FIDUCIARIES.

Imposition of fiduciary duty.

The imposition of a fiduciary duty / duties will arise in two main situations: either arising inherently from a role-based position (such as a solicitor), or, alternatively, arising can be found for in a limited context if one party gives rise to a legitimate expectation that they will act in the interests of another for a particular purpose. (***Arklow***, per PC).

Role-based main arguments:

- Elias CJ / Tipping JVP gives rise to an inherent relationship. (sharing profits / working together) – single transaction partnership?
    - Qualifies statement, can be a misleading term
    - ***Amaltam Corp***: label is unhelpful, can be used to describe relationships which are arms-length.
- Tipping: just because inherent relationship, does not follow that all aspects are fiduciary

Particular purpose main arguments:

- If one party creates a legitimate expectation they will act in the self-interest of the other, fiduciary duty may arise for a particular purpose
    - ***Chirnside:*** no K does not defeat obligations
    - ***Amaltam:*** Need to enquire into the **nature of the relationship and transaction (explicit, implicit)**
    - ***Aotearoa International***: look to the terms of the K
    - ***Arklow*** per Blanchard
    - PC in ***Arklow*** – informal agreement, continuing course of conduct?
- Relationship?
    - how long have they been working together?
    - meetings, developing project, how much party did one do over the other?
- But such a relationship can be terminated – ***Arklow*** – inherently based on the facts

Liability?

- If there is just a profit on the facts – ***Keech / Maj in Boardman –*** OK
- but can manipulate ***Keech*** – there could have been a conflict
- AND maj in ***Boardman*** all also refer to conflict *as well*
- then: elias in ***Chirnside*** – conflict second limb.

WHO is a fiduciary?

There are two main situations where fiduciary obligations can be held to arise:

- Inherent, role-based – employer, solicitor, doctor.
    - ***Chirnside v Fay:*** JVP on facts analogous / akin to partnership
    - ***Boardman v Phipps*** per Upjohn; Hodson; Guest: solicitor
    - ***Keech v Sandford***: trustee
- Fiduciary for a particular, limited purpose - reasonable expectation for a particular purpose
    - ***Arklow v Maclean*** per Blancard & Thomas: limited fiduciary obligations for that month
    - ***Amaltam Corp:*** limited duties in relation to the tax as one party had undertaken to act on behalf of the other
- A fid relationship will be found when one party is entitled to repose and does repose trust and confidence in the other

WHAT are fiduciary obligations?

- Loyalty: to act in the interest of the other; ends when the relationship ends
- Confidentiality: to not misuse confidential information; continues so long as information remains in confidential
- the two are not mutually exclusive, nor do they carry the same duties or obligations

WHEN will obligations be found?

- Inherent – will they always be found?
    - Tipping in ***Chirnside***: inherent fid relationship could have aspects that are subject to fid obligations
    - Tipping in ***Chirnside***: JVP almost certainly will give rise to fiduciary relationship – working together
    - Elias in ***Chirnside:*** when sharing profits, relationship will almost always be found
        - BUT acknowledges label of a relationship is not always helpful
- **Particular – when can they be found?**
    - ***Amaltam****:* not about the label of the relationship, fundamentally about the nature of the transaction and relationship
    - ***Paper reclaim:*** look to the terms of the K – whether any particular aspect of their agreement gives rise to fid obligations
    - **PC in *Arklow:*** legitimate expectation - *The concept encapsulates a situation where one person is in a relationship with another which give rise to a legitimate expectation that equity will recognise; that the fiduciary will not utilise his or her position in such a way that is adverse to the interests of the principal*
        - ***Arklow***: needed a K on the facts – crit: industry practice
    - Tipping comments in ***Chirnside*** – non fid relationship can have "fiduciary dimension"

Ultimately, the label of the relationship cannot be determinative – have to think about what one party is agreeing to do for the other in the business context – has either party – either explicitly or impliedly – undertaken to act on behalf of the other.
i.e. inherently fact dependent in both types , look to the circumstances.

WHEN is there a breach of obligation?

- **when profit has been made**
    - ***Keech v Sandford* –** no conflict on the facts?
    - ***B v P*** per the majority – application of strict profit rule? But this is not clear. they undermine / qualify their application of it.
- **when there was a conflict**
    - ***Keech v Sandford* –** there was a conflict: trustee could have put lease in his own name, then put it in trust for beneficiary
    - ***B v P*** per the majority – reference the conflict rule as a separate rule (superfluous).
        - consider there would have been a conflict as B would have had to advise
    - ***B v P*** per the minority – need a conflict, as well as a profit. Same rule
        - no possibility of ever real conflict, fox was never going to buy the shares
    - ***Chirnside*** per elias: conflict limb
    - ***Arklow*** per PC: fid will not utilise their position in such a way that is adverse to the interests of the principle
    - ***Bray v Ford:*** inflexible rule of equity that fid is not entitled to make a profit; not allowed to put himself in a position where his interest and duty conflict (that could be 2 sep rules)
    - **policy?** Equity demands strict application; Equity demands flexibility and justice.

Interaction of commercial fiduciaries, K obligations and self-serving ruthlessness.

Policy – balance between:

- ruthless, self serving behaviour
    - ***Waihi Mines:*** economic liberty – act as you wish except to the extent contractual obligations apply
    - ***Waihi Mines:*** death of contract – maze of legal & equitable obligations overlaid on any commercial arrangement parties may wish to make
- imposition of loyalty

Should the Court refrain from imposing fiduciary obligations unless explicit / lots of evidence (i.e. in K). vs at some point, in certain circumstances, self-interest has to be subjugated.

Compromise?
Can impose **particular, limited** fiduciary obligations. Commercial transaction can largely be non-fiduciary – for most aspects of obligations there is no imposition of loyalty – except for particular areas where there is evidence such obligations carry a reasonable expectation that the other party will act in their best interest.

- c.f. JVP / partnership
    - ***Chirnside per tipping:*** JV almost always involve inherent fid obligations
    - ***Amaltam Corp:*** label cannot matter, all about the facts

Amaltam better approach – particular areas where imposed, not on the whole relationship. balancing of interests.

KEECH v SANDFORD 1726.

Whether the acquisition of a profitable lease by the D, which had previously been property of an infant's trust to whom D was a trustee of, was a breach of D's fid duties?

Held breach – cannot make a profit from your own fiduciary position, irrespective of the lack of fraud.

Facts –

- lease held on trust, ending
- trustee attempts to renew on behalf of the trust as it is profitable
- landlord declines – does not want infant to have lease
- trustee then takes lease for himself, makes a profit

Judgment –

- may seem unfair to say trustee is only person in the world who cannot take the lease, but equity demands a strict rule
- consequences of allowing this – personal interests could creep in.

Issues –

What rule was being applied?

Was there a conflict on the facts? impossible for the infant to have taken the lease.

- Counter: trustee could have taken lease, use it for the benefit of the infant (i.e. doing what was being done before bit legal title sites with trust)
- Similar counter to what is present in ***Regal*** – can take as an individual, then give it to the principle.

Is the strict profit rule fair?

No profit rule can be overly strict – idea of fiduciaries not making a profit flows from the assumption that such a profit could *only* have arisen from a conflict. But in rare circumstances (i.e. ***Boardman***), it is arguable there is no conflict. Modern day context: importance of commercial flow. If there is no conflict, is there a problem utilising an opportunity for yourself. Could have an onus on the fiduciary to show no conflict.

From other cases –

Chirnside per Elias: *liability when conflict between fiduciary duty and personal interest; if benefit obtained through the fiduciary's position*

- **conflict rule.**

Arklow v Maclean per PC: *The concept* [the loyalty obligation] *encapsulates a situation where one person is in a relationship with another which give rise to a legitimate expectation that equity will recognise; that the fiduciary will not utilise his or her position in such a way that is adverse to the interests of the principal*

BOARDMAN v PHIPPS 1967.

whether B & TP owed fiduciary duties to the trust; if such fiduciary duties were breached through buying shares in a company which the trust also possessed shares in despite the fact the trust made money off their decision, they had obtained consent all of the trustees (and some of the beneficiaries), and there was no 'real' possibility of a conflict?

Held per Cohen Guest and Hodson; that fiduciary obligations were imposed (implied agency / inherent) and such obligations were breached: B & TP could only have gained the information they did via their position vis a vis the Trust and it follows that the they should account for the existence of profit. Furthermore, the purchasing of the shares also resulted in a conflict of interest arising from B's obligations as solicitor advising the Trust. The lack of any wrongdoing etc is immaterial – strict application of rule.

