The irreducible core of the trust

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August 2011

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws.

Acknowledgements

I wish to acknowledge and thank the Ministère du Développement économique, de l'Innovation et de l'Exportation and the Quebec Research Centre of Private & Comparative Law for generous funding provided to me in the form of the MDEIE Scholarship in Civil Law Trusts, which supported my stay in Montreal to read for the Master of Laws degree at McGill University and conduct research into trusts in a comparative perspective. I am also very grateful for the extension of that funding to support my publication and research agenda in the upcoming Fall term. I gratefully acknowledge the advice and guidance given to me by my supervisor, Professor Lionel Smith, who provided invaluable comments to me on multiple, sometimes overlapping, drafts of this thesis and saw this thesis right through to its completion. I also wish to acknowledge the assistance provided to me by my friend, Anne-Catherine Boucher, in helping me to translate my thesis abstract into French–merci beaucoup! I also had the good fortune of having my mother, Kirsten, visit Montreal in the week before this thesis was due to be submitted and she graciously reviewed an earlier draft for grammatical and typographical errors. Finally, I wish to thank my wife, Sarah, for her love, support and enduring patience throughout the gestation of this thesis, without which this thesis would not have been realised. Sarah diligently reviewed several drafts of the script and provided comments to me on those earlier drafts.

Abstract

This thesis examines the irreducible core concept in trust law, as well as the justifications for its further development and realisation throughout the prominent Commonwealth jurisdictions of Australia, Canada, England & Wales and New Zealand. A comparative analysis of the mandatory rules regime in United States trust law is also undertaken in order to compare and contrast the essential, juridical nature of the trust throughout the common law tradition. This thesis also pays particular attention to developments in the offshore practice of trusts and attempts to work through some of the contemporary challenges in trust law that strain the orthodox understanding of the trust. A comprehensive overview of the existing literature and international case law on the irreducible core approach to trusts is provided. Those lines of enquiry are then extended further in order to articulate more fully and precisely the irreducible core content of the trust.

A relational theory of trusts is proposed in this thesis that draws heavily from the Hohfeldian schema of jural relations–an overview of which is also provided. The thesis then goes on to identify and explore each of the essential legal relations that comprise the irreducible core of the trust by applying the relational theory of trusts. A significant new development that is proposed in this thesis is that the irreducible core concept in trust law logically extends beyond the internal dynamic of trustee-beneficiary to embrace the externality of the trust, which reflects the important effects that trusts have on third parties. It is argued that each of the legal relations identified as forming part of the irreducible core of the trust serve the important juristic ambitions of ensuring that trustees are accountable and that trusts are enforceable as a matter of law and assist in the juridical classification of trusts within a rational and coherent structure of the private law.

Résumé

Ce mémoire examine le concept du noyau irréductible en droit des *trusts*, ainsi que les raisons justifiant l'élaboration et la réalisation du concept dans les juridictions éminentes du Commonwealth de l'Angleterre et du Pays de Galle, de l'Australie, du Canada, et de la Nouvelle-Zélande. Une étude comparative du régime de règles impératives en droit des *trusts* américains est également entreprise afin de comparer et de mettre en contraste la nature juridique fondamentale du *trust* dans la tradition de *common law*. Ce mémoire porte également une attention particulière aux développements dans la pratique extraterritoriale des *trusts* et tente d'adresser certains défis contemporains reliés au droit des *trusts* qui remettent en question la compréhension conventionnelle des *trusts*. Une revue exhaustive de la littérature et de la jurisprudence internationale sur l'approche du noyau irréductible aux *trusts* est présentée. Ces secteurs d'intérêt sont explorés davantage afin d'articuler de manière complète et précise le concept du noyau irréductible du *trust*.

Une théorie relationnelle des *trusts* est proposée dans ce mémoire. Cette théorie s'inspire en grande partie du schéma Hohfeldien des relations juridiques, dont un aperçu est également présenté. Ensuite, le mémoire identifie et examine chacune des relations juridiques essentielles constituant le noyau irréductible du *trust* en appliquant la théorie relationnelle des *trusts*. Ce mémoire propose que le concept du noyau irréductible en droit des *trusts* puisse être appliqué hors du contexte de la dynamique interne fiduciaire-bénéficiaire pour rejoindre l'externalité du *trust*, qui reflète les effets significatifs des *trusts* sur les tiers. Ceci représente un nouveau développement important sur le sujet. Selon ce mémoire, chacune des relations juridiques identifiées qui sont comprises dans le noyau irréductible du *trust* sert l'ambition importante de garantir la sécurité juridique des *trusts* et assiste à la classification juridique des *trusts* dans un cadre rationnel et cohérent du droit privé.

Tables of Contents

Part 1. An introduction to the irreducible core of the trust

The common law tradition has known the trust for the better part of the last millennium. During that time, the trust has enjoyed a largely unregulated history, only suffering the slightest incursions from the State from time-to-time. This has allowed the trust to be used as an instrument of law reform and to fill gaps in the structure of the private law, such that: "[l]ike an exuberant vine, first twining for support upon the rocks of practice and precedent, it then separates, overthrows, and, lastly, scatters them into new heaps whose equilibrium is more stably adjusted to the needs of a growing democracy."[1] As a result, the trust has grown organically into a complex and sophisticated legal institution that has engrafted itself onto many substantive areas of law and seems almost impervious to proper juridical classification.[2] In recent times, however, the trajectory of the trust has given cause for concern regarding whether trust evolution is becoming self-destructive and pause for contemplating what the essential features of the trust are and whether those attributes must exist in the lawful creation of a trust and, where necessary, overbear subjective intention.

The idea of the irreducible core of the trust developed as a means to not only articulate the essential nature of the trust, but also as a way of setting parameters on the broad freedom enjoyed by citizens to establish trusts as pure manifestations of subjective expression ('the irreducible core approach'). The irreducible core approach implicitly makes a normative claim for the recognition of the trust as a fundamental legal institution possessing significant social utility and warranting its preservation as a matter of law through the imposition of mandatory requirements. This thesis will define those mandatory requirements by advancing a relational theory of trusts and arguing that the two key imperatives behind the irreducible core approach are *accountability* and *enforceability*. Thus, the irreducible core approach should not be thought to be merely an academic exercise, but is directed toward providing a coherent conceptual framework to address challenging and divergent problems in contemporary trust law and practice. The practical importance of the irreducible core of the trust has been a key motivator behind many prominent trust jurisdictions adopting the irreducible core concept

[1] FJ Stimson, "Trusts" (1887) 1 Harv L Rev 132 at 132. See also Austin W Scott, "The Trust as an Instrument of Law Reform" (1922) 31:5 Yale LJ 457 [Scott, "Instrument of Law Reform"] (noting a series of English law reforms that "would doubtless have been brought about by other means; but the fact remains that it was the trust device which actually was chiefly instrumental in bringing them to pass" at 457-58).

[2] See *ibid* ("[the trust] did not, Minerva-like, spring full-grown into being. There were centuries of gestation before it became a legal institution, and centuries of growth before that institution took its place as the central figure in a 'noble, rational and uniform system' of equity" at 458).

in trust law and explains its rising momentum.[3] Whilst the irreducible core of the trust is being judicially endorsed in many Commonwealth jurisdictions, and is beginning to feature on legislative agendas, an exhaustive account of the irreducible core concept in trust law has not been provided.[4] In order to assist in a coherent and rational realization of the irreducible core of the trust, a thorough analysis needs to be undertaken to provide: a) a clear statement of the juristic ambition of the irreducible core approach; b) an analytical framework to expose the content of the irreducible core of the trust; and c) a full exposition of what legal relations comprise the irreducible core of the trust and are, therefore, beyond lawful exclusion.

The three parts of this thesis are structured around those three substantive enquires: Part 1 provides an introduction to the irreducible core of the trust, its importance and the practical implications of its

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[3] In Australia: *Scaffidi v Montevento Holdings Pty Ltd*, [2011] WASCA 146 [*Scaffidi v Montevento*] at para 149 per Murphy JA & Hall J; *Wilden Pty Ltd v Green*, [2009] WASCA 38 [*Wilden v Green*] at paras 157, 163, 166 per McLure JA; *Leerac Pty Ltd v Fay*, [2008] NSWSC 1082 [*Leerac v Fay*] at para 23 per Brereton J; *Rankine v Rankine*, [1998] QSC 48 per de Jersey CJ. In England & Wales: *Armitage v Nurse*, [1997] EWCA Civ 1279, [1998] Ch 241 [cited to Ch] at 253-54 per Millett LJ. In Guernsey: *Spread Trustee Company Limited v Hutcheson*, [2011] UKPC 13 [*Spread Trustee v Hutcheson*] at paras 46-48, 57 per Lord Clarke, para 106 per Lord Mance, paras 165-67 per Lord Kerr. In Ireland: Law Reform Commission (Ireland), *Trust Law: General Proposals* (LRC 92/2008) (December 2008), online: Irish Law Reform Commission <http://www.lawreform.ie> [Law Reform Commission (Ireland), *Trust Law*] at 69-70, 78-80, 87, 172 (arguing that without the irreducible core of obligations there is no valid trust and recommending that exemption clauses purporting to exclude liability for those obligations are neither valid nor enforceable). In New Zealand: New Zealand Law Commission, *Some Problems in the Law of Trusts,* Report 79 (NZ: Law Commission, April 2002), also published as Parliamentary Paper E 3179; Bills Digest No 1685, *Trustee Amendment Bill 2007*, 2008 No 144-2 (as presented by the Justice and Electoral Committee 9 July 2008)(urging "the Government to conduct a comprehensive review of the law relating to trusts as soon as practicable [including 'the irreducible core of trustee duties']" at 3); New Zealand Law Commission, *Review of Trust Law in New Zealand: Introductory Issues Paper,* Issues Paper 19 (NZ: Law Commission, November 2010) at 23-24, 31, 38-39; New Zealand Law Commission, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts,* Issues Paper 36 (NZ: Law Commission, June 2011) at 3, 7-8, 10-11, 13, 34, 36-38, 83 (concluding with the question: "[w]hich duties should be treated as irreducible core duties that cannot be excluded?" at 91).

[4] Interestingly, despite the progressive nature of equity jurisprudence in Canada, the idea of the irreducible core of the trust has not so much as even been considered by the courts and one only finds occasional, passing references to *Armitage v Nurse*, *supra* note 3, without any detailed analysis of that case or its relevance to solving some of the contemporary problems facing Canadian trust law; see e.g. *Strother v 3464920 Canada Inc*, 2007 SCC 24, [2007] 2 SCR 17 at para 157 per McLachlin CJ; see also AH Oosterhoff et al, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed (Toronto: Carswell, 2009)[*Oosterhoff on Trusts*] at 1316. The underlying problems that the irreducible core approach is directed toward solving have, however, been highlighted elsewhere: Ontario Law Reform Commission, *Report on the Law of Trusts* (Toronto: Ministry of the Attorney General, 1984) at 80 (recommending that any term in a trust instrument that purports to exonerate trustees from failure to exercise the standard of care, diligence and skill required of them should be invalid); British Columbia Law Institute, *Exculpation Clauses in Trust Instruments*, Report No 17 (BC: Law Institute, March 2002), reprinted as Committee on the Modernization of the Trustee Act, "Report on Exculpation Clauses in Trust Instruments" (2002) 22 ETPJ 55 at 56, 71-72; Saskatchewan Law Reform Commission, *Proposals for Reform to the Trustees Act* (Saskatoon: Ministry of the Attorney General, 2002); *Poche v Pihera*, (1983) 6 DLR (4th) 40, 16 ETR 68 [cited to ETR] at 85-86 per Hetherington J; Donovan WM Waters QC, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Thomson Carswell, 2005)[*Waters' Law of Trusts*] at 926-28; DA Steele, "Exculpatory Clauses in Trust Instruments" (1995) 14 E & TJ 216 at 218-221 (noting "a paucity of Canadian authorities on the issue [of the enforceability of exculpatory provisions in trust instruments]" at 238); WA Lee, "Report on the Law of Trusts, Ontario Law Reform Commission, 1984" (1986) 6:1 Oxford J Legal Stud 150 [Lee, "Report on Trusts"] at 151-52.

recognition; Part 2 develops an analytical framework for exposing the legal relations comprising the irreducible core of the trust; and Part 3 identifies specific legal relations that comprise the irreducible core of the trust by being conscious of the juristic ambition and imperatives articulated in Part 1 and applying the analytical framework developed in Part 2.

Thus, by adhering to the theoretical construct developed in Part 1, and applying the analytical framework developed in Part 2, Part 3 of this thesis identifies precisely the following legal relations that are said to comprise the *inner core* of the trust (i.e. being the internal dynamic between beneficiary and trustee) being: 1. the duty/right to inform persons of their beneficial status under a trust; 2. the duty to keep, and right to have kept, trust accounts and information; 3. the duty of/right to disclosure of trust accounts and information; 4. the duty of/right to good faith trust administration; 5. the duty/right of loyalty; 6. the duty to perform the trust, and the right to have the trust performed according to its purposes and terms; 7. the power/liability to vary the trust; and 8. the power/liability to terminate the trust. The balance of the thesis then explores the externality of the trust with a view to exposing the crucial legal effects that trusts have on third parties. In that section, it is contended that there are three additional, but nevertheless essential, legal relations that comprise the *outer core* of the trust (i.e. being the external dynamic between the trust parties and third persons) as follows: 9. the power to convey title to the trust property to good faith purchasers for value and the liability to have that title so conveyed (‘good faith purchase’); 10. the duty not to *knowingly* participate in a breach of trust and the correlative right to non-interference in trust affairs and their lawful performance (‘knowing participation’); and 11. the duty/right not to *unknowingly* participate in a breach of trust through the innocent receipt of trust property unlawfully transferred (‘innocent recipient liability’).

1.1. What does it mean to have an 'irreducible core' in the law of trusts?

The idea of an 'irreducible core' in a field of law is by no means confined to the law of trusts and occasionally appears in other substantive fields of law, as well.[5] Despite the varied context in which the phrase is used, the irreducible core concept is used to express that which is essential to a legal doctrine, institution or entire category of law, such that any change in that content would represent a fundamental, normative shift in the current conceptual capture of the law in this respect. Therefore, to assert that an irreducible core exists in a field of law is to make a meta-claim regarding the rationality of the existing social order and, quite possibly, to contemplate a more just, or at least organised, one. Professor Weinrib exposed the immanent rationality of the private law that strives toward coherence and unity to reveal its internal intelligibility.[6] Private law is a justificatory enterprise for regulating intersubjective relationships by which salient features of its inherent rationality come together to harmoniously form a coherent normative ensemble.[7] Juridical classification of the constituent parts comprising the cohesive whole of private law attempts to articulate and assemble those parts in a logical manner to ensure a coherent and rational structure is retained.[8] This not only helps explain the assumed rationality in the isolated parts, but also assists in understanding the logical interplay between those parts and has the constructive capacity to expose the normative roots and immanent rationality of the private law.

Traditionally speaking, civilian jurists have been more preoccupied with juridical classification than their common law counterparts, which is strikingly obvious to a common lawyer becoming acquainted

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[5] For example, Justice French, as his Honour then was, extrajudicially described the 'Constitutional Jurisdiction of the High Court [of Australia]' as 'The Irreducible Core', before going on to be elevated to Chief Justice of that Court some 15 years later; Robert S French, "The Rise and Rise of Judicial Review" (1993) 23 UWA L Rev 120 at 122; Chief Justice French was sworn in on 1 September 2008. In an employment context, see Meryl Thomas & Brian Dowrick, "The Heart of the Matter– Rethinking Good Faith in Occupation Pension Schemes" (2007) Conveyancer and Property Lawyer 495 ("[m]uch of what we have said is predicated upon the good faith term constituting the irreducible core of obligations between employer and employee; obligations that are so fundamental, necessary and basic to the effective functioning of the employment relationship, that they cannot be excluded by an express agreement" at 514).

[6] Ernest J Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995)[Weinrib, *Idea of Private Law*] at 8-21, 29-36.

[7] See *ibid* at 9, 19, 32-44.

[8] See Ernest J Weinrib, "The Juridical Classification of Obligations" in Peter Birks, ed, *The Classification of Obligations* (Oxford: Clarendon Press, 1997) [Birks, *Classification of Obligations*] 37 [Weinrib, "Juridical Classification"]("[c]lassification is necessarily instinct with theory, because the act of classifying is the effort to understand a complex phenomenon through the interplay of its more general and particular aspects. Accordingly, the endeavour to classify the obligations of private law necessarily implicates the theory of private law" at 37).

with the methodical structure of civilian legal codes.[9] One can discern the heightened emphasis civilians place on juridical classification in contract law, for example, where operative facts[10] are commonly categorized into a series of nominate categories or otherwise fall into the basket of innominate contracts.[11] This is also evident in private international law, where there has been a shift away from fact intensive enquiries toward precise classification of contracts to determine applicable law, as well as unification projects with aspirations of articulating a common set of contract law principles that adhere to a civilian persuasion of juridical classification.[12]

The common law, on the other hand, developed in a more piecemeal fashion and it is perhaps bewildering for a civilian jurist to wander into its expansive fields.[13] However, prominent examples of

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[9] See generally Stefan Grundmann, "The Architecture of European Codes and Contract Law – A Survey of Structures and Contents" in Stefan Grundmann and Martin Schauer, eds, *The Architecture of European Codes and Contract Law* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006) 3; see also Peter G Stein, "The Quest for a Systematic Civil Law" (Maccabaean Lectures in Jurisprudence, delivered at the British Academy, 28 November 1995), (1996) 90 Proceedings of the British Academy 147 at 147-48.

[10] The phrase 'operative facts' is used in this thesis in the Hohfeldian sense, being distinct from 'evidential facts', see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, ed by Walter Wheeler Cook with a new foreword by Arthur L Corbin (New Haven: Yale University Press, 1964) 23 [Hohfeld, *Fundamental Legal Conceptions* cited to 1964] at 32-35 ("[o]perative, constitutive, causal, or dispositive facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously" at 32).

[11] See e.g. *Civil Code of Quebec*, title 1, ch 2, div 1 ("Nature and Certain Classes of Contracts"), title Two (Nominate Contracts): ch 1 (Sale), ch 2 (Gifts), ch 3 (Leasing), ch 4 (Lease), ch 5 (Affreightment), ch 6 (Carriage), ch 7 (Contract of Employment), ch 8 (Contracts of Enterprise or for Services), ch 9 (Mandate), ch 10 (Contracts of Partnership and of Association), ch 11 (Deposit), ch 12 (Loan), ch 13 (Suretyship), ch 14 (Annuities), ch 15 (Insurance), ch 16 (Gaming and Wagering), ch 17 (Transaction), ch 18 (Arbitration Agreements); contracts that do not fall into any of those categories are 'innominate' and governed by specific and independent rules; see also *Crown Trust Co v Higher*, [1977] 1 SCR 418 (where it was held that a purported 'trust' established with the principle object of purchasing a shopping centre did not fall into the category of 'trust' under the *Civil Code of Quebec* and, therefore, was an 'innominate contract', which must be governed by the general law of obligations).

[12] See e.g. EC, *Convention on the law applicable to contractual obligations (Rome 1980) of 9 October 1980*, [1980] OJ, L 266/9.10.1980, art 4 (for the earlier fact intensive enquiry); EC, *Commission Regulation (EC) 593/2008 of 17 June 1998 on the law applicable to contractual obligations (Rome 1)*, [2008] OJ, L177/6, art 4(1)(a)-(h) and (2)(for the new position that sets out a series of distinct contracts for determining applicable law under the first limb and, failing that, the arrangement falls for consideration and resolution under the second, residual limb of that article); Zheng Tang, "Law Applicable in the Absence of Choice – The New Article 4 of the Rome 1 Regulation" (2008) 71:5 Mod L Rev 785 at 791-95, 800 (arguing that, although the aim of the new art 4 was to achieve greater certainty through heightened juridical classification, further classification would ensure even greater certainty); see generally Commission on European Contract Law, *Principles of European Contract Law*, ed by Ole Lando (The Hague: Kluwer Law International, 2000). Compare International Institute for the Unification of Private Law, *Principles of International Commercial Contracts* (Rome: UNIDROIT International Institute for the Unification of Private Law, 2010)[UNIDROIT, *International Commercial Contracts*], Preamble, art 1.1.

[13] See generally Peter Birks, "Definition and Division: A Meditation on Institutes 3.13" in Birks, *Classification of Obligations*, *supra* note 8 [Birks, "Definition and Division"]("in the common law that evolutionary process [of systematic understanding] has faltered. Piecemeal legislation has combined with educational practice indifferent to legal taxonomy to return the common law to the disorderly heap on which jurists of the earlier twentieth century must have hoped that they had begun to impose some order... the internal rationality of individual units cannot in itself save the whole from incoherence and contradiction" at 1); see also Neil Duxbury, *Frederick Pollock and the English Juristic Tradition*, ed by AW Brian Simpson (Oxford: Oxford University Press, 2004) at 142-67 (on authority, reason and qualities of the common

juridical classification can be found in the legal reasoning underlying judicial distinctions being drawn, for example, between leases/licenses, fixed/floating charges and powers/trusts.[14] Strict adherence to juridical classification of the operative facts in those cases ensured that legal arrangements were properly categorised in the private law structure, which was not merely an academic endeavour but ensured that important rights were afforded and protected, and duties imposed, as a matter of law.[15] In a similar vein, the irreducible core approach to trusts disregards mere labels that drafters choose to attach to their transactions to preserve essential legal relations that must comprise a legal arrangement in the private law category of 'trust'.[16] Thus, the irreducible core approach to trusts is a projection of the immanent rationality of the private law.

In private legal ordering, the trust has quite possibly been the most vexing of all legal topics to define and situate within the schematic of the private law, and certainly one over which much ink has been spilt.[17] Attempts to classify and define the trust gained momentum at the turn of the 20th century, featuring prominently in the academic discourse at the time.[18] That tranche of trust jurisprudence

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law); OW Holmes, *The Common Law* (Boston: Little Brown, 1881)("[t]he life of the law has not been logic, it has been experience" at 1).

[14] On leases/licenses, see: *Bruton v London & Quadrant Housing Trust*, [2000] 1 AC 406 at 413-14 per Lord Hoffman); *Hadjiloucas* v *Crean*, [1988] 1 WLR 1006 at 1019 per Mustill LJ; *Street v Mountford*, [1985] AC 809 at 821 per Lord Templeman; *Addiscombe Garden Estates Ltd v Crabbe*, [1958] 1 QB 513 at 522 per Jenkins LJ; *Errington v Errington*, [1952] 1 KB 290 ("the circumstances negative any intention to create a mere licence. Words alone do not suffice. Parties cannot turn a tenancy into a licence merely by calling it one" at 298 per Denning LJ); *Facchini v Bryson*, [1952] EWCA Civ 3, 1 TLR 1386 (a tenant/landlord "relationship is determined by the law and not by the label which they choose to put on it" at 1389-90 per Denning LJ). On fixed/floating charges, see: *Re Spectrum Plus Ltd*, [2005] UKHL 41, [2005] 2 AC 680 [*Re Spectrum* cited to AC]("[b]oth sides agree that the label of "fixed" or "specific" (which I take to be synonymous in this context) cannot be decisive if the rights created by the debenture, properly construed, are inconsistent with that label. There is a fairly close parallel... with the important distinction, in land law, between a lease and a licence" at 730 per Lord Walker). On powers/trusts, see: *McPhail v Doulton*, [1970] 2 All ER 228 at 233, [1971] 1 AC 424 at 440-41 per Lord Hodson; *IRC v Broadway Cottages Trust*, [1955] Ch 20 at 31 per Jenkins LJ; *Brown v Higgs* (1803), 8 Ves Jr 561, 32 ER 473 [cited to Ves Jr] at 570-71, 574 per Lord Eldon; see also DM Maclean, *Trusts and Powers* (Sydney: Thomson Lawbook, 1989) [Maclean, *Trusts and Powers*] at 1-13; JW Harris, "Trust, Power and Duty" (1971) 87 Law Q Rev 31 at 53-54 [Harris, "Trust, Power and Duty"].

[15] See *Re Spectrum*, *supra* note 14 ("[i]n each case there is a public interest which overrides unrestrained freedom of contract. On the lease/licence issue, the public interest is the protection of vulnerable people seeking living accommodation. On the fixed/floating issue, it is ensuring that preferential creditors obtain the measure of protection which Parliament intended them to have" at 730 per Lord Walker).

[16] Compare Matthew Conaglen, "Sham Trusts" (2008) 67:1 Cambridge LJ 176 [Conaglen, "Sham Trusts"] ("[i]f the parties have attached a label to their arrangement that incorrectly reflects the legal consequences of the rights and obligations which they have created, that label is ignored in favour of an accurate legal characterisation of the arrangement" at 180).

[17] See RC Nolan, "Equitable Property" (2006) 122 Law Q Rev 232 [Nolan, "Equitable Property"] at 232; see e.g. Andrea Vicari, *The nature of the trust* (JSD Thesis, Cornell University, 2004) [unpublished]; Kevin William Ryan, *The Reception of the Trust in the Civil Law* (PhD Thesis, University of Cambridge, 1959) [unpublished] (on the nature of the trust at 1-55). See also *infra* notes 18 and 19.

[18] See especially Walter G Hart, "The Place of Trust in Jurisprudence" (1912) 28 Law Q Rev 290; AN Whitlock, "Classification of the Law of Trusts" (1913) 1 Cal L Rev 215; John W Salmond, *Jurisprudence or The Theory of The Law*

entrenched a schism along the lines of *in personam* (obligatory) and *in rem* (proprietary) theories of trusts, which continues to permeate the conceptualizations of the trust.[19] Private law 'mapping' and the juridical classification of trusts has gained renewed prominence amongst legal scholars in recent times.[20] In this respect, perhaps the greatest legacy left by Professor Birks was his formidable and unrelenting challenge to common lawyers to improve taxonomy and pay more attention to the rational strength of the law.[21] The irreducible core approach furthers that juristic ambition by enhancing the conceptual capture of trusts and attempts to fit trusts within the private law architecture.[22] As such, any exposition of the irreducible core of the trust is an advanced form of private law ordering and juridical classification.[23] Being in part a regulatory idea, the irreducible core approach to trusts fetters and overbears the broad freedom afforded to individuals to arrange their legal affairs according to their own wishes and to dispose of property to which they are presently or prospectively entitled in the manner

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(London, UK: Stevens & Haynes, 1902) at 78-282 and 515; CC Lagndell, "A Brief Survey of Equity Jurisdiction" (1887) 1 Harv L Rev 55.

[19] See especially FW Maitland, *Equity Also The Forms of Action At Common Law: Two Courses of Lectures*, ed by AH Chaytor & WJ Whittaker (Cambridge: Cambridge University Press, 1929) [Maitland, *Equity*] at 111-55 (Lectures IX-XI on the Nature of Equitable Estates and Interests); Harlan F Stone, "The Nature of the Rights of the Cestui Que Trust" (1917) 17:6 Colum L Rev 467; Austin Wakeman Scott, "The Nature of the Rights of the *Cestui Que Trust* " (1917) 17:4 Colum L Rev 269; Walter G Hart, "What is a Trust?" (1899) 15 Law Q Rev 294; see also DWM Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can Bar Rev 219; Nolan, "Equitable Property", *supra* note 17 at 232 and 265, n 1 (noting that Maitland's proprietary views became less dogmatic in his later writing). See also HAL Fisher, ed, *The Collected Papers of Frederic William Maitland*, vol 3 (Cambridge: Cambridge University Press, 1911) at 322-26.

[20] See e.g. CEF Rickett, "The Classification of Trusts" (1999) 18 NZUL Review 305 [Rickett, "Classification of Trusts"]("Maitland was much more than a technician of trusts. He knew the necessity of conceptual coherence in the law of trusts. In my view, that search for conceptual coherence has been severely devalued. Today, we tend to see lots of jigsaw pieces, but the whole picture is largely hidden. More tragic is the fact that many think the picture is unimportant" at 305-306); Peter Birks, "More Logic and Less Experience: The Difference Between Scots Law and English Law" in David L Carey Miller & Reinhard Zimmermann, eds, *The Civilian Tradition and Scots Law* (Berlin: Duncker & Humblot, 1997) 167 ([i]f [law] is to promote peace in society rather than stir up more unrest, that process of continual adjudication in turn requires consistency and stability. Like case must be treated alike. Where the law is muddled, courts find it virtually impossible to do that. The aspiration of serious lawyers must therefore be law which is muddle-free" at 167); Andrew Burrows, ed, *English Private Law*, 2nd ed (Oxford: Oxford University Press, 2007) [Burrows, *English Private Law*] at xxix-xxxiii.

[21] See especially Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UWA L Rev 1 [Birks, "Taxonomy"] at 4-10; Peter Birks, ed, *English Private Law,* 1st ed (Oxford: Oxford University Press, 2000) (the need for a well-drawn map of the common law was made by Birks at xxix-xxx (regarding 'information overload'), xxxv-xxxvi (on 'stovepipe mentality' whereby "practitioners... know their law only in the way that many people know London, as pools of unconnected light into which to emerge from a limited number of friendly tube stations" at xxxv)); Birks, "Definition and Division", *supra* note 13; Birks, "More Logic", *supra* note 20, at 167, 188. Indeed, Professor Birks' resounding explication on restitution (later unjust enrichment), for which he is most remembered, grew out of this more fundamental and normative claim for clarity in legal classification and the exposition of the rational structure of the law, see Peter Birks, *An Introduction to the Law of Restitution*, revised ed (Oxford: Clarendon Press, 1989) [Birks, *Introduction to Restitution*] at 1-3; Peter Birks, *Unjust Enrichment*, 1st ed (Oxford: Clarendon, 2003) at 1.

[22] The language and idea being inspired by a broadly analogous, but even more challenging, project undertaken by Birks, *Introduction to Restitution*, *supra* note 21 at 1.

[23] See Weinrib, "Juridical Classification", *supra* note 8 ("[a] classification is 'juridical'... if it reflects the distinctive moral rationality that is implicit in private law and that animates it from within" at 37).

they see fit, other than in accordance with the private law mandate for trusts if those persons wish to make use of trusts.

The irreducible core approach to trusts has been used to describe the essential *duties* that must exist in trusteeship, such that those duties will persist irrespective of any subjective intention to the contrary (if a trust was truly intended to be created), and to answer the deceptively simply question: what is the least we can expect of a trustee?[24] The present thesis will take this idea further by arguing that the irreducible core comprises a composite of legal relations that must exist in all express private trusts. In doing so, this thesis does not develop the essential juridical relations persisting in other kinds of trusts, although the present research may hold much analytical value for those trusts, as well.[25] This thesis will propose a relational theory of trusts that, in the context of the legal relations said to comprise the irreducible core, emphasises two recurrent themes: *accountability* (duty-sided) and *enforceability* (right-sided). Internally speaking, the irreducible core approach to trusts is concerned with ensuring, at a minimum, that trustees are required to *account* (again, duty-sided) for their holding and management of trust property and that beneficiaries can *enforce* the trust (again, right-sided). Externally speaking, the irreducible core approach to trusts is concerned with ensuring that third parties coming into contact with trust affairs conduct themselves in good faith and do not interfere or derail the lawful performance of the trust. Strict adherence to the core themes of *accountability* and *enforceability* in all of the essential legal relations comprising the inner and outer cores of the trust ensures at least a minimal degree of functionality of the trust as a fundamental legal institution.

