



The Law of Trusts (12th edn)

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p. 50 **3. Trusts and powers**

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter explores the features of express trusts, with a focus on powers. The discussions cover fixed trusts, discretionary trusts, and powers of appointment; the variety of interests under express trusts; the kinds of powers and duties under a trust; faulty exercises of powers; judicial control of the exercise of discretions; and limitations on the settlor's 'freedom of trust'.

Keywords: fixed trusts, discretionary trusts, protective trusts, powers of appointment, fraud on a power, *Saunders v Vautier*, perpetuities, illegal trusts

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Three basic building blocks: fixed trusts, discretionary trusts, and powers of appointment

3.1 Express trusts are very flexible devices for structuring the benefits that property can provide, in particular in ways that are impossible to do simply by making an outright gift of the title to property to someone. Three ways of doing so can be employed—fixed trusts, discretionary trusts, and powers of appointment; these are the basic building blocks of modern trusts. We have already come across examples of fixed and discretionary trusts in the last chapter (2.37, 2.38). How these three building blocks work together is best explained by examples.

A traditional form of trust in four variations

Example 1

All the rest and residue of my estate to my trustees ON TRUST for my beloved wife Mary for life, and then for my three sons, Jacob, Jasper, and Jeremy in equal shares.

p. 51 **Example 2**

All the rest and residue of my estate to my trustees ON TRUST for my beloved wife Mary for life, and then to my three sons, Jacob, Jasper, and Jeremy in such shares as my trustees shall in their absolute discretion think fit, with power to my trustees to appoint up to half the capital during my wife's lifetime to such of my sons and in such amounts as they shall in their absolute discretion think fit.

Example 3

All the rest and residue of my estate to my trustees ON TRUST for my beloved wife Mary for life, and then to my three sons, Jacob, Jasper, and Jeremy in such shares as my wife shall appoint by her will, with power to my wife Mary to appoint up to half the capital during her lifetime to such of my sons and in such amounts as she shall in her absolute discretion think fit.

Example 4

All the rest and residue of my estate to my trustees ON TRUST to pay or apply the income during the life of my beloved wife Mary for the benefit of Mary and my three sons Jacob, Jasper, and Jeremy in such shares as my trustees shall in their absolute discretion think fit, and then to my three sons, Jacob, Jasper, and Jeremy in equal shares, with power to my wife Mary to appoint up to half the capital during her lifetime to such of my wife's brothers and sisters and nieces and nephews in such amounts as she shall in her absolute discretion think fit.

Fixed trusts

3.2 The beneficial interests under a fixed trust are, as the name implies, fixed, which means that the share of the trust property the beneficiary will receive is defined by the terms of the trust. All the interests created in Example 1 for Mary, Jacob, Jasper, and Jeremy are fixed. Mary will receive the income of the trust for so long as she lives, and upon her death the trustees will distribute the trust assets to her sons in equal shares, at which point the trust will come to an end. ‘Fixed’ does not mean that the actual monetary value the beneficiary will receive can be determined from the outset. For example, company shares may be held on this trust. The trustees will pay the dividends to Mary during her life, and on her death the shares will be distributed in equal amounts to the boys. All know what their interests are, although the particular amounts of income that Mary may receive from the trust property will vary with the amounts of the dividends paid on the shares, and what the shares will be worth when distributed to the sons cannot be determined at the outset—shares fluctuate in value. ‘Fixed’ means ‘not discretionary’, and that is all it means.

Discretionary trusts

3.3 In contrast, the terms of a discretionary trust give the trustee, or indeed, may give someone else, a dispositive (2.27) discretion. In Example 2 the trustees have a discretion as to the particular amounts of capital that each Jacob, Jasper, and Jeremy will receive on Mary’s death. In Example 4 there is a discretionary trust of the income under which Mary and her three sons are the beneficiaries. Under the modern law, such a discretion will allow the trustees to choose any shares at all, even a ‘zero’ share, so that they might decide to distribute the capital to Jacob alone, giving the others nothing. The main reason for giving the trustee a discretion of this kind is that of flexibility: it allows the trustee to respond to changing circumstances. If Jeremy were to marry and have children of his own, whereas Jacob became a celibate priest, it might be sensible to give Jeremy a larger share of the capital on Mary’s death. Or, to take the case of a discretionary trust

of income in Example 4, if Jasper decided to become a ‘trust baby’, ie to forego education, refuse employment, and try to live off whatever income he could prise out of the trustees, it might be sensible to cut him off for a time.

3.4 Notice that the trustee has a discretion in how he must discharge his obligations under the terms of the trust. He must exercise his discretion when it becomes time to do so. That is why this form of disposition is a discretionary trust: he has an obligation to exercise this discretion. So, for example, in Example 4 when income is received, say dividends on shares, the trustees cannot just hang onto it for an indefinite time pondering how they will divide it between Mary and her sons; they must decide on shares and pay it out to them within a reasonable time after its receipt. The same is true in respect of the discretionary trust of capital in Example 2.

3.5 In Example 3 we have the case of a discretionary trust where the discretion is not the trustees’ but Mary’s, and this is perfectly possible and sensible. Mary gets to choose the shares in which her sons will receive the capital on her death, and the settlor would undoubtedly have given her this discretion because he thought her the best judge of how much each of her sons should be given. This is a trust because it is expressed in imperative terms: ‘as my wife shall appoint by her will’. Mary has a duty to do so. You may ask, what if she doesn’t? The sons will receive the capital; the court will ensure that they do, but they will, these days, be unlikely to exercise the discretion themselves (see **4.24 et seq**). They will likely order the trustees to give the sons equal shares on the maxim that ‘Equality is equity’.

3.6 Under a discretionary trust, no individual who is in the class of possible beneficiaries, ie in whose favour the trustee may exercise his discretion, has any individual interest in the trust property prior to the time the trustee actually exercises his discretion and transfers such and such a share or amount will go to that individual. The possible beneficiaries have only a hope, or expectancy (sometimes referred to in Latin as a *spes*), of receiving the testator’s bounty (Turner (2018), 247–256).

3.7 The result of the trustees having a discretion to select only some of the possible beneficiaries means, of course, that some might not receive any money at all, in which case they will not really be ‘beneficiaries’ of the trust. For this reason, the term ‘objects’ is used, and the group of objects among whom the trustee may select is called the ‘class of objects’. ‘Objects’, then, is the compendious term that covers beneficiaries under a fixed trust, possible beneficiaries under a discretionary trust, and possible recipients under a power of appointment, to which we now turn.

Powers of appointment

3.8 A power of appointment under a trust allows the power holder to ‘appoint’, ie give, property to individuals, free of the trust, and there is such a power created in the last part of Examples 2, 3, and 4. In Example 2, the power is given to the trustees, in the latter two to Mary. Example 4 is the most straightforward: Mary is given a power of appointment to transfer up to half the trust property to her brothers and sisters and nieces and nephews before her death. If Mary exercises the power by directing the trustees to do so, she can give it to whichever of these relations of hers she chooses. Because powers to appoint property to non-trustees are ‘given’ to individuals like Mary, power holders are often called ‘donees of the power’, or ‘donees’

for short; this terminology is obviously confusing because one naturally thinks of the person to whom the trust property is appointed as the donee, not the one who does the appointing. In any case, beware of this term when you read the cases. Very typically under the terms of the trust, power holders like Mary may exercise their power only by executing a formal legal document known as a deed in which she then gives to the trustees. This deed will obviously then be one of the documents making up the trust accounts (2.21).

3.9 As Examples 2 to 4 show, powers usually specify whether they allow the power holder to appoint income or capital; these were all powers to appoint capital, but the settlor might have given the trustees a power to appoint up to half the income as it arises from time to time to the three boys. Now, it is vital to notice who loses out when appointments are made. In Example 4, if Mary exercises the power, she will reduce the capital base from which income is earned, so it will cost her in income, and by appointing to such relations of hers as she chooses, she takes capital away that would otherwise go to her sons. Now consider Examples 2 and 3. In these cases, the class of objects of the power to appoint the capital is the same as the class of objects of the trust of the capital. To the extent the trustees or Mary were to appoint the capital to one or more of the boys during her life, the less there will be to distribute to them on her death. You might consider this an odd provision, but it makes perfect sense. Mary might be a long-lived old thing, and she might have more than enough income from the trust; why not give her or the trustees a power to give some of the capital (up to half) to the boys during her lifetime (they might all be married with children and be able to use the money) rather than making them wait until she drops off her perch?