Dilhorne and Upjohn dissenting; while fiduciary obligations were imposed (implied agency / inherent), the existence of a profit is not sufficient – there must also be an existing conflict. There was no possibility of any real conflict on these facts – Fox was never going to change his mind and if in the slim possibility he did; B could simply have chosen to not advise the trust

Main issues –

- Guest, Upjohn and Hodson JJ's reasoning re: why B & TP were fiduciaries – inherent from solicitor. TP: a beneficiary, nothing to do w fid.
    - cf Tipping observations in ***Chirnside***: different types of duties and obligations that can arise from different relationships. Just because inherently fid, does not flow all duties have a fid element
- Majority application of law: strict profit; profit as subsumed into wider conflict; or two separate rules.
    - if two sep rules, the conflict rule becomes superfluous.
- Majority finding of the conflict – would B really have had to advise the trust? not on a general retainer.
    - Maj fail to consider the reality of the circumstances, had Fox changed his mind, B would likely have ensured the Trust ended up buying the shares (as that is what he wanted)
- why were these duties owed to a beneficiary? (JP)

Facts –

- Testator dies, settles a trust on death – wife trustee; wife and other children beneficiaries (including TP and JP).
- Trust has shares in a textile company
- Boardman heavily involved in helping trustees, had been solicitor on particular issues in the past
- B and TP decide textile company not going that well – want to reorganise assets. First phase -
    - B & TP attend the AGM, (Dec 1956) try to get TP appointed as a director of the Board. Fails, B then considers that if they can buy more shares will be easier to reorganise assets
    - Fox (trustee) tells B & TP that trust will never buy more shares – too risky
    - B & TP make first offer of 3 pounds a share (April 1957), declined
- second phase –
    - pursue suggestion of splitting assets between directors and beneficiaries
    - clear that throughout this phase, B purporting to act on behalf of the trustees
    - during this phase that B obtained important info re the potential value of the company
- third phase –
    - T and BP agree to buy shares for 4 10 s
- B and TP, as majority shareholders, sell off assets, make money for the trust (as well as for themselves)
- JP decides to sue for making personal profit while in a fid role.

WHY WERE BOARDMAN & TOM PHIPPS FIDUCIARIES.

Dilhorne –

- actual agency (per the TJ) –
    - at all stages after Fox stated he would not let the Trust take part in buying shares, B & TP simply could not have been agents as they did not have principle's permission.

    - buying the shares "wholly outside the scope" of what they had authority to do
- implied agency, 'agents for certain limited purposes' –
    - was never purporting to be buying the shares on behalf of the trust, nor was a K of employment ever created, but at other times, they were acting on behalf of trust, so fiduciary duties imposed through such actions –
        - authorised by the trustees to represent the trust holding at two AGMs
        - Boardman as trust solicitor had dealt with inquiry regarding whether the trust would sell their holding
        - Boardman as solicitor & Phipps had discussed with Fox the textile company accounts & what could be done to improve the value of the trust holding

Cohen –

- B & TP assumed the character of agents for the trustees for the purposes of extracting information as to the company's business from its directors, and if possible, to strengthen the management of the company by securing representation on the board
- Such agency implicitly carried over into their action of buying the shares
    - However, TJ's use of 'self appointed' problematic – one trustee (here, Fox) can come to an arrangement with a third party (B) which will have the effect of placing the latter in a fid party
        - i.e. Fox, in allowing B & TP to attend the AGMs, discussing the accounts etc
- Does not distinguish between B & TP: while B did all the work, TP would not have been in the position he is in now notwithstanding his rights & knowledge as a beneficiary
    - does this conflate a beneficiary as someone who has fid duties to the trust? beneficiary can do what they like? (passive)

Hodson –

- inherent, emanated from B being a solicitor – "at all material times was a solicitor to the trust
    - no such thing as a solicitor to the trust?
    - Despite the fact that B was not employed by the Trust in buying the shares, Hodson considers it enough that historically he had been employed & the trust looked to him for advice at all material times.
- TP not in a fiduciary position due to fact he was beneficiary, but as he did not seek to be treated in a different way to B, necessarily subsumed into B's rationale.

Guest –

- frames question as "whether the appellants are constructive trustees"
- emphasis B's role as solicitor to the trustees, acted in this capacity throughout negotiations – continued to act as solicitor during all three phases
- Justification re TP – asked to be treated equally

Upjohn –

- no doubt from time to time acted as a solicitor to the trust, therefore throughout in a fid capacity at least to the trustees

Which is the better approach?

There are issues with the role-based solicitor approach –

- Rationale for TP? Judges all reason on basis that he did not want to be separate from B. Procedurally, that is not a sound reason for imposing fiduciary obligations.
- Why would such fid obligations – i.e. emanating from being a solicitor to the *trust* – extend to JP, a beneficiary?

LIABILITY OF B & TP – *REGAL,* CONFLICT, PROFIT.

Regal (Hastings) v Gulliver – both majority & minority use to argue application of respective rule.

Distinguish? Clear, initial intention that Regal would own the shares. Fox made clear Trust never intended to own the shares.

I.e. **clear conflict on the facts: directors could have paid for it, handed it over to Regal Ltd – did not have to keep it for themselves.**

- Regal Ltd owned a cinema – Gulliver chair of Board
- Regal took out leases on two more cinemas, through a new subsidiary (Hastings) – intention that Regal would wholly own Hastings
- Landlord wanted personal guarantee by the directors of Regal, or Hastings having a paid-up capital of 5000.
- Directors do not want to personally guarantee, decide to invest 2000 in Hastings, remaining 3000 to be found by each director
- Thus the directors of Regal became the majority shareholders of a company that had been intended to be owned by Regal itself
- Shares sold at a profit

Held directors liable for profit.

Majority interpretation: *Regal,* despite distinguishable on basis the trust never intended to acquire textile company shares stands for the application of a strict profit rule.

Minority interpretation: *Regal* distinguishable, House applied conflict rule – **Upjohn** – *obvious case where duty of the director and his interest conflicted. Scheme had been that Regal would make the profit, when in fact its directors did.*

Policy –

Majority: equity protects, need for strict application of rule

Minority: equity is supposed to be fair and flexible to individual cases. Here, there was nothing inequitable – benefited the trust.

Cohen – application of strict profit, conflict a separate rule.

- rejects the argument that information obtained by B & TP in the course of their negotiations could never have been used by the trustees for the purpose of purchasing shares: does not give due weight to the fact B & TP obtained such information and the ability to acquire the shares as a result of acting for certain purposes on behalf of the trustees
    - information came to B when acting on behalf of the trust (had actual authority from Fox)
    - then the opportunity for bidding for the shares came because B purported for all purposes – except for making the bid itself – to be acting on behalf of the Trust
    - ***Regal*** principle must apply.

Cohen's finding of liability depends on question of fact – special position (accessibility to information) which enabled them to put a competitive, informed offer on the shares arose out of trust. But then he qualifies: **could also be liable if there is a possibility of conflict.**

- here, Cohen considers there could be a conflict as there was a possibility the trustees may have wanted to use the information and opportunity to purchase (that B & TP were using) and B is the solicitor whom the trustees used to obtain legal advice.
    - B would not have been able to give unprejudiced advice if he had been consutlted by the trustees while at same time was negotiating for his own purchase of shares.

Criticism?

- Cohen mentions that B would not be obliged to work for the trust in such a situation – but does not flesh out the issue anymore.
- Superfluous to have a separate conflict rule if you already have a strict profit rule.

Hodson – seems to apply strict profit, then mentions conflict as the wider rule?

- immaterial to liability that trust was never intended to buy shares – ***Keech v Sandford*** relied on. Therefore distinction from ***Regal*** not relevant:

  nothing short of the informed consent … could enable the appellants in the position which they occupied having taken the opportunity provided by that position to make a profit for themselves.

  - unequivocally applying strict profit?
- but then considers conflict is relevant:

  no doubt it was but a remote possibility that B would ever be asked by the trustees to advise on the desirability of an application to the court in order that the trustees might avail themselves of the information obtained. nevertheless, even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied
- cites same paragraph as minority – ***Bray v Ford:*** *person in a fid position … is not … entitled to make a profit; he is not allowed to put himself in a position where his interest & duty conflict*
  - *the question of conflict directly emerges from the facts pleased, otherwise no question of entitlement to a profit would fall to be considered* – would imply profit merely part of broader conflict rule, here the conflict is very obvious (??).

Upjohn (dissenting) – need for real, sensible conflict, Fox was never going to purchase the shares.