The legal relations comprising the irreducible core of the trust are built on mandatory rules from the general law applicable to trusts and, as such, it is contended that trusts are territorial creatures deriving their normative structure from the particular jurisdiction in which they are found.[26] Thus, the irreducible core approach is built from the 'bottom-up', rather than being the result of 'top-down

[24] See AS Butler & DJ Flinn, "What is the Least That We Can Expect of a Trustee? Exclusion of Trustee Duties and Exemption of Trustee Liability" [2010] NZL Rev 459.
[25] That is, charitable, constructive, implied and resulting trusts. Even more difficult would be to try and discern the commonality existing in the amorphous category of statutory trusts; although such an endeavour would be of much less significance than the present study into private express trusts, given that statutory trusts frequently violate fundamental principles in the law of trusts and are often better understood as anomalous, but legitimised by State prerogative.
[26] Compare UNIDROIT, *International Commercial Contracts*, *supra* note 12 at arts 1.4, 3.3.1 (prescribing a mandatory rule regime for international commercial contracts and providing for the remedial consequences in the event of non-compliance with those rules).

reasoning'.[27] But not all mandatory rules in trust law comprise essential legal relations forming part of the irreducible core of the trust as some mandatory rules exist simply as prohibitions, reflective of other public policy concerns.[28] For example, in the private law generally, citizens cannot use legal devices and doctrines to carry out illegal activities, which applies to trusts as much as any other private law category.[29] Although these mandatory rules also restrict settlor autonomy by limiting the kinds of trusts that can be created, they do not assist us in understanding the juridical relationships that comprise the irreducible core of the trust because those mandatory rules do not ensure that every properly created (*legal*) trust embodies certain legal relations.[30]

Taking a jurisdiction-centric perspective enables strong comparative lines of research to be taken both intra and inter-traditionally. Authorities, fact patterns and sources will be drawn from the broader common law tradition in order to develop the irreducible core of the trust for the following reasons: *first*, while some conceptual breaks have arisen between the common law jurisdictions, the law of trusts

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[27] The phrase 'top down reasoning' was coined by Richard Posner, but is often used to level a fierce attack on the emergence of a law of unjust enrichment in Australia; see Richard A Posner, "Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights" (1992) 59 U Chicago L Rev 433; compare *Roxborough v Rothmans of Pall Mall Australia Ltd*, [2001] HCA 68, 208 CLR 516 at paras 72-75 [*Roxborough*]; Keith Mason, "Do Top-Down and Bottom-Up Reasoning Ever Meet?" in Elise Bant & Matthew Harding, eds, *Exploring Private Law* (Cambridge, UK: Cambridge University Press, 2010) 19; Andrew Burrows, "The Australian Law of Restitution: has the High Court lost its way?" in Elise Bant & Matthew Harding, eds, *Exploring Private Law* (Cambridge, UK: Cambridge University Press, 2010) 67 [Burrows, "Australian Law of Restitution"] (*ibid*, 67 at 68, 73-74, 84). It is often difficult to discern between rational deductions of principle and mere solidification.

[28] In Australia: JD Heydon & MJ Leeming, eds, *Jacobs' Law of Trusts in Australia*, 7th ed (Chatswood, NSW: LexisNexis Butterworths, 2006) [*Jacobs' Law of Trusts*] at 110-37; GE Dal Pont, DRC Chalmers & JK Maxton, *Equity and Trusts: Commentary and Materials*, 2nd ed (Sydney: LBC Information Services, 2000) at 521-45. In Canada: *Oosterhoff on Trusts*, *supra* note 4 at 295-99; *Waters' Law of Trusts*, *supra* note 4 at 27, 327-44, 386-400. In England & Wales: John Mowbray QC et al, *Lewin on Trusts*, 18th ed (London, UK: Sweet & Maxwell, 2008) [*Lewin on Trusts*] at at 121-97 (on legality of object and unlawful trusts), 1907-73 (on trustees coming into contract with criminal and terrorist property); John McGhee QC, ed, *Snell's Equity*, 31st ed (London, UK: Thomson, Sweet & Maxwell, 2005) [*Snell's Equity* (31st ed)] at 467; The Law Commission (UK), *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, Consultation Paper No 154 (London: HMSO, 1999) [Law Commission (UK), *Illegal Transactions*] at 49-77. In New Zealand: Andrew Butler et al, eds, *Equity and Trusts in New Zealand*, 2nd ed (Wellington, NZ: Thomson Reuters, 2009) at 1069-81.

[29] See John H Langbein, "Mandatory Rules in the Law of Trusts" (2004) 98:3 Nw UL Rev 1105 [Langbein, "Mandatory Rules"]("[a] scheme to overthrow the government or to sell dope or to operate a bordello is no more enforceable as a trust than as a contract, a corporation, or a partnership" at 1107). See generally RA Buckley, *Illegality and Public Policy* (London: Sweet & Maxwell, 2002). Compare Duncan Kennedy, *A Critique of Adjudication* (Cambridge, Mas: Harvard University Press, 1997)("policy argument, however firmly established as a legitimate legal practice, is commonly understood to be a potential 'Trojan Horse' for ideology" at 97ff).

[30] Of course, if a trust fails or is declared illegal then certain legal relations *may* arise to ensure that the relevant property finds its way into the rightful hands of the owner, usually in the form of a resulting trust, as to which see Sir Arthur Underhill, *Underhill and Hayton Law of Trusts and Trustees*, 17th ed by David Hayton, Paul Matthews & Charles Mitchell (London, UK: LexisNexis Butterworths, 2007) [*Underhill & Hayton* (17th ed)] at 425-33. The recovery of property after illegality is, however, a very controversial question with difficult public policy considerations , see e.g.: *Tinsley v Milligan*, [1994] 1 AC 340 at 364 per Lord Goff, dissenting; *Nelson v Nelson,* (1995) 184 CLR 538, 550-51, 577, 608-09; Law Commission (UK), *Illegal Transactions*, *supra* note 28 at 56-58, 148*;* Nelson Enonchong, "Illegal Transactions: The Future" [2000] RLR 82 at 99-104.

in those jurisdictions still proceeds along broad lines of commonality with respect to its normative justification in private law ordering; *second*, comparison between the prominent trust jurisdictions, and especially the presentation of challenging fact patterns that are encountered in comparative analysis, furthers the collective understanding of common law trusts in each of those jurisdictions; and, *third*, recent unification efforts in the United States have solidified the general principles applicable to trusts in codified form, including *mandatory rules*, which provides a useful analogue with significant comparative value.[31] In addition to the prominent common law jurisdictions–Australia, Canada, New Zealand, United Kingdom and United States–some of the more prolific 'offshore jurisdictions' will also be considered because those jurisdictions are very progressive in trust law, present challenging case studies in contemporary trust practice and sharpen the focus for the irreducible core approach to trusts.[32]

1.1.1. Commonwealth approaches and points of departure

Despite the passage of time since the idea of an irreducible core approach to trusts was first mooted some 15 years ago, as well as broad judicial endorsement for the concept in the interim, the content of the irreducible core of the trust has not been the subject of exhaustive examination and the academic literature on the topic remains relatively sparse.[33] Although the idea implicit in the irreducible core of

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[31] See *Uniform Trust Code* (2000), 7C ULA 126 (Supp 2005), with prefatory note and comments of the National Conference of Commissioners on Uniform State Laws, online: University of Pennsylvania Law School <http://www.law.upenn.edu> [*Uniform Trust Code*] (the comment to art 1 provides that "[t]he Uniform Trust Code is primarily a default statute. Most of the Code's provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 105(b)"). Thus, section 105(b) provides a mandatory rules regime in United States trust law–at least, insofar the *Uniform Trust Code* is put forward for adoption in all of the states.

[32] The polities usually described as 'offshore jurisdictions' were once often described as 'tax havens' but are now often called 'offshore financial centres', and do not readily fall into a coherent basket of commodities. See Ahmed Zoromé, *Concept of Offshore Financial Centers: In Search of an Operational Definition*, IMF Working Paper: 07/87 (Washington, DC: International Monetary Fund, Monetary and Capital Markets Department, April 2007)(highlighting the difficulty in grouping together and defining the 'Offshore Financial Centres' and proposes the following definition "*[a]n [Offshore Financial Centre] is a country or jurisdiction that provides financial services to non-residents on a scale that is incommensurate with the size and financing of its domestic economy*" at 7). See also "Places in the Sun", *The Economist* Issue No:8517 (22 February 2007) 119. This thesis pays particular attention to the jurisdictions that retain different constitutional connextions with the United Kingdom, but embody a doctrinal confluence that draws from the civil and common law traditions, such as the Cayman Islands (being a British Overseas Territory), as well as the Channel Island Bailiwicks of Guernsey and Jersey and the Isle of Man (being Crown Dependencies). See *British Overseas Territories Act 2002* (UK), c 8 (renaming the 'British Dependent Territories' to 'British Overseas Territories'); *British Nationality Act 1981* (UK), c 61, ss 1, 50 (granting citizenship to persons born in the Channel Islands and the Isle of Man and listing the British Dependent Territories, including the Cayman Islands in Schedule 6).

[33] See Langbein, "Mandatory Rules", *supra* note 29 ("[t]he topic of mandatory rules has not been addressed much in trust law, although it features prominently in the literature of other fields, especially corporations and contracts" at 1105, n 1). In fact, the present thesis will more than triple the quantum of writing explicitly on the irreducible core of the trust.

the trust was expressed much earlier,[34] the irreducible core concept first appeared explicitly in the extrajudicial writings of Professor Hayton and was soon taken up by the English Court of Appeal in *Armitage v Nurse*, where Millet LJ acknowledged that: "[t]here is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of the trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts."[35]

In his seminal writing, Hayton argued that "[t]he beneficiaries' rights to enforce the trust and make the trustees account for their conduct with the correlative duties of the trustees to the beneficiaries are at the core of the trust."[36] Hayton went on to identify the following duties as being essential to the existence of a trust: "the duty to find and pay a beneficiary";[37] "the duty to account which affords the beneficiaries a correlative right to have the court enforce the trustees' fundamental obligation to account";[38] and "[t]he duty to act in good faith (i.e. honestly and consciously)".[39] Hayton further argued that the beneficiaries right to information was designed to reveal what the trustees had done with the trust property and extended to cover "all documents relating to the management and administration of

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[34] See e.g. *Re Astor's Settlement Trusts*, [1952] Ch 534 [*Re Astor*] ("a trustee would not be expected to be subject to an equitable obligation unless there were somebody who could enforce a correlative equitable right, and the nature and extent of that obligation would be worked out in proceedings for enforcement... having regard to the historical origins of equity it is difficult to visualize the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration reform" at 541-42 per Roxburgh J); *Bowman v Secular Society Ltd* (1917), [1917] AC 406 ("[t]he question whether a trust be legal or illegal or be in accordance with or contrary to the policy of the law, only arises when it has been determined that a trust has been created, and is then only part of the larger question whether the trust is enforceable. For, as will presently appear, trusts may be unenforceable and therefore void, not only because they are illegal or contrary to the policy of the law, but for other reasons" at 437 per Lord Parker); *Morice v Bishop of Durham* (1804), 9 Ves Jr 399 ("[e]very [private] trust must have a definite object. There must be somebody, in whose favour the Court can decree performance" at 405); *Knight* v *Knight* (1840), 3 Beav 148 (referring to "the greatest difficulty in determining whether the act desired or recommneded is an act which the testator intended to be executed as a trust, or which this Court ought to deem fit to be, or capable of being enforced as such" and describing a trust as "an obligation to be enforced by legal sanction" at paras 172, 178, respectively). See also Augustine Birrell, *The Duties and Liabilities of Trustees: six lectures delivered in the Inner Temple during the Hilary Sittings at the request of the Council of Legal Education, London, 1896* (London, UK: Macmillan, 1920).

[35] *Armitage v Nurse*, *supra* note 3 at 253. See also Professor David Hayton, "The Irreducible Core Content of Trusteeship", in AJ Oakley, *Trends in Contemporary Trust Law* (Oxford: Oxford University Press, 1996) [Oakley, *Trends in Trust Law*] 47 [Hayton, "Irreducible Core"] at 47-62; see David Fox, "Non-Excludable Trustee Duties" (2011) 17 Trusts & Trustees 17 [Fox, "Non-Excludable Duties"] ("[t]he idea of an irreducible core of trusteeship originated in the extrajudicial writings of Mr Justice David Hayton, now of the Carribean Court of Appeal" at 18)*;* interestingly, whilst reference is made in *Armitage v Nurse* to Sir Arthur Underhill, *Underhill and Hayton Law Relating to Trusts and Trustees*, 15th ed by David J Hayton (London, UK: Butterworths, 1995)[*Underhill and Hayton* (15th ed)] as authority for different proposition (*Armitage v Nurse*, *supra* note 3 at 251-52), no reference is made to Professor Hayton's writing on the irreducible core content of trusteeship (i.e. Hayton, "Irreducible Core", *supra* note 35) in the reported version of that case, despite the striking similarity in the language used to express the irreducible core concept in that context.

[36] Hayton, "Irreducible Core", *supra* note 35 at 47.

[37] *Ibid* at 49 (Hayton goes on to clarify that, in the case of discretionary trusts, the trustee "must be under a duty to take reasonable steps to make a discretionary beneficiary aware that he be such").

[38] *Ibid* at 49-50.

[39] *Ibid* at 57.

the trust by the trustees and to the distributive function of the trustees".[40] Although Hayton accepted that the objects of a power of appointment do not hold rights comparable to trust beneficiaries, his views are nevertheless directed toward ensuring a minimal degree of accountability through the existence and notification of default beneficiaries.[41]

Hayton's approach is ostensibly directed toward an irreducible core content of *trusteeship*, but evinces an intention to adhere loosely to a Hohfeldian structure of jural correlatives, in which specific duties answer for certain rights.[42] It is, however, difficult to follow the precise legal relations that Hayton thought comprised the trust's core; the text floats back and forth from rights and duties, which do not altogether correspond with one another. This thesis attempts to articulate the irreducible core concept in trust law more precisely by adhering to a definitive structure of specific legal relations and by providing a fuller account of the core legal relations not only in the internal trust dynamic (e.g. trustee/beneficiary), but also in the externality of the trust.[43]

In reviewing Hayton's seminal text on the irreducible core approach to trusts, Professor Parkinson has questioned the underlying imperatives for recognizing an irreducible core of the trust at all and suggested that there is no "*public* interest in the accountability of trustees and the preservation of the trust property."[44] Parkinson contended that the regulatory implications flowing from the irreducible core of the trust are not justified, the creation of trusts should be an entirely private matter in which "the law should not interfere" and that it should not be a private law concern whether "trustees are held accountable and... the beneficiaries have appropriate remedies for dealing with breaches of trust."[45]

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[40] *Ibid* at 49 (Hayton goes on to exclude "the reasons for the exercise of distributive powers in favour of beneficiaries" at 49, as well as documents revealing the basis upon which sensitive discretions were exercised or documents in which confidentiality legitimately attaches (e.g. a settlor's letter of wishes) at 52).

[41] *Ibid* at 50-51.

[42] See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 36-38; this is also apparent from other works in which Hayton has been involved; see e.g. *Underhill & Hayton* (17th ed), *supra* note 30 at 2; DJ Hayton, SCJJ Kortnmann & HLE Verhagen, eds, *Principles of European Trust Law* (The Hague: Kluwer Law International, 1999)[*European Trust Law*]("[i]n respect of the trust fund it is fundamental that the trustee owes duties to the beneficiaries who have correlative rights against the trustee" at 32).

[43] Compare Hayton, "Irreducible Core", *supra* note 35 (Hayton alludes to the importance of the externality of the trust, but specifically excludes the external trust dynamic of the trust from his analysis: "[t]his paper is concerned with the internal trustee-beneficiary relationship and not with the external relations of trustees with third-party creditors" at 47, n 1). See sections 2.3 and 3.2 below (on the externality and outer core of the trust).

[44] Patrick Parkinson, "Review Essay: Trends in Contemporary Trust Law by A Oakley", Book Review of *Trends in Contemporary Trust Law* by AJ Oakley, ed, (1998) 20:2 Sydney L Rev 348 [Parkinson, "Review"] at 353.

[45] *Ibid* ("[i]t is entirely for the person who is choosing to dispose of his or her money... Most settlors and testators, perhaps, would want to ensure that the trustees are held accountable and that the beneficiaries have appropriate remedies for dealing with breaches of trust... However, if settlors choose to dispense with the traditional safeguards of the trust concept, the law

Helpfully, Parkinson provided two specific arguments to bolster his challenge to the underlying imperatives of the irreducible core of the trust.

First of all, Parkinson suggested that "[i]f the beneficiaries are volunteers, then they have no cause for complaint. If they are not volunteers, then consumer protection policies and principles may need to apply".[46] There are at least three reasons to doubt that proposition. *First*, it is contrary to the fundamental rationale of trust law: trusts must comprise ascertainable property, which is held for the benefit of the relevant beneficiaries.[47] Would-be settlors can, of course, deal with their property as they wish by benefiting themselves or anyone else, but if they choose to benefit certain persons through the use of a trust, then the beneficiaries should be afforded adequate protection as a matter of law. *Second*, it is wholly unsatisfactory that beneficiaries must have recourse to consumer protection law to address malfeasance in trust law. Consumer protection laws are already incredibly overworked, so the suggestion that wrongdoing from another substantive area of law (i.e. trusts) should be repackaged and transplanted into the field of consumer protection is unsatisfactory, as it will become even more difficult to maintain rational coherency of the principles in that field.[48] Furthermore, the underlying imperatives in trust law do not square very well with consumer protection laws, which are designed to protect the weak from exploitation. The logic of the irreducible core of the trust extends beyond mere 'consumers' to protect all trust beneficiaries, irrespective of value conveyed in exchange for beneficial status. *Third*, there is no rational basis for treating beneficiaries that have provided consideration in

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should not prohibit them from doing so. The settlor may of course be unwise. He or she may [be] giving to beneficiaries less of an interest, or at least a less certain and secure interest, than is traditionally the case under trust instruments. But if that is what the settlor chooses to do, is this any concern for the courts?" at 353).

[46] *Ibid* at 353.

[47] See Patrick Parkinson, "Reconceptualizing the Express Trust" (2002) 61:3 Cambridge LJ 657 [Parkinson, "Reconceptualizing"]("[t]he trust in the common law world necessarily involves the holding of property for others' benefit, and requires accountability to those who have an interest in the proper application of the trust property" at 679).

[48] In Australia, which appears to be Parkinson's home jurisdiction, see Paul Finn, "Equitable Doctrine and Discretion in Remedies" in WR Cornish et al, eds, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) 251 (commenting that the key consumer protection provision in Australia–*Competition and Consumer Act 2010* (Cth), s 18, repealing *Trade Practices Act 1974* (Cth), s 52–"has–and is acknowledged to have–the potential to render superfluous significant swathes of the law of tort, of contract and, particularly, of equity" at 253); see generally JD Heydon, *Trade Practices Law*, loose-leaf (consulted on 4 August 2011), vol 2 (Sydney: Thomson Lawbook, 2011) at ch 1. See also *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*, [2010] HCA 31, French CJ and Kiefel J reflected upon the ubiquity of the key consumer protection action in Australia (i.e. *Trade Practices Act 1974* (Cth), s 52) as follows: "[t]he cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian courts at all levels." See Compare Ann Kerry, "Living up to Expectations" (1996) 146 New LJ 348 (arguing that "[t]here is a real need for consumer protection of beneficiaries"). The reasons articulated by Kerry generally accord with the sentiments expressed in this thesis; however, it is contended that beneficiaries are best protected *within* the law of trusts and that the irreducible core of the trust affords that protection to all beneficiaries.

exchange for their beneficial status under a trust differently to so-called 'volunteer' beneficiaries; such a proposition is unprecedented and would cause an undesirable rift in trust law.

Second of all, Parkinson used two examples (gambling[49] and insurance[50]) to suggest that the law does not interfere to prevent individuals from acting recklessly with their money and, so, similarly this should not be a concern in trust law.[51] But these are not terribly strong examples to support that claim. *First*, in relation to the gambling example, there is no appreciation given to the proliferation of legislation that is specifically designed to regulate the gambling industry, as well as the fact that gambling contracts are void as a matter of English law.[52] This could certainly be said to reflect an underlying public interest in, and legitimate State concern for, protecting the vulnerable from exploitation. *Second*, with respect to the insurance example, whilst the law does not void insurance policies for carelessness on the part of the insured, it would be quite unreal for an insurance policy to allow recovery where the insured leaves the car keys in an unlocked car or jewellery in plain sight and unguarded.[53] Indeed, it would hardly be a profitable business venture if stock-standard exemptions did not deny recovery in those cases or the insurance premiums were not prohibitively expensive to obtain that kind of coverage. The answer to Parkinson's point is that this is simply not a field of activity that requires further intervention: insurance companies are very sophisticated, well-advised persons and, if anything, it is often the insured who requires further protection from the sharp practices of the insurer.

Thus, Parkinson's policy incentives against the irreducible core approach to trusts do not withstand scrutiny. And, interestingly enough, even Parkinson seems to have wholly abandoned the imperatives behind his preceding objections, where he has acknowledged in his later writing that: "[t]here is an irreducible core of obligations which should be regarded as inherent in the nature of trusteeship and

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[49] Parkinson, "Review", *supra* note 44 ("[t]he law does not prohibit gambling, which for some people is a form of behaviour far more reckless than that of any settlor" at 353).
[50] *Ibid* ("[the law] does not void insurance policies if the insured leaves the car keys in an unlocked car or goes out for the evening leaving a house unlocked and the jewellery in full view" at 353).
[51] *Ibid* ("[t]hese are regarded as matters in which there is no public interest, nor any legitimate state concern in protecting the vulnerable from exploitation, for the law is little concerned in how people spend their money nor in how carefully they secure it from the possibility of fraud or theft" at 353).
[52] See *Gaming Act,* 1845 (UK), 8 & 9 Vict, c 109, s 18; *Lipkin Gorman v Karpnale Ltd*, [1991] 2 AC 548 [*Lipkin Gorman v Karpnale*]("contracts by way of gaming or wagering are void in English law" at 577 per Lord Goff); given that Hayton's writing on the irreducible core was primarily concerned with English trust law, Parkinson's comments should also be viewed in this light, and the comments made herein will be restricted to England in this respect, as well. *Contra* Parkinson, "Review", *supra* note 44 at 353.
[53] *Contra* Parkinson, "Review", *supra* note 44 at 353.

without which the legal arrangement should not validly be termed a trust";[54] and, further, that "there is great value, and much practical significance, in trying to define the irreducible core of the trust concept, without which a court is entitled to say that no trust exists".[55]

Earlier this year, Dr Fox moved the irreducible core literature beyond the fixation with trustee exclusion clauses to expose some of the lesser known duties in the irreducible core of the trust.[56] In addition to providing lucid justifications for the irreducible core approach,[57] Fox contributes to the existing literature in three ways: *first*, by giving a fuller account of the nature and scope of a trustee's duty to inform beneficiaries of their status, which Fox suggests is part of the irreducible core of trustee duties; *second*, by articulating why a general duty to give reasons for the exercise of a trustee's discretionary powers does not form part of the irreducible core of trustee duties;[58] and *third*, by suggesting that "[i]t is a non-excludable feature of a trust that the trustee's administration of the fund must be, directly or indirectly, subject to the supervision of the court."[59] This thesis will extend that line taken by Fox by giving a fuller account of the core trust relations in Part 3.

However, this thesis stands apart from recent attempts to articulate the essential elements or features of the trust, which often employ a civilian perspective and attempt to 'fit' the trust concept into civilian pigeonholes.[60] Whilst those attempts are certainly helpful for civilian jurists attempting to embrace the

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[54] Parkinson, "Reconceptualizing", *supra* note 47 at 680, citing Hayton, "Irreducible Core", *supra* note 35.
[55] Parkinson, "Reconceptualizing", *supra* note 47 at 682. *C.f.* Lionel Smith, "Mistaking the Trust" (2010) 40 Hong Kong LJ 787 [L Smith, "Mistaking the Trust"] at 790-800.
[56] Fox, "Non-Excludable Duties", *supra* note 35; although in the result, only the duty to notify beneficiaries of their status is analyzed as being part of the irreducible core of the trust.
[57] *Ibid* (Fox's justifications hover around two related themes: accountability and minimal functionality: "the distinguishing feature of the duties in the irreducible core is they generally aim to ensure that the transaction intended by the settlor passes a test of minimum functionality as a trust. Without the core of basic duties, the institution which the settlor has created by vesting assets in the so-called trustee could not function as a trust... [t]he so-called trustee would be the beneficial owner of the assets vested in him." at 17; "[t]he irreducible core of trusteeship is the minimum core of trustee duties that must be owed if he is to be restrained from exploiting the trust assets beneficially for himself by relying on his privileges, rights, and powers as a legal owner" at 20; the "common feature [of trustee duties in the irreducible core] is that the existence of these rules aims to ensure that the trust is minimally functional and that the trustee is effectively prevented from treating the trust property as his own" at 20).
[58] *Ibid* at 21.
[59] *Ibid* (this final feature of Fox's article is couched as a "non-excludable feature of the trust" [emphasis added] at 22).
[60] See e.g. GL Gretton, "The Evolution of the Trust in a Semi-Civilian System" in Richard Helmholz & Reinhard Zimmermann, eds, *Itinera Fiduciae* (Berlin: Duncker & Humblot, 1998) 507-542 (observing that English law does not readily fit into 'civilian pigeon-holes' and that civilian systems can accommodate the trust concept without an 'English pigeon-hole'); MJ de Waal, "The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared" (2000) 117 SALJ 548-571 (the essential elements of the trust are said to be the fiduciary position of the trustee, separate estates or patrimonies (i.e. segregation), real subrogation (fluidity of the trust fund) and trusteeship as an office); GL Gretton, "Trusts without Equity" (2000) 49 ICLQ 599 (arguing that trusts can of course be accommodated in a civilian context without the dualistic system of law and equity and that the apparent obstacle of absolute ownership, unitary

trust, that writing tells us little about the complex legal relations that comprise express private trusts in common law jurisdictions. Furthermore, this thesis does not contend nor imply that there is one *true* conception of the trust for universal application, which seems to be implied when the trust concept is analysed in abstraction from *any* jurisdictional context.[61] Like other legal institutions, trusts are defined by subjective expression within the confines of relevant mandatory rules and legal ordering *within* a particular jurisdiction. To speak of the trust at too high a level of abstraction or generality risks overlooking certain jurisprudential aspects that distinguish those trusts and diminishes the value of comparative analysis by *blending* rather than *exposing* dissimilarities in the jurisdictional permutations of the trust concept.

1.1.2. United States approach and points of departure

The United States has taken a different path to that of the prominent Commonwealth jurisdictions by solidifying the general principles of trust law in the *Uniform Trust Code*, which has achieved broad success in unifying state-based trust laws.[62] The *Uniform Trust Code* sets up a classificatory system of dividing trust law into default and mandatory rules.[63] Mandatory rules prevail over inconsistent trust terms and thereby restrict the broad flexibility afforded to settlors in framing the terms of the trust; whereas, default rules govern "the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary" unless the terms of the trust deed provide otherwise.[64] The distinguishing feature between the two streams of trust law being that, while both will be *included* in the absence of contrary intention, only mandatory rules will persist irrespective of subjective intention. Mandatory rules are both *cautionary*, in that they inform settlors of the permissible scope of their freedom to establish trusts, and *protective*, in that they protect the persons that stand to benefit from the

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patrimony and the *numerus clausus* principle can be readily overcome by recognising distinct trust patrimonies, together with the office of a trustee).

[61] See especially Lusina Ho, "The Essential Rights and Duties of Trusts" (Paper delivered at the Worlds of the Trust conference, Faculty of Law, McGill University, 23 September 2010), [unpublished]; Tony Honoré, "Trusts: The Inessentials" in Joshua Getzler, ed, *Rationalizing Property, Equity and Trusts: essays in honour of Edward Burn* (London, UK: LexisNexis, 2003) [Getzler, *Rationalizing Property*]1 at 7-20 (arguing that the common law conception of ownership of trust assets is not essential to the *trust concept* and dualism of law and equity is also an inessential feature of the common law *trust concept*).

[62] Following introductions in Connecticut, Massachusetts and New Jersey earlier this year, the *Uniform Trust Code, supra* note 31 has now been enacted in 27 states in the United States of America.

[63] *Uniform Trust Code*, *supra* note 31, s 105(a), (b) respectively.

[64] *Ibid*.

trust.[65] While default rules heighten trust functionality (e.g. powers to invest trust funds), mandatory rules go further than this by exacting minimal functionality and thereby making trustees legally *accountable* and trusts legally *enforceable.*[66]

Professor Langbein has argued that the mandatory rules regime in United States trust law fall into two categories: intent-defeating rules that restrict settlor autonomy (serving an anti-dead-hand policy),[67] and intent-serving rules that discern and implement the settlor's true intent (channel and facilitate, rather than defeat, the settlor's purpose).[68] The latter category is said to prevent settlors from restricting the disclosure of trust information, dispensing with fiduciary obligations and good faith trust administration, and exculpating trustees from inescapable liability. This is the relevant category for comparison to the irreducible core approach to trusts. A point of departure will, however, be taken from Langbein's conceptualisation that this group of mandatory rules is unified by an 'intent-implementing' character because, in many cases, the settlor's intention will be quite clear; the problem is that that intention is not legally compliant.[69] The imputation of a *dominant* intent is somewhat contrived and will be avoided by simply calling a spade a spade: trust terms must comply with certain mandatory rules that will overbear any conflictual or contrary intention.

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[65] This upholds the the foundation idea that 'a private trust, its terms, and its administration must be for the benefit of its beneficiaries', see *Uniform Trust Code*, *supra* note 31, s 404; American Law Institute, *Restatement (Third) of the Law of Trusts*, Preliminary Draft No 3 (Philadelphia: American Law Institute, 2003), s 27.

[66] In relation to (default) powers of investment: *Uniform Trust Code*, *supra* note 31, ss 105(a)-(b), 815, 816; *Uniform Prudent Investor Act* (1994), ss 2, 4, 10; John H Langbein, "The Uniform Prudent Investor Act and the Future of Trust Investing" (1996) 81 Iowa L Rev 641 at 663-65; Langbein, "Mandatory Rules", *supra* note 29 (arguing for heightened restriction on settlor autonomy to ensure trust funds are invested prudently and in accordance with modern portfolio theory– especially, in terms of diversification of investments - to ensure that trusts are administered for the benefit of beneficiaries and to ensure the 'dead hand of the settlor' does not reach unduly into trust affairs after the creation of the trust at 1112-15); although this is suggestive of a mandatory rule of public policy, which in Langbein's terms is the 'benefit-the-beneficiary' rule, the working through of that theory in practice would be fraught with confusion and would lead to acrimonious and litigious trust relationships, as legitimate minds often differ on sound investment practices.

