning adopted in the case.

[91] See, *e.g.*, the explanation for the *Quistclose* trust given by Gummow J. in *Re Australian Elizabethan Theatre Trust* (1991) 102 A.L.R. 681. See also the analysis of Lord Millett in *Twinsectra Ltd.* v. *Yardley* [2002] 2 W.L.R. 802.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

alleged trustee rather than just the intentions of the parties? Consider the situation in *Trident General Insurance Co. Ltd.* v. *McNiece Bros Pty. Ltd.*[92] which concerned a contract for insurance covering sub-contractors who were not parties to the contract. If the question is whether a party to a contract which provides a benefit to a third party owes obligations to that party through the mechanism of the trust, then an analysis of the nature of the obligations assumed by the party in question is likely to be far more important than trying to identify the intention of a party who is in a position analogous to a settlor. Indeed, in a contractual situation such as the one in *Trident General*, it is hard to discern which party is in the position of a "settlor" for the purposes of ascertaining the relevant intent.[93] A similar inquiry concerning the obligations assumed by an alleged trustee may also assist in determining whether a trust was intended under a commercial arrangement such as the one in *Barclays Bank Ltd.* v. *Quistclose Investments*.[94]

An understanding of the express trust as a species of obligation also allows for the inclusion of the charitable trust within the conceptual framework of the law of express trusts. Charitable trusts do not fit into a proprietary understanding of the trust, for the nature of the charitable trust is that it is for a purpose rather than for the conferral of a proprietary interest on individuals. There is no need to treat charitable trusts as entirely sui generis if they are brought within the conceptual framework of the trust as obligation. They would nonetheless retain special rules, for example the cy-pres doctrine.

An obligations-based approach also makes possible a categorisation of trusts according to the obligations of trusteeship. Nicholas McBride has argued that trusts should be classified according to identity-based, events-based and aims-based classifications of trusts and an obligations-based classification of trustees.[95] The last form of classification is useful to determine what legal obligations are incurred as a result of the existence of a trust. He notes that while much work has now been done on events-based and aims-based classifications of trusts, in particular through the work of Prof. Chambers[96] and Dr. Elias,[97] little or no work has

[92] (1988) 165 C.L.R. 107.
[93] The difficulty of working out who is the "settlor" has also arisen in relation to payments into pension plans for defined benefits. See *Hockin* v. *Bank of British Columbia* 71 D.L.R. (4th) 11 (1992) at p. 20.
[94] [1970] A.C. 567.
[95] N. McBride, "On the Classification of Trusts" in P. Birks and F. Rose (eds.) *Restitution and Equity, Vol. 1: Resulting Trusts and Equitable Compensation* (2000), 23 at p. 24.
[96] R. Chambers, *Resulting Trusts* (1997) especially at pp. 220ff.
[97] G. Elias, *Explaining Constructive Trusts* (1990).

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

been done to develop an obligations-based classification of trusteeship.[98]

A starting point for such an analysis is to classify the different reasons why a trustee's conscience is bound by an obligation in respect of property.[99] Such a classification could illuminate the content of different forms of trust obligation. For example, one might be able to distinguish between trust obligations which are accepted (as in the case of express trusts and contracts for the sale of land), those which are assumed (where someone becomes a trustee de son tort), those which arise from promises or representations (enforceable in equity because of detrimental reliance)[100] those which arise by operation of law because the trustee was not intended to have beneficial ownership, those which are imposed by statute, those which are imposed to reverse an unjust enrichment at another's expense (whatever the events leading to that unjust enrichment) and those which are imposed to confiscate profits made in breach of fiduciary duty.[101] Such a classification could then provide a basis for defining the different obligations of trusteeship which Mr. McBride recommends. For example, it would be clear that a trust imposed to disgorge profits or to reverse an unjust enrichment would not carry the same obligations as a trust for the management of property.[102]

Furthermore, an obligations-based approach would allow for the orderly exposition of equitable obligations with respect to property which takes account of cases which might otherwise be regarded as anomalous. One example is *Re Trusts of the Abbott Fund*.[103] In this case, there was a surplus after providing for the support of two disabled women. It was held that the residue of the fund reverted to the contributors on a resulting trust. The most obvious explanation of the status of the trust during the lifetime of the beneficiaries is that the fund was provided for their maintenance

[98] McBride, *op. cit.* at p. 38.