- Cites same rule as ***Bray v Ford*** (as Hodson) – interprets as: *fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the* ***wider rule*** *that a trustee must not place himself in a position where his duty and interest may conflict.*
- Distinguishes ***Regal;*** distinguishes ***Keech:*** This case has nothing to do with trust property ***(Keech)***, or with property which the persons to whom the fiduciary duty were owed ***(Regal)***– property here was never contemplated as the subject matter of a possible purchase by the trust.
- considers that there **was never going to be a conflict on the facts.**
  - of cardinal importance that trust was never going to buy the shares – fox made this abundantly clear
    - **reasonable man looking at the situation would think there was a "real sensible possible". Cannot be mere fanciful; cannot be merely that you imagine conflict to exist.**
- A solicitor that acts, from time to time, is rightly described as being in a fiduciary capacity for that purpose.
  - But there is no such thing as an office to being a solicitor to a trust – a solicitor does not have to advise just because he has been asked too or has done so in the past.
  - CAN REMOVE HIMSELF FROM THE CONFLICT.
- equity policy – unequitable application of an equitable concept.

Dilhorne (dissenting) – no conflict as Fox never would have purchased the shares.

- Would there have been a conflict re duty to advise? (i.e. if he trust wanted to go to Court and buy the shares)
  - No: Fox had seen the "good margins and still considered the trust would not buy the shares

ARKLOW v MACLEAN 1998. ***NZCA / PC.***

Whether there was an imposition of fiduciary obligations – loyalty and confidentiality - on the defendant, following a meeting and information memorandum where the plaintiff set out investment idea, but the defendant's offer to act on the investment was never accepted.

Held (Blanchard & Thomas dissenting) that the defendants could not have owed the plaintiff loyalty because the plaintiffs were never retained (i.e. offer was never accepted; K never formed) by the plaintiffs.
A fiduciary duty of confidentiality was, however, found: the D undertook to receive the plaintiff's information in confidence and not use it without the plaintiff's authority. The D did not breach that duty as they did not misuse the information, because their deal was quite different (i.e. diff company, diff $$ paid) than what P's info was setting out.

Per Blanchard: there was a **limited** fiduciary obligation of loyalty between June 15 (the meeting) and July 15 (when D withdrew their offer). Accepting that this had been breached did not however, lead to a finding for the P as the breach gave FAR at best for a "head start" – i.e. not substantial enough.

Reason for different conclusions between Blanchard & Thomas?

- diff **factual** finding: Thomas considers but for Arklow, FAR never would made an offer; nor does he accept Arklow's plan doomed to fail. (goes to confidentiality diff as well)
- Thomas places a lot more emphasis on the industry practice – *reasonable expectation* point

Per Thomas: there was a **limited** fiduciary obligation to not further FAR's own self-interest at Arklow's expense that ended when D withdrew their offer. However, this did lead to a finding for the plaintiff as FAR would not have made an offer regardless. Regarding confidentiality, there was misuse of information as it "galvanised" FAR into action.

Facts –

- Wingate & Arklow want to buy an island – opportunity to fund purchase by selling the forestry assets
- Finds forestry company – K
- W & A's agents (B) contacted FAR – financial consultant / merchant bank
- Meeting w B & FAR – contested facts. Discuss existence of K, $$$ required.
  - FAR: told B they were aware of the opportunity – B: no mention.
  - B: FAR directors took draft proposal – FAR: denies.
- FAR sends offer to W & A, which required an upfront fee – W does not want to do that, so sits on offer
- One month later, FAR explicitly withdraws offer. Likely knew offer was not going to be accepted in late June as one of FAR's projected jobs was to prepare an information memorandum, which was sent to them. (But this not enough to revoke offer).
- Some evidence that in late June, prior to withdrawing offer, FAR began investigating their own possibilities of purchase, including inspecting the island.

CA MAJORITY.

First issue: distinction between the fiduciary obligations of loyalty and confidentiality?

- alleged in cause of action that *the same obligation arises alternatively from the fiduciary relationship or from the receipt of confidential information.*
  - ***A-G v Blake:*** *there is more than one category of fiduciary relationship and the different categories possess different characteristics and attract* ***different kinds of fiduciary obligations.***
- **Loyalty:** relationship of trust and confidence – lasts only as long as relationship lasts.
- **Confidentiality:** "quite different" relationship – arises **whenever** information is imparted by one person to another in confidence.

    - often imparted in relationships where loyalty is present, but the duty of confidentiality survives the termination of that relationship
- Loyalty and confidentiality are not mutually exclusive, they can exist between same parties at same time **but they generate different obligations, and their duration may be different.**

Second issue: loyalty?

- loyalty elusive to define, can encompass broad variety of situations
    - *Actual circumstances of a relationship are such that one party is **entitled to expect** that the other will act in his interests in and for the purposes of the relationship*
- only had one meeting, which related to the nature and status of the project – no other meetings took place
- no contractual relationship established
- *the relationship was of one party voluntarily choosing to disclose to the other information in circumstances in which they could not be said to be other than at arm's length.*
    - material (although not conclusive) that the relationship contemplated did not materialise
    - FAR had expressly required a commitment from a prospective client before providing advice or undertaking representations
- even if the position were otherwise, any obligations of loyalty would have ended once the offer was withdrawn.
- re **industry practice –**
    - *if a potential client approached an advisor for financial services, as soon as the advisor receives information about the proposed venture, the advisor can never subsequently take the setps that might in any way adversely affect the potential client's interest save with the client's consent even if all the relevant information is public*
        - **framed too wide – infinite duration?**
        - no nexus required between the proposed venture and the interests that might be adversely affected
    - such rules of practice can not be equated with the law
    - while such a rule can go to reasonable expectations, *high expectations do not necessarily lead to equitable remedies.*

Third issue: confidentiality?

- Clear there was an obligation of confidentiality: parties agreed the information was of a confidential nature, and that FAR directors were under the duty to not disclose the information that was confidential
- Issue is if the information was misused?
    - the legal obligation not to misuse information **attaches only** to information having the necessary quality of confidence
        - "no secret" that Wingate was planning to purchase the island, had told a newspaper
        - no secret that in forestry industry that the forest resource was being offered for sale
    - the purchase transaction which eventually was completed was formulated by bringing together parties FAR already knew and were active in the relevant field
    - Terms settled in FAR's final negotiations deemed from independent assessments were much more detailed than those of Wingate
    - Transaction pursued was of the forestry assets, not an investment in land – i.e. different purpose / goal of transaction
- none of the evidence shows any misuse of the specific information imparted by Wingate
    - "To be sure there is considerable circumstantial evidence to support the inference that they acted opportunistically in facilitating a transaction beneficial to themselves"
        - Timing of their actions

        - Way transaction structured
    - But that cannot be amount to misuse
        - cf Thomas J – different factual emphasis – considers such evidence material in finding there was a misue.
        - Not just about how J interpret the law, but also how they interpret facts

BLANCHARD P.

Second issue: loyalty? Dissent: a limited duty of loyalty existed for a month, which was breached but minimally so.

- *After* terminating FAR free to act in its own interests
    - considers that industry practice supports this conclusion – necessary in the evidence was that there must be some time constraint placed on the obligations
- *Before* terminating FAR was for a short period in breach of loyalty
    - *"*a duty of loyalty to Arklow came into existence when FAR did not signal at the meeting, or when setting out the mandate, that it had an intention of separately pursuing its interests"
    - But the extent of the duty was quite limited – FAR remained to free to terminate interest
- Factual finding that such a breach gave FAR at best "a head start"
    - At most Arklow would have lost perhaps two and a half weeks
    - The information given by Arklow to FAR was incapable of leading to the transaction that eventuated

THOMAS J.

Second issue: loyalty? Industry practice imposes a reasonable expectation.

- **Importance of industry practice –**
    - The court can be guided by evidence of the practice standards prevalent in the industry. To hold otherwise would be to run the risk of making determinations divorced from, or even at odds with, accepted commercial practice
    - **thinks it is important for law to be aligned with realities of practice as such practice influences the reasonable expetactions of parties**
- "unless the parties define their relationship at the outset in such terms, the relationship of a merchant's bank to a client, or potential relationship, cannot be classed as an arm's length transaction. The merchant bank relinquished its self-interest. It cannot exploit the relationship by using confidential information for its own benefit. Nor can it take advantage of the relationship by appropriating the business opportunity which has necessarily been explained by the client"
    - scope of the obligation was **limited,** namely an obligation to not further your own self-interests at Arklow's expense pending either the formalisation of its relationship with Arklow or the termination of that relationship
- factual finding that such a breach was material: FAR would not have been able to beat Arklow for the deal but for the breach – they had an advantage of a "head start"
    - (c.f. Blanchard's treatment of same term)
    - **does not accept that FAR would have made an offer regardless does not accept Arklow's deal was dommed to fail**

Third issue: confidentiality? FAR misused the information, would never have completed the deal in the time it did.