[67] Langbein, "Mandatory Rules", *supra* note 29 at 1107-17. See also Gregory S Alexander, "The Dead Hand and the Law of Trusts in the Nineteenth Century" (1985) 37 Stan L Rev 1189 [Alexander, "Dead Hand"] at 1261-62.

[68] Langbein, "Mandatory Rules", *supra* note 29 at 1119-26.

[69] *Ibid* ("[e]ven when these rules interfere with an expressed intention of the settlor, they do so for the purpose of implementing the settlor's dominant intent" at 1119); *Matter of Pulitzer*, 249 NYS 87 (1931) at 94 (although the case raised a slightly different issue where the beneficiaries under the trust sought and received judicial approval to sell the trust property, being the controlling interest in New York World newspaper in spite of the settlor's clear prohibition on sale, the position is developed by analogy), cited, discussed and quoted in *ibid* at 1118 (the mandatory rules grouped as having a prevailing intent-implementing character, as distinct from an intent-defeating purpose, operate "[e]ven where these rules interfere with an expressed intention of the settlor, they do so for the purpose of implementing the settlor's dominant intent" at 1120).

Despite the commonality between the mandatory rules regime and the irreducible core of the trust, no comparative study has been undertaken to draw out the relevance of both juristic projects.[70] This thesis intends to bridge that gap by highlighting and commenting upon the relevant mandatory rules as and when they arise in the present discussion. In doing so, we find that both juridical streams align remarkably well with one another, tending to show the broad cohesion of trust law across the common law tradition (United States and Commonwealth jurisdictions) and lending support for the intrinsic rationality of the irreducible core approach to trusts in other common law jurisdictions.

1.1.3. A relational theory of trusts

This thesis advances and applies a relational theory of trusts to reveal the full complement of relational legal conceptions that comprise the irreducible core of the trust. The development of any theory of trusts could perhaps begin with a truism: trusts cannot exist without property;[71] therefore, trusts are about property.[72] But proprietary theories alone are not sufficient to describe the complex nature of legal relations that comprise the irreducible core of the trust, the personal nature of obligations that necessarily arise in trusts nor the imposition of personal liability on thirds parties who knowingly participate in breaches of trust. And, on the other hand, obligational theories often fail to explain the proprietary consequences of trusts, such as the privileged manner in which trust property is treated in insolvency. The relational theory attempts a joinder of those approaches, but a brief overview of both the proprietary and obligations theories will be given below.

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[70] Although Professor Langbein has commented on the mandatory rules regime in the United States, no comparative study has yet been undertaken to show how that regime compares to, or correlates with, trust law elsewhere; John H Langbein, "The Uniform Trust Code: Codification of the Law of Trusts in the United States" (2001) 15 Trust L Int'l 69; Langbein, "Mandatory Rules", *supra* note 29. The commonality between the two projects is evident from the leading American trust commentary: Austin Wakeman Scott, William Franklin Fratcher & Mark L Ascher, *Scott and Ascher on Trusts*, 4th ed (New York: Aspen Publishers, 2006) [*Scott & Ascher on Trusts*], vol 3 ([t]hus, today, trustees often have duties not because the terms of the trust so provide, but simply because there is a trust relationship" at 1023).

[71] See e.g. *Westdeutsche Landesbank Girozentrale v Islington LBC*, [1996] 2 All ER 961 [*Westdeutsche*] ("[i]n order to establish a trust there must be identifiable trust property" at 988 per Lord Browne-Wilkinson); *Re Goldcorp Exchange Ltd*, [1995] AC 74 (PC); *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*, [1998] NSWSC 783 [*ISPT*]("[i]t is of the essence of a trust that property is vested in the trustee" per Mason P); Rickett, "Classification of Trusts", *supra* note 20 ("[t]he trust has two facets. First, the trustee owes obligations to the beneficiaries. The trust is an I-THOU relationship. The trust is an *in personam* doctrine. But, the obligations are referable, of course, to things which have value, to 'property', or an IT, as defined by the general law. Thus, secondly, the I-THOU relationship is mediated through an IT. There cannot be a trust without an IT to which both the trustee and the beneficiary relate in some way" at 309).

[72] See e.g. *ISPT*, *supra* note 71 ("[i]t is of the essence of a trust that property is vested in the trustee" at per Mason P); Ming Wai Lau, *The Economic Structure of Trusts: Towards a Property-Based Approach* (Oxford: Oxford University Press, 2011) ("[n]o matter how default or how anti-agency-costs trust rules are or how much asset-partitioning features trusts have, one cannot escape from the fact that trusts are about property and ownership" at 181); *c.f.* CC Langdell, "A Brief Survey of Equity Jurisdiction" (1887) 1 Harv L Rev 111 at 112-14 (on the distinction between actions in personam and in rem in the equity jurisdiction); *Waters' Law of Trusts*, *supra* note 4 at 9.

On the property-side, the dominant theory of 'property' is that property consists of a 'bundle of rights', which is a metaphysical notion of property by which rights hover over the property itself and essentially consist of a composite of entitlements for the right-holder that have the protection of law.[73] It would, however, be wrong to suggest that the bundle of rights theory strictly adheres to Hohfeld's analytical jurisprudence. The Hohfeldian theory emphasised that correlative *duties* exist *ipso facto* in the presence of *rights*; *rights* and *duties* being two sides of the same coin, as it were.[74] For this reason, the 'bundle of rights' theory could just as well have been called the 'bundle of duties' or, even better, 'bundle of legal relations'.[75] That the idea of property in law extends beyond *rights* is evident from Professor Honoré's exposition on ownership, which gave a fuller account of the eleven necessary incidents that collectively form the 'liberal conception of ownership' in modernity and included, for example, a *duty* to prevent harm, *liability* to execution and *immunity* from expropriation.[76]

On the trust-side, the predominant theories that are often pitted against one another are obligational and proprietary, but there is a heightened emphasis on *duties* or *obligations*.[77] This also pervades the

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[73] See JE Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA L Rev 711 [Penner, "Bundle of Rights"] at 712; Denise R Johnson, "Reflections on the Bundle of Rights" (2007) 32 Vt L Rev 247 at 247; this moves beyond a physicalist notion of property that predominated the 18th and 19th century jurisprudence, e.g. Sir William Blackstone, *Commentaries on the Laws of England*, ed by Wayne Morrison, vol 2 (London, UK: Cavendish Publishing, 2001)(proclaiming the 'right of property' as that "sole and despotic dominium" at 3).

[74] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 36-41. See also John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law*, ed by Robert Campbell (London, UK: John Murray, 1879) [Austin, *Lectures on Jurisprudence*] vol 1 ("[d]uty is the basis of Right. That is to say, parties who *have* rights, or parties who are invested with rights, have rights to acts or forbearances enjoined by the sovereign upon *other* parties. Or (in other words) parties invested with rights *are* invested with rights, because other parties are bound by the command of the sovereign, to do or perform acts, or to forbear or abstain from acts" at 407); Penner, "Bundle of Rights", *supra* note 73 at 711-14; *c.f.* Johnson, *supra* note 73 at 251-52.

[75] See Penner, "Bundle of Rights", *supra* note 73 ("[p]roperly understood then, 'property is a bundle of rights' expresses the thesis that property constitutes a legal complex of various normative relations, not simply rights at 713); Johnson, *supra* note 73 ("[t]he bundle of rights metaphor was intended to signify that property is a set of legal relationships among people and is not merely ownership of 'things' or the relationships between owners and things" at 249). Although, if Professor Penner's and Associate Justice Johnson's comments are correct, the intention to signify 'property' as comprising legal *relations* is hardly achieved by a fixation on *rights* alone.

[76] AM Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107, reprinted in AM Honoré, ed, *Making Law Bind* (Oxford: Clarendon Press, 1987) 163 [cited to *Making Law Bind*]. Not all of Honoré's incidents are legal conceptions in the Holfeldian sense (i.e. transmissibility, absence of term and residuraity at 171-79) nor do they adhere to the Hohfeldian formulation of jural correlatives and opposites (e.g. Honoré considered that "[l]egally, [the right to security] is in effect, an immunity from expropriation" and, further, that "a general right of security, availing against others, is consistent with the existence of a power in the state to expropriate or divest" at 171), which is perhaps unsurprising given that Honoré makes no reference in that writing to Hohfeld's analytical jurisprudence whatsoever.

[77] See JE Penner, "Exemptions" in Peter Birks & Arianna Pretto, eds, *Breach of Trust* (Oxford: Hart Publishing, 2002) 241 [Penner, "Exemptions"]("the concept of the trust as presently found in the law (and perhaps more importantly, in our general understanding of it as trust lawyers) is unstable, oscillating between an obligational and proprietary perspective" at

academic literature on the irreducible core of the trust, where we find a heavy emphasis on *duties* and *obligations*–even the irreducible core approach to trusts is commonly regarded as an obligational theory of property.[78] This could be explained by the deep, obligational roots in trust theory and also because the idea of the irreducible core of the trust has come by way of considerations on the permissible breadth of trustee exclusion clauses (i.e. duty-sided).[79] But to speak of either a rights-centric or obligation-orientated theory of trusts in isolation seems to exclude one crucial side of the story, which should be seen to necessarily inform the other theory.[80]

A relational theory in law views the law as primarily being concerned with the regulation of intersubjective relationships that exist between juristic persons.[81] The manner in which those

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267; although not advocated by Penner, he concludes by suggesting that the obligation theory seems to be gaining the upper hand, "I do think the proprietary understanding of the trust, if it is to go the way of the dinosaurs, ought to be given a decent burial" at 267). Other theories have also been mooted, see e.g. Lau, *supra* note 72 (economic theory of trusts); Robert Sitkoff, "An Agency Costs Theory of Trust Law" (2004) 89 Cornell L Rev 621 (agency theory of trusts); JH Langbein, "The Contractarian Basis of the Law of Trusts" (1995) Yale L J 625 [Langbein, "Contractarian"] (contractarian theory of trusts).

[78] See Terence Tan Zhong Wei, "The Irreducible Core Content of Modern Trust Law" (2009) 15:6 Trusts & Trustees 477 ("[t]hese minimum requirements are in accordance with the obligational theory of trusts, which requires that there exists an 'irreducible core content' in order for each trust to be valid" at 493); Penner, "Exemptions", *supra* note 77 ("the reasoning in *Armitage v Nurse* flows from a way of understanding trusts in which the 'obligational' aspect of the trust is emphasised over its 'proprietary' aspect" at 241); see also Alexander Trukhtanov, "The Irreducible Core of Trust Obligations" (2007) Law Q Rev 342; Fox, "Non-Excludable Duties", *supra* note 35; Hayton, "Irreducible Core", *supra* note 35; it appears that the terms *duties* and *obligations* have been used interchangeably in the irreducible core literature and those terms will continue to be used synonymously in this thesis; see also Penner, "Exemptions", *supra* note 77 ("the reasoning in Armitage v Nurse flows from a way of understanding trusts in which the 'obligational' aspect of the trust is emphasised over its 'proprietary' aspect" at 241).

[79] Although, if a settlor excludes a default duty that would otherwise be owed by the trustee, then, the trustee must, by necessary implication, also exclude each of the beneficiaries' rights that flow from that duty being owed to each of them individually. See *Armitage v Nurse*, *supra* note 3 at 253; *Leerac v Fay*, *supra* note 3; *Wilden v Green*, *supra* note 3; *Scaffidi v Montevento*, *supra* note 3 at para 149 per Murphy JA & Hall J.

[80] See Jessica Palmer, "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" [2010] NZL Rev 541 [Palmer, "Theories of the Trust"] ("[t]he inability of either the property view or the obligation view of trusts to account comprehensively for trustee duties could indicate that the two conceptions are inadequate or that the commonly proclaimed list of duties is wrong" at 552); Ben McFarlane, "Equity, Obligations and Third Parties" [2008] Sing JLS 308 [McFarlane, "Third Parties"] ("clearly, there is no general divide between obligations and property" at 310); Sarah Worthington, "The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" in Simone Degeling & James Edelman, *Equity in Commercial Law* (Sydney: Lawbook Co, 2005) 93. See also Paul Matthews, "The New Trust: Obligations without Rights?" in Oakley, *Trends in Trust Law*, *supra* note 35, 1 [Matthews, "The New Trust"] at 1 [footnotes omitted]; Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("[a] right in rem is not a right 'against a thing'" and "[t]o say that all rights, or claims, must avail against persons is, of course, simply another way of asserting that all *duties* must rest upon persons" at 74, 76, n 30); *c.f.* Penner, "Bundle of Rights", *supra* note 73, at 799-818; see also *Re Astor*, *supra* note 34 at 541 per Roxburgh J; *Westdeutsche*, *supra* note 71 at 988 per Lord Browne-Wilkinson.

[81] See Austin, *Lectures on Jurisprudence*, *supra* note 74, vol 1, 367-74, vol, 2 at 761-62; Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 74, 76, n 30; Albert Kocourek, *An Introduction to the Science of Law* (Boston: Little, Brown, and Company: 1930) at 215-22 (after observing the immense difficulty with proposing definition of law, Professor Kocourek goes on to provide that "[t]he proximate genus of law is a means or method for the control of human conduct" at

relationships are governed by the State is a matter of parliamentary sovereignty deriving its legitimacy from the citizenry.[82] But the importance of the relational theory is in understanding the use and purpose of law by being cognizant of the intended impact that the law has on *persons* and the sphere in which those persons may legitimately interact with one another *without* the threat of State coercion or sanction.[83] This highlights the importance of considering the bounds of lawful subjective expression *within* the confines of the law, which has a special importance in this thesis because we are concerned here with the lawful bounds within which legal arrangements called 'trusts' can be created, which not only affects persons who are beneficially entitled under that arrangement, but also third parties. Furthermore, the irreducible core of the trust is concerned with those legal relations that are essential to creating an arrangement that falls within the private law category of 'trust' and, therefore, reflect mandatory rules that overbear subjective expression.

In order to consider the law through a relational lens, one must employ a complex web of fundamental legal conceptions that magnify the content and scope of the specific, intersubjective relationships that are recognised at, and have the force of, law. The fundamental legal conceptions that will be adopted and used in the relational theory proposed in this thesis were articulated by Wesley Newcomb Hohfeld in two journal articles published almost a century ago.[84] Hohfeld's classification of those legal relations also furthers the relational theory of trusts, particularly in terms of the externality of the trust (i.e. third party effects and relations), and will be considered (in Part 2.3) and later applied (in Part 3.2).[85] Given the perceived importance of Hohfeld's legal conceptions and classifications to the present task, an

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216); Salmond, *supra* note 18 ("the term jurisprudence means the science of law, using the word law in that vague and general sense, in which it includes all species of obligatory rules of human action" at A).

[82] See generally Jürgen Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975). *C.f.* HLA Hart, *The Concept of Law*, ed by Penelope A Bulloch and Joseph Raz (Oxford: Oxford University Press, 2007) [Hart, *Concept of Law*] 18-25 (on law, commands and orders and, particularly on 'law as coercive orders' at 20-25).

[83] See Roscoe Pound, *The Ideal Element in Law* (Calcutta, India: Calcutta University Press, 1958) at 1-24 (defining 'legal order' as "the regime of adjusting relations and ordering conduct by systematic application of the force of a politically organized society. This regime is the most highly developed form of social control in the modern world. It is a specialized form of social control, carried on with a body of authoritative precepts, applied in a judicial and administrative process" at 1). *C.f.* Hart, *Concept of Law*, *supra* note 82 at ("[w]e must therefore suppose that there is a general belief on the part of those to whom the general orders apply that disobedience is likely to be followed by the execution of the threat not only o the first promulgation of the order, but continuously until the order is withdrawn or cancelled. This continuing belief in the consequences of disobedience may be said to keep the original orders alive or 'standing'" at 25, Professor Hart does go to extend this 'persistent quality of law from these simply terms by exposing the 'internal aspect of rules' by which people either feel impelled or compelled to act in a particular way at 51-61).

[84] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions As Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 & "Fundamental Legal Conceptions As Applied in Judicial Reasoning" (1917) 26 Yale LJ 710, both reprinted in Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 23 & 65.

[85] See Wesley Newcomb Hohfeld, "Relations Between Equity and Law" (1913) 11:8 Michigan L Rev 537 [Hohfeld, "Relations"]; Wesley Newcomb Hohfeld, "Supplemental Note on the Conflict of Equity and Law" (1917) 26 Yale LJ 767 [Hohfeld, "Conflict of Equity and Law"]; Hohfeld, *Fundamental Legal Conceptions*, supra note 10 at 67, 71-73.

overview of the Hofeldian schema of jural relations will be provided in Part 2, which will take account of some of the subsequent jurisprudential developments and criticisms since that schema was first published.

It should be evident at this point that the relational theory proposed here is by no means confined to 'trust law', but makes a much broader normative claim regarding the concept of law itself[86]–the relational theory (of law) is simply being applied to that aspect of the law known as 'trusts' for the purposes of this thesis.[87] The underlying public policy imperatives behind certain laws differ widely and, indeed, the irreducible core of the trust has its own public policy initiatives of ensuring that trustees are accountable and trusts are a enforceable legal institution, which fits within the broader goals and philosophy of the private law.[88] To allow any of the indispensable legal relations identified in Part 3 of this thesis to be dispensable would significantly weaken the functionality and social utility of those legal arrangements that we have come to call, and rely upon as, 'trusts'.[89] It is only within a fully-formed relational theory of trusts that one can expose those essential legal relations. And, in this sense, the relational theory has the constructive capacity to reunite the rights-based and obligation-inclined trust theories and assists the exposition of the irreducible core of the trust by looking at the entire complement of legal relations that *must* exist in trusts. For example, under the relational theory of law as it is applicable to trusts, the necessary imposition of a *duty* on a trustee requires that person to act or

[86] See Hart, *Concept of Law*, *supra* note 82 at 1-6.
[87] Although the idea of an explicit 'relational theory of trusts' is new and developed only in thesis, it is implicitly endorsed elsewhere, see e.g. Matthews, "The New Trust", *supra* note 80 ("[i]n the beginning, there were people. Trusts trusts did not come into existence because animals, or trees in California, complained to the Chancellor that property given to trustees for their benefit was being misapplied. They were called into existence because *people* complained, because *people* present petitions, because *people* pleaded for justice before the Chancellor as the keeper of the King's conscience. Animals and trees could not do that. Nor can they still, at any rate not in English law" at 1); Parkinson, "Reconceptualizing", *supra* note 47 ("an obligations-based approach helps more clearly to answer the question of what is the irreducible core content of the trust idea. There must be enforceable obligations" at 679 and "[c]onceiving the trust in terms of obligation would not be to deny the proprietary significance of many trust obligations. It would nonetheless, offer a more coherent explanation of the law as it has developed" at 682); Arthur L Corbin, "Legal Analysis and Terminology" (1919) 29:2 Yale LJ 163 (we must "[o]bserve that a right *in rem* is not a right in a thing or a right against a thing. Legal relations are relations between persons" at 171).
[88] In addition to the collected works of Professor Birks and the seminal work of Professor Weinrib, *Idea of Private Law*, *supra* note 6, which assisted earlier in situating the irreducible core approach to trusts as another example of juridical classification in the common law tradition (see section 1.1 above), I have had the benefit of two compelling works (the first being a collection of essays) on the goals and philosophy of private law, see: Andrew Robertson & Hang Wu Tang, eds, *The Goals of Private Law* (Oxford: Hart Publishing, 2009); William Lucy, *Philosophy of Private Law* (Oxford: Oxford University Press, 2007)–some of which will be referred to throughout this thesis. An excellent analysis of the trust as unique and fundamental legal institution is provided by Professor Hayton, see David Hayton, "Unique Rules for the Unique Institution, the Trust" in Degeling & Edelman, *supra* note 80, 279.
[89] See Weinrib, *Idea of Private Law*, *supra* note 6 ("like all law, private law is normative only to the extent that it serves socially desirable purposes; and one understands private law by first identifying these purposes and then evaluating its success in serving" at 2).

not act in a certain way that affords the beneficiary, as the correlative *right*-holder, a certain entitlement that is protected by a claim actionable in a court of law.[90]

After the analytical framework that underlies the relational theory of law (and, in this thesis, trusts) is developed in Part 2, this thesis will move on to apply those legal conceptions to identify the core legal relations of trusts in Part 3. The interaction of the relational theory of law and the irreducible core approach to trusts is crucial because it assists in not only exposing the core legal relations, but also furthers the underlying imperatives of upholding *accountability* and *enforceability* of trusts as a matter of law (being concerned with the imposition of meaningful legal relations on, and as between, *persons*).[91] However, nothing in the irreducible core approach to trusts demands that beneficiaries need to be the right-holders that enforce trusts in every jurisdiction.[92] Being driven by accountability and enforceability, the irreducible core approach to trusts is not merely concerned with the superficial existence of any class of persons, but embodies a deeper, normative claim regarding the imposition of essential legal relations to ensure that trustees are accountable and that trusts are enforceable as a matter of law, and thereby fit within the framework of the private law.[93] Notwithstanding that though, in express private trusts in the common law tradition, the beneficiaries are regarded as the primary rank of right-holders to whom trustees are accountable and those persons are alone charged with ensuring that trusts are performed, if necessary through the enforcement of the correlative rights those persons

[90] See Harris, "Trust, Power and Duty", *supra* note 14 ("[t]he relational concept of duty is in view whenever what the trustee has to do is spoken of as corresponding with what a particular beneficiary can affirmatively claim that he must do" at 50); Weinrib, "Juridical Classification", *supra* note 8 ("[i]n private law, an obligation exacts respect for the right that is correlative to it" at 54); see section 2.2.1 below on 'rights and duties'.

[91] See *Armitage v Nurse*, *supra* note 3 ("there is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of the trust. If the beneficiaries have no rights enforceable against the trustees there are trusts" at 253 per Millett LJ); David Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 Law Q Rev 96, reprinted in David Hayton, ed, *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (The Hague: Kluwer Law International, 2002) [Hayton, *Extending the Boundaries*] 189 [Hayton, "Developing the Obligation" cited to Law Q Rev] ("[a]ccountability of the trustees to the beneficiaries is at the very core of the trust... so that *de facto* exclusion of such accountability or *de iure* by a clause in the trust deed ousts any trust for the so-called beneficiaries" at 105).

[92] See Hayton, "Developing the Obligation", *supra* note 91 ([t]he underlying principle... is that for there to be a trust obligation there needs to be some person intended by the settlor to have *locus standi* to enforce the trustee's duties" at 98); Jonathan Hilliard, "On the Irreducible Core Content of Trusteeship–a reply to Professors Matthews and Parkinson" (2003) 17:3 Trust L Int'l 144 ("what is fundamental to the trust is that the trustees' duties will be enforced by *someone*. All that is necessary is that there is someone who will hold the trustees to their duties. It should not matter whether that person has an interest in the trust fund or not; so long as they will enforce the trust, that is enough" at 146); Harris, "Trust, Power and Duty", *supra* note 14 at 54-56 (noting the "preponderance of authorities to the effect that a valid trust needs someone with locus standi to apply to the court in the event of maladministration" at 55).

[93] See Fox, "Non-Excludable Duties", *supra* note 35 ("the trustee's exclusion from the benefit of the assets belonging to him is a better indicator of trusteeship than the existence of beneficiaries who assert beneficial claims against him" at 19).

hold.[94] Whilst some offshore jurisdictions have substituted that primary rank of right-holders (i.e. beneficiaries) with new office-holders,[95] such a transition would represent a significant normative shift for the onshore jurisdictions.[96] That shift would also challenge whether the trustees of such trusts are *effectively* accountable because the correlative right-holders in those trusts do not necessarily stand to benefit under those trusts–the role of specially designated enforcers, for example, is to enforce a legal arrangement with an abstract purpose not affecting those persons beneficially or individually. This may be thought to reduce the incentives for enforcing a particular trust according to its purposes and terms and, thus, the *effective* accountability of those trustees.[97]

1.2 What is the importance of the irreducible core approach to trusts?

The history of the trust helps explain why the trust has developed into an incredibly useful, but immensely complex, legal institution that seems impervious to precise definition.[98] The resounding impression given by the evolution of the trust is that it has proved to be an incredibly adaptable and resilient legal institution.[99] Perhaps the secret to the success of the trust is its inherent flexibility and constructive capacity to fill gaps in the private law.[100] Indeed, the trust grew out of an era that Professor Maitland described as "an exceedingly curious episode" in which "[t]he whole nation seems to enter into one large conspiracy to evade its own laws, to evade laws which it has not the courage to

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[94] See *Morice v Bishop of Durham*, *supra* note 34 at 405.
[95] See section 1.2.1.3 below.
[96] See Paul Matthews, "From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust" in Hayton, *Extending the Boundaries*, *supra* note 91 at 224-26 ("separating out the person who may bring the action to enforce the trust from the person directly benefiting effects a radical change in the nature of the legal institution involved. Instead of the right-holder claiming loss through non-performance, he seeks instead to enforce a promise" at 226); Parkinson, "Reconceptualizing", *supra* note 47 ("it is not possible to have a trust without enforceable obligations owed to those who are intended to gain the benefit (in the widest sense) of the property held on trust" at 679); Harris, "Trust, Power and Duty", *supra* note 14 at 53-56.
[97] See *infra* note 180 and accompanying text.
[98] See John H Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce" (1997) 107 Yale LJ 165.
[99] See FW Maitland, *State, Trust and Corporation*, by David Runciman and Magnus Ryan (Cambridge: Cambridge University Press, 2003)(the trust is the "greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence" at 52); Maitland, *Equity* ("[o]f all the exploits of Equity the largest and most important is the invention and development of the Trust... [i]t seems to us almost essential to civilization, and yet there is nothing quite like it in foreign law" at 23); FW Maitland, "The Origin of Uses" (1894) 8 Harv L Rev 127; Scott, "Instrument of Law Reform", *supra* note 1 ("the extreme adaptability of the trust is shown in the employment of it in business transactions" at 468).
[100] See Lionel Smith, "Trust and Patrimony" (2009) 28 Estates, Trusts and Pensions Journal 332 [L Smith, "Trust and Patrimony"] ("the trust has arisen, not once but many times and in many forms, exactly because people wished to accomplish lawful and licit goals that they could not accomplish through the use of contracts or legal persons" at 32 to 33); Donovan WM Waters, "The Institution of the Trust in Civil and Common Law" (1995) 252 Rec des Cours 113 [Waters, "Institution"] ("[t]he magic of the trust, and the 'mystery' of its operation, are part of its strength" at 425).

reform."[101] Trusts facilitated that reform by being allowed to be an anomalous projection of subjective expression and, thus, responsive to particular demands, suffering only the slightest incursions from the State from time-to-time and finding refuge in the Chancery courts.[102] In modernity, however, the permissible scope to which trusts can legitimately be subjectively manipulated is being scrutinised very closely and trusts that go too far encroach upon the public policy divide risk being declared unlawful and are also vulnerable to the wrath of the State in one form or another.[103]

The very design, prolific pedigree and diverse manifestations in which the trust has been used, all make the trust an incredibly difficult concept to capture by way of statutory formulation.[104] To read any definition of 'trust' is almost like approaching the outermost layer of a babushka doll, in which the concepts comprising the definition must in turn be opened, examined and unpacked again... and again.[105] The inherent ambiguity in that process is amplified by the uncertainty embedded in the

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[101] Frederic W Maitland, "Growth of Statute and Common Law and Rise of the Court of Chancery" in Frederic W Maitland and Francis C Montague, *A Sketch of English Legal History*, ed by James F Colby (1915: New York, GP Putnam's Sons) 103 at 123 (Maitland does, however, go on to say that there really was no conspiracy but that "men are but living from hand to mouth, arguing from one case to the next case" at 123). See also Pierre Lepaulle, "An Outsider's View Point of the Nature of Trusts" (1928) 14 Cornell LQ 52 [Lepaulle, "An Outsider's View"]("[i]f [the civilian jurist] tries to grasp [the trust concept in the common law], he will confront the same disappointing experience as that of the young Prince who runs after a Fairy: when he is on the point of reaching her, she has taken another form, ceases to be a beautiful lady, but has become a white bird, or an old witch!" at 52).

[102] See Scott, "Instrument of Law Reform" *supra* note 1 at 458-68.

[103] An excellent example of which is provided in the Canadian experience of the 'income trust', which recently suffered a significant correction by the State, see Jim Frank, "The Last Canadian Income Trusts: Reasons Not to Convert", *Investing Daily* (13 January 2011) online: Investing Daily <http://www.investingdaily.com>; David Parkinson, "A short history of income trusts", *The Globe and Mail* (29 October 2010) online: The Globe and Mail < http://www.theglobeandmail.com>; Steven Chase, "Income Trust Party is Over", *The Globe and Mail* (31 October 2006) online: The Globe and Mail < http://www.theglobeandmail.com>. For an overview of the structure, types and uses of income trusts, see Mark Gillen, "A Comparison of Business Income Trust Governance and Corporate Governance: Is There a Need for Legislation or Further Regulation" (2006) 51 McGill LJ 327 at 330-36; *Oosterhoff on Trusts*, *supra* note 4 at 32-33; *Waters' Law of Trusts*, *supra* note 4 at 553-60.

[104] See e.g. *European Trust Law*, *supra* note 42 ("[t]he word [trust] is versatile and chameleon-like, taking its meaning from its context, which has to be closely examined to reveal the full ramifications of the concept" at 29); Waters, "Institution", *supra* note 100 ("[t]he very reason it has not been codified in any common law jurisdiction, other than in British India and Ceylon... is the fact... that to define it is difficult; most trust lawyers see no success in such an attempt, and are sceptical as to the value of any such product in an inductive legal system" at 425); DJ Hayton, "Trusts", in DJ Hayton et al, eds, *Vertrouwd met de Trust: Trust and Trust-like arrangements* (Deventer, The Netherlands: WEJ Tjeenk Willink, 1996) 1 ("like an elephant a trust is easy to recognize, but difficult to describe" at 3).