[99] This is consistent with the approach taken by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] A.C. 669, 705. He stated that the guiding principle in the law of trusts is that "equity operates on the conscience of the owner of the legal interest."

[100] This is the basis of certain constructive trusts, *e.g.*, *Grant* v. *Edwards* [1986] Ch. 638; *Green* v. *Green* (1989) 17 N.S.W.L.R. 343. While such trusts are sometimes said to be based on the parties' common intentions, it is the intention of the legal owner which is relevant and, as these two cases show, the representation made to the plaintiff does not necessarily correspond to the subjective intention of the legal owner. Such cases are best understood as applications of the doctrine of estoppel: P Parkinson, "Estoppel" in P Parkinson (ed.), *Principles of Equity* (1996) 201, at pp. 263–264.

[101] A constructive trust may of course be imposed even where an enrichment is not made at the expense of the plaintiff, for example where an employee submits a tender in competition with the employer, and the employer would in any event not have gained the contract: *Green & Clara Pty. Ltd.* v. *Bestobell Industries* [1982] W.A.R. 1.

[102] *Timber Engineering Co. Pty. Ltd.* v. *Anderson* [1980] 2 N.S.W.L.R. 488, 504.

[103] [1900] 2 Ch. 326.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

without giving them a beneficial interest. Another illustration is *Ottaway* v. *Norman*[104] in which it was held that a trust arose on the death of a woman, who had lived in an intimate cohabiting relationship with Mr. Ottaway. She had received a house from him in his will, having promised Mr. Ottaway that she would leave it to his son and daughter-in-law. This was enforceable as a trust, yet it appears that during her lifetime, she owned the house absolutely. The only limitation on her rights of ownership was with regard to testamentary disposition. Freed from the need to locate the equitable interest in all cases, it is easier to understand how the trust could be in suspense during her lifetime, for the trust only arose in respect of the obligation which she had undertaken regarding testamentary disposition of the house.

Cases of innominate equitable obligation may also be placed within the framework of trusts law by an obligations-based approach. An illustration is *Gill* v. *Gill*.[105] In this case, a farm was left by will to the defendant on condition that he provided board and residence for his sisters. The obligation spelt out, inter alia, the number of rooms which were to be available for the sisters and the proportion of the cows and poultry which were to be available for their free use. The judge held that the obligations could not be treated as a condition of forfeiture. The positive obligations imposed under the will were nonetheless enforceable in equity either by way of specific performance or compensation.[106]

Finally, an obligations-based approach helps more clearly to answer the question of what is the irreducible core content of the trust idea. There must be enforceable obligations. The trust in the common law world necessarily involves the holding of property for others' benefit, and requires accountability to those who have an interest in the proper application of the trust property. Millett L.J. has referred in *Armitage* v. *Nurse*[107] to the "irreducible core of obligations owed by 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." Indeed this is so, especially if the term "beneficiaries" is understood in the wider sense used in *Re Denley*. It is possible to have a trust without being able to locate an equitable estate in the property held on trust. But it is not possible to have a trust without enforceable obligations owed to those who are intended to gain the benefit (in the widest sense) of the property held on trust.

[104] *Ottaway* v. *Norman* [1972] Ch. 698.
[105] (1921) 21 S.R. (NSW) 400.
[106] For a similar kind of case, interpreted as a trust, see *Gordon* v. *Gordon* 124 N.E. 2d 226 (1955) (Sup. Ct. of Massachusetts).
[107] [1998] Ch. 241, 253.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

In this respect, it is not sufficient that there be an enforcer of the trust, if the enforcer has no particular reason to want to enforce the obligation. Mr. Paul Matthews has well-described the features of many offshore trusts in tax havens which have been established in order to disguise ownership and control. These trusts have been facilitated by small jurisdictions which have enacted legislation to validate such non-charitable purpose trusts.[108] In such statutes, there is a requirement that there must be a person whose job it is to keep an eye on the trust and to receive information about it. That person might be called a protector, or guardian, or may have some other such name. But there is no requirement that the enforcer should enforce the trust, only that he or she has the legal right to do so. If the enforcer has no particular interest in having the obligation performed, and is in the pay of those who have established the trust for their own financial purposes, there is no reason why failures to perform the obligation should ever come to the attention of a court.