- Factual findings flow from his analysis / finding of loyalty – especially the but for
- information had value for competitor as a "complete workable scheme"
- considers more than just galvanisation – galvanised then used by them in putting together the deal

THE PRIVY COUNCIL.

second issue: loyalty? No obligation of loyalty at any point

- Meaning? *The concept encapsulates a situation where one person is in a relationship with another which give rise to a legitimate expectation that equity will recognise; that the fiduciary will not utilise his or her position in such a way that is adverse to the interests of the principal*
    - The existence and the extent of the duty will be governed by the particular circumstances
- FAR had not undertaken any obligation, either expressly or impliedly
    - No K ever created
    - **Nor where they at a stage where it could be said that an informal arrangement had come into existence, or there had been a continuing course of conduct between the parties which could give rise to a fiduciary relationship**
        - **c.f. *Chirnside***
- Re industry practice? Such evidence may be of assistance but it cannot be determinative.
    - this evidence was expressed in too wide terms and cannot be equated to the law
        - does this ignore the standard of reasonable expectation?

Third issue: Confidentiality? CA factual findings upheld

- No evidence for use of the confidential info; nor any basis for the influence of use
- the evidence shows FAR put together a "wholly different transaction" – did not contain any of the confidential info
- even if FAR galvanised into action, that does not translate into actionable misuse, particularly in light of fact that it was five months later when transaction eventualised – any possible disadvantage must have disappeared

RECONCILING ***CHIRNSIDE*** W ***ARKLOW?***

On first glance, ***Chirnside* & *Arklow*** seem to share a material fact: there was no K setting out the parameters of the relationship, a fact relied on by the NZCA & PC in dismissing the finding of fiduciary obligations in ***Arklow,*** yet easily overcome in ***Chirnside*** by the arguable crying of equity (Tipping). But a deeper analysis of the facts reveals that while sharing no K in common, there are other factors at play. To be sure, the two decisions are easier to reconcile if one takes the approach of Blanchard: limited obligation of loyalty between 15 June to 15 July – confined to when possibility was ever in fact existent (i.e. assumption of common goal). Majority is harder to reconcile with as majority places a lot of emphasis on the lack of a K, wherein there was also a lack of K in ***Chirnside***. Can, however, point to the statement of the PC re: reaching an informal agreement or continuing course of conduct – facts of ***Arklow*** emphasis there was certainly more of an informal agreement solidified, particularly regarding the amount of work that had been done together: in ***Chirnside,*** parties had had one meeting. in ***Arklow*** , parties had attending multiple meetings together – with architects, local council – and Fay had got HN on board – that is, in ***Chirnside*** they had were further down the path of formulating a plan together, whereas in ***Arklow*** it was merely a proposed framework that had been set out. Fundamentally one has to come back to first principles: reasonable expectation that the other will act in his interest. It follows that in ***Chirnside*** there was more conclusive basis for such an expectation.

CHIRNSIDE v FAY 2006

whether an informal partnership with no formal K gave rise to fiduciary obligations, therefore Chirnside bringing the project to fruition without Fay was a breach of such duty?

Held that a fiduciary relationship existed: a formal agreement nor an express undertaking was required. Here, the fact the partnership was already established wherein the parties had proceeded to a point when they were depending on each other to make progress toward a common objective meant that they clearly had a duty to not act against the other in their joint interest.

Reason for different conclusions between ***Arklow*** & ***Chirnside?***

- ***Chirnside:*** parties had worked together – more of the plan had been developed together. ie clearly at a point where they had a goal of sharing profit. ***Arklow:*** only one meeting, very initial stages.
- ***Chirnside***: history of working together
- Yes both have no K, and both feature an intent to form a K but perhaps relevant that W actively decided to not accept the offer from FAR, whereas parties in ***Chirnside*** just never got around to it as opposed to some kind of active decision?
- Yes both parties involved analogous to merchant banker, but Fay had actually risen capital, whereas on facts of ***Arklow*** FAR had only set out the possible framework of doing so

Facts –

- C & F previously involved in a JV to develop property
- In this project, become interested in developing a site
    - Chirnside: signs K w seller of property, developed site, turns into viable for commercial
    - Fay: raising capital, convinces HN to sign
- Fay requests accounts, C lies, pretends they don't exist, goes forward into the project w / out F
- F sues C, claims fid relationship therefore to account for profit

ELIAS CJ – inherently fiduciary because sharing profits.

First issue: Do parties to a JVP owe each other fiduciary duties?

- where parties join together in a venture with a view to sharing the profits obtained, their relationship is inherently fiduciary
    - qualification: label JV may be sometimes used to describe what are in fact arm's length business operations.
        - cf ***Amaltam Corp:*** label JVP can be helpful to figuring who owes fiduciary obligations, can just as likely (if not more) mean arms-length transaction still, especially in light of an all-encompassing fiduciary relationship.
        - inevitably depends on **expectation:** nature of that particular aspect one party is entitled to rely on the other, not just for the adherence to K obligations but also for some function either explicitly said or impliedly assumed
    - Here, however, there is no need for such a qualification: "single transaction partnership"
    - Fact parties may have expected to settle more formally does not alter the nature of the relationship

Second issue: breach?

- appropriation of a JV by one of the parties to his sole account is as fundamental breach as can be imagined
- applies conflict rule: "in breach of the non conflict limb of the obligation"

TIPPING J – circumstances must dictate, don't need an explicit undertaking.

First issue: Do parties to a JVP owe each other fiduciary duties?

- absence of written agreement does not preclude there being a JV
- here, there was clearly a JV – parties "working together towards a common goal which they expected would ne for their mutual benefit"
    - JV will come into being once the parties have proceeded to a point where they are depending on each other to progress towards a common objective
- but emphasises that label's cannot be determinative, relationship can carry a multiplicity of obligations of duties:

- "a relationship which gives rise to fid obligations irrespective of what may be the principal nature of the relationship or what the other obligation may arise from it"
    - K relationship can involve fid & K obligations
    - inherently fid relationship may involve duties which have no fid element
    - relationships which do not generally give rise to fid oblgiations may have a "fid dimension"
        - ***Amaltam Corp***

- 2 situations where fid duties will arise –
    - inherently fid
        - "strong case for saying most JV relationships can properly be regarded as being inherently fiduciary because of the analogy w partnership"
        - MB / ***Amaltam***: need to question if this is true, still need to ask nature of the transaction & relationship.
    - particular aspects justify it being so classified
- there can be little doubt that here relationship was PF fiduciary: Fay entitled to repose trust and confidence in C (i.e. there was legitimate expectation).
    - does there need to be an explicit undertaking? NO: explicit would confine the powers od equity, brings a strong K flavour
    - the idea must depend on the circumstances, inherently fact dependent. existence of an agreement or undertaking no more than a manifestation
        - Fay to provide finance
        - Worked together on feasibility
        - joint (initial) negotiations to purchase building
        - working together w architects, council & other advisors
        - F initially liaises w HN
        - C introduced F as principal in the development
- side note: withdrawal?
    - requires appropriate arrangements – notice etc
    - loyalty will come to an end but confidentiality obligations may remain

AMALTAL CORP v MARUHA 2006 NZSC (NB: before Chirnside)

Fid obligations when there is a K.

- commercial fishing company – set up as a joint company
- K that set out relationship was clearly not a partnership – parties had elected to not continue as partners and instead adopt a company structure
- tax problems

Held that as partners their relationship would have been inherently fiduciary but they had elected to not be partners anymore.

- the characterisation of a commercial agreement as a JV can be unhelpful as a guide to whether the parties owe each other fiduciary oblgiations. When commercial parties elect to use an incorporated vehicle for a venture that can only loosely be called a JV, it is unlikely that their relationship as a whole will be found to be fiduciary in nature.
- however, even in a commercial relationship of a non-fiduciary kind, there can be aspects which engage loyalty:
    - "in the nature of that **particular aspect of the relationship**, one party is entitled to rely upon the other, not just adherence to contractual arrangements between them, but also for loyal performance of some function which the latter has either agreed to perform for the other or has, perhaps less formally, even by confuct, assumed"
- on facts here – way in which partners allocated responsibility for these functions created a particular fid obligation for the tax purposes

PAPER RECLAIM v AOTEAROA INTERNATIONAL LTD 2007 NZSC

Fiduciary obligations when there is a K.