[105] See e.g. the use of the phrase 'equitable proprietary right' to explain a beneficial interest under a trust; see also *Livingston v Commissioner of Stamp Duties (Qld)*, [1960] HCA 94, 107 CLR 411 (HCA) [*Livingston* (HCA)]("[w]e may call it a proprietary interest, if we wish, or equity may call it 'property'... but whether it should have this dignity conferred upon it seems to me to be little more than a matter of 'words and names', capable of leading to the kind of strife which moved Gallio to say that he 'cared for none of these things'" at para 16 per Fullagar J), citing *Smith v Layh*, [1953] HCA 16, 90 CLR 102 at 108-109); Arthur L Corbin, Foreward, Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 vii ("[i]n one great dictionary, the word 'right' is given 20 different definitions; and the great Oxford Dictionary, defining words on 'historical principles,' fill 14 long columns of fine print to elucidate the meanings of the word 'mean'" at vii-viii). See also Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 113-14; Ben McFarlane & Robert Stevens, "The Nature of

constituent concepts, such that the resultant confusion becomes exponentially worse at each layer of analysis and comprehension. Rather uniquely for the common law, the prominent commentaries frequently explain what the trust *is* through an overview of what it *is not*; trusts are commonly pitted against agency, bailment, conditions, contracts for the benefit of third parties, debt, equitable charges, liens, personal obligations, and powers of various kinds.[106] That approach is deeply ingrained in the common law tradition, even featuring in Sir Francis Bacon's reading of the *Statute of Uses*.[107] The sheer plurality of opinion on how to define the trust should be a real concern for trust lawyers and certainly the shackles of the past should not hinder the rational progression of the law in the future.[108] The definition of 'trust' put forward in this thesis is as follows:[109] Trust *is a composite of legal relations that exist by intention or operation of law when certain property is held and managed by a person (or a group of persons together) for the benefit of another person (or persons) or for the fulfillment of a lawful purpose*.

While this definition begs the obvious question of what legal relations 'exist by intention or operation of law', it serves to narrow the focus on the important dichotomy of default and mandatory rules of

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Equitable Property" (2010) 4 Journal of Equity 1 [McFarlane & Stevens, "Equitable Property"]; Nolan, "Equitable Property", *supra* note 17.

[106] In Australia: Dal Pont, Chalmers & Maxton, *supra* note 28 at 444-66; *Jacobs' Law of Trusts*, *supra* note 28 at 6-41; WA Lee et al, *The Law of Trusts*, 4th ed (Sydney: Thomson Lawbook, 2010) at paras 1.1510-1.7810; Denis Ong, *Trust Law in Australia*, 3rd ed (Sydney: The Federation Press, 2007) at para 4-70. In Canada: *Oosterhoff on Trusts*, *supra* note 4 at para 71-141; *Waters' Law of Trusts*, *supra* note 4 at para 52-108. In England & Wales: *Lewin on Trusts*, *supra* note 28 at 12-15. In New Zealand: Butler et al, *supra* note 28 at 50-57. In South Africa: Edwin Cameron et al, *Honoré's South African Law of Trusts*, 5th ed (Lansdowne, South Africa: Juta Law, 2002) at para 32-115.

[107] See William Henry Rowe Esq, ed, *The Reading Upon the Statute of Uses of Francis Bacon* (London, UK: W Stratford, 1806)("[the] nature of an use is best discerned (a) by consdiering what it is not and then what it is; for it is the nature of all human science and knowledge to proceed most safely, by negatives and exclusives, to what is affirmative and inclusive" at 5).

[108] See Birks, *Introduction to Restitution*, *supra* note 21 ("[i]t ought to be possible to take any legal subject and to cut away its detail so as to reveal its skeleton of principle which holds it together. If there is a subject for which that task seems impossible, the probability is that it is so disorganised that it should properly be described as unintelligible" at 1); PA Keane, "The Conscience of Equity" (2009 WA Lee Lecture in Equity, delivered at the Banco Court, Supreme Court of Queensland, 2 November 2009), (2010) 10 Queensland University of Technology Law & Justice Journal 106 (commenting that in the rational development of equitable principles "the part should not control the future" at 108); OW Holmes, "Learning and Science" in *Collected Legal Papers* (New York: Harcourt Brace, 1920) 138 at 139.

[109] See especially *Scott & Ascher on Trusts*, *supra* note 70, vol 1 (emphasising the 'trust as a relationship', arguing that definitions of the trust either as a kind of duty, obligation or right is too narrow, and commenting that "the whole of the juridical device" must be included in any adequate definition of trust, "including not merely the duties of the trustee, to the beneficiaries and others, but also the rights, privileges, powers, and immunities of the beneficiary, against the trustee and others" at 37); Hohfeld, "Conflict of Equity and Law", *supra* note 85 at 767-68. Compare *Underhill & Hayton* (17th ed), *supra* note 30 ("[a] trust is an equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation" at 2). See also *Lewin on Trusts*, *supra* note 28 at 3-15 (for a useful assembly and discussion of some prominent definitions of 'trust', emphasising the trust as being 'a proprietary relationship', and that "[a] trust is not a mere obligation" at 7).

trust law–that is, by combining what *must* exist (mandatory or irreducible core legal relations) and what *may* exist (either by subjective expression or, in the absence of contrary intention, default law). This also adheres to the relational theory of trusts set out in the preceding section by emphasising the essential relational quality of trusts. The irreducible core of the trust contributes, *ex hypothesi*, to exposing the composite of legal relations comprising trusts by providing a standard 'package of terms' that is built from mandatory rules of the general law applicable to trusts.[110] By binding those essential legal relations together, the anatomy of the trust begins to take shape and that skeleton of principle can be further fleshed out through the applicable default laws, as well as (lawful) subjective expression.

1.2.1. Offshore and commercial challenges

The trend toward establishing offshore trusts with broad dispositive powers has been set in train for quite some time. In England, for example, this trend was spurred on in the 20th century by the introduction of higher rates of personal taxation in the 1930s, the introduction of estate duty after the Second World War, and the introduction of Capital Gains Tax in 1965.[111] This progressed into the accumulation of financial assets in the hands of offshore trustees in arrangements plagued with extraordinary opacity and featuring various kinds of dispositive powers.[112] Given the tax incentives that often drive the creation of novel trusts,[113] it might be thought that those persons should also be willing to bear the risk of those transactions not being classified as trusts according to private legal ordering.[114]

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[110] Compare Lionel Smith, "Constructive Trusts and Constructive Trustees" (1999) 58:2 Cambridge LJ 294 [L Smith, "Constructive Trusts"] (describing the fact that a beneficiary of a trust cannot sue anyone except his trustee as being "part of the package of legal incidents which is delivered when parties choose to use the trust institution to order their affairs" at 299); Nolan, "Equitable Property", *supra* note 17 ("[a] beneficial interest under a trust is a package of constituent elements, some of which can consistently be viewed as matters of property, others of which can consistently be viewed as matters of obligation"" at 254). *Contra* Penner, "Exemptions", *supra* note 77 ("so long as the legal arrangement of rights and duties voluntarily undertaken by the parties has some kind of workable legal effect, the law should give effect to it; it is not the role of the law to require parties to a legal arrangement to accept a standard 'package' of terms, unless there is some sufficiently weighty countervailing public policy consideration" at 250).

[111] See *Schmidt v Rosewood Trust Ltd*, [2003] UKPC 26, 2 AC 709 (PC) [*Schmidt v Rosewood*] ("[b]y the 1930s high rates of personal taxation led some wealthy individuals to make settlements which enabled funds to be accumulated in the hands of overseas trustees or companies" at 723-24 per Lord Walker; Lord Walker goes on to discuss the development of different dispositive powers to accommodate these apparent needs being evident in a long line of case from *Re Gestetner Settlement*, [1953] Ch 672 [*Re Gestetner*] to *Re Manisty's Settlement*, [1974] Ch 17 [*Re Manisty*] (*Schmidt v Rosewood*, *ibid* at 724).

[112] See *Schmidt v Rosewood*, *supra* note 111 at 723-24 per Lord Walker. See also *McPhail v Doulton*, *supra* note 14 at 457 per Lord Wilberforce; Maclean, *Trusts and Powers*, *supra* note 14 at 13-17.

[113] See *Schmidt v Rosewood*, *supra* note 111 (offshore jurisdictions "are supposed to offer special advantages in terms of confidentiality and protection from fiscal demands (and sometimes from problems under the insolvency laws, or laws restricting freedom of testamentary disposition, in the country of the settlor's domicile" at 715).

[114] *Ibid* ("[o]ne possible reaction would be that [the settlor] and his colleagues have made their bed and they must lie in it; if they have deliberately entered into a web of camouflage, it is hardly for anyone through them to complain that the position is not transparent" at 724 per Lord Walker); *Lord Howard de Walden v Inland Revenue Commissioners*, [1942] 1 KB 389,

An obvious tension for would-be settlors must, therefore, be whether to chase further flexibility and fiscal advantages offshore at the risk of compromising the predictability and protection afforded by the onshore jurisdictions.[115] Indeed, the offshore appeal "may encourage a settlor to entrust substantial funds to an apparently secure and confidential offshore shelter",[116] but some of these novel 'trusts' strain the orthodox, legal meaning of trust.

The most prominent challenges that are thrown up in contemporary trust practice, particularly in the offshore experience, are: a) broadly drafted exclusion clauses (what is the permissible scope of such clauses?); b) broad discretionary powers (what are the essential juristic relationships that must exist for a trust to be cognisable?); and c) the introduction of new persons to the trust paradigm that fulfill various functions (what duties must these persons owe?). All of these challenges test the normative roots of the trust, as well as the private law mandate of fiduciary accountability in trusts, and challenge jurisprudential thinking about the nature and functions of the trust, which is highly relevant in a study on the irreducible core of the trust.[117] Those challenges will be considered below.

1.2.1.1. Exclusions and exemptions

The lawful scope of clauses exempting trustees from liability for breaches of trust, and excluding the underlying duties that trigger that liability altogether, have contributed immensely to the development of the irreducible core approach to trusts.[118] There is a conceptual difference between the exemption of liability flowing from a breach of duty and the exclusion of the underlying duty itself; one must be

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25 Tax Cases 121 [*Lord Howard de Walden*] ("[i]t scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers" at 397 per Lord Greene MR).

[115] See Lionel Smith, "Access to Trust Information: Schmidt v. Rosewood Trust Ltd." (2003) 23:1 Estates, Trusts & Pensions Journal 1 [L Smith, "Trust Information"](Smith observed the dilemma facing would-be settlors of offshore trusts being that "[t]he only way to feel sure that the institution of the trust will deliver what is desired of it – including appropriate remedies against a trustee in breach and the enforceability of the settlor's expressed intentions – may be to choose a jurisdiction with a clear link to the traditional onshore trust." at 8).

[116] See *Schmidt v Rosewood*, *supra* note 111 at 715 (per Lord Walker) - it is perhaps understandable that Lord Walker should be minded o make such a comment in that case: it appeared to him that the relevant (two) trusts received some $US105 million since establishment to 1998 (the date of the alleged settlor's death, who the court accepted was "in substance a co-settlor" at 717). See also *Lord Vestey's Executors v Inland Revenue Commissioners*, [1949] 1 All ER 1108, 31 Tax Cases 1.

[117] See Rose-Maree Antoine, *Trusts and Related Issues in Offshore Financial Law* (Oxford: Oxford University Press, 2005) ("[t]he offshore trust has compelled jurisprudential re-thinking about the nature and functions of the tradition trust. It has invited, and sometimes forced, judges and policy-makers to assess the varied functions and characteristics of trust in modern commercial settings. Admittedly, to some, the offshore trust is a bastard offspring of equity. Whatever the view, it is undeniable that the offshore trust has been responsible for important new directions in trust law and practice" at 7).

[118] Indeed, *Armitage v Nurse*, *supra* note 3 was just such a case (although Clause 15 of the relevant trust deed, which exonerated trustees for "any loss or damage... unless such loss or damage shall be caused by his own actual fraud", was found to be valid, the acceptable ambit of exclusion clauses nevertheless provoked Lord Millett's dictum on "the irreducible core of obligations owed by trustees" at 250, 253-54 per Millett LJ).

cautious to state precisely what cannot be excluded.[119] Professor Penner has made the point that "[a]ny limitations on the liability of the trustees must be policy-based, not conceptual."[120] This thesis does not accept that one could provide a conceptual account of the law entirely divorced from policy; but the force of Penner's point is in the awareness and identification of the normative roots that buttress the making of positivistic claims, especially when one moves beyond the summation and synthesis of the law and into legal reform.[121] To the extent that this thesis encroaches on that divide, it is argued that, as a matter of public policy, trusts comprise an irreducible core of legal relations that cannot be excluded (i.e. duty exclusions) *and* that persons who are said to owe those duties cannot be exempted from liability for failing to discharge the content of those obligations (i.e. liability exemptions).[122] Against the views expressed by Penner,[123] it is further argued that trusts cannot have substance simply because the core duties exist, albeit that no liability will arise from breaching those duties.[124]

To allow trustees to be exempted from liability flowing from a fraudulent breach of trust, as Penner would have it,[125] would make a mockery of the trust as a fundamental legal institution of any social utility and undermine the recurrent themes of *accountability* and *enforceability* that motivate the irreducible core approach. The wholesale exemption of liability for breach of core duties should raise serious concerns from a public policy perspective, as much as the exclusion of the underlying duties themselves.[126] Penner's conceptual distinction, whilst taken, will not be used in this thesis as a platform

[119] see Penner, "Exemptions", *supra* note 77 at 251; Hayton, "Irreducible Core", *supra* note 35 at 57; Butler & Flinn, *supra* note 24 at 478-80.
[120] Penner, "Exemptions", *supra* note 77 at 251. Although, it is perhaps difficult to countenance any idea that would find any traction whatsoever in law were it not to be underpinned, however deeply, by certain policy considerations.
[121] That point is well made in terms of the permissible scope of exclusion clauses, which has been the focus of law reform commissions in recent times; see e.g. Law Reform Commission (Ireland), *Trust Law*, *supra* note 3 at 167-78.
[122] The underlying public policy justifications are, at least, fourfold: *first*, to ensure accountability and enforceability of trusts, *second*, to protect right-holders from loss or damage flowing from the breach of a correlative duty owed to that person; *third*, to compel persons acting in a fiduciary capacity to account for unauthorised and unlawful profits; and, *fourth*, to act as a general deterrent to persons owing non-excludable duties against breaching those duties.
[123] Penner, "Exemptions", *supra* note 77 (see e.g. "so long as those with claims against the trust are truly able to falsify the trust account, the personal liability of the trustee is not essential to give substance to the trust" at 253; elsewhere, Penner claims that "[t]o assume that the legal significance of contracts lies only in what courts may do when things go awry is to miss the forest for the occasional fallen tree" at 251); that may be to an extent, but it is in the predictability of the consequences that are widely understood to arise when trees might fall that ensures the other trees stand straight and tall, in the author's view. See also Butler & Flinn, *supra* note 24 at 478-80.
[124] See Hayton, "Irreducible Core", *supra* note 35 ("an exemption from liability for breach of the duty to act in good faith cannot have effect, because that would empty the area of obligation so as to leave no room for any obligation" at 58).
[125] Penner, "Exemptions", *supra* note 77 ("I would go further then Millett LJ [in *Armitage v Nurse*] and allow the relief of a trustee for personal liability even for fraudulent breaches" at 263).
[126] In a contract law context, compare: *Firestone Tyre & Rubber Co v Vokins & Co Ltd*, [1951] 1 Lloyd's List LR 32 ("[i]t is illusory to say: 'We promise to do a thing, but we are not liable if we do not do it" at 39 per Devlin J). The dictum of Devlin J has been frequently applied since then, including recently by the House of Lords, see *Homburg Houtimport BV v Agrosin*

to advocate for the exculpation of trustees from all forms of liability, nor is it accepted that Penner's logic is ineluctable from a public policy perspective, given the importance of ensuring that trustees are accountable and trusts are enforceable as a matter of law.[127]

Trust drafters will commonly use clauses from established trust precedents, but some colourful examples of duty exclusion still arise in trust practice, especially in the offshore jurisdictions where wide exemption clauses have become the industry standard.[128] In *Garron Family Trust v The Queen*, two trusts were established in Barbados with a view to procuring very large tax advantages from an anticipated sale of company shares.[129] Pursuant to the relevant trust deeds, a protector was empowered to remove and replace the trustees, but with respect to the exercise of those powers the protector: a) was not an agent, fiduciary, nominee or trustee; b) had an absolute and uncontrolled discretion; c) did not owe any duty to act according to the trust deed; and d) was not liable for any loss to the trust property arising out of actions taken (or not) by the trustee.[130] Professor Lionel Smith has exposed the potential absurdity of that situation by "repeating a hypothetical that has almost become a joke in trust circles: assume that the protector took out an advertisement in the local newspaper offering to appoint as trustee the person who offered him the largest amount of money" and posing two pertinent questions "[a]re we confident that anyone could do anything about it? For whose benefit was this protector appointed?"[131]

Although it should be noted that there was an in-built mechanism to protect the beneficiaries in the Garron Family Trust –a majority of the beneficiaries having attained a certain age could replace the protector–there is still a liability lacunar in this trust.[132] Let's assume that a mischievous fellow responds to the newspaper advertisement mooted by Smith and offers the protector $1 million to

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Private Ltd, [2003] UKHL 12, [2004] 1 AC 715 (relying on Devlin J's dictum to state that "an agreement without legal content is not a legally enforceable contract" at 790 per Lord Hobhouse of Woodborough).

[127] *Contra* Penner, "Exemptions", *supra* note 77 ("[i]t seems that by the ineluctable logic of seeking to determine the minimum extent of trustee duties and liability on the basis that we look to the "minimum" necessary to give substance to the trust, there need be no personal liability upon the trustee at all. He may be exempted from any personal liability whatsoever. It seems to me this is right..." at 253).

[128] See James Kessler & Tony Pursall, *Drafting Cayman Islands Trusts* (The Netherlands: Kluwer Law International, 2006)(suggesting that the problem is one of trust draftmanship and the idea that the trust document is the settlor's creation is highly artificial in offshore practice, "[a]n additional factor in the Cayman Islands, as elsewhere in the offshore world, is the dynamics of the industry: the trust company's precedents are drafted by their attorneys, frequently without being reviewed by an attorney acting for the settlor. Wide exemption clauses have consequently become industry standard" at 94).

[129] *Garron Family Trust v The Queen*, [2009] TCC 450 [*Garron*].

[130] *Ibid* at paras 58-60.

[131] L Smith, "Mistaking the Trust", *supra* note 55 at 792-93.

[132] *Garron*, *supra* note 129 at para 59.

procure his appointment as trustee–this might seem like a lot but keep in mind that the trust property comprised some $450 million.[133] Let's also assume that the protector accepts the offer and replaces the existing trustee. The new trustee proves to be a devious devil and squirrels away the entire trust fund through a labyrinth of transactions and absconds from the jurisdiction never to be seen from, or heard of, again. Could the beneficiaries sue the protector? If so, on what basis? If not, *should* the protector be liable? If so, on what basis? Should the law protect the trust parties from protectors (and themselves)? The irreducible core approach to trusts can be used to answer those kinds of questions.

1.2.1.2. Broad powers and discretionary trusts

Offshore trusts frequently confer broad discretionary powers on enforcers, trustees and protectors to appoint beneficiaries from a wide class of objects. One of the most extreme examples is provided by the Special Trusts-Alternative Regime[134] (STAR) of the Cayman Islands, pursuant to which "[a] beneficiary of a special trust does not, as such, have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property."[135] STAR trusts are not, however, unenforceable: provision is made for specific persons (enforcers) to hold rights to enforce the trust, who may or may not be beneficiaries.[136] Subject to the terms of their appointment, enforcers are said to have the same rights as beneficiaries under 'ordinary trusts', including rights to commence court proceedings, rights to trust information, and the same personal and proprietary remedies against trustees and third parties.[137] The obligation cast on trustees of STAR trusts to ensure that settlors understand the unorthodox role of enforcers being the only persons having standing to enforce the trust is taken rather seriously: failure to do so is punishable by a fine of $100,000 and five years imprisonment.[138] Upon introduction in 1997,[139] STAR trusts caused quite a stir amongst trust scholars about whether such trusts are trusts properly so-called and heightened the focus on the

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[133] The two discretionary trusts were essentially set up to hold the shares in two holding companies that in turn held shares in a very profitable Canadian company, the shares of which were subsequently sold to a private equity fund; the trust property of the two trusts comprised the funds representing the capital gain realised on the sale of the shares at para 2-4; within the space of one year valuations on the shares changed from $50 million to $500 million, which the Court accepted was due to a "meteoric rise that was not entirely forseeable" at para 84.
[134] *Trusts Law (2009 Revision)* (Cayman Islands), 2009/16 [*Trusts Law* (Cayman Islands)], Part VIII.
[135] *Ibid*, s 100(1); "standing to enforce" is defined elsewhere as meaning "the right or duty to bring an action for the enforcement of a special trust" (*ibid*, s 95(1)).
[136] *Ibid*, s 100(2).
[137] *Ibid*, s 102(a), (c); the details of STAR trusts must be kept at the office of the corporate trustee (*ibid*, s 105(1)(b)).
[138] *Ibid*, s 107 (if the charge is made on summary conviction the fine is $10,000 and one year imprisonment, whereas conviction on indictment may amount to a fine of $100,000 and five years imprisonment).
[139] *Special Trusts (Alternative Regime) Law 1997* (Cayman Islands), 1997/18. See also Antony Duckworth, *STAR Trusts: The Special Trusts (Alternative Regime) Law 1997 Cayman Islands - 2nd generation of purpose trusts and more* (Cambridge, UK: Gostick Hall Publications, 1998)[Duckworth, *STAR Trusts*].

essential, juridical nature of the trust, including what legal relations *must* exist in trusts to be cognisable as a legal arrangement falling in the private law category of 'trust'.[140]

In the Channel Islands and the Isle of Man, discretionary trusts often have a charitable institution named as the primary beneficiary (also known as 'Red Cross trusts' or 'blind trusts').[141] Broad powers of appointment are conveyed, often with an expression of wishes reduced into the form of a letter, to appoint the actual, intended beneficiaries some time after establishment, which can create a 'black hole' for investors in the interim.[142] In *Re Exeter Settlement*, a Red Cross trust was established for the purposes of holding shares in an insurance broking company.[143] Owing to inadvertence on the part of a solicitor, the charitable institution selected to be the default beneficiary of the trust was not named in the trust deed; in fact, no beneficiary was named in the trust deed at all.[144] A letter of wishes was signed contemporaneously by the settlor communicating her desire for the trustee to exercise a power to appoint the promotor of the insurance company and his family as beneficiaries under the trust after the

[140] Of course, the question was not whether the trust should properly be a called a trust in its home jurisdiction, but whether such a trust would be cognisable in other jurisdictions. See Paul Matthews, "Shooting STAR: the new special trusts regime from Cayman Islands" (1997) 11:3 Trust L Int'l 67 [Matthews, "Shooting STAR"] (arguing that "a grave danger, with at least some [STAR] trusts [is] that a court in another trust state, where the trust law runs along more orthodox lines, might well simply treat this arrangement as not a trust at all" at 68), following Millett LJ's irreducible core dictum in *Armitage v Nurse*, *supra* note 3; Antony Duckworth, "STAR WARS: The colony strikes back" (1998) 12:1 Trust L Int'l 16; *Convention on the Law Applicable to Trusts and on their Application*, 1 July 1985, HccH 30, online: Hague Conference on Private International Law <http://hcch.e-vision.nl/> [*Hague Trust Convention*], art 2; Paul Matthews, "STAR: big bang or red dwarf?" (1998) 12:2 Trust L Int'l 98 (expressing the concern that a UK court may not recognise a STAR trust under the *Hague Trust Convention* on the premise that it was not a 'trust' properly so-called); Antony Duckworth, "STAR WARS: smiting the bull" (1999) 13 Trust L Int'l 158; Fox, "Non-Excludable Duties", *supra* note 35 (referencing the STAR Trust, Fox poses the precise question that frames the irreducible core approach to trusts, being "[h]ow far can the settlor go in excluding the default duties commonly recognizable as a trust?" at 17).

[141] See *Rawcliffe v Steele*, (1993-95) Manx Law Reports 426 (for a Manx example of a (Irish) Red Cross trust, where the trust deed failed to name a protector and the Court held that it could appoint a protector to the trust in the same way that the Court could appoint a trustee to ensure the trust would not fail for want of a trustee); although the charitable organization is ostensibly the primary beneficiary of these trusts, those charities are never actually intended to benefit from the trust other than by default; see *Schmidt v Rosewood*, *supra* note 111 at 711 per Alan Steinfeld QC and Marcus Staff in argument for the petitioner (in that case the charitable institution named as the primary beneficiary was the Royal National Lifeboat Institution at 717); see also Paul Matthews, "In the Land of the Blind, The One-eyed Salesman is King" online: (1998) 2:2 J L Rev <http://www.jerseylaw.je/publications/jerseylawreview/>.

[142] See *Ahuja v Scheme Manager, Depositor's Compensation Scheme*, (1996-98) Manx Law Reports 278 (where the Manx Court of Appeal held that the beneficiaries, who were allegedly intended to benefit from the trust (i.e. other than the named beneficiary, being the International Red Cross), were unascertainable and, thus, when the Manx bank holding the trust fund collapsed, compensation could was only payable (once) to the trustee and not to the eight ('real') beneficiaries of the trust fund, who had contributed equally to the fund; see Paul Matthews, "The Black Hole Trust–Uses, Abuses and Possible Reforms: Part 2" (2002) 2 Private Client Business 103 [Matthews, "Black Hole Trust"] at 104-105.

[143] *Re Exeter Settlement*, [2010] Jersey Law Reports 169. Although the trust was initially suggested by the solicitor instructed to draft the trust deed that the British Red Cross should be the only named beneficiary, the settlor expressed a wish for the Royal National Lifeboat Institution to be the named charity (*ibid* at 172).

[144] *Ibid* at 173-74.

trust had been established.[145] Shortly thereafter, the promotor and his family were appointed as beneficiaries as envisaged by the letter of wishes.[146] Over the next 25 years, the trust fund grew in value and distributions were made to the intended beneficiaries from time-to-time, all in good faith and on the continued assumption that the trust deed was valid. Eventually the solicitor's omission to name a beneficiary at creation was discovered and the trustee sought a declaration as to the validity of the trust or, alternatively, rectification of the trust deed.

Predictably, the trust was found not to have been validly constituted due to a lack of certainty of objects at the time of establishment.[147] While the power to add beneficiaries was valid, the Court held that that power could not of itself be sufficient to constitute a valid trust, which failed for a lack of certainty of objects from the outset.[148] Fortunately enough, the Court ordered rectification of the trust deed to insert the relevant charity as a beneficiary with the effect that the trust was valid from its purported establishment. Because rectification is a discretionary remedy, this case provides a salient lesson in that hollow trusts, which lack ascertainable beneficiaries, may not be enforced.[149] The case also sounds a warning that objects of a power of appointment do not have rights analogous to that of a beneficiary, but only the (sole) right to be considered for appointment.[150] Further to this, if settlors choose to exclude the real beneficiaries upon establishment, and only name a charitable institution that is never given notice of its beneficial status, significant challenges would seem to arise for ensuring the *effective* accountability in, and enforceability of, these trusts.[151] Despite this, time and again, the *true* beneficiaries seem to wait in the wings, ready to pounce on the first sign of maladministration or departure from the *real* plan and the courts do seem willing to supervise these trusts and provide for

[145] *Ibid* at 172-73.
[146] *Ibid* at 174.
[147] See *Knight v Knight*, *supra* note 34 at 172–73; *McPhail v Doulton*, *supra* note 14. Although the principle is reflected in the *Trusts (Jersey) Law 1984* (Jersey), 1984/11 [*Trusts Law* (Jersey)]. See also *Re Exeter Settlement*, *supra* note 143 at 174-80.
[148] *Re Exeter Settlement*, *supra* note 143 ("[o]ne could not validly add beneficiaries to a trust which did not exist" at para 34), following *Re Manisty*, *supra* note 111 per Templeman J and distinguishing *Re Hay's Settlement Trusts,* [1982] 1 WLR 202, [1981] 3 All ER 786 [*Re Hay* cited to WLR] on the basis that it was not possible to say with certainty whether a particular person was the object of the discretionary power and no default beneficiaries were specified in the trust deed.
[149] Factors such as delay, the true intentions of the settlor, full and frank disclosure, and the practicability of alternative remedies will all be relevant to the exercise of the court's discretion to rectify a trust deed; see *Re Exeter Settlement*, *supra* note 143 at 180-81.
[150] *Ibid* ("[a] power to add beneficiaries is something completely different. It means what it says. A person who is a possible object of a power to add beneficiaries is not in fact a beneficiary unless or until the power is exercised in his favour and he is added as a beneficiary. Until that moment, the trustees may not apply income or capital for his benefit and he does not have any of the rights attached to being a beneficiary of the trust. The sole right that he has is as a possible object of the power to add beneficiaries" at 178-79 per Bailiff Birt). See *supra* note 14 and accompanying text (on powers vs trusts).
[151] *C.f.* Hayton, "Irreducible Core", *supra* note 35 at 51-52.

removal and replacement of officeholders where necessary.[152] Although the administrative and dispositive powers under these discretionary trusts may seem so general in scope as to be administratively unworkable, the prime candidates, who are the real objects of the trustee's discretionary power, are readily apparent in most cases and trustees need not survey mankind from China to Peru.[153]

1.2.1.3. New trust parties

As seen from the previous offshore examples, the addition of new offices to the orthodox three party paradigm of the trust (i.e. settlor, trustee and beneficiary) present problems for accountability and enforceability of trusts. Some of the more common 'supernumeraries' that are added to the traditional *dramatis personae* of the trust include appointors, enforcers and protectors.[154] Offshore trust design often provides for broad discretionary powers to trustees that cannot be exercised without the consent of the protector, both of whom may be removed at any time by an appointor, enforcer or protector.[155] Although effectively controlling the trust, all of the extraneous trust parties are often excluded from acting in any kind of fiduciary capacity to the beneficiaries and exonerated from any kind of liability in their dealings with the trust. This begs the obvious question of whether the relevant trustees are *effectively* accountable and whether these trusts are *effectively* enforceable as a matter of law? These questions provoke the enquiry into the essential juridical nature of trusts and thereby invoked the irreducible core approach to trusts.[156]

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[152] Sometimes the plan is contained in a (confidential) letter of wishes, which is effectively the 'real' trust deed; see Matthews, "Black Hole Trust", *supra* note 142 at 104.

[153] See *Re Gestetner*, *supra* note 111 (Harman J found no difficulty in ascertaining whether any given postulant was a member of the specified class of persons who were the objects of the relevant power and, thus, was not willing to find that the trust should fail for a want of certainty; furthermore, he held that the trustees need not "worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England" at 688-89 per Harman J).

[154] See e.g. Antony GD Duckworth, ''Protectors and Other Supernumeraries: Part 1'' (2006) 20:3 Trust L Int'l 180 (supernumeraries are 'non-trustees' and that 'supernumerary powers' are 'powers [given] to outsiders (i.e. supernumeraries who are neither the settlor nor a beneficiary)' at at 180); Duckworth, "Trust Offshore", *supra* note 171 ("the labels vary, but "protector" and "management committee" are both popular... [m]y generic label for these power-holders is "supernumeraries" at 919). See also *Jacobs' Law of Trusts*, *supra* note 28 at 50-51 (rightly makes the point that some of these new trust parties are superfluous; in relation to so-called 'advisory trustees' it is stated that "[i]n truth, an advisory trustee is not a trustee at all. Bearing in mind the ease with which trustees can take advice in any event, it is not easy to see the point of these creatures" at 50).