3.10 A bit of terminology: the people whose interests diminish when the property is appointed are called ‘those who take in default of appointment’, sometimes shortened to ‘those who take in default’. So, in Examples 2 to 4, the three sons are those who take in default because they are otherwise entitled to the capital under the prior trust terms; if the power is not exercised, they will get it. But this is the vital point to grasp—there is no such thing as a free-standing power of appointment over trust assets. There must first be objects of trusts, whether fixed or discretionary. Without these trusts, the assets are not held on trust. Powers of appointment operate to ‘partially defeat’ these trusts by transferring away assets that would otherwise be subject to them. I have just said ‘partially defeat’. There is no good, standard terminology to express what happens, for example, to the sons’ capital interests when Mary appoints capital to her relations in Example 4.

p. 54 In one sense, their interests are exactly the same: each has a one-third interest in the trust capital. But in another sense, their interests are clearly diminished because there are fewer assets in the trust fund. But so long as you understand this point, do not worry too much about how you express it.

3.11 Until the trustee actually exercises the power of appointment to appoint trust assets to an individual in the class of objects, the objects in the class have only a hope, or *spes*, (3.6) of receiving anything.

General, special, and hybrid/intermediate powers of appointment

3.12 Powers are generally restricted, essentially in the same ways that discretionary trusts can be. As the examples show, the settlor can restrict the power so that the power holder can only appoint to a certain class of objects, the amounts that any object receives can be limited, and so on. A power to appoint to anyone in the world, including the power holder himself, is called a ‘general’ power. Such a power essentially amounts to absolute ownership, although a power to appoint to anyone that can only be exercised by will, which obviously

cuts out the power holder himself, is still considered a general power. A 'special' power is a power to appoint to a restricted class of persons (eg the testator's children) even if that class includes the power holder; the powers of appointment in Examples 2 to 4 are all special powers. A 'hybrid' or 'intermediate' power is a power to appoint to anyone except for a restricted class, for example anyone except the settlor or his spouse or children (see eg *Re Park* (1932); *Re Beatty* (1990)); intermediate powers are a very important part of the structure of modern trusts.

Fixed trusts, discretionary trusts, and powers of appointment compared

3.13 Fixed trusts and discretionary trusts are alike because, being trust obligations, the trustee is under a duty to distribute the property. This is obviously not the case with powers, although (as we shall see) there may be various duties that govern the power holder's choice to exercise or not exercise the power. On the other hand, discretionary trusts and powers are alike, and different from fixed trusts, because the discretionary trustee and the power holder both have a discretion. In the case of the discretionary trust, the trustee has one discretion—how to distribute the property amongst the objects of the trust. In the case of the holder of a power of appointment, she will always have a discretion as to whether to exercise the power at all—she has no obligation to exercise it, and that's why it's not a trust—and will also typically have a discretion, just like the trustee of a discretionary trust, as to how to distribute the property amongst the objects of the power. But the power holder may not have the second discretion, although this is unusual. For example, the power may be to make a one-time gift of capital of £10,000 to the Red Cross.

Power to exclude objects

3.14 In *Re New Huerto Trust* (2015) the trustees of a discretionary trust sought a declaration that they had the power to exclude permanently and irrevocably one of the objects, the settlor, from any benefit under the trust. The Eastern Caribbean Supreme Court held that:

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← [32] *If the trustee can validly appoint property among two or more objects of the trust while excluding altogether one or more objects, then there is no reason why the trustee cannot, in advance of appointing any property to the objects of the trust, use the power of appointment to exclude one of them from benefiting under the trust.*

Presumably this reasoning would apply *a fortiori* in respect of an object of a power of appointment.

The variety of interests under express trusts

3.15 There are different ways of characterising the interests that may arise under a trust, and a terminology has grown up to describe these interests. Some of these we are already familiar with.

Capital and income interests

3.16 Under a trust, the beneficial interests in the trust property can be carved up pretty much in any way the settlor wishes. However, there are standard ways of doing so that we shall encounter again and again, in particular dividing the property between ‘income’ and ‘capital’ beneficiaries, as we have already seen (2.37–2.39), and which we see in all of Examples 1 to 4. In each of Examples 1 to 4, such a division is drawn. Mary is the income beneficiary, her sons the capital beneficiaries in Examples 1 to 3. In Example 4 the boys are also objects of the discretionary trust of income. Following the example of land law, it is sometimes said that upon Mary’s death the sons’ interests ‘fall in’, or ‘fall into possession’.

3.17 What is income? That will depend upon the kind of property in the trust. Income on shares consists of the dividends that are paid, or bonds or other interest-bearing investments the interest pays, or land rent. What is capital? It is the trustees’ title to the various trust assets in the trust, title which must be distributed to the capital beneficiaries on Mary’s life. So, for example, in Example 1, Jacob, Jasper, and Jeremy are the capital beneficiaries, and on Mary’s death the trustee must transfer title to those assets to them in equal shares. If the asset is not divisible, like title to land, the trustee must transfer the title to them as tenants in common with equal one-third shares. Where the asset is divisible, like the money in the trust bank account, the trustee must pay them one-third of the money each. During Mary’s life the market value of their capital interest will fluctuate with the market value of the trust assets.

Exhaustive and non-exhaustive trusts of income

3.18 Trusts of the income of property can be cut down by giving the trustees a ‘power to accumulate’, ie a power to save the income as it arises rather than distributing it to the income beneficiaries. The accumulations can be directed to go either to the capital beneficiary or to accumulation funds, which must later be paid over to the income beneficiaries. Trusts with a power to accumulate are called ‘non-exhaustive’, because when the power is exercised the distributions to the beneficiaries do not exhaust all of the income. Trusts of income with no power to accumulate are called ‘exhaustive’, as in Examples 1 to 4.

Successive interests

3.19 Where there are income and capital beneficiaries, there are ‘successive’ interests. Successive interests are interests in the same property that take effect one after another, usually following the successive deaths of the beneficiaries. In Example 1 Mary will get the benefit for the time being, and only later will her sons get any benefit from the trust property.

Conditional and determinable interests

3.20 Complicating matters somewhat, there may also be conditional and defeasible interests in property held under a trust. Conditions may be of two kinds: conditions precedent and conditions subsequent. A condition precedent is a condition that must be fulfilled for a gift to take effect, such as ‘Blackacre to A in fee simple, on condition that he marries before the year 2030’. A condition subsequent is a condition of defeasance—the gift will come to an end if the condition occurs, such as ‘Blackacre to A in fee simple, but if he should become a

barrister, then to B in fee simple': if A becomes a barrister, then B will become entitled to Blackacre. Finally, a determinable interest is one that, while similar to a gift defeasible upon condition subsequent, is conceptually different. A gift defeasible upon condition subsequent is regarded as a full gift, of a life interest for example, which might come to an end before running its normal course, ie until the death of the life tenant. A determinable interest is regarded as being a gift of property for a lesser period than an estate like a life interest, this lesser interest being framed by the event by which the interest comes to an end; however, as things turn out its actual duration may extend to the full period of a normal estate (eg a full life interest) if the determining event does not occur. Thus, a life interest determinable upon X's marriage will 'ripen' into a complete life interest if X never marries. The very subtle conceptual distinction between determinable interests and interests defeasible upon condition subsequent—so that the legal effect of a gift 'to Mathilda for life, but if she remarries, to Betty' (a life interest defeasible upon condition subsequent) differs from one 'to Mathilda during her widowhood' (a determinable life interest)—has been much criticised for being 'extremely artificial' (*Pennycuick VC, Re Sharp's Settlement Trusts* (1973)).

Vested, absolute, and contingent interests

3.21 Because interests can be determinable or defeasible when a condition operates, the interest can shift from one person to another. A person's interest is 'vested' if he is entitled to receive the benefits of the property as matters stand at present. In Example 1, both Mary and her sons have vested interests in the income and capital respectively. It is not to the point that her sons have only a future interest. Their capital interest is still vested, because they are in line to receive it and no one else is. In Example 1, because the gifts are not subject to any condition of defeasance or determining event, Mary's and the boys' interests are also 'absolute'. An absolute interest is one that cannot be defeated. An example of a person with a vested interest that is not absolute is the unmarried widow Mathilda in 3.20—the income interest is vested in her and she receives the income, but it is not absolute, because if she remarries, she will lose it. Another example, perhaps, is the case of a person who will take property in default of appointment before any appointment is made. Consider a modification of the trust in Example 1, but where Mary's power to appoint to her relations in Example 4 is added to the trust terms. Under this trust the boys are in line to receive the property, but they are clearly not absolutely entitled, in the sense that some of the property can be taken away from them in so far as they are entitled as capital beneficiaries, for that entitlement will in part be defeated by an appointment.

3.22 As we have seen (3.10), the reason why one says 'in part' in this case is that the appointment does not extinguish their rights as capital beneficiaries per se, in the way that Mathilda's marriage extinguished her right to income entirely; it just diminishes the capital their interest relates to. On the other hand, if the power in Example 4 was a power to appoint up to all the capital, then an appointment of all the capital would extinguish their interest, for there would be no trust property left; such an appointment would also extinguish Mary's income interest for the same reason. Those who have vested, but defeasible interests, have counterparts in those persons who will get a vested interest if the former's are defeated. Thus, if a gift is 'Blackacre to Harry for life, but if he publishes the photographs he took at my 40th birthday party, then to Jane for life', then Jane has a contingent interest in Blackacre, which will vest if Harry publishes those photographs.