- parties involved in the disposal of waste paper
- made an oral agreement that Paper Reclaim would manage obtaining waste paper; Aotearoa would focus on finding export markets for the waste paper
- 16 years late, Paper Reclaim wrote to Aotearoa, claiming no long term agreement existed between them, each sale was on a sale-by-sale basis; Aotearoa not to hold itself out as PR's agent
- Aotearoa try to cancel K 15 months later; claim relationship with PR was a joint venture

Judgment –

- caution in labelling relationship 'joint venture'- when parties have formed a contract the correct approach is to first decide exactly what the parties have agreed on – i.e the particular terms
- From there, and only from there, should the Court consider whether **any particular aspect** of their agreement gives rise to a relationship which can properly be characterised as fiduciary
- A fid relationship will be found when one party is entitled to repose and does repose trust and confidence in the other
- It is not enough to attract an obligation of loyalty when:
    - one party may have given up more than the other party in entering into the K
    - nor when parties are relying on each other to perform the purpose of the K
- on these facts, seems very doubtful as to that anything more than the K obligations governed this relationship - nothing in the terms of the K implies anything more than this

TRUSTS.

There has been a recent trend of the Courts to undermine the existence of an express trust – to 'bust the trust' - in pursuit of some greater purpose, most commonly in the context of relationship property. To be sure, reasoning of the Court does primarily rest on the instrumentalization of policy in order to justify the outcome, but such an approach reflects the increasing instrumentalization of the trust itself as a vehicle to avoid obligations while simultaneously retaining control. So while an orthodox approach would consider first principles undermined, it is arguable that the utilisation of trusts in New Zealand has moved on from such principles. The doctrines of constructive trust on an express trust, sham (to an extent) and illusory, while perhaps frustrating the traditional trust parameters, are merely attempting the put out the fires of inequitable settlor control.

Constructive trust on an express trust –

- first doctrine to effectively bust the trust, utilitising ***Lankow v Rose*** principles – initially developed to create a constructive trust – but the Court of Appeal considered in ***Murrell v Hamilton*** there was no reason in principle to not be able to create a constructive trust on an express trust
- That is, if a claimant has made a contribution to a property, it is reasonable for the claimant to expect an interest in the property and the defendant has reasonably yielded such an expectation, the quantification of the contribution will be placed in the constructive trust
- An issue was quickly pointed out: unanimity of trustees. usually, all trust decisions require all trustee to agree – so if the defendant is only one to yield an interest in the property, then that is insufficient.
- This is where the mitigation of settlor control becomes a relevant justification:
    - in both ***Murrell,*** and later with ***Vervoort***, the Court considered the answer "had to be found in the reality" that if the settlor, as trustee acted in effect as controlling trustee, deliberately excluding other trustees – that is, the other trustee had abjured responsibility (as in ***Murrell***) so the defendant could bind parties to K, make decisions on their own – then it would in fact, be inequitable to allow the defendant to avoid their obligations
    - the court must be alive to the "practical reality"
- Court emphasised the need for equity principles to continue developing

Sham –

- where the settlor and trustee(s) share a common subjective intention to create the pretence of a trust, so to all objective appearances a trust was created but was, in fact, never intended to be created
- such a finding obviously invalidates the existence of a trust, as it is missing the core crucial ingredient – that is, the settlor never intended to transfer property out of their ownership
- Such an argument was put forward in ***Official Assignee,*** where the fact the settlor had been able to dictate demands to the trust that were arguably for the benefit of himself – selling the trust property back to him, buying a house in order for him and his family to live in, taking out more than necessary on the respective loan in order for the settlor to pay back some of his debts – therefore he had never intended to create a trust, intending to retain full control
- The Court, however, rejected such a finding emphasising the narrowness of the doctrine, the need for clear, unequivocal evidence of intent at the time of creation and the policy around what such a finding would mean for the beneficiaries
- They also emphasised that a finding of de facto control by a settlor was not enough to satisfy – there had to be an intention to deceive – as de facto control was materially distinct from intending to not create a trust.
- This threshold has been reiterated in subsequent cases – all finding it difficult to justify such a finding.
- Therefore the sham doctrine is an oft argued, oft rejected doctrine in the context of settlor control

Distinction between Illusory & sham –

- problem quickly emerges with the ***Official Assignee*** decision: is a settlor who exercises extensive control – so extensive in some cases that they can unilaterally redistribute all trust assets to themselves – really able to avoid relationship obligations and thus keep his subjectively intended but morally questionable trust?
- ***OA*** considered that the illusory cause of action – that is, where there was subjective intention to create a trust but in reality the effect of the trust deed was that a trust was not created – could not be a separate cause of action. Such intention to exercise control could be used to argue sham, but only within a paradigm of no intent at all.
- To be sure, both doctrines have the same end result, declaring the trust invalid. But they rest on different conceptual foundations.
- While the sham lacks the core ingredient of intention, the illusory lacks the divestment of beneficial interest: under an illusory trust, the settlor retains an extensive amount of control – through various mechanism, such as being the sole trustee and discretionary beneficiary and / or some kind of third party mechanism, such as 'protector' – thus the irreducible core of trust obligations is missing.
- In ***Clayton,*** the supreme court considered that, conceptually, illusory trust could be a separate cause of action to sham. On the facts, however, they declined to rule, citing the both arguments available – that as C could essentially vest the trust capital in himself any time he wanted the trust was invalid, or alternatively

A trust is a relationship in which the trustee holds a right (property) at common law by (or by statute) but such a right is only held for the benefit of another. Equity dictates the relationship between trustee & beneficiary –

- beneficiary owns the asset in equity – has equitable rights to ensure that the asset is used for their benefit.

Why use a trust?

- In an orthodox use, trust separate ownership and management of an asset from the benefits of an asset
    - insolvency: business assets sep from personal assets (***OA; Pugachev***)
    - estate planning: more fixed way of determining who gets what
    - avoiding the relationship property regime (***Murrell; Vervoort; Webb***)
    - family business – share assets (tax advantages; avoid stat obligations).

Who has what rights in a trust? i.e. who has the *beneficial* ownership, particularly in a discretionary trust

- express trust creates both in rem & in personam rights –
    - in rem: subject matter is property
    - in personam: express obligations; implied imposed by equity (& statute)
- creation is justified within the framework of the settlor's intention
- traditional analysis: beneficiary has in personam rights that they are able to enforce to get the beneficial in rem rights; trustee has the in rem rights minus anything beneficial, but what about when we don't know who is getting what (i.e. discretionary beneficiary)
- 3 possibilities -
    - no beneficial ownership
    - beneficial ownership exists in rem but is suspended
    - beneficial ownership is held by all discretionary beneficiaries, acquired at the point of creation

Trust busting – constructive; sham; illusory.

- reflects the changing use of trusts in NZ – courts need to have way of being able to work through them
- policy based instrumentalism to be sure, but perhaps that reflects the way trusts are being used themselves. Yes Courts are arguably undermining traditional equitable doctrine in trust-busting, but the trust, as a creature of equity, has also morphed into an instrument used to avoid certain obligations.
- So, is what the Courts doing really frustrating – or are they merely fighting fire with fire.

Problems with the imposition of the constructive trust on the express trust?

- nemo dat: orthodox framing of rights considers that while in law the asset is the trustee, equity demands the trustee receives no beneficial ownership, that is for the beneficiary. So when a trustee can place a trust assets on bare trust in accepting contribution and creating a reasonable expectation, that is essentially giving away what is not theirs to give away.
- red herring but: one act of the trustee – do you need common intention of all trustees. Orthodox position: need consensus of all trustees.
- initially constructive trust developed to deal with property not in an express trust (***Lankow***) – the Courts are just extending the law to deal with circumstances as they arise – that has always been the role of equity.
- To be sure, equity traditionally was flexible to deal with injustice at common law, but it is an unnecessary dichotomisation of CL / Equity to say equity can not bend to improve itself. In a post-fusion world, it is an arbitrary distinction.

Distinction between sham and illusory / void trust?

Sham: INTENTION TO DECIEVE. no subjective intention to ever create a trust, intended for it to merely look like a trust. Thus the trust was never in fact a trust, and legal ownership rests with the settlor.

- common subjective intention between settlor & trustee to objectively make it appear they are creating a trust but are in fact, not creating a trust *at the time of creation*
- need to prove that there was never intention to settle for the benefit of beneficiaries, settlor always intended to retain legal ownership
    - high threshold – need clear evidence – communication etc
    - breaches of trust can act towards going to the sham but also might just be breaches – breaches occur *after* the creation of trust. evidence needs to show *at the time of creation.*
    - policy: puts beneficiaries in a bad position

Palmer: A sham requires an active intention to deceive — the sham is intended to look like a trust but it is deliberately not intended ultimately to operate as one. A sham allegation is justifiably a difficult one to prove and successful cases are few. An illusory trust, on the other hand, does not depend on an intention to deceive. Rather, an analysis of the terms of the trust deed shows that actually no trust was intended … On analysis of the powers and restrictions in a particular deed, it may become clear that a true trust was in fact not intended after all. There was no intention that the trust be a pretence; there was simply a misunderstanding or lack of knowledge about what is required for a trust to be a trust. The settlor may have genuinely thought he was settling a trust, **but if there was not an absolute and effective alienation of property to the trustee for the benefit of beneficiaries,** he did not intend a trust after all.