[155] See e.g. *Re VR Family Trust*, [2009] Jersey Law Reports 202 [*Re VR Trust*] at 205 (for a list of the kinds of powers that may be conferred); *Garron*, *supra* note 129. See also *supra* note 130 and accompanying text.

[156] See L Smith, "Mistaking the Trust", *supra* note 55 ("[t]rust drafters know that they cannot create a trust in which the trustees do not owe a duty of loyalty; it is not obvious that they should be allowed to get around this principle by giving significant powers to a protector and then seeking to alleviate the protector of the same duty at 793 [emphasis added]).

In *Re VR Family Trust*, the functions of the protector and appointor (Pabst) of the relevant trust (VR Family Trust) conflicted with his personal interests as the primary beneficiary of another trust (the Africa Trust) and his duties as the director of a Jersey company (Terret Holdings Ltd), which was owned in equal shares by the Africa Trust and VR Family Trust. Each trust stood to benefit substantially from the shareholdings in Terrett Holdings Ltd when that company sold a 70% stake it owned in another company (Hernic Pty Ltd) for some US$46 million. Pabst used his various positions to obtain the lion's share of the sale proceeds, despite the fact that those attempts were contrary to the interests of the VR Family Trust's beneficiaries and in spite of his position as appointor and protector of that trust.[157] As a result of these conflicts, and specific requests Pabst had made for the repayment of sale proceeds distributed to the VR Family Trust, the trustees requested the suspension of Pabst's powers as protector. Pabst denied that there was a conflict of interest that warranted his removal and refused to step aside as appointor and protector, forcing the trustees to apply to the Court for his removal.[158] Pabst did not oppose his removal as appointor and protector at the hearing and the trustees sought indemnity costs against him.[159] In resolving that application, the Court accepted that Pabst's power to appoint new trustees was a fiduciary power that could not be exercised for his own benefit and that it was probable that Pabst's power to appoint other protectors was also of a fiduciary kind.[160] So, even in this extreme case, we find that the appointor remained accountable, and the trust enforceable, and that the appointor was not beyond reproach.[161]

Using the irreducible core approach to trusts as a springboard, Terence Tan Zhong Wei has eagerly argued that, like trustees, protectors owe "an irreducible core of fiduciary duties to the beneficiaries to exercise their powers and functions *bona fide* in the way they consider to be in the interests of the beneficiaries."[162] The need for protectors to owe these duties is said to be because protectors: "can be given an extensive list of powers by a trust deed" and that "since a Protector, like a trustee, is a holder

[157] *Re VR Trust*, *supra* note 155 ("[i]t was not inaccurate to describe [Mr Pabst]... as a hostile party to the VR Family Trust" at 208 per Commissioner Clyde-Smith).
[158] The terms of the trust did not provide for the appointment and resignation of appointors, which the Court held could only be affected through the Court; *ibid* at 203, 211, 214-15.
[159] Relying on *Pell Frischmann Engr Ltd v Bow Valley Iran Ltd (2)*, [2007] Jersey Law Reports 479 per Commissioner Page and *Macmillan Inc v Bishopsgate*, [1995] 1 WLR 978, 3 All ER 747 per Millett J .
[160] *Re VR Trust*, *supra* note 155 at 210-11, 217 per Commissioner Clyde-Smith, citing: *Lewin on Trusts*, *supra* note 28 at 486 at pars 14-39. See also *Re Bird Charitable Trust*, [2008] Jersey Law Reports 1.
[161] *Re VR Trust*, *supra* note 155 at 210-11, 215, 217; despite the broad discretionary powers conferred by the trust, the court retained a supervisory function over the trust to dismiss the appointor and protector for acting wholly unreasonably in spite of the obvious conflict of duty and interest that arose.
[162] Wei, *supra* note 78 at 482-83.

of power within a trust arrangement... its powers as Protector are granted to it by virtue of its office".[163] In drawing a distinction between fiduciary and non-fiduciary duties said to be owed by protectors, Wei comments that this distinction is crucial because only fiduciary duties–"unlike duties which apply to both fiduciaries and non-fiduciaries"–cannot be excluded *by a fiduciary*.[164] To bolster that dichotomy, Wei suggests that "the 'conflict rules' are considered an undisputed part of fiduciary duties" and cannot be excluded, whilst "the duty of care and skill are not peculiarly fiduciary in nature" and can be excluded.[165] Wei goes on to consider the role of enforcers distinctly to that of protectors and reaches similar conclusions regarding their fiduciary status.[166]

That stream of thought seems somewhat confused and inconsistent. One of the difficulties in following Wei's comments is that they are divorced from any jurisdictional context, swinging back and forth from onshore to offshore trusts without demarcation. While in some offshore trust regimes the offices of enforcer and protector are reasonably well defined,[167] and even expressly fiduciary,[168] onshore trusts that provide for additional trust offices do so purely from subjective expression communicated in the trust deed. Thus, it is not true to say that all enforcers or protectors receive any kind of power by virtue of their office alone, nor is it true to say that in every case those persons will wield any particular kind of power, which should in every case be construed as being more than a 'mere power'.[169] Although the scope of a protector's powers over trusts is certainly relevant,[170] those powers may vary greatly from trust to trust.[171] Moreover, simply because protectors *can be given powers* is not a compelling

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[163] *Ibid* at 482, 483.
[164] *Ibid* at 485. It is unclear what is meant by exclusion "by a fiduciary" because it seems to imply some kind of self-exclusion by fiduciary office-holders, which introduces some faulty analysis.
[165] *Ibid* at 485.
[166] Wei, *supra* note 78 ("[s]ince an Enforcer is also a power-holder within a trust, it is argued that it owes an irreducible core of obligations—to act responsibly so as to enforce the proper execution of the trust, and to consider at intervals which it reasonably considers appropriate whether and how to exercise its powers and then to act accordingly" at 489).
[167] In the Caymans Islands: *Trusts Law* (Cayman Islands), ss 95(1), 100-102. In Guernsey: *The Trusts (Guernsey) Law 2007* (Guernsey), 2008/3 [*Trusts Law* (Guernsey)], s 12-14, 15(e), 26(1)(a), 59(h)(iii), 69. In Jersey: *Trusts Law* (Jersey), ss 12-14, 21(7)-(8), 51(2)(a)(iv), 51(3). Interestingly, all of those jurisdictions seem to favour 'enforcers'.
[168] In the Cayman Islands, the default position is adopted: *Trusts Law* (Cayman Islands), s 101(2)("[s]ubject to evidence of a contrary intention, an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust."). In Guernsey, a mandatory position seems to be taken: *Trusts Law* (Guernsey), s 12(2)("It is the fiduciary duty of an enforcer to enforce the trust in relation to its non-charitable purposes."). *C.f.* Jersey, where there is no stipulation that the duty is 'fiduciary' in character at all (i.e. the position is neither default nor mandatory): *Trusts Law* (Jersey), s 13(1)("It shall be the duty of an enforcer to enforce the trust in relation to its non-charitable purposes.").
[169] Wei, *supra* note 78 at 483.
[170] See Trukhtanov, *supra* note 78 ("the larger the scope of the protector's powers, the greater the case for treating him as a fiduciary or indeed a quasi-trustee" at 344).
[171] See Antony GD Duckworth, "The Trust Offshore" (1999) 32:4 Vand J Transnat'l L 879 [Duckworth, "Trust Offshore"]("[s]o it is now usual to find that powers of one sort or another are given to persons who are neither the settlor nor the trustee... I refer to their powers as 'supernumerary powers'... Supernumerary powers vary greatly. Sometimes the

justification to vault protectors to the status of fiduciaries in every case.[172] Why should a protector bear the burden of the irreducible core of duties in every case even though that person's position, so shaped by the trust deed, bears limited involvement in, or oversight of, the trust affairs? Furthermore, if a person is not intimately concerned with the day-to-day running of the trust, nor apprised of the material facts concerning each and every decision taken by the trustees, how could they possibly discharge the irreducible core of obligations owed by trustees?

Wei's proposal runs contrary to the conventional logic regarding the imposition of fiduciary obligations, which is that the substance of the relationship itself is determinative of fiduciary status and that this is especially so in more novel relationships.[173] Even if a protector is appropriately characterized as a fiduciary in a given case, the content of the relevant fiduciary duties should be "moulded according to the nature of the relationship and the facts of the case."[174] This thesis favours an *ad hoc* assessment of the trust deed and ancillary documents to construe and shape the duties owed by protectors in a given case.[175] Quite irrespective of the titularly expression, as well as the apparent tutelary overtones of those new trust offices, the courts are likely to adhere to the fundamental equitable maxim of looking to substance rather than form in determining whether a person is a fiduciary in a given case, as well as to tailor the specific obligations owed by that person.[176] Even if

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supernumerary is peripheral to the trust administration, sometimes he is so central that the trustee is little more than a custodian" at 919).

[172] Although, ultimately it is somewhat unclear whether Wei actually considers that protectors owe fiduciary duties in all cases–although, this does seems to be his preferred view–and, if so, which of the irreducible core duties are said to be owed by protectors in all cases; see Wei, *supra* note 78 at 484-85 and especially 484, n 44 (it is also unclear what is meant by "[a]lthough the deferential standard of review will constitute the general rule, there remains room for flexible standards within this general rule" at 485).

[173] See Peter Devonshire, "Account of Profits for Breach of Fiduciary Duty" (2010) 32 Sydney L Rev 389 ("the content of the duty is gathered from the circumstances in which a party was acting, not from his or her status or description" at 390); PD Finn, *Fiduciary Obligations* (Sydney: Thomson Lawbook, 1977)[Finn, *Fiduciary Obligations*]("It is not because a person is a 'fiduciary' or a 'confidant' that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant *for its purposes*" at 2)[emphasis in original]; LS Sealy, "Fiduciary Relationships" [1962] Cambridge LJ 69 at 72-73; whilst there are certainly relationships that warrant the fiduciary classification, it would be wrong to simply vault each new trust party to a fiduciary status on the pretense of a commonality in office that simply does not exist.

[174] *Hospital Products International Pty Ltd v United States Surgical Corporation*, (1984) 156 CLR 41 [*Hospital Products*] at 102 per Mason J, quoted in Devonshire, *supra* note 173 at 390. See also RP Austin, "Moulding the Content of Fiduciary Duties" in Oakley, *Trends in Trust Law*, *supra* note 35, 153 [Austin, "Moulding Fiduciary Duties"].

[175] See Stewart E Sterk, "Trust Protectors, Agency Costs, and Fiduciary Duty" (2006) 27 Cardozo L Rev 2761 ("routine transplantation to trust Protectors of the same fiduciary standards applied to trustees would be a mistake" at 2785), citing Gregory S Alexander, "Trust Protectors: Who Will Watch the Watchmen?" (2006) 27 Cardozo L Rev 2807 at 2811; Donovan WM Waters, "The Protector: New Wine in Old Bottles?" in Oakley, *Trends in Trust Law*, *supra* note 35, 63 [Waters, "Protector"].

[176] See *Parkin v Thorold* (1852), 16 Beav 59 at 66 per Romilly MR; RP Meagher, JD Heydon & MJ Leeming, eds, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th ed (Chatswood, NSW: Butterworths LexisNexis, 2002) at 106-13; *Snell's Equity* (31st ed), *supra* note 28 at 106-07. *C.f.* Wei, *supra* note 78 at 482-83.

these new power-holders are not technically described as fiduciaries, *any* power must nevertheless be exercised in good faith and for the purpose for which it was conferred.[177]

Additional offices may certainly be justified and valuable in certain trusts, but without further (most likely statutory) definition of these new offices, the determination of what duties these persons owe must occur on a case-by-case basis.[178] Given that *accountability* and *enforceability* are the recurrent, normative themes of the irreducible core of the trust, one additional aspect canvassed by Wei requires comment: to whom do enforcers owe their (fiduciary) duties?[179] In the case of offshore private purpose trusts, beneficiaries may not exist at all or the real beneficiaries may not yet have been appointed. Professor Parkinson has rightly questioned whether enforcers have sufficient incentive to enforce the trust at all.[180] Wei simply suggests that an enforcer's duties "can be enforced by a trustee, another Enforcer or any person expressly authorized by the trust instrument."[181] But it seems illogical to suggest that any of those persons could be satisfactory right-holders in respect of fiduciary duties that might be owed by an enforcer for the following reasons. *First*, if an enforcer's role is to enforce the trust, and thereby supervise the trustee, it is highly specious to suggest that the trustee would bring the enforcer to account for a failure to enforce the trust (the action would effectively be against the trustee!).[182] *Second*, enforcers cannot simply owe reciprocal fiduciary duties to one another to ensure the trust is performed because if the trust is not enforced, they would both be in breach (again, enforcement would self-incriminate the right-holder, who is simultaneously a duty-bearer). *Third*, it is unsound to suggest that a specially authorized person could simply become the correlative right-holder

[177] See *Scaffidi v Montevento*, *supra* note 3 at para 149 per Murphy JA & Hall J; *Pope v DRP Nominees Pty Ltd*, [1999] SASC 337, 74 SASR 78 at paras 46-48 per Bleby J; *Re Burton*, [1994] FCA 1146, 126 ALR 557 at 559 per Davies J; *Re Newen,* [1894] 2 Ch 297 at 309 per Kekewich J; *Re Skeats' Settlement* (1889), 42 ChD 522 at 526-27 per Kay J; *Duke of Portland v Topham* (1864), 11 HL Cas 32, [1864] EngRep 339 [cited to HLC] at para 54 per Lord Westbury LC; Finn, *Fiduciary Obligations*, *supra* note 173 at paras 627, 644.

[178] See Sitkoff, *supra* note 77 (doctrinal analysis aside, Professor Sitkoff argues that protectors could reduce the overall agency costs of the trust; although that view seems strongly influenced by an Anglo-American sympathy toward expansive settlor control of the trust at 670-71); Alexander, "Dead Hand", *supra* note 67 at 1261-62; *Lewin on Trusts*, *supra* note 28 ("[t]he term 'protector' may occasionally be used simply as a convenient name for a given person but more commonly it refers to an office created by the trust instrument, with provisions for a succession of persons to fill it. If a power is conferred on a protector of that latter kind, it will ordinarily be impossible to construe the power as beneficial; the protector will be there for the protection of the beneficiaries and his powers will be fiduciary" at 996-97)

[179] That is if those persons are considered fiduciaries in a given case or jurisdiction.

[180] Parkinson, "Reconceptualizing", *supra* note 47 at 680 ([i]f the enforcer has no particular interest in having the obligation performed, and is in the pay of those who have established the trust for their own financial purposes, there is no reason why failure to perform the obligation should ever come to the attention of a court" at 680).

[181] Wei, *supra* note 78 at 489.

[182] See *Re Astor*, *supra* note 34 ("where... the only beneficiaries are purposes and an at present unascertainable person, it is difficult to see who could initiate such proceedings. If the purposes are valid trusts, the settlors have retained no beneficial interest and could not initiate them. It was suggested that the trustees might proceed ex parte to enforce the trusts against themselves. I doubt that, but at any rate nobody could enforce the trusts against them" at 542 per Roxburgh J).

of the enforcer's fiduciary duties since that person would not, in turn, be accountable to anyone (unless, another special office-holder were appointed to supervise that person and so on, which would simply perpetuate the problem).

The most meritorious suggestion is that the right-holder must be the settlor; if the settlor dies then those rights would pass with the settlor's estate and be enforced either by the administrator or the settlor's heirs, given that these persons may be interested in monitoring whether the trust is performed (possibly taking the benefit of the trust in default if the trust fails through the mechanism of a resulting trust).[183] However, even that suggestion undermines the traditional understanding of the trust being that, once the trust is established, the settlor is removed from the picture.[184] These are the kinds of challenges that the irreducible core approach to trusts assists in solving.

1.2.2. Fiduciaries, trustees and equity in commercial law

The challenges canvassed previously all test the normative roots of the trust and question whether fiduciary accountability is essential for the trust in modernity. Although it is no easy feat, the goal of fiduciary law is to dissuade selfishness by persuading selflessness in one person's management of the affairs of another.[185] Fiduciary duties are imposed under the general law when certain relationships of trust and confidence exist, and although the categories remain open, certain relationships have been

[183] See Lee et al, *supra* note 106 at paras 21.000-21.020; see also Donovan Waters, "Settlor control—what kind of a problem is it?" (2009) 15:1 Trusts & Trustees 12 at 15; John T Gaubatz, "Grantor Enforcement of Trusts: Standing in one Private Law Setting" (1983) 62 NCL Rev 905 at 916. It might also be obvserved that those persons may have a keen interest in monitoring the enforcer and ensuring that the trust is performed, given that they possibly stand the strongest position to receive the benefit of the trust, if the trust should fail.

[184] See *Re Astor*, *supra* note 34 at 542 per Roxburgh J; *Bradshaw v University College of Wales*, [1988] 1 WLR 190 at 194 per Hoffmann J; David Pollard, "Trustees' duties to employers: the scope of the duty of pension trustees" (2006) 20:1 Trust Law Int'l 21 ("[o]nce the settlor has unilaterally transferred his entire interest in particular property to his trustee this is regarded as amounting to the complete fulfilment of his purposes, so that he drops out of the picture" at 23); Millett, "Quistclose Trust", *supra* note 218 ("[i]t is elementary that a settlor who retains no beneficial interest cannot enforce the trust which he has created" at 287); see also *Goulding v James,* [1997] 2 All ER 239.

[185] See *Scott & Ascher on Trusts*, *supra* note 70 ("[i]f only on thing is clear, it is that conflicts of interest and the temptation to advance one's own interests at the expense of those of others are ubiquitous. Nor is this any less so in the world of those who create, administer, or benefit from trusts" at 1078); Keane, *supra* note 108 ("the Big Picture is of human selfishness, and the extent, and standards by which, individual self-interest, especially in trade and commerce, is to be restrained by the courts" at 108, "[t]he fiduciary obligation is absolute, subject to the knowing consent of the beneficiary, because nothing less is regarded as a sufficient protection for the interests of the beneficiary against the powerful temptations of self-interest" at 116); *Meinhard v Salmon*, 164 NE 545 (1928)("[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions... Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd" at 546 per Cardozo CJ).

defined as being of a quintessentially fiduciary character (e.g. trustee/beneficiary).[186] Although the trust is often considered the paradigm example of the fiduciary relationship, contemporary trust practice provides examples of so-called trusts that attempt to curtail fiduciary accountability by alleviating certain persons that effectively control the trust (e.g. trustees, protectors, etc.) of core duties and all forms of liability.[187] In light of this, the importance of elucidating the irreducible core of the trust takes focus: can trusts exist without *fiduciary* accountability?

In *Citibank NA v MBIA Assurance SA*,[188] a trust was used to hold the benefit of a covenant to repay notes issued in order to raise the capital for Fixed-Link Finance BV ("FLF") to acquire certain debt (£304m and €395m) from the restructure of the Eurotunnel debt arrangements. The trust was structured in such a way that: the beneficiaries under the trust were the holders of the notes; Citibank NA ("Citibank") was appointed to act as trustee; FLF was the settlor of the trust and was required to contribute to the trust by way of repayments on the notes it had issued; and *MBIA Assurance SA* ("MBIA") had stepped in to guarantee those repayments by FLF and had bargained for the privileged position of being able to give certain directions to Citibank, pursuant to which Citibank was required to comply.[189] After the trust was established, various Eurotunnel companies that were liable for the debt acquired by FLF went into insolvency in France. Upon the appointment of judicial administrators of those companies, a 'Safeguard Plan' was resolved to secure the position of creditors and others. MBIA issued a direction to Citibank regarding how to proceed in relation to the Safeguard Plan and directing the disposal of the FLF notes at the earliest available opportunity. Although not opposing the Safeguard

[186] See *Hospital Products*, *supra* note 174 at 68 per Gibbs J and 96 per Mason J); PD Finn, "The Fiduciary Principle" in TG Youdan, ed, *Equity, Fiduciaries and Trusts* (Agincourt, Ontario: Carswell, 1989) 1 [Finn, "Fiduciary Principle"] at 54; Austin Wakeman Scott, "The Trustee's Duty of Loyalty" (1936) 49:4 Harv L Rev 521 [Scott, Trustee's Duty of Loyalty"] ("[i]n some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust" at 521); Robert Flannigan, "The (Fiduciary) Duty of Fidelity" (2008) 124 Law Q Rev 274 at 275, 291-96; *c.f. English v Dedham Vale Property*, [1978] 1 All ER 382, 1 WLR 93 at 110 per Slade J.

[187] On the strength of fiduciary obligations imposed on trustees, see e.g.: *Maguire v Makaronis*, (1997) 188 CLR 449 ("[t]he trustee is the archetype of a fiduciary" at 473); *Re Permanent Trustee Australia Ltd*, (1997) 137 FLR 190 ("[the trustee acts in] a fiduciary capacity of the highest order" at 199); Butler et al, *supra* note 28 ([i]t is well known that express trusts create the paradigmatic fiduciary relationship" at 497); Peter Birks, "The Content of Fiduciary Obligation" (2000) 34 Isr LR 3 [Birks, "Fiduciary Obligation"] ("[t]he truth is that 'fiduciary' is one of those words which means what it does, and what it does is to form a bridge from the express trust to other analogous situations... The word is thus a vehicle for the extension of incidents of the express trust to trust-like situations. A fiduciary relationship is a relationship analogous to that between express trustee and beneficiary, and a fiduciary obligation is a trustee-like obligation exported by analogy" at 8). David Hayton, "Fiduciaries in Context: An Overview" in Peter Birks, ed, *Privacy and Loyalty* (Oxford: Clarendon Press, 1997) [Birks, *Privacy and Loyalty*] 283 [Hayton, "Fiduciaries in Context"] at 283-84. *C.f.* Joshua Getzler, "Rumford Market and the Genesis of Fiduciary Obligations" in Andrew Burrows & Lord Rogers of Earlsferry, eds, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) 577.

[188] *Citibank NA v MBIA Assurance SA*, [2006] EWHC 3215 [*Citibank v MBIA*].

[189] This is, of course, a highly simplified version of the first 10 or so pages of the judgment, which Mann J in turn described as a simplified version of the immensely detailed and complicated facts of the case; *ibid* at paras 2-16.

Plan, one of the beneficiaries (QVT) believed that the proposed disposal undervalued the notes and opposed the sale.[190] In the face of this conflict, and adopting a 'broadly neutral stance', Citibank sought the Court's guidance on how to proceed and was directed to follow the instruction given by MBIA.[191]

Alexander Truktanov argued that *Citibank v MBIA* undermines the idea of an 'irreducible core of obligations' being owed by trustees because the duties and liabilities that the office of trustee carries were liable to be circumvented by an instruction of MBIA, having the effect of removing the trustee's duty to act in the interests of the beneficiaries and representing "an extreme example of duty exclusion, on a scale that comes close to having the office of trustee removed from the trust altogether."[192] On the premise that Citibank's role as trustee was relegated to that of a mere agent, simply acting on instructions of MBIA, Truktanov contended that "compliance with *Armitage* [*v Nurse*] can only be tested at the level of MBIA", but because MBIA had sought to make itself immune from acting in a fiduciary capacity that left "a void in terms of the fiduciary element of what is on the face of it a trust relationship; the *Armitage* test does not begin to be met since there is no one who could be subject to the 'core' duties."[193] Confronted with the self-constructed antinomy of a trust without a fiduciary, Truktanov went on to consider whether that void could be filled by "saddling MBIA... with the duties and liability of a constructive trustee", but concludes that that result would be contrary to "the commercial position which MBIA has bargained for and which the courts have set out to protect."[194] Trukhtanov concluded that "the relationship of trustee and beneficiary is replaced by contractual arrangements giving effect to 'matters of commerce'" and that "courts will allow the enforcement of contractual arrangements without much concern for difficulties they may create in terms of the trust relationship"[195]–a view shared by others, as well.[196]

An alternative view of *Citibank v MBIA* is put forward in this thesis, whereby that case is construed as being consistent with the irreducible core of the trust. At the outset, two things should be noted in order

[190] Although, it should be noted that Mann J was not willing to assume that the notes were, or would be, undervalued; *ibid* at paras 36-37.
[191] *Ibid* at paras 20, 25, 49, 55; aff'd *Citibank NA v QVT Financial LP*, [2007] EWCA Civ 11 [*Citibank v QVT*].
[192] Trukhtanov, *supra* note 78 at 343.
[193] *Ibid* at 344
[194] *Ibid* at 344.
[195] *Ibid* at 344, 346.
[196] See SL Schwarcz, "Fiduciaries with Conflicting Obligations" (2010) 94 Minn L Rev 1867 at 1890-93, 1897; Yuzuo Yao, "A legal snapshot of the lead bank: the position and responsibilities in arranging a syndicated loan" (2010) 25 JIBL 148; Joshua Getzler, "Conflicts of interest and duty, consent, and *ultra vires*" (Paper delivered at the Chancery Bar Association Seminar Consequences of Fiduciary Accountability: *Vires* and Virtue, Lincoln's Inn, 24 May 2010), [unpublished]("the law has allowed contract to trump fiduciary law in this area" at 3).

to provide context to the alternative reading of that case. *First*, this was not a case where the Court was not mindful of the irreducible core approach to trusts and inadvertently came to an inconsistent result. On the contrary, Mann J directly assessed whether the extent of the powers conferred upon MBIA, and the degree of control this gave MBIA over the subject matter of the trust, violated the irreducible core of obligations that must be owed by trustees to beneficiaries and he specifically held that the powers conferred on MBIA did "not contravene Millett LJ's principle [in *Armitage v Nurse*]" and that "[t]he trust regime as a regime remains intact."[197] That position was further elaborated and upheld on appeal.[198] *Second*, the trustee certainly felt the force of the trust's irreducible core: the very nature of the proceedings themselves were brought *by the trustee* in order to ensure that by following the instruction of MBIA, Citibank did not commit a breach of trust.[199] Both of those preliminary comments provide important context for the following reading of the case.

The alternative reading proposed here is that the legal relations comprising the irreducible core of the trust existed and persisted despite the fact that Citibank was obliged to follow instructions given by MBIA.[200] In terms of the core duty of good faith, for example, Mr Popplewell QC submitted that "MBIA could even give a direction to the trustee to give its consent to the disposal by FLF of all of its assets for £1."[201] But that example served only to defeat Counsel's submissions that the trust structure reduced the "trustee's obligations below the irreducible minimum identified by Millett LJ" and provoked Arden LJ to state explicitly that "[t]he trustee continues at all times to have an obligation of

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[197] *Citibank v MBIA*, *supra* note 188 at [48] per Mann J. See also *Citibank v QVT*, *supra* note 191 ("Mr Popplewell submits that the effect of the structure which enables a direction to be given to the trustee by MBIA is to reduce the trustee's obligations below the irreducible minimum identified by Millet LJ in *Armitage v Nurse*. In my judgment this is not correct. The trustee continues at all times to have an obligation of good faith... In my judgment, while it is correct that it would be a surprising interpretation of the documentation, against which the court should lean, if the powers of the trustee were so reduced that it ceases to be a trustee at all, that point has not been reached in the present case and therefore there is no risk of recharacterising the office of trustee as something else." at para 82 per Arden LJ); those findings were not disturbed by the separate concurring judgment of Dyson LJ and were agreed to by Lord Clarke MR); nor could it be suggested that the Court of Appeal had misconceived Millett LJ's approach in *Armitage v Nurse*, as Millett LJ's dictum was aptly repeated as being "the irreducible core of the trust, which is that a trustee must act in good faith and to the benefit of beneficiaries in relation to the trust property and be accountable as such" earlier in the *Citibank v QVT* judgement (at para 58 per Arden LJ).

[198] *Citibank v QVT*, *ibid* at paras 28, 58-60, 82 per Arden LJ (with whom Lord Clarke MR & Dyson LJ agreed).

[199] *Citibank v MBIA*, *supra* note 188 ("Citibank had become concerned as to whether it could safely accept the direction of MBIA" at [20] per Mann J; compliance was assessed against the minimum standards set in *Armitage v Nurse*, *supra* note 3 at 253-54 per Millett LJ.

[200] *Citibank v QVT*, *supra* note 191 at para 55 per Arden LJ (finding that the trust was not bare in its incidents nor was the trust designed to be one for the mere preservation of trust property, but that Citibank retained duties and powers conferred by the trust deed).

[201] *Ibid* at para 59 (Mr Popplewell QC used this example in an attempt to show that, on the opposing construction of the trust deed, the trustee "becomes a nominee, unaccountable to the beneficiaries, and knowing no duty to act even in good faith").

good faith."[202] One can only deduce from that conclusion that had MBIA given a direction so untoward–for example, instructing Citibank to consent to the divestment of FLF's assets for £1–that compliance by Citibank with that direction would conflict with Citibank's core duties of loyalty, good faith and to perform the trust in accordance with its purposes and terms.[203] Citibank would then have been obliged to refuse such an instruction because that action would be beyond the trustee's powers and in breach of trust.[204] Neither Citibank nor MBIA abused any of the powers conferred upon them by virtue of the trust deed and no breaches of trust were alleged, contemplated or proven. Thus, it was within Citibank's powers as trustee to adhere to MBIA's direction, whereupon Citibank was also empowered to exercise the option to covert the hybrid notes into cash because those notes substituted the debt previously held by FLF.[205] The irreducible core concept in trust law does not provide a mechanism to judicially review discretions lawfully exercised by the trustee any more than is usually afforded.