Protective trusts

3.23 A beneficiary under a fixed trust, such as a life tenant, has a vested interest in the trust property, which can be assigned, or given as security on a loan and, most significantly, will go into the beneficiary's estate in bankruptcy if he becomes insolvent. A settlor may be happy to give a beneficiary an interest under a trust, but may like to avoid that entitlement going to pay his creditors if he becomes bankrupt. A protective trust is a device that combines a determinable life interest with a discretionary trust to protect trust assets from just this occurrence.

3.24 The protective trust works as follows. There are two trusts: first, there is a gift of a determinable life interest in favour of the person the settlor wishes primarily to benefit, for example his son, who is known as the 'principal beneficiary'; on the occurrence of a determining event the trust property is then to be held on a second trust, which is a discretionary trust in favour of a class of objects, which may include the principal beneficiary himself. The determining events always include the situation in which the principal beneficiary's right to income is assigned to anyone else or goes to his trustee in bankruptcy, but typically also includes any case where the beneficiary's interest becomes charged or, more vaguely, 'payable' to anyone else. On the determining event, the secondary, discretionary, trust kicks in by operation of law, for the determinable interest automatically terminates when an event of defeasance occurs. The situation will now be that the income is distributable at the trustees' discretion to the objects of the secondary trust, 'the secondary objects'. Since an individual object of a discretionary trust has no vested interest in the trust property (3.6) neither can his creditors or trustee in bankruptcy. Protective trusts can be expressly stated in a trust instrument, but may also be created by directing the trustees to hold property for X 'on protective trusts', which automatically invokes the particular protective trust formulated in s 33(1) of the Trustee Act 1925.

3.25 Following the determination of the principal beneficiary life interest, she may be an object under the secondary discretionary trust, and will be if the s 33 provision is invoked. Following her discharge from bankruptcy, she may be paid income at the trustees' discretion. While still a bankrupt, the trustees may apply income for her benefit (2.38), by, for example, providing her with consumables such as meals or services such as accommodation, but only to the extent that this is for her 'mere support' (*Re Ashby* (1892)). Any money that is paid directly to her may be claimed by her trustee in bankruptcy, but to the extent that she receives no property in her own right, as when the trustees, at their discretion, pay third parties for services, the trustee in bankruptcy has no claim, for the bankrupt receives no property (*Re Coleman* (1888); *Re Smith* (1928)). Unless the trustees have the power to accumulate income (3.18), however, they may not retain accrued income in order to pay it to the former principal beneficiary upon her discharge from bankruptcy; the trustee must distribute the income within a reasonable time following its accrual (*Re Gourju's Will Trusts* (1943)).

3.26 Although technically the protective trust works just as well for a settlor who wishes to transfer his own property on protective trusts to avoid the consequences of his own bankruptcy, this is not allowed (*Re Brewer's Settlement* (1896)). The justification is roughly as follows: A may give B a gift structured or limited in whatever ways he wishes, so if he wants B to have an interest, but not B's trustee in bankruptcy should B become insolvent, that's OK. As a donee from A, B cannot expect any particular gift, or any gift at all, and neither can his creditors; if the latter are therefore deprived of A's bounty, they have no just cause to complain. On the other hand, A may not escape his liability to his own creditors by purporting to 'give' his property to himself in the same way. His own property is absolutely his, and must retain the normal 'incident', ie conceptual

attribute, of property, of being available to pay his debts. (In other jurisdictions, which offer ‘asset protection trusts’, such creditor avoidance may be possible: see eg Matthews (2006).) On the other hand, a person may put his property on trust for himself, determinable on the event that he assigns or charges or otherwise alienates it—the policy is only against defeating one’s creditors, so as long as the happening of the determining event does not do so, the secondary trust is valid (*Re Detmold* (1889); *Re Burroughs-Fowler* (1916)). So, for example, if the determining event was the settlor/principal beneficiary’s renouncing British citizenship, and the secondary trust was for his children, that would be perfectly fine. (For a more detailed examination of the protective trust see Penner (2019a), [3.129]–[3.142].)

p. 59 **The variety of powers and duties under a trust**

3.27 There are any number of ways in which a person can be instructed by the terms of a trust to transfer property in some way. Such instructions can be given not only to the trustees of a settlement, ie the title holders of the property who are in charge of seeing to the proper administration of the trust, but to others, like Mary in Examples 3 and 4 (see Nolan (2018)). Although Mary does not have title to the trust property, the trustees must comply with the terms of the trust, and so if she chooses to exercise the power and appoint property (usually by executing a deed that is delivered to the trustees), the trustees must follow her instructions and give the property away as she directs.

Fiduciary and personal powers and discretions

3.28 As we have already seen, discretionary trusts and powers of appointment both involve discretions. When exercising the discretion under a discretionary trust as to determine who gets, and when exercising discretions under a power of appointment, first a discretion whether to exercise the power at all, but also, usually (3.13) a discretion to determine who in the class of objects will be appointed to and how much they will receive those discretions must be exercised in good faith with only the interests of the objects of the power in mind—in particular, the discretionary trustee or power holder must not exercise the power to benefit herself. We call her a fiduciary because she holds her rights and powers not for her own benefit. The contrasting adjective is ‘personal’, which means the right or power holder holds it for their own benefit. We have seen an example of a personal power under a trust already, that of the settlor to revoke the trust (2.11).

3.29 There is a second meaning of fiduciary which needs only be mentioned here that concerns ‘the fiduciary relationship’. This is not restricted to discretions held under a trust, although it applies to trustees. Two examples will suffice. A trustee may have a wide power of investing the trust assets. This is a power which is fiduciary in the second sense because the power is one that the trustee must use judgement in exercising—there would be different investment strategies she might pursue—and she must pursue that strategy which, in her judgement, best advances the beneficiaries’ interests. A classic example of a non-trustee fiduciary is an agent, for example a company director. The classic agent has powers to contract on behalf of another, called his ‘principal’. An example would be a company director who might have the power to employ individuals and negotiate their terms of service. This is a fiduciary power because the director must only enter into such employee contracts which, in her judgement, best advances the interests of the company. Very roughly and

briefly, the main issue that arises when we are concerned with the fiduciary relationship is the possibility that the exercise of a discretion might be ‘tainted’ because, even if exercised in good faith, it was done in ‘conflict of interest’.

3.30 So, to take our examples again in turn, a trustee who invests the trust property to fund a land development in which she was personally financially interested would be acting in conflict of interest. A company director would be acting in conflict of interest if she were to hire her brother. These particular rules which govern trustees, agents, and other fiduciaries are larger than and different from trusts law or the rules of agency per se, as one might put it. So, for example, in the trustee example, the investment is tainted even if the investment was of a kind fully authorised by the terms of the trust. The investment is not a breach of trust, but a breach of the trustee’s fiduciary relationship with her beneficiaries. Similarly, in the contract of agency the agent has with the agent, there may be no express or implied term of the contract which says she should not hire a relation. It doesn’t matter. The company can act to reverse the hiring decision. Equity’s regulation of the exercise of these ‘judgement-requiring’ fiduciary duties and powers will be the subject of an entire chapter, **Chapter 14**.

Powers ‘in the nature of a trust’

3.31 These are ‘powers’ given to individuals by name (‘nominatum’), rather than to trustees, but on the true construction of the terms of the trust, the individual holder of the ‘power’ is under a duty to exercise the power. The discretion to appoint shares in capital amongst her sons in Example 3 is such a case. Mary is obliged to choose shares by her will just as much as the trustees in Example 2 must choose shares for the boys. Just like the trustees she must act, although unlike the trustee she is not the legal owner of the trust property. If she fails to act, in principle the court will act for her, in the same way as the court will enforce a trust should the trustees themselves fail to act (*Brown v Higgs* (1803)). And, just like a trustee, she will have a fiduciary obligation to exercise this power taking only the best interests of the objects into account. Thus, an individual such as Mary is a kind of ‘one-off’ trustee, a trustee not of the whole settlement but only of her own particular power under the trust.