Illusory: **THE DEED WAS NOT A TRUST.** intended to make a trust – for whatever reason – but what you created was not a trust because the trustee lacked the core irreducible obligations – Court can find that a trust does not consider, legal ownership rests with the settlor.

- ***Pugachev:*** have to analyse the trust deed itself – what is the *effect* of the deed
- ***OA:*** settlor control – "de facto property of the settlor" - **factual control**
- whether the powers reserved to the settlor were inconsistent with an intention to irrevocably relinquish a beneficial interest
    - what would have occurred if settlor attempted to recover the property which he ostensibly settled on the trust?
        - If such a step requires the permission of someone truly independent; or if the settlor would have been subject to an enforceable fiduciary duty – trust effective

- But if settlor had retained for himself the uncontrolled power to recover the property, such a settlor had never divested himself of his beneficial ownership of the property.

Clayton v Clayton NZSC: the two are distinct – finding that a trust deed was not a sham does not preclude a finding that the attempt to create a trust failed, that no valid trust came into existence.

- BOTH CAUSES OF ACTION ARGUING THAT NO TRUST IN FACT EXISTS, LEGAL OWNERSHIP STILL RESTS WITH SETTLOR.

MB: illusory trust has arisen in response to the use of the trust in increasingly unorthodox ways, greater settlor control or trustee self-benefit

- trustee ability to take *unlimited benefit*: trustee can take benefit of the trust fund to the detriment of the beneficiaries
    - The idea that the trustee should not be able to distribute all the trust property to themselves is implicit in the axiomatic trusts law idea of the trustee being a fiduciary steward of property they hold for the benefit of others.

Depends what one thinks the core aspect of a trust is – the intention to transfer common law ownership of the asset for the benefit of *others*, or merely just the intention to transfer common law ownership out of your interest as the settlor.

MURRELL v HAMILTON 2014 **–** constructive trust on an express trust.

Whether a constructive trust should be imposed on an express trust, when one who made contribution to the asset and had a reasonable expectation of an interest in order to ensure some % of relationship property is given?

Held that the imposition of a constructive trust – Murrell contributed to the property and had an expectation of interest. Such a creation does not alienate trust property, instead it averts unjust enrichment to the beneficiaries.

Judgment -

Lankow v Rose principles:

1. contributions, direct or indirect to the property
2. expectation of an interest in property
3. such expectation is reasonable (i.e. RP in shoes of P)
4. D should reasonably have expected to yield the P an interest (i.e. RP in shoes of D)

Does it matter that you are imposing a constructive trust on a property that is already in an express trust?

- ***Prime v Hardie:*** de factor relationship. BUT: trust effectively Hardie's alter ago – is this a conflation of constructive trust w illusory?

Did the the trustees of the Trust reasonably expect to yield Murrell an interest in the property/?

- Hamilton only one of two trustees – Mirkin – and no evidence to support that Mirkin stimulated Murrell's expectations of an interest
    - however, in reality, Mirkin essentially "abjured his trustee responsibilities" in favour of Hamilton, therefore H's actions must be treated as the actions of both trustees, or at least as actions binding on both trustees vis-à-vis the trust
- would be unconscionable to not recognise Murrell's claim – both trustees must be taken to have stimulated M's expectation

What about the beneficiaries rights?

- Not the trustee's property to give away – does this alienate property unfairly?
- No – the contribution of the property would never have happened but for the actions of the plaintiff, therefore "means a part of the value of the trust property which should not accrue to the Trust does not accrue to it"
    - to decide otherwise would give the trust $37,500 for nothing.

- Ricketts: this dichotomisation of value and assets is incorrect, overlooks the reality that value is inherently tied to the asset – that while the value has increased, that can only be translated into tangible form (i.e. into the 37,500) by taking $ out of the asset
- In reality, the imposition of a constructive trust ignores the fundamental relationship of a trust in that the trustees do not have beneficial rights in the asset, therefore cannot bind the asset to the creation of a right.

VERVOORT v FOREST 2015 NZCA. – sham, illusory, constructive (AFTER ***CLAYTON;OA).***

1. Was the trust a sham from its inception?
2. Was the trust illusory?
3. Should a constructive trust be imposed on an express trust, despite the existence of another trustee?

1. While Duffy exercised de facto control of the Trust, a co-trustee was nevertheless appointed; accounts prepared; properties purchased in the name of the trust; formalities of the structure by and large were retained. There is a material distinction between a lack of intention to create a trust (i.e. a sham) and intention to control a trust without the imposition of trustees.
2. There is no sep claim of action based on illusory – either the trust is a valid trust, or it is not.
3. The reality of the trust should be considered; often one trustee will be in effect the "controlling partner" and therefore it would be inequitable if the existence of a passive trustee should operate to defeat the application of constructive trust. Here, Vervoort did make some contribution but it was largely of a cosmetic nature, therefore $ would reflect that.

Issue one: was the trust a sham?

- a sham trust arises where the structure set up was not intended by the parties involved to create the rights & obligations of a trust
  - i.e. it has to be shown Duffy never intended to set up an operating trust.
  - no evidence: appointment of co-trustee; accounts prepared; properties purchased; formalities of structure retained
  - ***Official Assignee:*** "the law does not currently recognise that de facto control of a trust by a single trustee, who is also a beneficiary, creates a sham even if the other trustees are clearly not involved"
- is there such a thing as an emerging sham?
  - "there may be a situation that could arise when an originally valid trust becomes a sham because there has been a deliberate change in the trust arrangements so that it no longer has any of the characteristics of a trust, and the use of a trust name has become a **deliberate pretence** of a trust arrangement
    - conceptual difficulties with this, probably high threshold
    - cf ***OA v Wilson*** - outright rejected it.

Issue two: illusory trust?

- ***Clayton (CA):*** there can be no halfway point, either there is a trust or there isn't

Issue three: constructive.

- High Court: Forrest – other trustee - had not yielded an interest and basing the creation of the constructive trust on Duffy's actions alone would "squarely violate orthodox principles of unanimity & non-delegation"
  - HC distinguished ***Murrell:*** there was clear evidence on those facts that the independent trustee had "abjured his responsibility" to Hamilton
  - whereas here, there was no decision to defer in relation to a particular acquisition, there was a complete abstention from all decision-making by the other trustee – i.e. no agreement which ruled out certain things

- CA: these principles must bend to the practical realities. any other conclusion would be inequitable.
- constructive trust development –
    - emerged in 1980s when the relationships regime did not cover de facto relationships.
    - initially required common intention – then ***Lankow v Rose*** established 4 step test.
        - cf UK: requires common intention; value contribution to specific property
- equity does not stop developing – can adapt to modern needs – there needs to be room for the evolution of equitable principles
- justification – instrumentalism
    - "equity should operate to mitigate the rigour of any absolute rights & obligations arising out of equitable creations such as the trust – if equity acted to mitigate CL, why can it not mitigate equity as well
    - Courts approach must meet the reality of the how property is owned in NZ – family trusts, should not be able to avoid relationship property claim in entirely
        - here one trustee is effectively partner who has acted to deliberately exclude the other trustee, cannot use that fact to isolate other trustees
- nemo dat – creation of a constructive trust involves a trustee unilaterally redistributing trust property rights at the expense of existing beneficiaries
    - same reasoning as ***Murrell***: constructive trust depends on contributions to the asset made by the claimant which the assets would not have had but for the claimant
    - thus there is no misapprop of property – beneficiaries cannot expect trustees to retain for them an unearned benefit …. express trust beneficiaries should reasonably expect to yield such an interest
        - ***Lankow*** already eschewed traditional property rights analysis as the contributions created a right against the D's property generally, as opposed to specific asset – just developing the law.

OFFICIAL ASSIGNEE v WILSON 2007 – sham, beneficiaries' interests, illusory not a sep cause of action.

NB: procedurally, this claim could never have succeeded: the assignee steps into the legal shoes of the bankrupt. Therefore cannot occupy a greater or different position than Reynolds – and rhe Court could not allow R to seek relied for something that would effectively be for his own benefit (i.e paying off creditors). This issue has been amended by the Insolvency Act.

> Whether R family trust was never intended to be a trust, in light of the fact the trust seemed to act for the benefit of R as opposed to beneficiaries, was administrated poorly, thus the property ought to available to form part of the pool of creditors.

Held that a sham trust required clear evidence of a common intention of which there was none in this case. Courts should be hesitant in finding a trust in fact ever existed due to the consequences it would have on beneficiaries.

Facts – (most legit trust in terms of positions occupied, problematic in trust doing everything he asks?)