Such trusts, whatever validity they may have under international arrangements for the recognition of trusts,[109] should not be regarded as valid trusts apart from statute. Equity protects the trust by means of tension. The beneficiaries or other persons with a right of enforcement must have interests in the proper management of the trust which, in the event of a default, will place them in conflict with the trustees. That is, the enforcer must have interests to protect, not necessarily in a proprietary sense, but in the sense that he or she is interested in the fulfillment of the trustees' obligations. For this reason, even if the trust is conceived as a species of obligation rather than a form of ownership, the trustee must be in some way accountable to people whom it was intended should benefit from the accumulation or application of the funds. The obligations of trusteeship can be modified by the terms of the trust document, but the essential nature of the trust as requiring obligations to others ensures that limits must be placed on such modifications. There is an irreducible core of obligations which should be regarded as inherent in the nature of trusteeship and without which the legal arrangement should not validly be termed a trust.[110]

It is, then, the essence of the trust that property is held for the benefit of others. A trust established in an offshore jurisdiction under purpose trust legislation which identifies as its purpose the

[108] P. Matthews, "The New Trust: Obligations Without Rights?" in A. Oakley (ed.), *Trends in Contemporary Trust Law* (1996) 1, at pp. 18–28.
[109] Hague Convention on the Law Applicable to Trusts and Their Recognition, 1984.
[110] See D. Hayton, "The Irreducible Core Content of Trusteeship" in A. Oakley (ed.), *Trends in Contemporary Trust Law* (1996) p. 47.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

holding of shares in another private company may well be valid under the statute law of that jurisdiction, and may be recognised elsewhere in accordance with international arrangements, but it is not a trust in the equitable sense. As Matthews has put it, trusts involve the application of funds, not merely the organisation of them.[111]

Understanding the trust in the common law world as essentially a species of obligation raises two further issues. First, is the trust distinguishable any more from contract? Secondly, does the notion of the trust as obligation mean that there is no longer any material difference between the common law and civil law understandings of the trust?

Nothing in this argument is meant to suggest that the trust is merely a species of contract.[112] Certainly, the differences between trusts and contracts have been reduced by recent developments in the law, at least in England. The passage of the *Contracts (Rights of Third Parties) Act* 1999 has made more possible a contractual understanding of trusts created by transfer as agreements to benefit third parties. The scope given by the *Trustee Act* 2000 for negligence liability to be excluded,[113] confirming existing case law,[114] further demonstrates that the irreducible core of trustee obligations which cannot be modified by contract is small indeed. Nonetheless, the analogy with contract is not complete. The traditional trust created by a settlor transferring money or assets gratuitously to trustees is not readily conceptualised within the law of bargains, and nor is the trustee/beneficiary relationship one of mutual benefit conferral where the trustees are unpaid. Furthermore, the settlor who declares himself or herself a trustee makes no contract with anyone.

Certainly, treating the express trust as a species of obligation which does not rely on the division between legal and equitable ownership indicates the possibility of greater convergence between the common law and civil law notions of the trust. Article 2 of the Hague Convention on the Law Applicable to Trusts and Their Recognition, 1984 defines the trust in such a way that the emphasis is placed on the obligations of trusteeship and not the interests of the beneficiaries.[115] This is consistent with the argument in this article concerning the common law trust. However, the trust in the

[111] *Ibid.*, at p. 26.
[112] For discussion of the notion of the trust as a form of contract, see Langbein *op. cit.*
[113] Schedule 1, para. 7.
[114] *Armitage* v. *Nurse* [1998] Ch. 241.
[115] M. Bryan, "Reflections on Some Commercial Applications of the Trust" in I. Ramsey (ed.), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (Lexis Nexis, Sydney, 2002), 205 at 208.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

common law world will always remain distinctive even if we move away from an understanding which sees it only in proprietary terms. Trusts are creatures of equity, and there are centuries of authority on the nature and identification of proprietary interests which arise out of the beneficiary's personal rights against the trustee. Conceiving the trust in terms of obligation would not be to deny the proprietary significance of many trust obligations. It would nonetheless, offer a more coherent explanation of the law as it has developed.