Cases where there is no duty to distribute trust property—powers *virtute officii*

3.32 If a power of appointment is given to a trustee, he must use his judgement to decide whether to appoint the property at all, and then typically must decide upon what amounts to appoint in favour of which objects within the class of objects. Unless otherwise specified, and this would be rare, a trustee must make those choices with only the interest of the objects in mind, thus, as a fiduciary holder of the power. This has three important consequences. The first is that the trustee may not release the power, ie surrender it. It was given by the terms of the trust for the benefit of its objects, and releasing it would clearly be an act against their interests. Secondly, the trustee, although not being bound to exercise the power, must consider using it from time to time (4.32). Finally, in exercising the power, the trustee must consider not only the interests of the objects of the power but also the interests of those beneficiaries of the trust who would take in default of appointment, because to appoint the property to the objects of the power is to take it away from them. It is a contentious matter, as we shall see (3.76; 4.30–4.33, 4.68 et seq), whether these fairly minimal obligations of the trustee to the objects of powers of appointment entitle these objects in other ways.

p. 61 Non-trustee fiduciary powers

3.33 In the same way that a named individual who is not a trustee may be given trust duties, he may be given powers of appointment nominatum, and in the same way that a trust obligation to distribute property may be imposed upon him, the trust instrument on its true construction may also indicate that he must exercise the power as a fiduciary, in the interests only of the objects and not with his own interests in mind. In that case he is in the same position as the trustee who has powers of appointment *virtute officii*—he cannot release the power, must consider using it, and must exercise it only with the objects and those who take in default in mind, but analogously with 3.31, he is a ‘one-off’ fiduciary power holder.

Pure personal powers

3.34 These are powers of appointment given nominatum where the power holder can exercise it as he chooses, considering only his own interests. Here the individual power holder may ignore the power or release it (ie inform the trustees, typically by deed, that he surrenders his right to exercise the power), and if the power confers a discretion upon him to appoint to only one or some of a class of objects, he may exercise the power in any way that suits him, favouring one object over another as he likes; he has no obligation to the objects to benefit, or even consider benefiting, them in any way. Consider the different powers of appointment given to Mary in Examples 3 and 4. In Example 3 the power to appoint capital to her sons is almost certainly fiduciary. The settlor presumably intended that Mary should consider exercising the power from time to time, and definitely not release it. But things seem quite different with the power to appoint capital away from her sons to her relations in Example 4. It is likely the settlor gave her this power for her own benefit, to help her relations out if she chooses, not because the settlor had any particular affection for these people. If she decided she no longer cared for these relations, there seems no good reason why she should not release the power. Finally, there is nothing in principle preventing the settlor from giving a pure personal power to someone who is also a trustee, ie not *virtute officii*, but in his own name, although for obvious reasons this will have to be very clearly spelt out.

‘Limited powers’

3.35 In the case of pension fund trusts (see *Re the HHH Employee Trust* (2012)) a kind of power falling between a personal power and a fiduciary power has been recognised, an example being the power of the settlor of a company pension fund trust, ie the company, to amend the trust instrument. Whilst the power is not fiduciary, the company need not consider exercising it from time to time, and furthermore the company can take into account its own interests in exercising the power or not; if it does exercise the power, it must do so in good faith. In so doing it must take into account the reasonable expectations of the beneficiaries in light of the fact that their benefits under the trust are not, as in the case of traditional family trusts, the result of a gift from the settlor, but are part of the remuneration package the employee receives; that is, the employees paid for these benefits through their services to the company.

p. 62 **'Bare powers', 'mere powers', 'trust powers', 'powers in the nature of a trust'**

3.36 Fiduciary powers are sometimes distinguished from personal powers by referring to the latter as 'bare' powers. In your author's view, it is better to use the word 'personal' than bare. Powers of appointment, where there is no duty to appoint, are sometimes distinguished from discretionary trusts where there clearly is such a duty, by being called 'mere powers', 'mere' indicating the absence of any duty to distribute the trust property. This is sometimes used as just a shorthand for powers of appointment to distinguish them from discretionary trusts. The desirability of this shorthand is related to two other terms which are synonymous with 'discretionary trust': 'trust power' and 'powers in the nature of a trust' (3.31). In your author's view, it is best to avoid these two terms.

3.37 As Examples 1 to 4 illustrate, one whole 'trust' can combine the different devices of the fixed trust, the discretionary trust, and the power of appointment and given, as we have just seen, the various ways of distributing duties, fiduciary powers, and pure personal powers, the terms of a trust can be very complicated, involving many different actors. Trust instruments are therefore capable of giving rise to troublesome interpretive difficulties in determining whether what might on one reading be a discretionary trust is really just a fiduciary power of appointment, or whether a power conferred nominatum is accompanied with an obligation to exercise it, or only a fiduciary requirement to exercise it in good faith in the interests of the objects if exercised at all, or is a purely personal power.

Administrative duties and powers

3.38 Besides dispositive duties and powers, any number of administrative duties (2.26) and powers are necessary to keep the trust running while it is in existence. And just as is the case with dispositive duties and powers, there can be fixed and discretionary administrative duties, and fiduciary and personal administrative powers. For example, trustees have a fixed duty to keep the trust accounts, ie the records of trust dealings. They typically have a discretionary duty to invest the trust fund so as to earn a reasonable rate of return, where the discretion as to how they invest is, of course, fiduciary, so they must choose their investments with only the interests of the beneficiaries in mind. Trustees may have a power to delegate some of their functions, such as investment, though not an obligation to do so. Trustees have a power to retire from the trust, and may have a power to appoint new trustees; as they receive these powers *virtute officii*, they are fiduciary powers.

3.39 But administrative powers may also be given to individuals nominatum and, again, they may be accompanied by duties to exercise them, or may be mere powers that might be fiduciary or might be purely personal. This particularly arises in relation to what has become known as a 'protector'. The phenomenon of the protector arose particularly in what is called the 'offshore world', ie small jurisdictions which have important financial industries such as Jersey or the Cayman Islands, but the appointment of protectors is now widespread. The protector, for example, might be under an obligation under the trust terms, to consider and either give or refuse consent to certain actions taken by a trustee under his investment powers. We shall look at protectors in more detail (4.7 et seq). A named individual may be given the power to replace the trustees—this is a popular power for settlors to confer upon themselves in *inter vivos* trusts. This power may be fiduciary, in which case it may be exercised in the interests only of the beneficiaries, or purely personal, in which case the holder may exercise it as he likes. Now, given that administrative powers given to named individuals are administrative, ie they concern the proper running of the trust, there must be a strong initial

presumption that they are fiduciary, because the purpose of a trust is to provide for and protect the interests of the beneficiaries, and so any power to enhance the trust's proper working would presumably be similarly oriented.

3.40 However, this might not always be the case. Assume an *inter vivos* trust of which the bulk of the trust fund is a majority shareholding in the settlor's private company, and assume the trust instrument confers upon the settlor a power to refuse consent to the trustees' voting him off the board of directors of the company. Such a provision may be inserted, not to protect the best interests of the beneficiaries, but to protect the settlor's own position. Whether an administrative power is fiduciary in such a case will depend upon the true construction of the terms of the trust. Settlors have what might be called a very broad 'freedom of trust', and the courts are generally assiduous in trying to read a trust instrument to give effect to their intentions. How a trust instrument is read in terms of the imposition of duties and the conferral of powers is very important of course, and in certain cases fine distinctions must be drawn.

3.41 Consider the following: a trust allows the trustees a discretion in dealing with the income of the trust as it arises: they may either pay it directly to the income beneficiaries or may 'accumulate' it (3.18), ie retain the income for later distribution. Now, at first glance, it may not appear important whether this is framed as a duty to distribute income as it arises with a power to depart from that duty and accumulate, or as a duty to accumulate with a power to depart from that duty and distribute, since the exercise of the power entails departure from the duty, and vice versa. Of this very example, in *McPhail v Doulton* (1971), Lord Wilberforce said (at 448H):

It is only necessary to read the learned judgments in the Court of Appeal to see that what to one mind may appear as a power of distribution coupled with a trust to dispose of the undistributed surplus, by accumulation or otherwise, may to another appear as a trust for distribution coupled with a power to withhold a portion and accumulate or otherwise dispose of it. A layman and, I suspect, also a logician would find it hard to understand what difference there is.

3.42 On either reading, then, it appears the trustee has the same freedom of choice, so how can it matter how it is put? Here is how it matters: because trustees must comply with their duties, which task is framed as the duty sets the 'default' position from which we proceed if there is a problem of some kind. Roughly, powers are options whereas duties must be carried out. Thus, in order to exercise a power to depart from a duty, trustees must agree unanimously to do so; in the absence of agreement there is no question but that they must comply with their duties. So, if on the true construction of the trust instrument we have a duty to distribute income and a power to accumulate, and the trustees cannot agree to exercise that power, then they must distribute the income. And conversely, they must carry out a duty to accumulate if they could not agree to exercise their power to distribute. So, such fine distinctions can have significant practical consequences. Finally, in interpreting different trust instruments the different circumstances of different trusts, whether they are family trusts, pension fund trusts, or commercial trusts will obviously colour the initial presumptions one might apply to determining whether duties are imposed or powers conferred, and whether powers are fiduciary or personal.