So to return to the initial question posed of whether it is possible to have a trust without a fiduciary, and in light of the preceding discussion, this thesis argues that a trust would be bereft of legal content if trustees–the exemplars of fiduciary law–were able to contract-out of fiduciary obligations entirely.[206] This would rupture the coherent, rational structure of the private law.[207] This approach accords with that taken in the *Uniform Trusts Code*, pursuant to which "[a] settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity."[208] The imposition of fiduciary duties is, therefore, justified when it is recalled that: a) fiduciary obligations do

[202] *Ibid* at para 82.
[203] *C.f.* John H Langbein, "Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments" (2010) 90 BUL Rev 375 [Langbein, "Burn the Rembrandt"] at 382-87.
[204] It is perhaps an unfortunate drafting expression to use the phrase "the Trustee shall not be required to have regard to the interests of the [beneficiaries] in relation to the exercise of such rights, powers or discretions and shall have no liabilities to any [beneficiaries] as a consequence of so acting", but that provision can only be read as applying to lawful (*intra vires*) instructions given by MBIA. It might also be noted that it would be unlikely that MBIA would have given an instruction to Citibank toward the disposal of FLF's assets for £1 because it had guaranteed an enormous share (£232m and €365m) of FLF's debt to other noteholders, who were also beneficiaries under the trust.
[205] See Waters, "Protector", *supra* note 175 ("[i]f the trustee or fiduciary is within the scope of his power in what he does or fails to do, and his manner of exercise of that power satisfies the test of what a reasonable person might have done, then the trustee or fiduciary is beyond assault" at 83).
[206] This will be elaborated further in the later analysis of the duty of loyalty, see section 3.1.5 below.
[207] See Waters, "The Institution", *supra* note 100 ("[o]ur concern today is the belief that a divorcing of the fiduciary administration from "ownership" of the trust property can still leave a recognizable trust" at 449).
[208] *Uniform Trust Code*, *supra* note 31, 105(b)(1); interestingly, the *Uniform Trust Code* goes on to contemplate a fiduciary relationship between the trustee and the settlor, as well: *Uniform Trust Code*, section 1008(a)(2)(an exculpation clause is ineffective when "inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor").

not arise other than by free consent;[209] and b) trustees can always step down "if it all becomes too much for them."[210]

1.2.3. Civil law trusts and inter-traditional dialogue

The preceding discussion has largely concentrated on the broader common law tradition with an eye to the 'mixed' offshore jurisdictions. There has, however, been an overwhelming move by civil law jurisdictions to embrace the trust concept, as well. The complexity of the juridical nature of common law trusts does not make the task an easy one and this is especially so when one remembers that civilian jurists and legislators are concerned with the comprehensive capture of the trust concept in codified form, without the greater part of a millennium worth of home-grown trust jurisprudence to sift through.[211] Although the translation of 'trust' seems a rather daunting prospect,[212] this has not slowed the introduction and reception of the trust concept throughout the civil law jurisdictions.[213] One of the ambitions of defining the irreducible core of the trust is to aid the civil law translation of the trust concept by opening further comparative lines of communication regarding the essential juridical nature of the trust with a view to further stimulating inter-traditional dialogue. One prominent civilian jurist did not, however, believe there was, in effect, an irreducible core of legal relations in trusts and that blockage should be removed before moving on.

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[209] See Keane, *supra* note 108 at ("[t]he burdens of the obligation of self-abnegation upon a trustee are heavy. Why would it be thought to accord with conscience to impose those burdens upon a person who had not freely and deliberately accepted them?... While the obligation is absolute, the strict claims of conscience are confined to a voluntary undertaking in respect of a particular subject matter" at 116); Lionel Smith, "The Motive, Not the Deed" in Getzler, *Rationalizing Property*, *supra* note 61, 53 [L Smith, "The Motive"] ("[t]he fiduciary relationship is best understood as premised on a voluntary undertaking to assume an office to which the law attaches fiduciary obligations, or, outside of that, on a voluntary undertaking to put another's interests ahead of one's own" at 61, earlier Smith describes that "[n]ormally when obligations are voluntary, we expect that the content of the obligation will correspond to what was voluntarily undertaken" at 54, n 5, Smith calls this expectation 'the correspondence principle').

[210] Penner, "Exemptions", *supra* note 77 at 267.

[211] See Waters, "Institution", *supra* note 100 ("to deprive [the trust] of its case law origins–its existing sole source–would be to take from it that which has given it flexibility and adaptability century after century" at 425).

[212] See Nicholas Kasirer, "*«Le trust» est-il condamné à vivre en italiques?*" (Paper delivered at the Worlds of the Trust conference, Faculty of Law, McGill University, 23 September 2010), [unpublished]; James Sheedy, "Civil Law Jurisdictions and the English Trust Idea: Lost In Translation?" (2008) 20 Denning Law Journal 173; Waters, "Institution", *supra* note 100 (Waters confesses that "he is no admirer of statutory formulations of concept; the ingenuity of common law courts, and their sensitivity to the need for the careful balancing of policy and predictability of doctrine from decade to decade has always struck him as being the quintessential strength of the common law system" at 425).

[213] See e.g. Alexandra Braun, "Trusts in the draft Common Frame of Reference: the "best solution" for Europe (2011) 70:2 Cambridge LJ 327; Maurizio Lupoi, "The new law of San Marino on the "affidamento fiduciario" (2011) 25:2 Trust Law Int'l 51; Alexandra Braun, "A Trust for Europe?" (Paper delivered at the Worlds of the Trust conference, Faculty of Law, McGill University, 23 September 2010), [unpublished]; Paul Matthews, "The French fiducie: and now for something completely different?" (2007) 21:1 Trust L Int'l 17; Paul Matthews, "Fiducia and the Hague Trusts Convention: the new Luxembourg Law" (2003) 17:4 Trust L Int'l 188.

In the first half of the 20th century, Pierre Lepaulle proved to be a persuasive force in influencing and shaping the conceptual capture of the trust in the civil law tradition.[214] Relevantly for present purposes, Lepaulle claimed that "it is impossible to point out one single definite right (or duty) that is to be found necessarily in all trusts."[215] This is a rather damning statement insofar as the present thesis is concerned since this must imply that there are no legal relations that must comprise trusts (i.e. the irreducible core approach to trusts). Lepaulle is fairly clear in his intent and goes on to state that "if one could take one by one all the rights and duties that the trustee and the *cestui* have, one would realize that each of these rights and duties taken separately could be stricken out without destroying the trust in its essence."[216] Although Lepaulle did not explain what he meant by the 'the trust *in its essence*', he helpfully provided two examples to demonstrate what he meant by this claim.

First, Lepaulle considered that "it cannot be said that a trustee must necessarily preserve the substance of the *res,* since in cases of trusts for the benefit of creditors, he must most often sell it."[217] This is a rather odd 'trust' to invoke in support of a submission that trusts do not have an irreducible core;[218] but even in the administration of insolvent estates, we find that trustees in bankruptcy cannot dispose of trust property other than in accordance with the terms of their appointment. Lepaulle speaks as though the obligation borne by the trustee is to dissipate, rather than liquidate, trust property; but the sale of property will create reciprocal rights that will be held by the trustee in trust for the benefit of the beneficiaries (i.e. creditors). This creates a fluidity in the fund that comprises the trust, whereby sale simply substitutes the identity of the trust property.[219] Powers to substitute trust property do not distinguish trusts; if anything, it tends to show their commonality.

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[214] See *European Trust Law*, *supra* note 42 at 4; Donovan Waters QC, "The Future of the Trust from a Worldwide Perspective" in John Glasson & Geraint Thomas, eds, *The International Trust* (Bristol, UK: Jordan Publishing, 2006) [Waters, "Future of the Trust"] at 875; L Smith, "Trust and Patrimony", *supra* note 100 at 335-36.
[215] LePaulle, "An Outsider's View", *supra* note 101 at 54.
[216] *Ibid*. Lepaulle's phrasing of "the trust in its essence" is an interesting one in light of that comment, although Lepaulle does not explain what he meant by that phrase.
[217] LePaulle, "An Outsider's View", *supra* note 101 at 54.
[218] The phrase "trust for the benefit of creditors" is a curious one since the persons to benefit under a trust, at least in a common law trust properly so-called, *are* the beneficiaries of the trust. Lepaulle's phrase might have referred to the administration of an insolvent estate by a trustee in bankruptcy, in which the paramount duty of the 'trustee' is to liquidate the assets of the bankrupt to satisfy the claims of creditors; creditor claims are, of course, paid according to the relevant rules on priority in bankruptcy and, in the event of a shortage of funds to meet those claims, to pay out the limited funds *pari passu* amongst creditors with equal ranking or, in the event of surplus, to hold the residual funds on a resulting trust for the discharged bankrupt, effective being the insolvent settlor. See PJ Millett, "Quistclose Trust: Who Can Enforce it?" (1985) 101 Law Q Rev 269 [Millett, "Quistclose Trust"].
[219] See RC Nolan, "Property in a Fund" (2004) 120 Law Q Rev 108 at 109; Ewan McKendrick, ed, *Goode on Commercial Law*, 4th ed (London, UK: LexisNexis, 2009) at 66-67.

Second, Lepaulle was of the view that "[i]t cannot either be stated that the trustee has an absolute duty to account, since in discretionary trusts he may be freed from such an obligation."[220] This is perhaps a more difficult statement to deal with in offshore jurisdictions that often strain accountability and enforceability of the trust concept; although, even in those jurisdictions, mechanisms are designed to ensure that trustee's account for their administration and management of the trust property.[221] In any event, Lepaulle's statement is certainly not true in common law trusts. The phraseology of 'duty to account' is rather ambiguous, but this thesis will later argue that the phrase 'duty to account' comprises three irreducible core duties.[222] Although some murmurings along similar lines to that of Lepaulle do exist,[223] Lepaulle's comments have finally been contradicted in trust jurisprudence[224] and by a recent European unification project on trusts, as well.[225]

1.3. What are the practical implications of the irreducible core approach to trusts?

Given the kinds of contemporary challenges discussed in the previous section, a coherent understanding of the irreducible core of the trust is essential and will assist in working through those challenges in a reasoned way.[226] In order to determine whether a particular legal arrangement falls in the private law category of 'trust', there are essentially two stages in judicial reasoning:[227] first, *ascertaining* the rights and duties the parties intended to create ('stage one'); second, *categorising* that set of rights and obligations as a matter of law ('stage two').[228] This strikes a balance between

[220] LePaulle, "An Outsider's View", *supra* note 101 at 54.
[221] See e.g. *supra* note 134 (for a discussion of STAR trusts in the Cayman Islands) and accompanying text.
[222] See section 3.1 below.
[223] See Penner, "Exemptions", *supra* note 77 at para 252-53. *C.f.* Matthews, "The New Trust", *supra* note 80 at 30-31.
[224] See *Armitage v Nurse*, *supra* note 3 ("there is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of the trust. If the beneficiaries have no rights enforceable against the trustees there are trusts" at 253 per Millett LJ). *Contra* LePaulle, "An Outsider's View", *supra* note 101 ("it is impossible to point out one single definite right (or duty) that is to be found necessarily in all trusts... if one could take one by one all the rights and duties that the trustee and the *cestui* have, one would realize that each of these rights and duties taken separately could be stricken out without destroying the trust in its essence" at 54).
[225] See *European Trust Law*, *supra* note 42 ("[i]n respect of the trust fund it is fundamental that the trustee owes duties to the beneficiaries who have correlative rights against the trustee" at 32).
[226] See Fox, "Non-Excludable Duties", *supra* note 35 ("when the exclusion of core trustee duties is at issue... it is a matter of deciding whether the kind of transaction that the settlor intended to enter into can actually pass muster as a trust according to the ordinary understanding of what a trust must consist in" at 18); see also L Smith, "Trust and Patrimony", *supra* note 100 ("The trust is a fundamental institution in the sense that it cannot be understood in terms of other institutions. It is not a sub-category of legal persons, nor of contracts, nor of anything else. Conversely, treating the trust as one of those things—in particular, treating it as a legal person—will, in the long run, threaten to destroy its status as a fundamental institution." at 26).
[227] See *Leerac v Fay*, *supra* note 3 at at para 12 per Brereton J.
[228] The two-stage process of reasoning is evident in the lease/licence cases, see *supra* note 14. See also *Agnew* v *Commissioner of Inland Revenue*, [2001] 2 AC 710 (PC) at para 32.

particularity (stage one) and universality (stage two). Thus, simply because someone intended to do *something* does not mean it will be enforced or upheld as such as a matter of law upon proper legal analysis if that something is mischaracterized according to private legal ordering.[229] The irreducible core approach to trusts assists the second phase of that reasoning process and is essentially one of juridical classification: it involves the application of law to the facts of the case (as ascertained in stage one) and may have serious consequences for the parties concerned.[230] It is not only private persons that may be keen to know the practical implications of the irreducible core of the trust: revenue authorities must also be keen to know the base requirements for a person to divest themselves of property through the use of trusts. Indeed, the cat and mouse game between tax agencies and those who seek to avoid, evade and minimize tax liabilities has been played out for some time.[231] If trusts are deployed as a means of accessing certain tax advantages, the irreducible core of the trust must be respected: one cannot have one's cake and eat it too![232]

If a particular arrangement falls short of complying with the irreducible core of the trust (stage two analysis), there are essentially three paths forward from that point: *first*, and perhaps most likely, the operative facts will nevertheless be held to have validly constituted a trust, but that certain provisions of the trust deed are to be read down or struck out; *second*, the purported transfer will fail as a trust and the settlor will retain ownership of the relevant property; or, *third*, the settlor will be held to have conveyed the property outright to one of the so-called trust parties, but not on the terms of the

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[229] See Conaglen, "Sham Trusts", *supra* note 16 at 180; Trukhtanov, *supra* note 78 ("[i]f equity is not to become a valet to commerce, the parties should be held to the terms of their commercial bargain and only given such relief as their commercial relations justify. There should be no equitable remedy for breach of trust where there is no trust in the first place" at 346).

[230] See Langbein, "Mandatory Rules", *supra* note 29 ("[t]he question of whether a purported transfer did or did not take the trust form raises an issue of categorization. Distinguishing between trust and other legal forms (contract, gift, bailment, agency, corporation) keeps order among juridical concepts. The process of legal categorization is, therefore, a matter of positive law, removed from private autonomy") at 1120-21); Thomas W Merrill & Henry E Smith, "The Property/Contract Interface" (2001) 101 Colum L Rev 773 at 843-49; Thomas W Merrill & Henry E Smith, "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle" (2000) 110 Yale LJ 1 at 18, 57-59.

[231] See *Lord Howard de Walden*, *supra* note 114 ("[f]or years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents of whom the present appellant has not been the least successful. It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties." at 397 per Lord Greene MR).

[232] See Christopher McKenzie, "Having the cake: a global survey of settlor reserved power trusts: Part 1" (2007) 5 Private Client Business 336 ("settlors also prefer it to be a term of their settlements that they effectively retain control over the way in which the trust's assets are invested and over the manner in which the trustees' other administrative powers are exercised. In other words they want to "have their cake and eat it"." at 338). See also L Smith, "Mistaking the Trust", *supra* note 55 at 789.

purported trust arrangement, as the legal arrangement will fall into another private law category. Each of these practicalities will be considered in turn.

1.3.1. Reading down and striking out

Clauses that attempt to exclude liability will be narrowly construed and, if ambiguous, will be construed against the person seeking to be exculpated by its terms.[233] In the case of professional trustees, suggestions have been made that exclusion clauses will be construed even more strictly.[234] But no matter how strictly one wishes to construe exclusion clauses, eventually the boundaries must be set for what can and cannot be lawfully excluded.[235] This is not to say that questions of validity will be considered before questions of construction–such an approach would put the cart before the horse–but simply to say that the scope and validity of these clauses should be clearly defined.[236] Exemption clauses that tested the boundaries of lawful exclusion triggered the jurisprudence on the irreducible core of the trust and, now that those boundaries have been set, the courts have made it abundantly clear that these clauses will be read down and struck out to the requisite extent.[237]

In offshore jurisdictions, where trust drafters appear to be a little more brazen, we find the distinction between reading down and striking out is pronounced even more starkly. Under the *Jersey Trust Law*, for example, trust terms cannot "relieve, release or exonerate a trustee for breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence" (thus, directly informing the stage two analysis).[238] In *Midland Bank Trustee,* the Royal Court of Jersey held that a clause, which purported to exclude the trustee's liability for all breaches of trust except those 'knowingly and willfully

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[233] See *Leerac v Fay*, *supra* note 3 at para 13, citing *McLean v Burns Philp Trustee Co Pty Ltd*, (1985) 2 NSWLR 623 [*McLean v Burns*] at 641C per Young J; *AN v Barclays Private Bank & Trust (Cayman) Ltd*, (2006) 9 International Trust and Estates Law Report 630 [*Barclays Private Bank*] at para 71 per Smellie CJ; *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd*, [1995] Jersey Law Reports 352 [*Midland Bank Trustee*] at 373-80.

[234] See Malcolm Cope, "A Comparative Evaluation of Developments in Equitable Relief for Breach of Fiduciary Duty and Breach of Trust" (2006) 6:1 Queensland University of Technology Law & Justice Journal 118 (on the basis that "professional trustees who charge for their services should not be able too readily to avoid their obligations" at para 14).

[235] It is now plainly established not only in the field of negligence but *a fortiori* in the field of trusts: *Leerac v Fay*, *supra* note 3 at para 13 per Brereton J, citing *McLean v Burns* 641C per Young J; *Barclays Private Bank*, *supra* note 233 at 71 per Smellie CJ); *Midland Bank Trustee*, *supra* note 233 at 380.

[236] This is further elaborated in section 1.3.1 below.

[237] See *Alexander v Perpetual Trustees WA Limited*, [2001] NSWCA 240 at at paras 61-63 per Stein JA, paras 131-32 per Davies AJA; *ANZ Banking Group Ltd v Intagro Projects Pty Ltd*, [2004] NSWSC 1054 at paras 29-30 per White J; *Armitage v Nurse*, *supra* note 3; *Leerac v Fay*, *supra* note 3; *Scaffidi v Montevento*, *supra* note 3 at para 149 per Murphy JA & Hall J; *Wilden v Green*, *supra* note 3; *Wilkinson v Feldworth Financial Services Pty Limited*, [1998] NSWSC 775 [*Wilkinson v Feldworth*] per Rolfe J.

[238] *Trusts Law* (Jersey), s 30(10); For the analogous position under Guernsey law see *infra* note 464.

committed', was ineffective to exculpate a trustee for action deliberately taken in full knowledge of the consequences to the trust fund, albeit that the trustee did not know at the time that those actions were in breach of trust.[239] The relevant clause was not void for being repugnant to public policy and was, therefore, read down, rather than struck out. In *West v Lazard Brothers (Jersey) Ltd*, the Jersey Court of Appeal struck out a clause exempting the trustees for all breaches of trust except those fraudulently committed by the trustee and, in doing so, held that "[w]e find it void as being repugnant to the fundamental concept of a trust. If that means riding the unruly horse of public policy then so be it."[240] Thus, under Jersey law, trusts will be invalid *to the extent that* the trust purports to do anything contrary to *Jersey Trust Law* or public policy.[241]

Professor Langbein has rightly observed that "[t]he suspicion is ever present that a term dispensing with good faith trust administration may not have been properly disclosed to the settlor, or that the settlor may not have understood its effect."[242] And so it should be: it simply beggars belief that a duly informed settlor would intend to convey property to a person to be held for the benefit of another in circumstances where that person is entirely exculpated from liability should that person commit a breach of trust that is so abhorrent as to amount to bad faith.[243] However, it would be wrong to broadly infer that either the drafter or the objects of far-reaching exclusion clauses possess illegitimate motives for managing the trust affairs. The incentive for drafting such clauses could be simply to deter expensive and unnecessary litigation (e.g. reviewing discretionary actions lawfully undertaken by trustees).[244] Although that motivation is understandable, it is also misplaced. It is understandable because even the successful defence of legal proceedings costs money, as well as a lot of time and

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[239] *Midland Bank Trustee*, *supra* note 233.
[240] *West v Lazard Brothers (Jersey) Ltd*, [1993] Jersey Law Reports 165 at 292. *C.f. Midland Bank Trustee*, *supra* note 233 (where the Jersey Court of Appeal hastened to add in reference to this quote that this should not be stood as standing for the proposition that "an exemption clause in a trust deed (not purporting to confer protection from liability for fraud) is to be regarded as void on grounds of public policy or repugnancy" at 381).
[241] *Trusts Law* (Jersey), s 11(2)(a)(i), (ii), (b)(ii).
[242] Langbein, *Mandatory Rules*, *supra* note 29 at 1124.
[243] *Ibid* (such an exemption is so irrational that Langbein suggested a presumption should lie in favour of the exclusion clause having been concealed from, or otherwise misunderstood by, the settlor "because no settlor seeking to benefit the beneficiary would expose the beneficiary to the hazards of bad faith trusteeship" at 1124); see also *Uniform Trust Code*, *supra* note 31, s 1008(b)("[a]n exculpatory term drafted or caused to be draft by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor").
[244] See *Re City Equitable Fire Insurance Company Ltd*, [1925] Ch 407 [*Re City Equitable*]("[t]he truth is that such restrictions on liability may, and I think often do, operate to protect rather than harm beneficiaries, because they prevent honest and responsible persons from being frightened away from accepting an office which might otherwise involve them in various unmerited and unexpected losses notwithstanding perfect honesty on their part" at 528 per Sargant LJ).

effort that is certainly not recompensed by cost orders.[245] Attempts by well-meaning, but sadly mistaken, settlors and testators to discourage beneficiaries and legatees from contesting estate and trust affairs have been made for quite some time.[246] Resultantly, the mandatory rules preventing the ouster of the court's supervisory jurisdiction over trusts also enjoys a healthy longevity.[247] But the mere existence of a broadly drafted exclusion of duty or liability should not give rise to the presumption that improper motives are at play or, worse, that certain persons are disingenuously maneuvering themselves into privileged positions to be able to 'loot the trust'.[248]

1.3.2. Retention of ownership

This is an important category because it ties the irreducible core of the trust into conventional analysis on what is and is not a trust.[249] Here, the stage two analysis of legal categorization takes on heightened importance because under this category the court will determine that a trust was not validly created as a matter of law. Although there is some commonality with the jurisprudence on shams, the pejorative emphasis in the sham doctrine on disingenuous behaviour and hidden motives is unnecessary in the present context and renders that doctrine somewhat distinct from the present approach.[250] The settlor's

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[245] It would be a very rare case, indeed, that a successful litigant were able to recover every cent or penny spent in defending legal proceedings, which is somewhat aggravated in trusts disputes by the frequently complex nature of the legal issues, as well the often protracted background facts; see e.g. Financial Services Consumer Policy Centre, *Review of Compensation Arrangements* (November 2002), online: Australian Government, The Treasury <http://www.treasury.gov.au>("[i]n [*Wilkinson v Feldworth*, *supra* note 237] the clients were able to pursue other defendants. The matter was finalised four years after consumers became aware of their losses, following an appeal by a defendant. One plaintiff died in the interim. Legal costs were over $800,000, only $600,000 of which was recovered on a party party basis. Alternate defendants with deep pockets are not always available" at 23, para 4.2); *Ketteman v Hansel Products Ltd*, [1987] AC 189 (on an application to amend pleadings it was held that "justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes" per Lord Griffiths at 220).

[246] Especially in the context of wills, see e.g. *Evanturel v Evanturel* (1874), LR 6 PC 1; *Cooke v Turner* (1846), 15 M & W 727, 152 ER 1044; *Barclays Private Bank, supra* note 233.

[247] See *Permanent Trustee Company v Dougall*, (1931) 34 NSW St R 83 [*Permanent Trustee v Dougall*] at 86-87 per Harvey CJ in Equity.

[248] *C.f.* Langbein, "Mandatory Rules", *supra* note 29 at 1106, 1124, 1126.

[249] Particularly as regards the 'three certainties'; *Knight v Knight*, *supra* note 34 at 172 per Lord Langdale MR; see Jessica Palmer, "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZL Rev 81 ("an aspect of the law relating to certainty of intention required for a valid trust" at 92)–although Professor Palmer goes too far in recasting the project entirely within the requirement for certainty of intention, see Conaglen, "Sham Trusts", *supra* note 16 at 184. See also *Antle v The Queen*, [2009] TCC 465, which suggests that the approach in Canada may be to focus on the certainty of intention (at paras 40-49), although the Court also found that there was no certainty of subject matter, as well (at paras 50-58), finding that "this is only a shell with no legal significance" at para 57).

[250] See e.g. *Prudential PLC v HMRC*, [2009] EWCA Civ 622; *Minwalla v Minwalla*, [2004] EWHC 2823; *AG Securities v Vaughan, Antoniades v Villers*, [1990] AC 417; *Snook v London & West Riding Investments*, [1967] 2 QB 786 [*Snook*] at 802 per Diplock LJ; *IRC v Duke of Westminster*, [1936] AC 1 ("[t]here may, of course, be cases where documents are not bona fide nor intended to be acted upon, but are only used as a cloak to conceal a different transaction" at 21 per Lord

intentions may have been genuine and reasonable (stage one), but the arrangement itself does not meet the threshold for the recognition of the particular arrangement as a trust (stage two); divestiture has simply not occurred and the would-be settlor has retained ownership. In order to create a trust, it is well entrenched that property must be conveyed outright to another person (i.e. the trustee) or, in the case of a self-declaration of trust, held by that person in a distinctively trustee capacity.[251] For this reason, it might be possible to absorb much of the jurisprudence on 'sham trusts' into the irreducible core of the trust, but in order to do so the fixation on illegitimate motives, rather than mistaken intentions, would need to be expunged.[252]

1.3.3. Outright conveyance

The third practicality that could arise from the failure to comply with the irreducible core of the trust is that a trust has not been created as a matter of law, as was the case with retention of ownership, but that an outright conveyance has occurred. The transferee might be the trustee, the beneficiary or some other person who is effectively controlling the trust (e.g. an appointor, enforcer or protector).[253] If a person has in all respects intended to transfer the property to another person, but has mistakenly characterised that transfer as a trust, the transferee will take the property outright.[254] Furthermore, if a supposed trustee acts without fetter on his power to dispose of property that is ostensibly held in trust, that person effectively acts as the outright owner of the relevant property, which is inimical to the juridical

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Tomlin); D Hayton, "When is a Trust not a Trust?" (1992) 1 Journal of International Trust and Corporate Planning 3; D Brownbill, "When is a Sham not a Sham?" (1993) 2 Journal of International Trust and Corporate Planning 13; Conaglen, "Sham Trusts", *supra* note 16 ("a sham only exists where the parties intended to generate a false or misleading appearance that certain rights and obligations had been created" at 183); Fox, "Non-Excludable Duties", *supra* note 35 at 18.

[251] *C.f. Knight v Knight*, *supra* note 34 ("[a]s a general rule it has been laid down, that when property is given absolutely to any person, and the same person is by the giver who has power to command, recommended, or entreated or wished, to dispose of that property, in favour of another, the recommendation, entreaty or wish shall be held to create a trust... [if the three certainties of words, subject and object are certain]" at 172 per Lord Langdale MR).

[252] See Ben McFarlane & Edwin Simpson, "Tackling Avoidance" in Joshua Getzler, *Rationalizing Property*, *supra* note 61 ("the task of a court is simply to ascertain the genuine intentions of the party or parties in circumstances where those intentions are relevant; and a statement that an act is a sham is simply a consequence of ascertaining that it does not reflect such a genuine intention" at 140); L Smith, "Mistaking the Trust", *supra* note 55 at 791-92.

[253] See *Scaffidi v Montevento*, *supra* note 3 ("on the proper construction of the instrument, the power of the appointor to remove and appoint trustees may be exercised for the purpose of controlling the trust estate for the appointor's benefit, the trust property may be regarded, at least for certain statutory purposes, as effectively owned by the appointor, or as property in which the appointor has a contingent interest" at para 151 per Murphy JA & Hall J); *Australian Securities and Investments Commission v Carey (No 6)*, [2006] FCA 814, 153 FCR 509 at paras 19, 29, 37-46 per French J; *Public Trustee v Smith*, [2008] NSWSC 397, 1 Australian Succession & Trusts Law Reports 48 at paras 108-138 per White J; *In the Marriage of Goodwin*, [1990] Family Law Cases 92, 101 Fam LR 386 at 392; *In the Marriage of Davidson (No 2)*, [1991] Family Law Cases 92, 101 Fam LR 373.

[254] See Conaglen, "Sham Trusts", *supra* note 16 ("if parties have intentionally created a gift transaction, the fact that they have labelled it as a trust is of no consequence, but it does not make the gift a sham and nor does it make the trust a sham-there simply was no trust" at 180; *c.f.* Geraint Thomas and Alastair Hudson, *The Law of Trusts* (Oxford:Oxford University, 2004)(who would classify this as a sham at 29).

classification of trusts.[255] Again, it is simply a matter of proper private legal ordering and keeping a tidy common law house; the court's supervisory jurisdiction over trusts should not be enlivened to monitor simple transfers of property.[256] Because the consequences and finality of determining that an outright conveyance of property has occurred as a matter of law (stage two), the court will require cogent evidence of intention (stage one).[257] The potential for the property to be outrightly conveyed serves as a salient reminder to the drafters of novel trust deeds that the courts will categorise the transaction for what it is as a matter of law.[258] Such is the case in United States jurisprudence: "[a] trust in which there is no legally binding obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of property."[259]

In the unlikely event that a would-be settlor does not wish to abide by the mandatory requirements set by irreducible core of the trust, then that person would be well-advised to pursue other private law devices for the disposal or management of their property.[260] Beyond these practical implications,

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[255] See Fox, "Non-Excludable Duties", *supra* note 35 ("[t]o return to the point made by Millett LJ in *Armitage v Nurse*, trustees who are free to act in dishonest disregard of the duties imposed on them by the settlor, and or to manage the trust assets without being legally accountable, are not really trustees at all. In substance, they are behaving as beneficial owners of the assets vested in them... The decision to make a disposition lies entirely with them. There is no practical difference in the consequences of exercising their powers ultra vires or intra vires." at 20); David Hayton, "The Difficulties in Impeaching Trustees' Exercise of Discretionary Functions" (2002) 4 Trusts e attività fiduciarie 497 [Hayton, "Discretionary Functions"]("[i]f [beneficiaries] do not have meaningful rights against the trustee where is the trustee's obligation? Without an obligation to the beneficiaries there is no true trust for them" at 504).

[256] See *Cook v Fountain* (1676), 3 Swans 585, 36 ER 984 [cited to Swans] ("the Defendant's case is never to be favoured in Chancery, and so all general proofs of equitable circumstances are vain; if he were Plaintiff and needed the relief of this Court, he ought to be dismissed, for his title being only *donum gratuitum* must take its fortune at law, and cannot be assisted here" at 590-91 per Lord Nottingham LC); Langbein, "Mandatory Rules", *supra* note 29 ("[t]he settlor can choose to proceed by trust or by outright gift, but the settlor cannot make the courts call the one the other" at 1121).

[257] See *Cook v Fountain*, *supra* note 256 ("the law never implies, the Court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust, unnecessarily, a way is opened to the *Lord Chancellor* to construe or presume any man in *England* out of his estate; and so at last every case in court will become *casus pro amico*" (at 988), Lord Nottingham LC goes on to provide four instances to illustrate where the law would not imply a trust, of which the fourth is the most relevant being that "[a] purchase of land in the name of the eldest son implies no trust, for it is not necessary to imply a trust where an advancement may be intended: *Wyndham's case*"); The Reports of Sir Edward Coke in thirteen parts, Volume 1 ("for the cestuique use had no right at law, and equity will not enforce *donum gratuitum* (*Coleman v. Sorrel*, 1 Ves. Jun. 50.)" at 298.

[258] See *Glenn v Federal Commissioner of Land Tax*, (1915) 20 CLR 490 [*Glenn*]("[the Commissioner's argument was] based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable" at 497).

[259] *McNeil v McNeil*, (2002) 798 A2d 503 at 509. See also *Scott & Ascher on Trusts*, *supra* note 70, vol 1, at 323-25 (for a useful discussion and assembly of the cases where transfers 'in trust' were held to be outright gifts, rather than trusts).