- Reynolds a business man, settles a family trust, children & grandchildren beneficiaries – puts Invercargill house in trust
- R wants to carry out renovations on Invercargill house – trustees reluctant to commit themselves to further borrowing; sell property **back** to Reynolds. Original mortgage was repaid, new mortgage w R as guarantor
- R then gets trust to buy QT house – R & family to take up occupation
- Trustees borrow **more than what was required to buy the house** - used by R to refinance the mortgage over the property

- However, buying the QT house did unilaterally secure one mortgage over both the I & QT house, therefore lower interest rate on the mortgage

What factual arguments were made re: the Trust was a sham, never intended to be a trust?

- The sale of the invers house was so R could use the house as security
- trustees borrowed more than required on the QT house so R could pay his debts
- R using QT property as security to raise money for their own purposes

Judgment

Issue one: Sham trust?

- A trust is a sham where is an intention to have an express trust in appearance only
  - i.e.: essential ingredient in its creation missing in its creation missing
- common intention required: absurd if the settlor's secret, subjective intention when a "trustee has aced as perfect trustee applying assets in good faith – i.e there can be no sham if, although a settlor did not intend to create a trust, the trustee is still ***giving effect*** to the trust
- distinguishes ***Wyatt***: wife (trustee) had no "**knowledge** of the effect or nature of the declaration that she signed" hence "she merely went along with the shammer not either knowing or caring what she was saying"
  - recklessness or ignorance on the part of trustee can be tantamount to intention, as distinct to recklessness or ignorance being adequate without more
- equity will look to substance, not just form – however, necessarily has to be a high threshold – "extreme finding"
  - breaches of trust do not necessarily suggest the trust has been a sham from inception – distinction between breaching one's obligations / duties per trust, and no intention for there to be a trust
    - contemporaneity – breaches occur *after* the creation of the trust – sham requires for there to no intention *at the time* the trust is created
    - emerging sham? CA rejects: unless the later appearance of a trust can be traced back to the creation, the trust remains valid.
  - have to consider the consequences on the beneficiaries
- Bad organisation / admin / decisions etc do not mean there was no intention to create a trust.
- **Re: transfer of the Invercargill property?**
  - Not necessarily proven that the transfer was not in the best interests of the beneficiary (reflects high threshold)
- **Re: borrowing more than necessary for QT?**
  - better leverage and better rate of interest
  - also necessary as trust only had $5000 in assets
  - however "unwise" a decision, still not clear enough evidence
- **poor admin?**
  - evidence not enough on its own, may be evidence of breach

Issue two: alter ego / illusory trust?

- There was intention to create a trust, but the trust does not operate *as a trust*, but as an *alter ego* of R: i.e. defacto property of the settlor
- R controlled the trust, trustees mere puppets
- HC: found alter ego, but had not considered theoreotical basis for the cause of action
- Aus: separate cause of action – CA: Aus authority needs to be treated with caution, different legislative framework
- Alter ago about **factual control** – in the eyes of the law, factual control has no effect on legal ownership

- but cannot be a separate cause of action – might amount to evidence that the trust was a sham as effective control could go to intention for there to never be a trust
- actual control does not provide justification for invalidating a trust
    - overruled in by the SC in ***Clayton***: we observe that a finding that a trust deed does not **seem to preclude** a finding that the attempt to create a trust failed and that no valid trust came into existence

CLAYTON v CLAYTON NZSC 2016 **–** illusory a cause of action, sham high threshold.

1. Whether the assets in VRPT settled by Clayton, wherein C occupied the position of settlor, discretionary beneficiary and principle family member – which empowered C the ability to appoint, remove any discretionary beneficiary or trustee – was C's property for the purposes of the RPA; or
2. whether the powers held by C rendered the trust sham, or illusory?

1. Held that the combination of powers held by C were properly classified as "rights", which gave C an "interest" in the VPRT for the purposes of the RPA. The definition of 'property' in the RPA ought to be interpreted broadly to reflect the purpose, broadening traditional concepts of property, that would, in other circumstances not be regarded as property. As C could appoint the entire assets to himself at any time, that was an interest tantamount to ownership.
2. The VRPT was not a sham. Ignorance of the law and terms of the trust; nor the extensive powers afforded to him can not be said to form a subjective intention to have never in fact created a trust. The sham doctrine must remain confined to the intention to not create a trust at all, arguments re illusory / otherwise reprehensible must remain separate.
   Therefore illusory is a seperate cause of action, but the label is problematic, as it is encompasses a situation where there is no valid trust in existence, as opposed to conferring to the Court the ability to look through something in existence. While not concluding on the relative strength of either argument, the Court did note that two arguments can made -
   - the VRPT was never a valid trust because C reserved himself such broad powers, therefore never disposed of the property in favour of the beneficiaries – i.e. the irreducible core of obligations does no apply to him; OR
   - Although the trust is defeasible in the sense C can bring it to an end, there is no reason why it cannot be regarded as a trust until C exercises that power.

Facts – (probably the most problematic trust)

- Signed a prenuptial agreement, contracting out of the RPA (family court later overruled this)
- C, when parties meet, already pretty rich, became richer over course of marriage
- VRPT settled 13 years after the relationship commenced; daughters final beneficiaries, Clayton & wife discretionary beneficiaries
- C reserved powers as 'principal family member' –
  - appoint / remove trustees
  - appoint / remove discretionary beneficiaries – however, cannot remove final beneficiaries
  - BUT can pay entire trust capital to himself, as well as all the trust income
  - can resettle, can end trust whenever
  - fiduciary obligations explicitly removed – does not have to act in consideration of other beneficiaries

Judgment.

Issue one: Property for the purposes of the RPA

- C does not have powers analogous to a general power of appointment, because, while he "unfettered rights" re discretionary beneficiaries, he cannot, in fact, remove the Final beneficiaries – removal of the FB as DB does not mean they cease being FB (diff factual finding to the CA)
- However, the existence of other powers under the deed mean interest can still be considered property:
  - Can bring forward the vesting date to a date of his choosing and, could also appoint all the trust capital to himself, therefore giving him both **legal & beneficial ownership** of the trust capital, and the trust would come to an end
  - powers are not constrained by fiduciary obligations

- therefore all the powers combined amount to a "general power of appointment", and a general power of appointment can be treated as property.

Issue two: sham? (obiter)

- HC: Clayton still had **core obligations** as Trustee to act honestly and in good faith, which the other beneficiaries could still enforce
    - wb clause that allowed him to act without fiduciary interest?
- CA: genuinely intended to create a trust, just to retain power over that trust
- do not consider that c's lack of legal knowledge & knowledge of the trust deed amounts to a conclusion that he never intended to create a trust
- fact of power & extensive control is not the same as having the requisite intention to not create a trust
    - MB: 10 – 15 years, and C never knew what the trust deed said. If the only trustee does not know what the deed says and signs, doesn't that go to the idea it was a sham?
        - But – procedural note - SC is dependent here on the factual findings of HC – so confined in that respect.
- reflects very high threshold of doctrine

Issue three: illusory? (obiter)

- HC J considered trust was illusory –
    - trust have C unfettered power to distribute the income & capital how he pleases, therefore he exercises, in a practical sense, the powers of ownership.
    - **how is that different from ownership under the common law?**
    - powers are so broad the Trustee "can basically do what he wants with the property"
- CA: overturned this decision – considering finding an illusory trust was inconsistent with finding of no sham; not separate causes of action – "either there is a valid trust or there is not"
- SC: while finding of an illusory trust is not precluded by finding no sham, the label illusory is unhelpful. It just means there is no valid trust.
    - **Not a valid trust –**
        - C reserved too extensive powers; therefore cannot be said to have disposed of the property settled under the trust deed in favour of ***another***
        - equally, the breadth of those powers can question whether the irreducible core of Trustee obligations could be said to apply to C
        - however, such an analysis does not deny the possibility that a valid trust may come into existence if C were to be replaced by a new Trustee who was not the PFM and / or a beneficiary
    - **Valid trust –**
        - while certainly defeasible in the sense C can solely dismantle at any time he wants, there is no reason in principle that the trust should not continue as C chooses to utilise those powers.
- Ultimately, Court does not consider – a matter of complexity that Court does not agree unanimously on. Distinction?
    - sham is a pretence – the terms of the document do not reflect what the parties actually meant
    - illusory – the trust was never in fact valid – the document as executed does reflect the subjective intention to create a trust, but they nevertheless failed to create the trust

WEBB v WEBB 2017 ***(Cook Islands CA).***

Whether the trusts created by Webb were in fact a valid trust, in light of the extensive powers reserved to Webb under the deed, including the ability to solely give himself the trust capital without regard to any other fiduciary obligations; freely resettle; vest in himself all the trust property; get rid of all existing beneficiaries; and even if removed himself as trustee, in his capacity as consultant could remove & replace trustees, therefore effectively remaining in Webb's control, thus subject to the relationship property regime?