Faulty exercises of powers

The ‘proper purposes’ doctrine

3.43 Under what is known as the ‘proper purposes’ doctrine, discretionary powers given to trustees have a ‘scope’—the courts will decide the scope of a power, that is, for what purposes it may be exercised, as a matter of the construction of the trust terms. On this basis, a purported exercise of a power may in fact be outside the scope of the power and therefore invalid.

Excessive exercises of powers

3.44 A power of appointment or advancement is ‘excessively’ exercised when the trustees purport to use trust funds to benefit an object of the power in a way that is not provided for by the power. Whether an exercise of a power is excessive often turns on the words with which the power is expressed. For example, in this passage from *Pilkington v IRC* (1964, at 634), Viscount Radcliffe discusses how applications of trust money by exercise of a power of advancement were regarded as restricted to certain kinds of expenditure:

The word ‘advancement’ itself meant in this context the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment. Thus it was found in such phrases as ‘preferment or advancement’ ... , ‘... advancement or preferment in the world’, and ‘placing out or advancement in life’. Typical instances of expenditure for such purposes under the social conditions of the nineteenth century were an apprenticeship or the purchase of a commission in the army or of an interest in business. In the case of a girl there could be advancement on marriage ... Advancement had, however, to some extent a limited range of meaning, since it was thought to convey the idea of some step in life of permanent significance, and accordingly, to prevent uncertainties about the permitted range of objects for which moneys could be raised and made available, such words as ‘or otherwise for his or her benefit’ were often added to the word ‘advancement’.

p. 65 3.45 Similarly, the word ‘appoint’ has been construed as not allowing a trustee to appoint trust property on new discretionary trusts for objects within the power—that is an excessive exercise of the power, because a power to appoint is a power to transfer fixed interests to persons within the class, not to delegate that decision to the discretionary trustee under a new trust (*Re Hay’s Settlement Trusts* (1981)).

Trustees being directed in exercise of powers

3.46 Besides appointing outside the class of objects, a purported exercise of a power will be invalid if the power holders never truly applied their minds to what they were doing, as in *Turner v Turner* (1984), where the trustees blindly followed the directions of the settlor without appreciating they had a discretion to exercise.

Non-exercise of discretionary trusts and powers

3.47 In *Re Locker's Settlement Trusts* (1978) trustees of a discretionary trust applied to the court for its approval when they sought to distribute income which had arisen over a three-year period some eight years before, but which they had failed to distribute at the time as they ought to have done. It was argued that, having failed to comply with their duty at the relevant time, the trustees were disabled from distributing the income on a discretionary basis among the objects now, and that the court must give effect to the trust by ordering an equal division among all the objects. Goulding J disagreed. Although, Goulding J said (at 218) that the court had ample power to execute a discretionary trust upon the failure of the trustees to do so, trustees intent upon making good their past failure by subsequently exercising their discretion should be encouraged to do so, as this was more in keeping with the settlor's intention than execution by the court; he added, though (at 219), that in such circumstances the court should 'readily listen' to any misgivings about such a course of action where the trustees have failed to listen or act upon the beneficiaries' requests for distribution; in such a case the ample powers of the court to execute the trust might justifiably be invoked.

3.48 Note that the failure to exercise a mere power of appointment results in the property going to those who take in default of appointment, so where a holder of a mere power of appointment fails to exercise it that would normally raise no issue of this kind. In *Klug v Klug* (1918), the court felt under a duty to direct the trustees to exercise a mere power to transfer funds (under a power of advancement, 3.44, 8.50 et seq) 'when one trustee very properly desires to exercise his discretion ... and his co-trustee [who refused to do so because she disapproved of the marriage of the appointee, her daughter] will not' (at 71). This may be a case where the court acts because one of the trustees' refusal to exercise the power is in bad faith (14.2 et seq). And in the case of pension fund trusts, the beneficiaries who have earned their rights may have legitimate expectations that mere powers held by trustees to augment the benefits to which they are strictly entitled under the trust will be exercised in their favour (*Mettoy Pension Trustees Ltd v Evans* (1991); see also *Nobles* (1992b)).

p. 66

The fraud on a power doctrine

3.49 A fraud on a power occurs when the appointment is made to a person who is properly within the class of objects, with the purpose, however, of benefiting someone who is not a proper object, where, for example, a power holder who could only appoint to members of her family appointed to her sister believing and intending that the sister would apply most of the funds for the benefit of a couple with whom she had lived (*Re Dick* (1953)). The leading case is the PC decision in *Vatcher v Paull* (1915), which outlines the basic principles: 'fraud' does not denote conscious immoral or dishonest wrongdoing, but merely that the power has been exercised with the intention to benefit someone outside the class of objects. Typically, this will be done under a bargain between the appointer and appointee, under which the latter will upon receipt of the property secure the benefit for someone not properly within the class, typically the appointer himself when he is a non-object, although a bargain of this kind is not essential for a fraud to occur. The test appears to be that the power holder has deliberately set out to benefit a non-object by making the appointment to a valid object, and it is irrelevant that the appointee might not, as it turned out, have complied with the appointer's wishes (*Re Dick*). Fraud does not occur simply because the appointer sets conditions on his exercise of the power; only conditions that if fulfilled result in securing the benefit of the appointment for a third party will be bad.

3.50 These principles were applied in the New Zealand case of *Wong v Burt* (2005). Under a testamentary trust, the testator's grandchildren would receive no income payments for their support if their mother were to predecease another beneficiary, which, in the event, she did. In order to fix this 'mistake', the trustee exercised a power of appointment which had as its object the testator's widow, providing her with \$250,000 so that she could fund a trust for the grandchildren. The New Zealand CA held that the appointment was a clear fraud on the power, forming part of a 'deliberate scheme to subvert the terms of the will'.

3.51 It is not the case, however, that a trustee will commit a fraud on a power where power is exercised for the benefit of an object of the power, even if the benefit is an indirect one. In *Re Clore ST* (1966) (8.53) the court approved of an appointment to a rich beneficiary to allow him to make a charitable donation he felt morally bound to make. By contrast, in *X v A* (2005), the court refused to sanction the appointment of the entire trust fund to an object who wished to donate it all to charity; the court did not think that such an advancement would allow the object to make a donation which she was morally obliged to make, if only because the amount exceeded anything she could have been obliged to give out of her own resources.

Judicial control of the exercise of discretions

3.52 Duty holders, whether trustees or other individuals, may act wrongly either by nonfeasance, ie not carrying out their duty, or misfeasance, ie exercising their duty but doing so incorrectly. Because there is no duty to exercise mere powers, mere power holders can only be brought to court for misfeasance, using the power inappropriately, not for failing to use it at all (generally speaking—see 3.48). Of course, fixed duties, whether dispositive or administrative, pose no problem in this regard. If a trustee or other fixed duty-holder fails to carry out a fixed trust obligation, the court will either make him do it or will order whatever is to be done itself. The difficulties lie in controlling trustees and other power holders in the exercise of their discretions. It is noteworthy that originally, and for quite some time, the courts would not allow trustees to exercise discretions without the court's approval, though for the last couple of centuries the courts have held that the discretion is the trustee's alone, not the court's (see Lau (2011), 4–5). The court's control of trustees' discretions is a difficult and complex subject (see Cullity (1975)), but the following points outline the general position.

3.53 In determining what sort of bounds exist upon the trustee's or other power holder's discretion, the first thing to be done is to construe the terms of the trust. In the leading case of *Gisborne v Gisborne* (1877) the HL refused to intervene on behalf of a beneficiary where the trustees had exercised their 'uncontrollable authority' under the trust instrument to pay her less from the fund than they might have done. Where the discretion is held by a trustee, or by an individual but the power is fiduciary, the discretion must be exercised in good faith in the interests only of the beneficiaries, although it is fair to point out that it is often very difficult to prove that a particular decision, within the scope of the trustee or power holder's discretion, was taken mala fide or not in consideration of the interests of the beneficiaries; different persons will appreciate the best interests of the beneficiaries differently. However, there is an overarching principle here, enunciated by Templeman J in *Re Manisty's Settlement* (1974), where he said (at 26):

The court may also be persuaded to intervene if the trustees act 'capriciously', that is to say, act for reasons which I apprehend could be said to be irrational, perverse, or irrelevant to any sensible expectation of the settlor[.]

3.54 The Singapore case *Foo Jee Seng v Foo Jhee Tuang* (2012) used a different locution to express when the court might intervene. The trustee held a residential property on trust to sell it with a power to postpone the sale. The house was in a dilapidated state, there was no money in trust to renovate it, the rental income was paltry, but the property had significant development value. The court held that the trustee's decision to continue to postpone its sale 'baffles the mind' (at [80]) and ordered him to sell it.