[260] See *Seeley v Jago* (1717), 1 P Wms 389, 24 ER 438 ("equity, like nature, will do nothing in vain" at 438 per Lord Cowper LC); See generally Burrows, *English Private Law*, *supra* note 20 (for a structured overview of the well-established categories of English private law); see also William Swadling, "Property: General Principles" in Burrows, *English Private Law* (*ibid* at 219) and especially 272-78 (on the 'juridical effect of placing rights behind a trust', 'why create a trust?' and the 'classification of trusts').

another serious consequence of purporting to establish faux trusts is that those arrangements may not be enforced in jurisdictions that apply orthodox trust principles.[261] This presents a significant risk for would-be settlors chasing fiscal advantages through the use of 'wacky' offshore trusts.[262]

[261] See *Hague Trust Convention*, arts 1, 2; Jonathan Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (Oxford: Hart Publishing, 2002) at 100-22 (on the 'recognition of trusts' in foreign states and the 'characteristics of the trust' under the *Hague Trust Convention*); *European Trust Law*, *supra* note 42 38-44; Peter Willoughby, *Misplaced Trust* (Cambridge: Gostick Hall Publications, 1999) ("[t]he trust legislation of some offshore jurisdictions, in an effort to be user friendly by seeking to overcome perceived disadvantages in the equitable rules developed over many centuries, have sometimes distorted the trust concept and unwittingly permitted the creation of what are, in substance, different legal relationships such as bailments of chattels, agencies and nomineeships, unconvincingly disguised as "international trusts". These so-called trusts are unlikely to be treated as effective trusts by other jurisdictions in which, for example, the assets are situated; at best they will operate as resulting trusts to the settlor or his estate" at 1). See also *supra* note 140 and accompanying text.

[262] See Matthews, "Shooting STAR", *supra* note 140 ("[t]here is an infallible test against which to judge the wackiness of new offshore products. It comes in two parts. First, are locals permitted to use it? Second, can it be applied to local land? If the answer to both questions is No, then you know that the local authorities think it is seriously wacky. If the answer to one question is Yes and to the other is No (whichever way around), you know that they at least have doubts", Matthews then describes the STAR trust regime as falling into the "semi-wacky category" at 67). *C.f.* Antoine, *supra* note 117 at 14-16, 269-363.

Part 2. Analytical jurisprudence

2.1. The importance of analytical jurisprudence to the irreducible core of the trust

> "*'When* I *use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean–neither more nor less.'*
> *'The question is,' said Alice, 'whether you* can *make words mean so many different things.'*"[263]

As discussed in Part 1, some people use the word 'trust' to describe many kinds of property-holding arrangements in a purely subjective manner that strains the orthodox understanding of the trust concept in the common law ('the Humpty Dumpty approach').[264] The Humpty Dumpty approach serves as a salient reminder that words do not have a natural, objective or true meaning;[265] rather, words have the precise meaning we choose to ascribe to them. In the absence of the speaker or writer, we are left to derive the meaning of a particular word used by that person from the context in which it was spoken or written.[266] And the same is true of the word 'trust': anything can be called 'trust'.[267] However, in order

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[263] Lewis Carroll, *Through the Looking-Glass And What Alice Found There* (London, UK: Macmillan & Co, 1872) at 117.
[264] See e.g. Nicole Langlois and Adam Cloherty, "Playing the 'Get out of Jail Free' Card: Mistake in the Law of Trusts" (2010) Jersey & Guernsey Law Review 1 ("when I use a trust, it means exactly what I choose it to mean" at 1); Paul Matthews, "The Comparative Importance of the Rule in Saunders v Vautier" (2006) 122 Law Q Rev 266 [Matthews, "Saunders v Vautier"] at 287-88, n 205 (in answering the question of whether or not the rule in *Saunders v Vautier* is fundamental to private trust law, Professor Matthews highlights the point in the following way: "[w]ell, as Professor Cyril Joad might have said, "It all depends what you mean by 'trust'." Professor Matthews explains in the footnote that Professor Joad was well known for his participation in a popular BBC Radio programme called "The Brains Trust" and would usually begin answering questions by saying "It all depends what you mean by …").
[265] See Arthur L Corbin, Foreward, Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("[n]o word in any language has a 'true' meaning, or an 'objective' meaning, or a 'legal' meaning, which everyone is required to adopt at his peril, in his conversation, his letters, his contracts, his statutes, or his constitutions" at viii); HLA Hart, "Definition and Theory in Jurisprudence" (1953) 70 Law Q Rev 37 [Hart, "Definition and Theory"] at 38-41.
[266] E.g. *Thorn v Dickens*, [1906] Weekly Notes 54 (where "probably the shortest will ever known" contained only the words "all for mother" was proved and admitted to bequeath the testator's entire estate to his wife, and the mother of his children, who he habitually called 'mother', rather than his actually mother, who was dead when the will was made at 54 per Sir Gorell Barnes); *Re Smalley*, [1929] 2 Ch 112 (the English Court of Appeal accepted that the testator, who had bequeathed his entire estate to "my wife E.A.S." had intended not to benefit his wife, 'M.A.S.', but a second wife from a bigamous marriage, 'E.A.M.', known to him as 'E.A.S.'); see also *R (Daly) v Home Secretary*, [2001] 2 AC 532 ("[i]n the law, context is everything" at 548 per Lord Steyn); see also HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593 at 607 and Lon L Fuller, "Positivism and Fidelity to Law–A Reply to Professor Hart" (1958) 71 Harv L Rev 630 at 662-64 (for an interesting debate arose over a public park notice forbidding vehicles in the park, which, taken in context, could surely not extend to vehicles such as prams or children's tricycles).
[267] See Waters, "Institution", *supra* note 100 ("[o]f course, anything can be called a trust; that is the prerogative of legislators, codifiers and all of us. There is no copyright in the word." at 449); Waters, "Future of the Trust", *supra* note 214

to progress language and collective understanding at all, we need to have a common frame of reference in order to know what certain words mean when they are used in conceptual expression ('the Alice approach').[268] The idea resounds in the field of trusts, where the discerning temperament shown by Alice in the previously quoted passage would bring some order to the discourse and practice relating to trusts.[269] On the Alice approach, trusts will not be recognized too readily simply because something is called 'trust'.[270] We must consider precisely whether drafters can make the word 'trust' mean so many different things. So to develop the lingering allegory further, if would-be settlors adopt the Humpty Dumpty drafting technique, and their so-called trust should have a great fall, all the king's horses and all the king's men may not be willing to put their trust back together again. This exemplifies the importance of analytical jurisprudence in the context of juridical classification within a coherent, rational structure of the private law. It also highlights that clarity of communication must be at the heart of legal comprehension. Analytical jurisprudence sharpens the focus on ensuring effective legal communication to achieve that juristic ambition.[271]

Therefore, before moving on to consider the specific legal relations that comprise the irreducible core of the trust (in Part 3), it is important to consider the analytical tools that will enable these relations to be defined. The balance of this Part develops the analytical framework that will be employed, being

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("[i]n this paper I am primarily concerned with the future and fate of the common law trust, but I seek to assert no common law claim to the word, trust" at 864); *Citibank v QVT*, *supra* note 191 at 71.

[268] See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("[a]nyone who has seriously observed and reflected on the interrelation of ideas and language must realize how words tend to react upon ideas and to hinder or control them. More specifically, it is overwhelmingly clear that the danger of confusion is especially great when the same term or phrase is constantly used to express two or more distinct ideas" at 69-70) at Matthew H Kramer, "Rights Without Trimmings" in Matthew H Kramer, NE Simmonds & Hillel Steiner, *A Debate Over Rights: Philosophical Enquiries* (Oxford: Clarendon Press, 2000) 7 ("to participate in an intellectual dispute, one must explicitly define its terms; and, by defining the terms of the dispute, one will already have begun one's participation therein" at 7).

[269] That temperament is also reflected in the drafting of the Principles of European Trust Law: *European Trust Law*, *supra* note 42 ("[n]ot every concept that is called "a trust" in English or translated into English as "a trust" is "a trust" within the meaning of Article 1. To include all so-called 'trusts' within Article 1 would make any definition of a trust virtually meaningless" at 30, the authors then go on to explicitly exclude Quebec trusts and Dutch bewind trusts (one of two kinds of South African 'trust') on the basis that the trust property in those trusts is not owned by the trustee at 30). See also Matthews, "Shooting STAR", *supra* note 140 (in the context of the STAR trust regime and, more particularly, whether those trusts are trusts properly so-called, Professor Matthews observes that"[g]ranted, a legislature may do what it wishes, may call 'Sunday' 'Monday' and 'Monday' 'Sunday' if it pleases, but this really does push the notion of of parliamentary sovereignty to the limit" at 68).

[270] See Fox, "Non-Excludable Duties", *supra* note 35 ("[m]ere incantation of the word 'trust' is not enough to make a transaction a trust if it lacks some of the essential features of trusteeship" at 18); L Smith, "Mistaking the Trust", *supra* note 55 ("I was one of many who were pleased to see [Willoughby, *Misplaced Trust*] saying so clearly what needed to be said: just because something is called a trust by someone or other, does not make it so" at 788). See generally Willoughby, *supra* note 261; James Wadham, ed, *Willoughby's Misplaced Trust*, 2nd ed (Cambridge: Gostick Hall Publications, 2002).

[271] See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("[t]he great practical importance of accurate thought and precise expression as regards basic legal ideas and their embodiment in a terminology not calculated to mislead is not always fully realized" at 65).

that of Hohfeld's schema of jural relations, and gives an overview of the legal conceptions that will be used in Part 3 to define the legal relations comprising the irreducible core of the trust.[272] Beyond a concerted effort to avoid ambiguity, there are three main trust-related reasons for adhering to an analytical framework when exposing the core legal relations in trust law.

First, the academic discourse and judicial dictum on the trust's irreducible core has so far concentrated upon non-excludable *duties* of trustees or *obligations* of trusteeship.[273] Whilst the idea of correlative *rights* permeates that discussion, this thesis emphasises the necessary correspondence of those legal conceptions, as well as providing a more comprehensive account of other legal conceptions that comprise the irreducible core of the trust. *Second*, the law is concerned with the conduct of relationships between persons, and not things, nor relations between persons and things (hence, the *relational* theory of law (and trusts)).[274] *Third*, it is important to break down and identify more precisely the core trust relations due to the advent of new trust offices (e.g. advisors, enforcers and protectors[275]) and the fact that, depending on the circumstances of the case, those persons may owe certain core duties (e.g. duty of loyalty[276]) that correlate with distinct rights held by each of the beneficiaries. To be responsive to these kinds of contemporary challenges in trust law, an analytical framework will facilitate a clear and principled approach to be taken to these problems.

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[272] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("[e]ven if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued both to clear thought and to lucid expression" at 35), quoting James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little Brown, 1898)("[a]s our law develops it becomes more and more important to give definiteness to its phraseology; discriminations multiply, new situations and complications of fact arise, and the old outfit of ideas, discriminations, and phrases has to be carefully revised. Law is not so unlike all other subjects of human contemplation that clearness of thought will not help us powerfully in grasping it" at 190).

[273] See Fox, "Non-Excludable Duties", *supra* note 35; Hayton, "Irreducible Core", *supra* note 35; Penner, "Exemptions", *supra* note 77; Trukhtanov, *supra* note 78; Wei; *supra* note 78. See sections 1.2.1.1 and 1.3.1 above.

[274] See section 1.1.3 above.

[275] See section 1.2.1.3 above.

[276] In the Cayman Islands, for example, the default position is that enforcers owe fiduciary obligation to perform the trust: *Trusts Law* (Cayman Islands), s 101(2)("[s]ubject to evidence of a contrary intention, an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust."). In Guernsey, the fiduciary obligation to perform the trust appears mandatory, being imposed by statute: *Trusts Law* (Guernsey), s 12(2)("[i]t is the fiduciary duty of an enforcer to enforce the trust in relation to its non-charitable purposes."). In Jersey, a similar obligaiton exists to that of Guernsey, but it is not stated to be 'fiduciary' in character: *Trusts Law* (Jersey), s 13(1)("[i]t shall be the duty of an enforcer to enforce the trust in relation to its non-charitable purposes").

2.2. Hohfeldian schema of jural relations

Hohfeld's analytical jurisprudence brought together fundamental legal conceptions *applied in judicial reasoning*.[277] Hohfeld was concerned to "dissipate... th[e] fallacious notion" that his exposition of the fundamental legal conceptions was not simply disregarded as "merely 'academic' in character and devoid of substantial utility for the practitioner or judge."[278] In a real sense, therefore, Hohfeld's contribution to analytical jurisprudence was intended to assist in solving practical legal problems, rather than simply theorising those problems into meaningless abstraction.[279] In order to do so, Hohfeld concentrated on exposing "the lowest common denominators of the law", together with their relation to one another (interconnected by correlatives and opposites), but also demonstrating how those terms can be applied in order to solve complex and concrete problems arising in litigation.[280] Hohfeld's schema is diagrammatically reproduced as follows:[281]

[277] See Walter Wheeler Cook, Introduction, in Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("'*Fundamental Legal Conceptions as Applied in Judicial Reasoning'–the* very title reveals the true character of Hohfeld's interest in the analytical field. 'As applied in judicial reasoning'–that is the important thing; fundamental legal conceptions not in the abstract, but used concretely in the solving of the practical problems which arise in the everyday work of lawyer and judge" at 5) [emphasis in original].

[278] *Ibid* at 66, see 63-64, as well. See also Robert Stevens, "The Conflict of Rights" in Robertson & Tang, *supra* note 88 ("[c]ompared with the work of many modern-day legal theorists, Wesley Newcomb Hohfeld's work reveals a refreshing engagement with the law that lawyers deal with on a daily basis" at 142). Indeed, one of Hohfeld's contemporaries had similar aspirations, see Roscoe Pound, "Law in Books and Law in Action" (1910) 44 Am L Rev 12 ("[i]t is the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it....Let us not become legal monks. Let us not allow our legal texts to acquire sanctity and go the way of all sacred writings" at 36).

[279] See *Ibid* ("Hohfeld was a great lawyer, and he was seeking to show how his work was of relevance to law in practice. Unfortunately, the only people some modern day theorists seem to be engaged with are other theorists. I have head Hohfeld described as 'old hat'. I could not disagree more strongly" at 142); Walter Wheeler Cook, Introduction, in Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("no one recognized more clearly than did Hohfeld that 'theory' which will not work in practice is not sound theory. 'It is theoretically correct but will not work in practice' is a common but erroneous statement. If a theory is 'theoretically correct' it will work; if it will not work, it is 'theoretically incorrect'" at 21).

[280] *Ibid* at 63-66.

[281] Hohfeld's arrangement was (*ibid* at 36, 65):

Jural Opposites	right	privilege	power	immunity
	no-right	duty	disability	liability
Jural Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

Hohfeld 1

Hohfeld 2

In the above diagrams, the vertical arrows represent *correlation*, while the diagonal arrows represent *opposition*. Viewed in this way, one could also analyse the horizontal relations between the legal conceptions in each of the diagrams (e.g. right/privilege, power/immunity, etc.). Although Hohfeld acknowledged the potential value in understanding the connexion between these concepts, the interplay was not developed a great deal, nor has it been explored in analytical jurisprudence since that time.[282] It might be that there is an antithetical connexion between the horizontal legal relations in the above diagrams, but one that is nevertheless analytically distinct from the pairings of legal opposites in the above diagrams (diagonal arrows). The horizontally-linked legal conceptions in the above diagrams appear to represent *independence*, rather than *dependence* (vertical arrows) or *interdependence* (diagonal arrows). In a specific, horizontal legal relation, *affirmation* is defeated by one's *freedom from* that positive assertion (i.e. independence).[283] In this sense, the Hohfeldian schema might even be thought to have an emancipatory quality. A full exposition of that interesting topic falls outside the scope of the present thesis. However, it is worth noting the potential value of the horizontally-linked conceptions for the purpose of the analysis of the legal relations comprising the irreducible core of the trust, which will follow in Part 3.

Each of the four correlative pairings from the diagrams, Hohfeld 1 and Hohfeld 2 above (i.e. right/duty, privilege/no-right, power/liability, immunity/disability), will be discussed briefly before moving on to consider Hohfeld's main classification of the fundamental legal conceptions, together with some competing theories that either challenge or extend the Hofeldian classification, which will bear on the formulation of the irreducible core relations, particularly with respect to the *outer core of the trust* (in Part 3.2).

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[282] *Ibid* (""a power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation" at 60).
[283] *Ibid*.

2.2.1. Right/duty

One of the greatest ambitions in the Hohfeldian schema was to correct the multifarious usage of the term *right* to its narrowest, and most meaningful, sense: simply being the correlative of *duty* and synonymous with *claim*.[284] Given the circularity in that formulation, this is not much of a definition of *right*, unless we know what is meant by *duty* and/or *claim*. Despite the importance of the terms *right* and *duty*, not only to the Hohfeldian framework but also to legal definition and juridical classification, Hohfeld spends little time working through these legal conceptions. However, the characterization of correlation between the two concepts of *right* and *duty* is invaluable to meaningful legal analysis. Thus, a *duty* without a correlative *right* is not a legal duty because there is no one that can enforce the duty and hold the person to account in the event of breach. If a person cannot bring a recalcitrant obligor before a court of law, then, it cannot be said that the person owes a legal obligation–they might feel morally obliged to act in a certain way but they will not be held legally responsible for failing to do so (the duty lacks *accountability*).[285] Conversely, a *right* that does not impose a correlative *duty* on another person is bereft of legal content, as no one owes any obligation to ensure the content of the right is fulfilled (the right lacks *enforceability*).[286] Legal culpability is essential to the meaningful existence of a genuine duty/right relation as a matter of law.[287] This thesis argues that *accountability*

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[284] *Ibid* at 71-72. In the Hohfeldian schema, *claim* and *right* are not only treated synonymously and used interchangeably, but Hohfeld ultimately preferred the term *claim* to that of *right* in order to convey the technical sense in which *right* is used as a matter of law. Although there is not space enough to provide a full exposition, this thesis will not treat *claim* and *right* synonymously because it is considered that those legal terms are analytically distinct and serve to convey different ideas in the law, particularly given the prevalence of *claim* as being the legal conduit or vehicle by which *rights* are vindicated in a court of law and used in the language of civil procedure. *C.f.* Stephen A Smith, "The Rights of Private Law" in Robertson & Tang, *supra* note 88, 113 [S Smith, "Rights of Private Law"] at 119. See also William Blair QC et al, eds, *Bullen & Leake & Jacobs' Precedents of Pleadings*, 16th ed, vol 1 (London, UK: Sweet & Maxwell, 2008) [*Bullen & Leake*] at 14 (although the exposition is generally on pleadings and statements of case, the importance of the conceptions of *claim* and *defence* is crucial–"[t]he statements of case must state facts which, if correct, give rise to a valid legal claim or defence. If it does not do so, it is liable to be struck out" at 14). See e.g. *Bullen & Leake*, *ibid*, vol 2 at 1415-16 (for the distinctness of proprietary claims from the underlying rights that those claims vindicate). See also Bernard Cairns, *Australian Civil Procedure*, 6th ed (Sydney: Thomson Lawbook Co, 2005) at 160; Lord Woolf, *Access to Justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* (London, UK: HMSO, 1996) (in the context of pleadings, Lord Woolf recommended a departure from 'pleadings' to 'statement of case' because "a change of language will, I believe, help to underpin a change of attitude and a real change of practice to a more open and straightforward method of stating a claim or defence" at ch V, para 14). This idea also builds on a line of thought taken by Professor Hart that the the *vindication* of a right depends upon the *choice* of the right-holder–it is considered that this tends to show the distinct of *claim* and *right* because the existence of a *claim* show that a choice has been made toward the vindication of a *right*; Hart, "Definition and Theory", *supra* note 265 at 49.

[285] See Kramer, *supra* note 268 at 8-9; compare Hart, *Concept of Law*, *supra* note 82 at 79-88.

[286] See Kramer, *supra* note 268 at 9.

[287] See Austin, *Lectures on Jurisprudence*, *supra* note 74 at 353-67; John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, ed by HLA Hart (London: Weidenfeld and Nicolson, 1954) at 14, 133; Hans Kelson, *General Theory of Law and State* (Cambridge, Mass: Harvard University Press, 1945) at 58-64; Hans

and *enforceability* are the two normative themes that underlie the irreducible core approach to trusts and ensures that the trust remains a fundamental *legal* institution by defining *right* as follows: *a* right *is a certain entitlement afforded to a person that imposes a correlative duty on another person and is enforceable by a claim actionable in a court of law*.[288]

2.2.2. Privilege/no-right

From the diagram Hohfeld 1 above, it is evident that *privilege* is the opposite of *duty* and the correlative of *no-right*.[289] A *privilege* could be taken further to describe the pure negation of what would otherwise be a *duty* imposed on a particular person.[290] Whilst Hohfeld struggled to find a suitable word in popular usage to express the jural correlative of a *privilege*, and the opposite of *right*, he ultimately settled with *no-right*.[291] Quite obviously, *right* and *no-right* are the pure negation of each other and, thus, diametrically opposed in the Hohfeldian schema. Professor Hart took the Hofeldian *privilege* further to the idea of *liberty-right*, which is itself protected by a plurality of rights that ensure non-interference by the establishment of a 'protective perimeter'.[292] Although others have also expressed a preference to embody the concept communicated by the Hofeldian *privilege* in terms of *liberty*, that trend will not be followed at present. *Privilege* will be retained for the reasons articulated by Hohfeld and because no compelling account has been given to justify that linguistic transition from *privilege* to *liberty* nor for the additional conflation of the latter with *right*.[293] Moreover, there is a

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Kelson, *The Pure Theory of Law* (Berkeley: University of California Press, 1967) at 114-19; Kramer, *supra* note 268 ("[a] genuine right or claim is enforceable. (Unlike a purely moral claim–which is also enforceable in certain ways–a genuine legal claim is enforceable through the mobilizing of government coercion, if necessary" at 9). See e.g. *Re Mackay; Mackay v Gould*, [1906] 1 Ch 25 [*Re Mackay*] ("I mean bound in the sense that any consequences follow from his not performing the obligation. Bound in one sense he may be. There may be an imperfect obligation... but a perfect obligation, i.e., an obligation to which a sanction is attached" at 33 per Kekewich). See also Hart, "Definition and Theory", *supra* note 265 at 49-53. Compare Hart, *Concept of Law*, *supra* note 82 (arguing that, although a duty may not be enforced by sanction, it may instead be supported by strong social pressure and commenting on the 'internal aspect of rules' by which people 'feel bound' to bahave in a certain way at 55-56).

[288] The converse of that statement develops the definition of *duty:* duty *is a certain obligation imposed on a person that corresponds to a correlative right held by another person that is enforceable by a claim actionable in a court of law*. Compare Hart, "Definition and Theory", *supra* note 265 at 49. In this definition of right, claim and right are not treated synonymously. This is a departure from the Hohfeldian schema, as to which see the text in *supra* note 284.

[289] See the diagram Hohfeld 2 above (accompanying *supra* note 281).

[290] See Glanville Williams, "The Concept of Legal Liberty" (1956) 56:8 Colum L Rev 1129 (although preferring the term *liberty* to Hohfeldian *privilege* to express the concept, the same point is noted that "the concept of absence of duty is being expressed by 'liberty'" at 1131).

[291] See Arthur L Corbin, Foreword, in Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at ix.

[292] HLA Hart, "Legal Rights" in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) 162 at 171. *C.f.* Williams, *supra* note 290 at 1142-45.

[293] See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 44-49. *C.f.* AM Honoré, "Rights of Exclusion and Immunities Against Divesting" (1959-60) 34 Tul L Rev 453 [Honoré, "Rights of Exclusion"] at 456, n 9 (preferring *liberty* to *privilege* because of the 'specialized connotations' of the latter); Williams, *supra* note 290 (preferring *liberty* to *privilege*

pressing need to simply adopt common terminology rather than nitpicking over minor mutations in language to express the same content in law.[294]

2.2.3. Power/liability

Moving to the second diagram, Hohfeld 2, we find that *power* is the legal correlative of *liability* and the opposite of *disability*.[295] Given the legal opposite of *power* is *disability*, one might even conceive of *power* as legal ability and disability as no-power.[296] According to the Hofeldian schema, *power* is the volitional control to effect a change in legal relations.[297] Of course, the opposite of *liability* is an *immunity; liability* is better understood as *responsibility*, rather than being synonymous with *debt*.[298] Powers are, of course, incredibly important in the field of trusts because this is the source of a trustee's capacity to do a variety of things in performing the trust. In order to ensure a certain degree of trust functionality, many powers are part of the default law applicable to trusts that can be excluded by express provision in the trust deed.[299] However, there are two key powers that form part of inner core of the trust that cannot be excluded and act as exceptions to the trustee's core duty to perform the trust in accordance with the terms of the trust deed: one predominantly trustee-sided (power to vary the trust); the other beneficiary-sided (power to terminate the trust), which act as a limit on the settlor's freedom to dictate how the trust will be performed.[300] There is also one additional power that is conferred upon trustees given their capacity to convey title to the trust property to good faith faith purchasers for value, irrespective of whether that transfer is in breach of trust. It is contended that this is one of the three core relations that comprise the outer core of the trust (in Part 3.2).

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because "[t]he term 'privilege' carries the strong popular and etymological meaning of a special favor given to the individual or a narrow class (*privilegium,* a private law)" at 1131); Kramer, *supra* note 268 at 7, n 1.

[294] See WIlliams, *supra* note 290 (even in choosing to depart from *privilege* in favour of *liberty*, it is observed that "[t]his departure from Hohfeld is made with reluctance, because the need for an agreed technical language is so great that it counterbalances any minor difficulties that may be urged against the choice of this or that particular word" at 1131).

[295] See the diagram Hohfeld 2 above (accompanying *supra* note 281); Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 50.

[296] *Ibid* at 51.

[297] *Ibid* at 51 (e.g. agency (at 52), appointment (at 53), alienation (at 58) offer to enter into contractual relations (at 56)).

[298] *Ibid* at 59 (Hofeld also considered that 'subjection' was one of the nearest synonyms to *liability*).

[299] In Australia: *Trustee Companies Act 1968* (Qld), Part 3. In England & Wales: *Trustee Act,* 1925 (UK), 16 Geo V, c 19, s 69(2). In the United States: *Uniform Trust Code*, *supra* note 31, s 815(a).

[300] See Harris, "Trust, Power and Duty", *supra* note 14 at 53, 63 (applying the Hohfeldian relation of power/liability to explain the rule in *Saunders v Vautier*). See section 3.1.6.1 below.

2.2.4. Immunity/disability

In the second diagram above, Hohfeld 2, the final set of legal conceptions are *immunity* and its correlative, *disability. Disability* is, of course, the legal opposite of *power* (or legal ability) and could, therefore, be understood as no-power.[301] While *immunity* is opposed by *liability*, Hohfeld considered that exemption was the best synonym for *immunity* and that impunity was also instructive because it had a similar connotation. [302] This is particularly important to the present thesis because it ties back into the discussion on exclusion clauses and exemptions from liability that afford immunity to the trustee from liability (i.e. the permissible scope within which the trustee can act with impugnity). It also serves to tie the two separate diagrams, Hohfeld 1 and Hohfeld 2, together. It would be wrong to conceptualise the powers of the trustee as being enlarged by virtue of certain duties being lawfully excluded by the trustee; rather, what we find is that, in Hohfeld 1, the beneficiary has a *no-right* with respect to the content of that excludable *duty* (conferring a correlative *privilege* on the trustee to act in that way irrespective of the negation of *duty*) and that, when we transition to Hohfeld 2, the trustee's powers still remain those set out in the trust deed and otherwise derived from the default law, but with the trustee having immunity flowing from the exemption. The beneficiaries have a *disability* with respect to the particular content of the right that has been lawfully excluded. Much of the irreducible core of the trust is concerned with ensuring that the trustee is not entitled to act unreasonably by having *immunity* (i.e. exemption or impunity).

2.3. Externality of the trust

One of the most difficult fields of enquiry in trust law is the affect that trusts have on third parties; particularly, a beneficiary's rights against strangers to the trust. This goes to the heart of the debate over the juridical nature of the trust, which has produced a weight of academic writing in the last century and continues to have a polarising effect on trust analysis.[303] Phrases such as 'equitable proprietary rights' and 'beneficial interest' are apt to mislead, especially in the more difficult cases of determining rights under discretionary trusts and to whom trust assets belong.[304] This thesis will

[301] Hohfeld, *Fundamental Legal Conceptions, supra* note 10 at 60, 62-63.
[302] *Ibid* at 59.
[303] See *supra* note 19 and accompanying text.
[304] See *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)*, [1999] HCA 51, 198 CLR 494 at [34] per (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ; *Livingston v Commissioner of Stamp Duties (Qld)*, (1964) 112 CLR 12, [1965] AC 694 (PC) [*Livingston* (PC) cited to CLR]("the terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words 'interest' and 'property'. Thus propositions are

propose a logical extension of the irreducible core concept in trust law by considering the important third party effects of trusts and reducing those effects into three essential legal relations for further analysis (in Part 3.2). This is a distinct and novel contribution to the stream of academic writing and jurisprudence on the irreducible core approach to trusts and should not be taken to have been articulated elsewhere or accepted formally as yet. It is new and original from the author's part and proposed only by this thesis.

While preserving the law/equity divide, Hohfeld classified the fundamental legal conceptions in his schema into two distinct categories on the basis of *exigibility*.[305] In Hohfeld's view, a *right*, for example, could be classified depending on the scope of the correlative *duties*: if the right avails against a single person or a few definite persons, the right is *paucital*;[306] if the class of correlative duty-bearers is large and indefinite, the right is *multital*.[307] Kourek reworked Hohfeld's classification of rights to suggest that where the 'essential investigative facts' serve to directly identify the person who owes the incident duty, the right could be said to be 'polarised' (*paucital*) and, if not, the right is 'unpolarised' and attaches to a large and unidentifiable class of persons (*multital*).[308] Thus, no special demarcation is drawn between personal (*in personam*) rights and proprietary (*in rem*) rights in the Hohfeldian schema beyond the number of persons to whom those rights affect through the imposition of correlative duties.[309] Hohfeld's thesis on the law/equity divide was one of broad harmony, but appreciated that

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advanced or rebutted by the employment of terms that have not in themselves a common basis of definition" at 22 per Viscount Radcliffe); *Livingston v Commissioner of Stamp Duties (Qld)*, [1960] HCA 94, 107 CLR 411 [*Livingston* (HCA) cited to CLR]("[a]fter all, the expression "beneficial interest" is a *nomen generale*, not to say *generalissimum*; and the label is not sufficiently informative" at para 10 per Kitto J; at 438 per Fullagar J); *Leedale v Lewis*, [1982] 1 WLR 1319 ("[t]he word 'interest' is one of uncertain meaning and it remains to be decided on the terms of the applicable statute which, or possibly what other, meaning the word may bear" at 1329 per Lord Wilberforce) *Baker v Archer-Shee*, [1927] UKHL 1, AC 844; *Barnardo's Homes v Special Income Tax Commissioner*, [1921] 2 AC 1.