V. Redefining the Trust

Because trusts arise in so many different contexts, and the necessary features of the trust vary accordingly, it is a futile exercise to try to find a definition of the trust which is both comprehensive (in that it includes all the trust's distinctive features) and also accurate. However, there is great value, and much practical significance, in trying to define the irreducible core of the trust concept, without which a court is entitled to say that no trust exists, unless compelled to a contrary conclusion by statute.

Such a definition has recently been offered by Prof. Hayton. Recognising that an express private trust does not need a beneficial owner or ownership by a group collectively under the *Saunders* v. *Vautier* principle, Prof. Hayton has provided a definition of the trust which would allow for a trust to be valid as long as there is someone to enforce it.[116] Prof. Hayton notes the number of jurisdictions which have enacted legislation to allow for non-charitable purpose trusts as long as there is an enforcer. Given that these trusts will be recognised in Britain under the *Recognition of Trusts Act* 1987, he reviews the reasons for the orthodox view that such a trust could not validly be created under English law and finds those reasons less than compelling. As a consequence, he concludes that a non-charitable purpose trust should be valid if the settlor has appointed an enforcer, so long as it is administratively workable and does not offend the rule against perpetuities.

On this basis, he argues that a trust under English law should be described as "an equitable obligation binding a person ('the trustee') to deal with property owned by him as a trust fund segregated from his private patrimony whether for the benefit of persons ('the beneficiaries') of whom he may himself be one, and any of whom has the right to enforce the obligation, or for the furtherance of a purpose which can be enforced by an enforcer

[116] D. Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 L.Q.R. 96.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press

provided for in the terms of the trust or, in the case of charitable purpose trusts, by operation of law."

For the reasons given in this article, I am unable to share Prof. Hayton's view that the trust fund must be segregated from the private patrimony of the trustee, and nor do I think it is sufficient that someone has a legal power of enforcement. Nonetheless, I share his view that a definition of the trust in terms of obligation and enforcement does offer a way of understanding the irreducible core of the trust concept. I would want to define the private express trust, including the charitable trust, in the following terms:

> An express trust is an equitable obligation[117] binding a person ("the trustee") to deal with identifiable property to which he or she has legal title[118] for the benefit of others to whom he or she is in some way accountable. Such obligations may either be for the benefit of persons who have proprietary rights in equity, of whom he or she may be one, or for the furtherance of a sufficiently certain purpose[119] which can be enforced by someone intended to have a right of enforcement under the terms of the trust[120] or by operation of law.[121]

This is not a sufficient definition of all trusts. Nor does it address other important features of trusteeship such as the obligation of management in active trusts. However, it is submitted that it does provide a definition of the features which all express trusts share in common law jurisdictions where the requirements for a valid trust have not been modified by statute.

[117] It is this which distinguishes the trust from other forms of obligation, for the obligation is equitable in nature and consequently enforceable by means of the full range of equitable remedies appropriate to the situation.

[118] On this definition, it is sufficient that the trustee has legal title to identifiable property. That property may be held within a larger mass as long as it is capable of identification within that mass. This definition also covers the situation where a trustee is required to provide for another person out of an estate, for the subject-matter of the trust is identified, and the definition does not require precise quantification of the amount to be used for the purposes of satisfying the trust obligation.

[119] This requirement deals with one of the objections to the trust in *Re Astor's Settlement Trusts* [1952] Ch. 534 that it was too vague.

[120] On this definition, it is not necessary that the enforcer be provided for expressly in the terms of the trust. It is sufficient that the court will recognise that it was the intention of the settlor that certain persons should have a right of enforcement. In *Re Denley* [1969] 1 Ch. 373, Goff J. took the view that the employees of the company for whose benefit the sports ground was to be established would have such an enforcement right. Creditors or shareholders intended to be assisted under a *Quistclose* arrangement might in certain circumstances have been intended to be able to enforce the trust. So too, might a lender.

[121] This part of the definition is necessary in order to bring the charitable trust within the definition. Charitable trusts are enforceable by the Attorney-General as a matter of law, not because this is so provided in the trust instrument.

https://doi.org/10.1017/S0008197302001769 Published online by Cambridge University Press