3.55 To give a hypothetical case, under modern trusts trustees typically have an intermediate power (3.12) to appoint anyone in the world to the class of beneficiaries except specified individuals. Imagine that the trustee exercised this power to appoint a waiter who had given him excellent service to the class of objects, and then appointed him a large sum from the trust as a very generous tip. I have no doubt this use of the trustee's powers would clearly be irrational, perverse, or irrelevant to any sensible expectation of the settlor, and the court would reverse it.

p. 68 **Powers exercised for the wrong reasons or by mistake**

3.56 Until 2013, under the so-called 'principle in *Re Hastings-Bass* (1975)' the court could treat the exercise of a power by a trustee as void or voidable, or the non-exercise of a power by a trustee could be treated by the court as having been exercised, where it could be shown that the trustee would not have acted as he did if he had either taken considerations into account which he ought to have done or not taken considerations into account which he ought not to have done. In *Pitt v Holt* (2013), the UKSC held that *Hastings-Bass* was not authority for the court to undo what trustees had done or failed to do on this basis. In particular, where a trustee's exercise of a power merely leads to adverse tax consequences, that will not make the exercise voidable. In order for the court to set aside an exercise of a power which is within its terms, ie is something that is not prohibited by the terms of the trust, but where because the trustee has 'inadequately deliberated on its exercise' the exercise has led to a result the beneficiaries would like to undo, it must be shown that the trustee has breached a duty in respect of his deliberations, failing to seek expert tax advice, for instance, or failing to properly consider such advice. The court said the trustee must have breached a 'fiduciary' duty, but it does not appear from the context that the trustee must have acted in bad faith or in conflict of interest, so until the case is further interpreted it is probably best just to think that the trustee breached a 'trustee' duty, and this might be a duty to take care, so that even cases where the trustee was negligent in exercising the power in the way he did might be set aside.

3.57 *Pitt v Holt* raised another ground for setting aside a trustee's exercise of a power, that of mistake. The court held that where a trustee exercised a power in a mistaken belief about the consequences of the exercise (in this case a matter, again, about liability for tax), and the consequences of the mistake are so grave that it would be unconscionable for the court to refuse relief, the court will set aside the exercise of the power. The UKSC did not give any very precise guidance on how the notion of 'gravity' of the mistake was to be applied, and said that this would have to be determined on a case by case basis on a close examination of the facts.

3.58 In *Van de Merwe v Goldman* (2016) Morgan J summarised the relevant principles as follows ([26], references omitted):

In a case concerning a gift made as the result of a mistake, the relevant legal principles are those which were recently restated in Pitt v Holt ... For present purposes, the principles can be summarised as follows: (1) a donor can rescind a gift by showing that he acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the gift; (2) a mistake is to be distinguished from mere inadvertence or misprediction; (3) forgetfulness, inadvertence or ignorance are not, as such, a mistake but can lead to a false belief or assumption which the law will recognise as a mistake; (4) it does not matter that the mistake was due to carelessness on the part of the person making the voluntary disposition unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong; (5) equity requires the gravity of the mistake to be assessed in terms of injustice or unconscionability; (6) the evaluation of unconscionability is objective; (7) the gravity of the mistake must be assessed by a close examination of the facts which include the circumstances of the mistake and its consequences for the party making the mistaken disposition; (8) the court needs to focus intensely on the facts of the particular case; (9) a mistake about the tax consequences of a transaction can be a relevant mistake; (10) where the relevant mistake is a mistake about the tax consequences of a transaction, then: 'in some cases of artificial tax avoidance, the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy'; (11) it is not pointless, nor is it acting in vain, to set aside a transaction and to remove a liability to pay tax, even where that is the principal, or the only, effect of the setting aside.

p. 69

3.59 In *Gany Holdings (PTC) SA v Khan* (2018), relying upon *Pitt*, the UKPC set aside an appointment made by a person with a power to appoint property under a trust where the directors of the corporate trustee were unaware that the trust held certain assets. The court held ([58]) that the directors' failure to know what the assets of the trust were was a 'serious breach' of their fiduciary duties.

3.60 So far only in the context of pension funds, judges have assessed the validity of a trustee's exercise of discretion on the public/administrative law 'Wednesbury principle' (*Associated Provincial Picture House Ltd v Wednesbury Corp*n (1948)). For example, in *Edge v Pensions Ombudsman* (1998), Scott VC said a judge should refuse to interfere unless the trustee took into account improper, irrelevant, or irrational considerations, or otherwise the trustee's decision could be shown to be one that no reasonable body of trustees could have made.

Limitations on the settlor's 'freedom of trust'

3.61 Although the trust device allows a settlor to distribute his bounty in a variety of ways over a period of time, the law does put limitations on this power, which can be thought of as limitations on what might be called the settlor's 'freedom of trust'.

The principle in *Saunders v Vautier*

3.62 Although named after the case of *Saunders v Vautier* (1841), the principle is actually of much longer standing (Matthews (2016), 204), and may be stated as follows: wherever a beneficiary with an absolute interest under a trust is *sui juris*, ie of full age and sound mind, he may call for the trust property that represents that interest, and the trustees are obliged to transfer the title of it to him; if he is a sole beneficiary, or if there are two or more beneficiaries all *sui juris* and all willing to do the same, this will result in the complete collapse of the trust. For example, if a settlor creates a trust under which his son A is to receive the income of property until he is aged 30, at which time he is to receive the capital, that son can 'call for' the trust property, ie demand the trustees transfer the legal title to the trust property to him as soon as he reaches the age of 18.

3.63 This represents a significant limitation upon the settlor's freedom of trust, but it can be justified in two ways. First, there might be something of an 'anti-trust' justification, as follows: while it is fine to empower owners to create structured gifts of property where this is essentially the only means of giving the benefits of property, as for example when money is provided for minor children, this power should not be used to allow an owner to control his beneficiaries when they are fully competent to look after themselves. If you give property to someone, you naturally take the risk that they will use that property in ways that are foolish or which otherwise might defeat your hopes. But that is the price of treating people, including donees of property, as autonomous individuals. The law of trusts should not, therefore, allow settlors to treat sane adults as children, and so the principle of *Saunders v Vautier* reflects the law's desire that all individuals, once *sui juris*, should be treated as capable of running their own affairs, including their rights over property.

3.64 The second justification is related, and concerns the idea of equitable ownership. In the eyes of equity, the beneficiaries are the owners of the trust property, not the settlor. They have the rights against the trustee, and must enforce the trust themselves. When they reach full age, in essence the trust is in their hands. They can enforce their rights against the trustee or not, may consent to the trustees acting outside the terms of the trust, ie doing what would otherwise be a breach of trust (13.75 et seq), and may 'vary' (ie alter) the terms of the trust as they wish (8.69 et seq). The settlor has no say in any of this. Thus, they are (in theory) in full control of the property via the office of the trustee. But, if that is so, why cannot they do with their property what they like, as can any other full owners and, in particular, take the property out of the trust completely if they so desire? (See also Matthews (2006), (2016).)

3.65 These justifications have not been found persuasive in the US, where the wishes of the settlor have often been regarded as paramount. Following *Claflin v Claflin* (1889), the principle will not apply so long as there remains a 'material purpose' of the settlor in the trust continuing. Some 'settlor-friendly' jurisdictions have adopted the 'material purpose' limitation on the principle by legislation: see, for example, the Bahamas Trustee Act, s 87. Others have modified the rule in other ways: in Alberta and Manitoba the rule has been modified to require the court to find that 'in all the circumstances at the time of the application to the court, the arrangement appears otherwise to be of a justifiable character' (Trustee Act, RSA 2000, c T-8, s 42(7); The Trustee Act, CCSM c T160, s 59(7)(b); see also Langbein (2016), who approves of these departures from the principle).

p. 71 **3.66** It is important to note, however, that the principle allows the beneficiaries to collapse the trust, not to 'micro-manage' the trust by telling the trustee how to exercise his powers and discretions. For example, in *Re Brockbank* (1948), the court stated that while *sui juris* beneficiaries could collapse the trust and resettle the fund on new trustees, they were not entitled to direct the present trustee to exercise his power to appoint a replacement trustee as they wished (see also *Lewis v Tamplin* (2018), [46]; Lewin (2020), [22–031]). In short, the principle in *Saunders v Vautier* does not turn all trustees into the agents of their beneficiaries (2.29). Although statute has recently conferred a power upon *sui juris* beneficiaries to replace their trustee (8.63), this does not alter this general principle, that beneficiaries have no right to micro-manage the trust by directing the trustee to exercise his discretionary powers in certain ways. So long as the trust continues, these discretions are the trustee's and the trustee's alone (3.46; see also 3.52 et seq). Under fixed trusts, *sui juris* beneficiaries such as the life tenant together with the remainderman may act together to call for the trust assets (*Brown v Pringle* (1845); *Quinton v Proctor* (1998)) or such portion of the assets as can conveniently be separately transferred (*Quinton v Proctor*). *Sui juris* beneficiaries of fixed shares of the trust assets may in principle demand that the trustee transfer the legal title to whatever share of the trust property is theirs, but this is subject to a general limitation that such a transfer must not result in the devaluation of the other beneficiaries' shares.