Held the trusts were invalid: there was no effective alienation of trust assets for the benefit of another. The assets in question remained factually in the beneficial ownership of Webb.

Facts –

- Webb an entrepreneur, lots of assets, interests in the Cook Islands.
- Married in 2005, split up 11 years later
- **Aorangi Trust**: settled a week after marriage, settled for the purpose of acquiring land in the Cook Island; beneficiaries Webb and son from previous marriage; later on his business partner was made a trustee and 'consultant'; retired in 2013, Webb left as sole trustee
- After sep, Webb settled the **Webb family trust**: Webb & new partner trustees, Aorangi resettled some of its assets on the new trusts

High Court –

- Restrictions on the beneficiaries rights did not extend so far as to invalidate the trusts
- W intending to retain factual ownership same argument as limited beneficiary rights – i.e. both go there being no intention to creating a trust (sham)

Court of Appeal –

- **whether, on an objective analysis of the powers reserved to the respondent in that deed, the settlor has evinced an intention to irrevocably relinquish a beneficial interest?**
- Analogy to ***Pugachev?***
    - P settlor, protector and beneficiary – here, C settlor, consultant and beneficiary? analogous duties also
    - As protector P had power to remove & appoint trustees, to direct the sale of a particular asset, to veto distribution, to veto removal of beneficiaries; or variation of the trust deed, release or revocation of powers
- Analogy to ***Clayton*** – 'similar approach might well have been relied on"
    - this ignores fact ***Clayton*** considered it was not deciding the issue.
- However Court do not consider it beneficial to embark on a detailed comparison of trust deeds – just need to ask whether the powers reserved are inconsistent with an intention to irrevocably relinquish a beneficial interest?
    - **what would have occurred if W had attempted to recover the property he had settled on trust?**
        - If the assent of a truly independent person is required (when not a trustee), or the recovery was subject to fiduciary obligations (when sole trustee), then the trust is effective.
        - If W had uncontrolled power to recover the property, then it could not be said he ever divested himself of his beneficial ownership of the property.
- describes as an "objective nullity" – distinct from a sham
- Here, W was vested with such powers that the trust deeds in question failed to effectively alienate the beneficial interest in the assets in question
    - extra that he was consultant as well – ie would have been enough to just be the sole trustee with those powers.

PUGACHEV 2017 (UKHC). Need to look to the deed – are the powers of ownership retained by the settlor?

Whether Pugachev's position as settlor, discretionary beneficiary and protector meant that the trusts in question were invalid (/ illusory), therefore liable to form the pool of his assets?

Held that the powers reserved to P as protector – appoint / remove trustees, beneficiaries; veto trust decisions – meant that P had never divested his beneficial interests in the property – that is, the assets are still under his legal ownership, or alternatively are held on bare trust for him.

Facts –

- very rich Russian, etc
- Settled number of NZ trusts – trustee NZ company (Patterson)
- Despite not being a trustee, reserved extensive power as Protector –

Judgment –

- ***Clayton*** shows that when considering what powers a person actually has a result of a trust deed, the court is entitled to construe the powers and duties as a whole, and work out what is going on as a matter of substance.
- When the deed is examined with care, it is clear C retained the powers of ownership
    - the powers conferred on P as protector are conferred to be exercised freely, for his own benefit.
- this conclusion is not the same thing as a finding of sham. The analysis is all concerned with what the *effect* of the deed truly is. It is not concerned with the *subjective intentions* of the parties to create a pretence to mislead (i.e. lie).
- considers that the core, fundamental basis of creation of trust is the irreducible obligations owed to trustees by beneficiaries
- concept of a protector not a term of art, in that different trusts it may provide for different rights, powers; they do, however, usually involve the ability to remove and appoint trustees, and that some powers of the trustees are only exercisable with the protector's consent
    - but what is the nature of those powers? are they fiduciary?
        - D: P does not have any right in law to do what he likes, P was still subject to fid obligations. Even if the power was not fid, it still counts as a power which must be exercised honestly and for a proper purpose.
    - In another context, it may make sense to consider that such protector's powers are subject to fiduciary obligations.
        - But here, if an unscrupulous person seeking to sue a discretionary trust to protect assets from creditors, a trust which includes a role as protector with very wide powers of veto and to remove and appoint trustees may perhaps achieve the desired result. Such an unscrupulous person can prevent the trustees from distributing the money to anyone but themselves, can remove recalcitrant trustees who fail to do their bidding and replace them with willing trustees. Viewed in that way, maybe such an unscrupulous person has retained effective control of the assets, or at least can recover that control whenever they like.
- material that P was a discretionary beneficiary and a protector – "fact it is a beneficiary on whom these powers are conferred militates against the idea of a limitation. One would expect a beneficiary ordinarily to be entitled to act in their own interests"
    - reaffirms what MB was saying in class re not needing an explicitly negating fid obligation – implicit your role as discretionary beneficiary, and the one with powers (trustee / protector) that you can act in your own self interest
- Put simply, the powers are just not subject to any limitation.

***Murrell v Hamilton* –** relationship property. Constructive trust found.

Settlor: Hamilton (family trust) – settled *after* relationship began

Trustees: Hamilton & Mirkin

- **Relative power:** Hamilton could do what he wanted re the house: construction and development.
- Mirkin "had essentially abjured his trustee responsibilities"
- Hamilton could bind the trustees to contracts – "So Hamilton's actions were treated as the actions of both trustees, or at least as actions binding on both trustees vis-à-vis the contract counterparts

Beneficiaries: (presumably the children & Hamilton but immaterial).

Vervoort v Forest – relationship property. Constructive trust found

Settlor: Duffy (family trust)

Trustees: Duffy & Forest

- **Relative power:** Duffy exercised "de facto power"
    - nothing to indicate a lack of intention to create a trust, but no doubt Duffy intended to control it
- But still the presence of a co-trustee; trust accounts prepared; formalities of trust structure retained
- Existence of de facto power does not go to illusory but to the rejection of requiring all trustee intention when imposing a constructive trust

Beneficiaries: Duffy & others

Official Assignee v Wilson – insolvency. Rejection of sham & illusory arguments – illusory not a sep cause of action.

Settlor: Reynolds

Trustee: Wilson & Harvey

- **Relative power:** W & H did what R asked of them – i.e. sell the house back, borrow $ than necessary to purchase the QT house
- But still arguable the trustees were acting for the benefit of the children (c.f. high threshold of doctrine)

Beneficiary: children

Clayton v Clayton – relationship property. most extreme case of trust.

Settlor: Clayton

Trustee: Clayton (sole)

- **relative power?** entitled to exercise powers without considering the interests of all beneficiaries and in a way that might be contrary to the interests of present or future beneficiaries – irreducible core of trustee obligations? i.e. could exercise his power as trustee as he wanted.
- exercise any power notwithstanding any conflict of interest created

Beneficiary: discretionary – Clayton, Wife and 2 children; final – 2 children.

Other powers? Principal family member –

- appoint or remove discretionary beneficiaries – could not, however, alter the status of the final beneficiaries
- power to pay all of the capital to any discretionary beneficiaries
- bring forward the vesting date
- resettle the trust fund

Webb v Webb – relationship property – trust settled irrevocably relinquish beneficial interest?

Settlor: Webb

Trustee: Webb (sole trustee).

- **Relative power?** Give himself $, won't need to consider fiduciary obligations

- Can resettle trust
- Can vary its term so can vesting all trust property in himself
- can nominate himself as sole beneficiary, remove other beneficiaries

Beneficiary: Webb, children

Other powers? Consultant – but MB; would have had finding of illusory trust regardless of consultant thing, because his powers conferred to him as trustee were broad enough to not divest beneficiaries of any interest.

- even if resigned as trustee, could retain a high level of control as Consultant
- Power conferred to him the ability to remove / replace any trustee "at his absolute discretion and without giving reasons therefore"

***Pugachev* –** insolvency

Settlor: Pugachev

Trustee: NZ company

Beneficiary: Pugachev; Tolstoy; children

Other powers? Protector

- Protector's consent requited before the trustee may exercise many of the powers normally vested in a trustee such as the distribution of income or capital and investment
- Consent also needed to exclude discretionary beneficiary or vary the deed
- Can remove or appoint trustees
- Can appoint further discretionary beneficiaries
- Finding of court: powers conferred can be exercised for his own benefit
    - could be diff if there was a third party protector, with provisions barring that person being a beneficiary
    - if less powers were conferred on the protector / beneficiary
    - Fact P also settlor reinforces this conclusion – again could be diff if wasn't beneficiary as well