3.67 Summarising these principles, in *Stephenson v Barclays Bank Trust Co Ltd* (1975) Walton J said (at 889–890):

*In general, the [individual *sui juris* beneficiary] is entitled to have transferred to him ... an aliquot share of each and every asset of the trust fund which presents no difficulty so far as division is concerned. This will apply to such items as cash, money at the bank or an unsecured loan, Stock Exchange securities and the like. However, as regards land, certainly, in all cases, as regards shares in a private company in very special circumstances ... the situation is not so simple, and even a person with a vested interest in possession in an aliquot share of the trust fund may have to wait until the land is sold, and so forth, before being able to call upon the trustees as of right to account to him for his share of the assets.*

3.68 In *Lloyds Bank plc v Duker* (1987), the court refused the request of one beneficiary for the transfer of his proportionate interest in shares of a private company held on trust; the transfer would have given him a controlling bloc of shares in the company, and as a result his shares would be worth more per share on the open market than the remaining shares in the trust. The judge ordered the sale of all the trust shares on the open market, which, since it would give control of the company, would attract for the whole bloc of shares a higher price; the beneficiary could then claim his proportionate share of the proceeds of sale. It is important to note that the beneficiary acquired the large proportionate interest in the shares both because certain of the gifts in the original will that disposed of the shares lapsed (2.83) and through a subsequent bequest. Where a testator or settlor specifically gave one beneficiary a majority interest in a trust of shares, it might be inferred that he intended that beneficiary to take also the market value benefit of a controlling interest, in which case the principle of *Saunders v Vautier* should allow him to withdraw his shares.

3.69 The application of the principle in the case of discretionary trusts is stated in *Re Smith* (1928) by Romer J (at 918–919):

*What is to happen where the trustees have a discretion whether they will apply the whole or only a portion of the fund for the benefit of one person, but are obliged to pay the rest of the fund, so far as not applied for the benefit of the first named person, to or for the benefit of a second named person? There, two people are the sole objects of the discretionary trust and, between them, are entitled to have the whole fund applied to them or for their benefit. It has been laid down by the Court of Appeal in *Re Nelson* (1918) that, in such a case as that you treat all the people put together just as though they formed one person, for whose benefit the trustees were directed to apply the whole fund.*

3.70 Therefore, such beneficiaries may together call upon the trustees to transfer the trust property to them as co-owners. If the discretionary trust is one to pay the income only, they can demand the trustee pay the income, as it arises, to them directly as co-owners of it all. Where a beneficiary mistakenly calls for and receives the trust property under the principle, just as in the case of any other person receiving trust property transferred in breach of the trust terms, the beneficiaries can follow the property into his hands (2.54) and trace into any proceeds (2.69) he acquires with it (*Thorpe v Commissioners for HMRC* (2009)).

3.71 The principle is alive and well as is demonstrated by two more recent cases. In *Re Barton* (2002) the trust assets were held on trust to accumulate the income (3.18) of the trust and add it to capital until the settlor's son turned 65, from which time he was to be paid £20,000 per annum, and following his death the trust assets were to go to the Royal Society of Chemistry as a capital beneficiary. Dissatisfied with his provision under the trust, the son, who was not yet 65, negotiated with the RSC and together they exercised their *Saunders v Vautier* rights to require the trustees to pay £164,000 to the son immediately and the rest of the fund to the RCS. This was, by the way, ordered over the vehement objections of one of the trustees, the son's stepmother.

3.72 In the Singapore case *Re Singapore Symphonia Co Ltd* (2013) the settlor settled \$25m on trust, the income of which was to be distributed from time to time to support an orchestra company, but with the proviso that if there was any decline in the value of the capital sum, ie if its value dropped to below \$25m, no further income could be paid. Following the 2008 financial crisis, the value of the fund fell below \$25m, and there was no immediate prospect of the fund recovering its value, so the trust became useless as a support for the orchestra. There was no power granted to anyone to terminate the trust early. The only beneficiaries of the fund were the orchestra and the settlor (who was entitled to the capital after 21 years, when the trust was due to come to an end), and together they terminated the trust under the principle (having earlier agreed on a different way in which the settlor would support the orchestra in future).

p. 73 **Objects of mere powers**

3.73 It is an unsettled question whether objects of mere powers must participate if the objects of fixed and discretionary trusts wish to collapse the trust under the principal (Lewin (2020), [22-023], Smith (2017), 40–42). We shall return to this issue at (4.68 et seq).

Variation of trusts, revocation and resettlement

3.74 Where the principle applies, the beneficiaries may require the trustee to transfer the trust funds as they (unanimously) direct, including to a different trustee on new trusts. But it is also the case that the beneficiaries can ‘vary’ or alter the terms of the trust under the principle. So, for example, A, B, and C, all being *sui generis*, could vary a trust for A for life, then to B and C in such shares as the trustee shall appoint, to a trust for A for life and then to B and C in equal shares. But this power to vary the trust is subject to the agreement of the trustee—no trustee is required to carry on administering a trust upon different terms than the ones it undertook. So if the trustee does not agree to the variation, the beneficiaries will have to direct the trustee to transfer the funds to a new trustee willing to administer the new trust (*Stephenson v Barclay's Bank* (at 889); Lewin (2020), [53–004]; (8.69 et seq)).

Trusts void on grounds of public policy

3.75 Trusts, or the provisions of certain trusts, may be void on the grounds that they violate rules of public policy.

Trusts that infringe the rule against perpetuities

3.76 Until recently, in no common law jurisdiction could a settlor create a trust that was perpetual, that is, that could last forever (the exception is charitable trusts: **Chapter 18**). Various rules have been put in place to invalidate such trusts, the most notorious of which was the ‘rule against perpetuities’. This rule, as well as others regulating the duration of trusts, will be discussed at 3.87 et seq. The reason such rules are raised here is that what was often used to justify the rules is the idea that allowing a settlor to rule the disposition of his assets from his or her grave indefinitely violated a principle of public policy.

Private purpose trusts

3.77 A trust for pure purposes (eg a trust to devise a 40-letter alphabet for the English language, 18.25) is void, unless it is charitable (eg a trust for the relief of poverty). This is sometimes said to be because these ‘private’ (ie non-public or charitable) purpose trusts violate an internal principle of trusts law, the ‘beneficiary principle’ (**Chapter 7**), but it can also be said that these trusts violate a rule of public policy.

Illegal trusts

3.78 Traditionally, neither the common law nor equity would allow a claimant to establish a claim on the basis of evidence that implicates him in an illegal purpose; thus, the equitable maxim, ‘He who comes to Equity must come with clean hands’. The essentially identical principle at common law, framed in Latin, as ‘*ex turpi causa non oritur actio*’, roughly translates as ‘no action will be heard which arises from a morally turpid cause or basis’. So, for example, a trust which is used to commit a fraud will not be enforced by a court of equity. In *Tinsley v Milligan* (1994) two women, T and M, agreed to put a house they both paid for in the name of T so that M could deny having a beneficial interest in the house and misrepresent her assets to the Department of Social Security to claim benefits to which she would not be entitled if her beneficial interest in

the house was declared. Relying on her sole legal title, T sought to evict M, and M resisted the action by claiming her beneficial interest under the trust. Thus, the question arose whether M was caught by the clean hands maxim since her interest under the trust of the house was created in order to commit a fraud.

3.79 What rankles some judges and commentators about such a rule is that, as often as not, the defendant to the action, who prays in aid from this maxim, has hands just as filthy as the claimant, so as between the parties at least the rule can appear to have unfair consequences. In *Tinsley*, for example, both women devised the fraudulent scheme and both benefited from it. But the rule is not a rule of justice as between the parties. Thus, Lord Mansfield said of the traditional rule as it applied to illegal contracts (in *Holman v Johnson* (1775), 343):

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act ... [T]here the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it.

3.80 Prior to the recent UKSC decision in *Patel v Mirza* (2016), the illegality rules had special relevance to the law of resulting trusts (**Chapter 10**) because of the way such trusts are pleaded (as explained in *Tinsley*; see Penner (2016), 5.33–40). This law has now been superseded by *Patel*, which holds that whether a claim founded upon an illegal transaction will succumb to the illegality defence will turn on the consideration of three factors: first, the purpose of, or the public policy behind, the law or rule that was breached by the claimant; second, whether there are any other public policies that would weigh in favour or against the application of the illegality defence; and finally, whether the application of the defence would be a disproportionate response to the illegality in question. The decision in *Patel* is controversial. (See Burrows (2017); Goudkamp (2017); Law & Ong (2017); Lim (2017); Virgo (2016a); for a common law jurisdiction refusing to follow the reasoning in *Patel*, see the Singapore Court of Appeal decision *Ochroid Trading v Chua Siok Lui* (2018).) We shall have to see how this applies to future trust cases.

p. 75 Unwise and ‘capricious’ trusts

3.81 Within the limits of the law, a settlor can create any trust he wishes, even if in several respects it is unwise. To take a very simple case, if a settlor creates a trust in favour of his children under which the trustee has a discretion to determine the shares that each child will take rather than leaving it to them in equal shares (as in Example 2), this may lead to family strife. Determining which child might be more ‘worthy’ of a larger share than another is obviously a fraught business, and one who receives less might (rightly or wrongly) feel resentful of his lesser portion. This is not to deny the advantages of flexibility that giving a trustee dispositive discretions affords, but just to point out that flexibility is not an unmixed blessing.

3.82 In any case, the law does not invalidate a trust because it might be unwise in some respects. The classic example of such a trust was considered in the late eighteenth century case of *Thellusson v Woodford* (1799). In that case a truly vastly wealthy testator, after providing for his immediate family quite generously under his will, directed the trustees of his will to invest the vast bulk of his estate and accumulate the income, re-investing the income as it arose, the resulting fund to be distributed to his descendants then living at the end of the perpetuity period (3.85 et seq). Though some of the judges deciding the case made it clear that they thought the trust unwise or ‘impolitic’, the trust was held to be valid.

3.83 The whole story ended badly, as Polden (1994), 14, relates:

Probably no testator has been so vilified by contemporaries and later writers, and few wills have given rise to such persistent and long-lasting litigation. The grotesque outcome of his grandiose plan – a final distribution in 1860 which, thanks to the family's tenacious litigiousness, the insatiable appetite of the Court of Chancery and the incompetence and self-interest of the trustees, barely exceeded the initial investment – has made Thellusson a figure of ridicule as well as contumely.

The case also led to the passage of what was known as the Thellusson Act (the Accumulations Act 1800), which limited accumulations of income to 21 years, a rule which stood until 2010 (3.91).

3.84 However, the court does appear to have a power, very rarely used, to strike down trusts which are ‘capricious’. In *Brown v Burdett* (1882) the testator’s instruction to trustees to block up the rooms of a house for 20 years was struck down.

Limits on the duration of trusts

3.85 Prior to legislative changes, a rule known as the rule against perpetuities prevented settlors from creating perpetual trusts, ie trusts that could in principle last forever. The rule requires that the beneficiaries’ interests in the trust property must vest in interest (aka ‘vest in possession’), and vest absolutely, within a certain period from the time the trust came into effect. Vesting in interest absolutely means that the various beneficiaries are all identified and their interests definitely determined to be theirs, and so they may individually or together require the trustees to transfer the trust property to them under the rule in *Saunders v Vautier*. The rule does not mean that by the end of the perpetuity period the trust must collapse, all legal title to trust property being transferred to individual beneficiaries. The trust must simply be in the position that this can happen. So take Example 1: when Mary dies, the trustee will hold the trust assets absolutely for her sons, on what is sometimes called a ‘bare trust’ (5.70, Chapter 11), meaning that the trustee has minimal duties, and must simply transfer the assets to the sons or to someone else as they direct. For the purposes of the rule, then, as long as this bare trust arises within the allowable perpetuity period (as it does in this case (3.88 et seq)), the bare trust can continue indefinitely.

3.86 The reason for the rule is straightforward: it prevents individuals from directing the use of their property from their grave long after they are dead. The rule ensures that within a certain time after the trust comes into effect, the full beneficial ownership of the property gets into the hands of living persons. Because

the rule can be regarded as overly restrictive on the wishes of settlors and gives rise to other inconveniences, the rule has been abolished entirely in a number of North American jurisdictions, which may lead to some quite startling results; see Waggoner (2014).

3.87 England now has two different kinds of time periods restricting perpetual trusts following the coming into force of the Perpetuities and Accumulations Act 2009. Trust instruments taking effect on or after 6 April 2010 must come to an end after a period of 125 years. Those taking effect before will be governed by either rule against perpetuities, which operates in terms of lives in being, or by the specification in the trust instrument of a fixed period up to 80 years under the Perpetuities and Accumulations Act 1964. Since those trusts will be around for a while, and also for the purpose of understanding some of the older cases, it is necessary still to understand the basic operation of the old rule. Despite the Acts' reference to 'perpetuities', the new rules are not perpetuity rules, but simply set maximum periods for the duration of a trust. As we shall now see, perpetuities concern the validity of remote successive interests.

3.88 Applying the post-seventeenth century equitable rule against perpetuities was a most difficult and complex process, both because of the way the time limit was calculated, and because of the way it took into account the possibility of events occurring that might make a gift fail. The time period of the rule was framed to allow testators to make gifts to their grandchildren that would not vest until the children reached the age of majority, which was 21 when the rule was devised. The rule was devised to make that possible, but also to make sure that this was the limit of what a testator could do to extend the time before his gifts actually vested; in consequence, the allowable time period was framed in a particular way, in reference to 'lives in being' plus a further period of 21 years.

3.89 The way in which this limit worked is best explained by an example. If I leave property in my will to be divided equally between all my grandchildren who attain the age of 21, under the rule we calculate the time period within which the beneficiaries will become entitled to their shares of the property as follows: if I have any living grandchildren when I die, their shares will vest when they each turn 21, and so, being alive at my death, they must turn 21 within 21 years following my death. But I may end up having more grandchildren than them, because my living children may have more children. My own children who are alive at my death are lives in being for the purpose of the rule. (If my wife is pregnant with my child, a child en ventre sa mère, as the expression goes, that child counts as a child living at my death, thus a life in being for the purpose of the rule.) The rule now works as follows: obviously, any child born to my children must be conceived before my children die; therefore, the last grandchild of mine that could possibly be born will be conceived no later than the death of my last living child; therefore, that last grandchild will turn 21 (ignoring periods of gestation) no later than 21 years after the death of the last life in being. Thus, a gift to any or all of my grandchildren who attain their age of majority, 21, must vest, if it vests at all (all of my grandchildren may, as it turns out, die before 21—that makes the gift fail, but not for perpetuity), within the period determined by the lifetime of the last surviving life in being plus 21 years. Thus, the rule can be stated as follows: a gift upon trust is valid if the interests in the trust property of those who are intended to benefit must vest, if they vest at all, within 21 years following the death of the last surviving life in being.

3.90 The most important aspect of the rule, which could upset the plans of settlors, was that it took into account only logical possibilities, not the practical likelihood of something happening. A famous trap is that of the ‘unborn’ widow. Consider this testamentary gift: ‘Blackacre to my son A for life, then to A’s widow for life, then to A’s eldest child then living absolutely.’ A is already alive, so is a life in being for the purpose of the rule. The problem is that A might marry someone who is not alive at my death, ie someone yet to be born when I die, and therefore someone who will not be a life in being at my death. After growing up and marrying A, she might outlive A (and anyone else alive at my death) by more than 21 years. So, the gift to A’s eldest son might vest more than 21 years after the death of the last life in being (ie A, my son), so the gift is void.

3.91 The 2009 Act restores the position that Mr Thelluson exploited (3.82). Restrictions on accumulations for trusts taking effect after 6 March 2010 have been abolished by s 13 of the Act.

Further reading

Cullity (1975)

Turner (2018)

Langbein (2016)

Matthews (2016)

Must-read cases: *Stephenson v Barclays Bank Trust Co Ltd* (1974); *Lloyds Bank plc v Duker* (1987); *Pitt v Holt* (2013); *Vatcher v Paull* (1915); *Wong v Burt* (2005); *Re Locker’s Settlement* (1977)

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Self-test questions

1. What is a ‘fixed trust’, a ‘discretionary trust’, and a ‘power of appointment’, and how do the interests of the objects of each differ?
2. Acting as the settlor, write several provisions in a trust instrument giving dispositive and administrative discretions to trustees, to individuals nominatum, and to an individual nominatum who is also described as the ‘protector of the settlement’. Then elaborate how you think the court would determine whether these discretions must be exercised, whether they were ‘mere’ powers but fiduciary powers, or whether they were pure personal powers.
3. What are ‘income interests’, ‘capital interests’, ‘successive interests’, ‘defeasible interests’, ‘absolute interests’, ‘vested interests’, and ‘contingent interests’? Give examples of each, and apply these terms to the various interests in Examples 1 to 4 at 3.1.
4. What is the rationale behind the principle of *Saunders v Vautier* and when can it be invoked?
5. When would a trust be void on grounds of public policy?
6. What is an ‘excessive delegation’ of a power? What is a ‘fraud’ on a power? Give an example of each.

7. How does a protective trust achieve its purpose?
8. When can a court interfere with a trustee's exercise of a discretion?

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