[305] See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 74-76. See also Birks, *Introduction to Restitution*, *supra* note 21 at 49; McFarlane & Stevens, "Equitable Property", *supra* note 105 ("[t]he key attribute of a right against a thing is its universal exigibility: if B has a right against a thing, B's right is prima facie binding on the rest of the world" at 1); this was also the essential distinction been absolute and relative rights in Continental legal philosophy, where the former avail against everyone and the latter avail against a single person or a limited number of persons; Honoré, "Rights of Exclusion", *supra* note 293 at 454.

[306] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("[a] paucital right, or claim (right *in personam*), is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons), or else it is one of a *few* fundamental similar, yet separate, rights availing respectively against a few definite persons" at 72).

[307] *Ibid* ("[a] multital right, or claim (right *in rem*), is always *one* of a large *class* of *fundamentally similar* yet separate rights, actual or potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people" at 72).

[308] Albert Kocourek, *Jural Relations* (Indianapolis: Bobbs-Merrill, 1928) at 201.

[309] See Arthur L Corbin, Foreword, in Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("a right *in personam* was a right against another person bound by a correlative duty, while a right *in rem* was merely one of many (manifold) rights against innumerable unidentified persons each of whom was under a correlative duty. Every right *in rem* is also a right *in personam*" at xii)[emphasis added]

conflict did exist between the rules of equity and law and in such cases, the equitable rule was paramount and determinative.[310] This did not affect nor undermine his expression of the content of specific rights, albeit that those rights may be exclusively equitable, conflict with legal rights, and be exigible against 'third parties'.[311]

Professor Honoré objected to the numerical criterion in Hohfeld's classification of rights, claiming that "[i]t rests on a confusion of rules of law with facts".[312] Honoré sought to expose that confusion by noting that a contract could be replicated by one person with many other persons, thereby transforming the paradigm paucital (*in personam*) right of contract into a right that resembled a multital (*in rem*) right simply because it availed against many persons similarly and simultaneously. Honoré further pointed out that multital (*in rem*) classification was deficient in that a land owner is said to hold an *in rem* right irrespective of the fact that only a small number of person's might be present in the jurisdiction where the land is situated and that the landowner might have licensed all those person's to roam and picnic on that land.[313] Ultimately, Honoré concludes that there is no particular social importance for the traditional distinction between *in rem* and *in personam* rights but finds sufficient justification for the classification of real and personal rights in relation to property being determined by the scope of *immunity* from divestment without consent.[314]

Honoré's argument is rather academic and fails to appreciate that *multital* rights impose correlative duties on strangers without any kind of factual interface or interaction between any two persons at either end of a specific (*multital*) legal relation (i.e. the duty-bearers are a *class* of persons). Honoré's argument is self-defeating in the sense that the manufacturing of the composite of rights that apparently look like *in rem* rights is achieved by the awkward proliferation of *in personam* rights. Honoré proves too much, for if one person were added to the jurisdiction, the person enjoying these quasi-*in rem* rights (created through multitudinous contracts) would actively need to seek out that person and enter into contractual relations in order to bind that person in the way others had been previously bound; for if one fish slips through Honoré's net (e.g. by refusing the contract), his synthetic blueprint for the

[310] Hohfeld, "Relations", *supra* note 85 ("while a large part of the rules of equity harmonize with the various rules of law, another large part of the rules of equity–more especially those relating to the so-called exclusive and auxiliary jurisdictions of equity–conflict with legal rules and, as a matter of substance, annul or negative the latter *pro tanto*" at 543-44).
[311] *Ibid at* 555-56; Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 111-14.
[312] Honoré, "Rights of Exclusion", *supra* note 293 at 454.
[313] *Ibid* at 454-55.
[314] *Ibid* at 459, 464-68.

replication of *multital* rights is defeated. This is precisely the thing that is avoided in the case of *multital* rights, which arise by force of law without any contact or contractual interface between a particular right-holder and any of the duty-bearers (again, comprising a broader *class* of persons).

In his exposition on equitable property, Richard Nolan took Honoré's core feature of proprietary rights (i.e. the ability to *exclude* others from enjoyment of an asset) and turned that idea into a double-edged sword by adding the right to *enjoy* the asset, as well.[315] Nolan observed that the ability to exclude others from access to assets (*negative rights*) cannot be an exhaustive understanding of property, but also requires the conjoining of the capacity of the right-holder to benefit from those assets (*positive claims*).[316] In Nolan's view, the core feature of equitable property is that claims to exclude others from certain assets are enforceable against a wide and indefinite class of people conjoined with the claim to benefit from those assets which can only be enforced against a very limited number of persons.[317] Professor Stevens and Ben McFarlane have contended that the obvious problem with Nolan's approach is that a person may hold an equitable proprietary right in relation to an intangible asset (the ubiquitous example being a beneficiary's legal standing vis-a-vis a trustee holding a personal right against a bank in the form of a bank account).[318] Thus, whilst it makes sense to speak of excluding others from the use of physical things (deriving from title to a car or land), it is not meaningful to speak of excluding others from making use of a debt.[319]

The alternative view proffered by Stevens and McFarlane essentially sees equitable proprietary rights not as property rights (rights against things), nor as personal rights (rights against persons), but as *rights against rights*, thereby placing those rights outside the Roman dichotomy of *in personam* and *in rem rights*.[320] The key feature of characterising a beneficiary's rights in this way is that those rights *persist* against any person (i.e. recipients) purporting to derive a right (or title) from a person under a pre-existing duty to hold a 'claim-right' or power in a certain way (i.e. a trustee).[321] The force of that theory is evident from the observation that a beneficiary cannot claim against a third party for that

[315] Nolan, "Equitable Property", *supra* note 17 at 234-35; although Nolan does not expand on Honoré's suggestion that an *immunity,* in the Hohfeldian sense, effectively acts as a shield to defeat a proprietary right.
[316] *Ibid* at 233 and 235-36.
[317] *Ibid* at 235-36; Nolan also argues that it is imperative that infringement of these primary rights (of exclusion and access) will generate secondary claims to vindicate those primary rights (*ibid* at 233, 235-36).
[318] McFarlane & Stevens, "Equitable Property", *supra* note 105 at 3.
[319] *Ibid* at 3.
[320] *Ibid* at 1-3. See also Ben McFarlane, *The Structure of Property Law* (Oxford: Hart Publishing, 2008) [McFarlane, *Structure of Property Law*] at 21-38, 69-79, 206-65; McFarlane, "Third Parties", *supra* note 80.
[321] *Ibid* at 1-2, 5.

person's careless or reckless damage to, or destruction of, trust property. Nor can a beneficiary have direct recourse against a third party who steals an asset held in trust.[322] Any tort claim for damage to (i.e. in negligence), or recovery of (i.e. in conversion), the trust property must be made by the trustee or, through an expedited process, the beneficiary effectively claiming through the trustee.[323] Recipient liability is explained by the acquisition of an encumbered title that is impressed with any pre-existing right, subject to relevant defences.[324] In the rights against rights theory, the relevant right to be susceptible to another's right must be: a) capable of being the subject of a duty;[325] b) specific and distinct;[326] and c) a *claim-right* or a *power*, not an *immunity* or a *liberty*.[327]

While Stevens and McFarlane doubt whether it is possible to have a right against an *immunity*, one common Australian example proves this to be possible. In the case of franking credits distributed with dividends on company shares, those credits provide an *immunity* from taxation to the extent of the face value of those credits.[328] The franking credit regime allows corporate entities that are liable to be taxed as juristic persons to pass through the value of taxes already paid in the form of tax exemptions that are designed to ensure that one stream of income is not taxed twice in the hands of two separate taxpayers.[329] Franking credits could properly be classified as granting an *exemption* or *immunity* from taxation (being the negation of a (tax) *liability*).[330] Franking credits can be stored, transferred and held

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[322] *Ibid* at 3-6.
[323] *Ibid* at 3-6, citing *MCC Proceeds Inc v Lehman Bros International (Europe)*, [1998] 4 All ER 675; Andrew Tettenborn, "Trust Property and Conversion: An Equitable Confusion" (1996) 55 Cambridge LJ 36 (on conversion); and *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd*, [1986] AC 785 at 812 per Lord Brandon (on negligence).
[324] McFarlane & Stevens, "Equitable Property", *supra* note 105 at 4-6.
[325] *Ibid* at 10-11; whether or not the right is transferable is not determinative of whether a person is able to come under a duty in relation to that right (*ibid* at 10), citing *Don King Productions Inc v Warren*, [2000] Ch 291, [1999] 2 All ER 218 [*Don King* cited to Ch]; *Barbados Trust Co Ltd v Bank of Zambia*, [2007] EWCA Civ 148, [2007] 2 All ER (Comm) 445.
[326] McFarlane & Stevens, "Equitable Property", *supra* note 105 at 11-12; the divisibility of common law rights is determined at common law and, therefore, equity is said to follow the law in this respect because the right must be one that is separate and distinct in that a person has a *power* to create a right in relation to that right (*ibid* at 12).
[327] *Ibid* at 12-15 (in the Hohfeldian sense of those terms); restrictive covenants over land are aanomalous in the rights against rights theory, by which rights can only be held against claim-rights or powers (*ibid* at 14).
[328] See *Income Tax Assessment Act 1997* (Cth), subdivision 208-F; note that the terminology of *exemption* is used synonymously and interchangeably with *immunity* in the context of the franking credits regime.
[329] See Austl, Commonwealth, *New Business Tax System (Imputation) Bill 2002*, Explanatory Memorandum (Canberra: Australian Government Publishing Service, 2002)("[f]ranking credits reflect income tax paid directly by the entity, or underlying tax paid through other corporate tax entities that is imputed to the entity.... When a franked distribution is made to a member of an entity, the franking credit referred to as an *imputation credit* in the member's hands. Imputation credits usually reduce income tax by giving rise to a tax offset known as the *franking rebate*. In addition, if the recipient is a corporate tax entity itself, an imputation credit is also allowed as a franking credit in the entity's own franking account, which may in turn be distributed to the entity's members" at 1.11 to 1.12).
[330] Hohfeld treated both those terms–*exemption* and *immunity*–synonymously; Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 60-63 (exemptions from taxation are featured prominently as examples of *immunities*); see section 2.2.3 & 2.2.4 above and the diagram, Hohfeld 2, above (accompanying *supra* note 281).

on trust,[331] which reflects the fact that franking credits are a distinct legal conception (i.e. *immunity*) to that of the *right* from which they are derived (i.e. the right to be paid a dividend, which is one aspect of the composite of legal relations comprising a company shareholding).[332] The correlative legal conception imposed on the taxing authority is properly understood as a *disability* (being the opposite of the taxing agency's *power* to tax a certain portion of the individual's income owing to the tax exemption (i.e. *immunity* from taxation) so held).[333] Franking credits could be likened to a 'get-out-of jail-free' card in Monopoly,[334] which grants an immunity on the player *holding* the card to avoid a jail sentence and can be traded or transferred to another player, so that a player could act with impunity to the extent of the face value of the card (typically one jail sentence in the standard rules).[335]

More fundamentally though, the rights against rights theory does little to explain precisely what *rights* beneficiaries actually have against the trustee's rights held in trust. Although we are told that in order for a right to be the subject of another's right, the right must be *specific* and *distinct*, no specific or distinct rights are identified in the rights against rights theory.[336] It seems that what is meant is simply that the trustee holds the composite of rights typically comprising common law ownership, which can be in turn made the subject of equitable claims (giving rise to the beneficiary's right against the bundle of rights held by the trustee).[337] What we find in the rights against rights theory, then, is not an

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[331] See the text in *supra* note 329 and *infra* note 332; *Thomas Nominees Pty Ltd v Thomas*, [2010] QSC 417 [*Thomas Nominees*] ("there is no apparent controversy that a beneficiary may obtain the benefit of franking credits" at [38] per Applegarth J, citing R Deutsch, *Australian Tax Handbook 2010* (Sydney: Thomson ATP, 2010), at para 27.370; companies are not required to pass through franking credits with dividends paid but can choose the extent of franking credits passed on through shares (dividends so paid are referred to as being fully or partially franked).

[332] See *Thomas Nominees*, *supra* note 331 (contrary to the Deputy Commissioner of Taxation's submission that "franking credits are merely a tax concept which do not represent an accretion to the trust fund over and above the distributions to which they attach", Applegarth J held that "franking credits would appear to be an accretion to the trust fund, and something of substantial value. They are not merely a concept of the income tax regime, they are a benefit" at paras 48-49).

[333] See the diagram, Hohfeld 2 (accompanying *supra* note 281).

[334] The popular board game published by Parker Brothers.

[335] Indeed, if your fellow players are nerdy enough, the card itself could be held on trust for any of those players until such time as the beneficiary-player directs the trustee-player to hand over the card. So, too, with franking credits, which are a kind of 'get-out-of-tax-free' card; although one would want to be careful not to fall foul of the anti-tax avoidance provisions; *Income Tax Assessment Act 1936* (Cth), Part IVA (dealing with schemes to reduce income tax and, more specifically proscribing schemes for the streaming of franking credits); see also *Income Tax Assessment Act 1936* (Cth), s 177EA; *Electricity Supply Industry Superannuation (Qld) Ltd v Deputy Commissioner of Taxation*, [2003] FCAFC 138 (franking credit streaming scheme in a trust context).

[336] See McFarlane & Stevens, "Equitable Property", *supra* note 105 at 11-12; the divisibility of common law rights is determined at common law and, therefore, equity is said to follow the law in this respect because the right must be one that is separate and distinct in that a person has a *power* to create a right in relation to that right (at 12).

[337] Accord McFarlane, *Structure of Property Law*, *supra* note 320 (McFarlane describes the "Core Trust Duty" as "duty not to use the right for C's own benefit" at 256). On the legal conceptions that comprise common law ownership, see Honoré, "Ownership", *supra* note 76 at 187-89.

avoidance of the personal/proprietary rights dichotomy, but rather a layering of both kinds of rights.[338] While the rights against rights theory certainly does not seem to be a comprehensive account of the composite of legal relations pertaining to a beneficiary under a trust, at least not in its present formulation, there is much to commend that theory and it is gaining ground in providing a fuller account of equitable proprietary rights.[339]

On the balance of this thesis, it is considered that there remains tremendous value in the Hohfeldian schema of jural relations, in that the precise formulation of legal conceptions assists in dismantling and dissecting complex, *practical* legal problems for closer examination and exposition. It would be a fair assessment of, and accurate to describe, the present thesis as essentially being an Hofeldian analysis of the essential, juridical nature of the trust. And, in this respect, Hohfeld's closing remarks in his magnum opus provide a poignant reminder of his fascination with the trust:

> The nature of equitable rights, privileges, powers, and immunities of the *cestui que trust* is too large a subject for adequate treatment in the present place; and so further consideration of that interesting subject must be reserved for another occasion. It is hoped, however, that the various classes of rights and remedies already discussed are sufficient to show that the intrinsic nature of substantive primary rights–whether they be rights *in rem* or rights *in personam*–is not dependent on the character of the proceedings by which they may be vindicated.[340]

While these final words of Hohfeld's seminal work reveal Hohfeld's intrigue with the trust, Hohfeld never got the chance to turn his hand to the extensive project of trust analysis to which he alluded.[341] Hohfeld's more extensive writing on the fundamental legal conceptions and their classification, as well as the dualism between law and equity, does, however, give us a fair indication of where Hohfeld might

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[338] See McFarlane, "Third Parties", *supra* note 80 ("[a] property right is therefore defined here as a right that: (i) imposes *prima facie* duty on the rest of the world; and (ii) relates to a thing (an object that can be physically located)" at 313).
[339] See e.g. Andrew Burrows, *The Law of Restitution*, 3rd ed (Oxford: Oxford University Press, 2011) [Burrows, *Law of Restitution*] at 191-93 (describing the rights against rights theory as "fascinating and novel" and "illuminating and persuasive" at 191, 192); L Smith, "Trust and Patrimony", *supra* note 100 ("[t]he essence of the common law trust lies not in any division of ownership of the trust property; this is a metaphor that is as likely to confuse as it is to enlighten... [r]ather it lies in the fact that the trust beneficiaries hold rights *in* the rights that the trustee holds as trust property" at 333).
[340] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 113-14.
[341] The article containing the preceding quotation was published in 1917 and Professor Hohfeld died the following year in 1918 at the age of 38. The following edition of the Yale Law Journal, which featured Hohfeld's seminal publications, was dedicated to him, see the editorial piece by Karl N Llewellyn, "Wesley Necomb Hohfeld–Teacher" in (1919) 28 Yale LJ 795. See also Walter Wheeler Cook, "Hohfeld's Contributions to the Science of Law" (1919) 28 Yale LJ 721, reprinted in Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 3.

have stood in articulating, with precision, the composite of essential legal relations that comprise the irreducible core of the trust. It is hoped that the balance of this thesis will do justice to Hohfeld's vision.

Part 3. Specific legal relations comprising the irreducible core of the trust

In this Part, it is contended that the irreducible core of the trust can usefully be divided into inner and outer cores, each of which comprises legal relations that can be delineated along *paucital* and *multital* lines according to the Hohfeldian classification[342]. The legal relations in the inner core of the trust are exigible against an ascertainable and finite number of persons: on the side of right-holders (beneficiaries), those essential rights are exigible against trustees; and, on the side of the duty-bearers (i.e. trustees), those duties are owed to beneficiaries (i.e. these relations are *paucital*).[343] In addition to providing a fuller account of these essential, internal legal relations of trusts, this thesis contends that the irreducible core concept in trust law can be logically extended to explain the externality of the trust and used to capture, and provide a more accurate picture of, the essential juridical nature of the trusts and its placement within the structure of the private law.

Although the analyses of the irreducible core concept in trust law usually relate to the internal dynamic between trustees and beneficiaries, the argument thus proposed in this thesis is that the third party effects of trusts are just as essential and non-derogable as any of the legal relations existing between trustees and beneficiaries. The reason for the fixation on the internal, trustee-beneficiary relationship in the irreducible core approach to trusts is explicable on the basis that the irreducible core approach to trusts arose in the context of trustee exemption/exclusion clauses and juridical considerations regarding the margin of appreciation afforded to settlors to exempt trustees from liability for breaches of trust.[344] But the genesis of the irreducible core concept in trust law should not dictate nor constrain its future progression and its utility in the law of trusts more generally to explain the essential, juridical nature of the trust.

The formulation of an outer core of legal relations comprising trusts is is an original approach that has not been articulated elsewhere and so, it should not be taken to be settled either in academic literature or trust jurisprudence. But this thesis does draw heavily from those sources for implicit support regarding the essential quality of the relevant legal relations identified. Thus, to take account of the external aspects of the trust, it is contented that the 'outer core of the trust' comprise those legal

[342] See section 2.3 above.
[343] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 72; see *supra* note 306 and accompanying text.
[344] See sections 1.2.1.1 & 1.3.1 above.

relations that are manifold in the sense that the particular legal conception involved is held by a trust party, but avail against persons that constitute a very large and indefinite class of persons (i.e. those relations are *multital*).[345] The paucital/multital classification is not confined to duty/right relations, but is equally applicable to other legal relations in the irreducible core of the trust, such as *power/liability* and *immunities/disability*, which will be apparent from, and relevant to, the subsequent analysis provided in relation to both the inner and outer cores of the trust.[346]

3.1. Inner core of the trust

The inner core of the trust is expressed by six legal relations that are fundamental to the trust concept in the common law tradition. Those legals relations relate to: a) informing beneficiaries of their status; b) keeping trust information; c) disclosing trust information; d) good faith; e) loyalty; and f) performing the trust. Those legal relations can further be split (broadly) into two groups: the first three (i.e. (a)-(c)) being administrative in character (*accountability*-sided), the latter three (i.e. (d)-(f)) being dispositive in nature (*enforceability*-sided).[347] Bound together, the administrative group of irreducible core relations provides an opportunity to the beneficiaries to falsify or surcharge the account and, thereby, goes to the heart of trust *accountability*.[348] These relations are generally described simply in terms of there being a 'duty to account', which is frequently employed to describe "the essential historical character of the trust as an accountable stewardship of property."[349] Professor Hayton situated the so-called 'duty to account' under the rubric of "Rights to Information", which was then said to include the "duty to find and pay a beneficiary" and, in the case of discretionary trusts, the "duty to take reasonable steps to make a discretionary beneficiary aware that he be such."[350] Therefore, it appears that what is meant by the 'duty to account' is the base notion that trustees must be accountable *and* that any and all core duties must exist in order "to make the trust effectual with the trustees being accoutable to the

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[345] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 72; see *supra* note 307 and accompanying text.
[346] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 67, 71. See sections 3.1.6.1 & 3.1.6.2 below.
[347] See *Waters' Law of Trusts*, *supra* note 4 at 852-54 (on the distinction between administrative and dispositive powers and duties).
[348] *Underhill & Hayton* (17th ed), *supra* note 30 at 3, 763; Penner, "Exemptions", *supra* note 77 at 253.
[349] L Smith, "Trust Information", *supra* note 115 at 8. See also Hayton, "Irreducible Core", *supra* note 35 ("[t]he essential ingredient of trusteeship is the duty to account which affords the beneficiaries a correlative right to have the court enforce the trustee's fundamental obligation to account" at 49-50); *Chaine-Nickson v Bank of Ireland*, [1976] IR 393 (rejecting a submission that the trustee did not have to account for, or disclose, the amount of remuneration the trustees had received for administering the relevant discretionary trust as it was "contrary to the basic concept of a trustee being accountable for his management of the trust fund" at 396 per Kenny J), quoted with approval by the Privy Council in *Schmidt v Rosewood*, *supra* note 111 at 731-32 per Lord Walker.
[350] Hayton, "Irreducible Core", *supra* note 35 at 49.

beneficiaries for their stewardship of the property."[351] In a comparative context, the capacity for the 'duty to account' to mislead is readily apparent from Lepaulle's claim that there are no common duties or rights in trusts.[352]

The ambiguity inherent in the phrase 'duty to account' is also apparent from the following list of meanings that could possibly be ascribed to the phrase 'duty to account':[353] a) inform beneficiaries of their status (inform beneficiaries); b) maintain accounts and ledgers recording the management of the trust property (i.e. trust accounting); c) keep trust information and ensure that trust information is not lost or destroyed (keep trust information); d) either proactively or reactively (i.e. when requested to do so), disclose trust information (disclose trust information); e) in addition to simply providing trust information, explain to beneficiaries the state of the trust affairs in order to assist those persons to understand trust information disclosed to them (explain trust affairs); f) disclose or explain to a beneficiary the reasons for the exercise of a discretion (disclosure of discretionary basis); g) restore trust funds and make good any loss caused by a breach of trust (restore trust losses);[354] and h) disgorge any profits obtained in breach of a fiduciary duty owed to each of the beneficiaries (disgorge profits).[355] The first six of meanings (i.e (a) - (f)) are *primary* legal relations, whereas the last two constitute *secondary* (or remedial) legal relations.[356] But only the first ((a) inform beneficiaries), third ((c) keep

[351] *Ibid* (Hayton suggest the duty to account follows from "knowledge of the trust" at 49); see also Hayton, "Developing the Obligation", *supra* note 91 ("[i]f the trustee cannot be called to account by a beneficiary, then the beneficiary is remediless and the trustee may do as he likes" at 105, n 54), citing *Raak v Raak*, 428 NW 2d 778 (1988) at 780.
[352] LePaulle, "An Outsider's View", *supra* note 101 ("[i]t cannot either be stated that the trustee has an absolute duty to account, since in discretionary trusts he may be freed from such an obligation" at 54). See also *supra* note 220 and accompanying text; *c.f. European Trust Law*, *supra* note 42 ("[t]o be able to enforce their rights it is crucial that the beneficiaries have a right to make the trustee account for his management of the trust property" at 32).
[353] *C.f.* Dan B Dobbs, *Law of Remedies: damages, equity, restitution* (St Paul, Minnesota: West Publishing, 1993) (sets out five distinct doctrines or remedies that the term 'accounting' might refer to in trust practice at 609-10), although Dobbs' formulations, being directed to an enquiry on remedies, are different to the present formulations).
[354] See *Jacobs' Law of Trusts*, *supra* note 28 at 594.
[355] Although the language of disgorgement strikes a restitutionary chord, and is described in this way in the United States jurisprudence, this thesis does not advance the proposition that breaches of fiduciary obligations give rise to any kind of *restitutionary* response (known in the field of restitution as 'restitution for wrongs'); *contra* Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 Law Q Rev 472; see also Birks, "Definition and Division", *supra* note 13 (for an analysis of primary and secondary relations and on the distinction legal responses to causative events at 23-28); see *Soulos v Korkontzilas*, [1997] 2 SCR 217 per McLachlin J and *Muschinski v Dodds*, (1985) 160 CLR 583 per Deane J; *c.f.* Langbein, "Mandatory Rules", *supra* note 29 (Langbein describes disgorgement of profits as a "restitutionary remedy" at 1125); David Wright, *Remedies* (Sydney: The Federation Press, 2010) at 103-18.
[356] See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 at 67; this would also accord with the Austinian dichotomy between rights arising from facts and events (*primary rights*) and rights arising from infringement of other rights (*secondary rights*); Austin, *Lectures on Jurisprudence*, *supra* note 74, vol 2, at 811-12, 858-59. See also Stephen A Smith, "Rights, Remedies and Causes of Action" in Charles Rickett & Ross Grantham, eds, *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford: Hart Publishing, 2008) 405 (arguing that court orders are qualitatively different from ordinary rights-creating events and that the language of 'remedies' should be retained over the Birksian view of court orders

trust information) and fourth ((d) disclose trust information) form part of the irreducible core of the trust and will be considered below.[357]

In the United States, the drafters of the *Uniform Trust Code* were careful not to use loose language such as 'duty to account' and even exercised caution when defining the trustee's account keeping functions "in order to negate any inference that [trust reports] must be prepared in any particular format or with a high degree of formality."[358] Instead, the *Uniform Trust Code* states precisely the duties owed by trustees, each of which accords with the approach taken in this thesis and will be discussed below where relevant.[359]

The second group of internal (paucital) legal relations are often run together as though they collectively and exhaustively form *the irreducible core obligation* in trusts law. In Millett LJ's words, "[t]he duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries."[360] This thesis contends that there is no such *single* duty, nor does a trust consist simply of *an obligation*,[361] but that Millett LJ's apothegm embodies three distinct core legal relations: a) the duty of good faith; b) the (fiduciary) duty of loyalty; and c) the duty to perform the trust (in accord with its purposes and terms).[362] This second group of core legal relations has heightened importance for the exercise of the

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as right-creating events); Wright, *supra* note 355 at 7-13; James Edelman & John Davis, "Torts and Equitable Wrongs" in Burrows, *English Private Law*, *supra* note 20, 1185 (for a classification of primary and secondary *duties*); Kit Barker, "Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Rights" (1998) 57:2 Cambridge LJ 301 ("the analytical divide between remedy and right has practical utility, because it prevents the elision of (distinct) ideas relevant to causes of action and remedies respectively. It helps to structure legal thought" and, later, " we judge the nature and power of a primary right by observing the way courts react to its violation in their selection of remedy or-which is the same thing-in their allocation of secondary rights. Action and reaction each contribute to our understanding of the other. Rights bear upon remedies and remedies bear upon our understanding of rights" at 319, 323, respectively). *C.f.* Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20 Oxford J Legal Stud 1 [Birks, "Rights, Wrongs and Remedies"]; Daniel Friedmann, "Rights and Remedies" (1997) 113 Law Q Rev 424 ("[r]ights and remedies are inter-related, though the relationship is subtle and complex. The type and extent of remedies available shed some light on the nature of the legal right, though they cannot explain everything... Rights and obligations were created in order to justify the granting of a remedy" at 525); CC Langdell, "Classification of Rights and Wrongs" (1900) 13 Harv L Rev 537; SM Waddams, "Remedies as a Legal Subject" (1983) Oxford J Legal Stud 113.

[357] See sections 3.1.1 (informing beneficiaries of their status), 3.1.2 (disclosing trust information) & 3.1.3 (keeping accounts and trust information) below.

[358] *Uniform Trust Code*, *supra* note 31, s 813(c)(in the commentary to that provision).

[359] See *Scott and Ascher on Trusts*, *supra* note 70, vol 3, at 1186-95 (on the duty to keep and render accounts), 1196-1205 (on the duty to furnish information); Langbein, "Mandatory Rules", *supra* note 29 at 1125.

[360] In England & Wales: *Lewin on Trusts*, *supra* note 28 at 788; *Armitage v Nurse*, *supra* note 3 at 253-54 per Millett LJ; In New Zealand: Butler et al, *supra* note 28 at 151-52.

[361] See *Underhill & Hayton* (17th ed), *supra* note 30 at 2, para 1.1.

[362] See *infra* notes 432, 433 and accompanying text (good faith vs loyalty); see *infra* note 461, 462 and accompanying text (good faith vs performance).

trustee's dispositive powers and is fundamental to ensuring trust *accountability* through the related theme of *enforceability*.

3.1.1. Informing beneficiaries of their status

Adult beneficiaries having a vested entitlement under a trust have a right to be notified of their status as beneficiaries. This imposes a correlative duty on trustees to notify those persons with a vested interest under the relevant trust of that beneficial status. The right to be informed of one's status as a beneficiary is, in practical terms, the essential first step to ensuring *accountability* and *enforceability* of the trust and forms part of the irreducible core of the trust.[363] The public policy behind this mandatory rule is simply, and rather strongly, that notification of beneficial status under a trust enables those persons to be cognizant of rights that those persons uniquely hold as a matter of law (both core and as otherwise provided in the trust deed). Although this duty/right relation features prominently in the English trust commentaries and jurisprudence, it is not often clearly and distinctively articulated elsewhere in the Commonwealth jurisdictions (typically being bundled-up with the duty/right to trust information).[364] In the United States, settlors cannot dispense with the trustee's duty to notify the beneficiaries "of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports."[365]

On the side of the right-holders, there are three classes of persons that create uncertainty and present problems to the accountability and enforceability of trusts: *first*, beneficiaries who are not *sui juris*; *second*, beneficiaries with a right that will vest some time in the future; and, *third*, persons who are not

[363] See *O'Rourke v Darbishire*, [1920] AC 581 [*O'Rourke*]("[i]t is not material for the present purpose whether [the right to the production for inspection of all documents relating to the affairs of the trust] is to be regarded as a paramount proprietary right in the cestui que trust, or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission, or the establishment, of the status on which the right is based." at 619-20 per Lord Parmoor), [emphasis added].

[364] In England & Wales: *Lewin on Trusts*, *supra* note 28 at 788; *Underhill & Hayton* (17th ed), *supra* note 30 at 763, para 54.2. *C.f.* Australia: Dal Pont, Chalmers & Maxton, *supra* note 28 at 688; *Jacobs' Law of Trusts*, *supra* note 28 at 382, para 1716; Lee et al, *supra* note 106 at para 9.4610; Ong, *supra* note 106 at 244. In Australia this fundamental precursory right has been clouded by the fixation on the beneficiaries' right to trust information, the basis for which is incredibly controversial. *C.f.* Canada: *Oosterhoff on Trusts*, *supra* note 4 at 1102 (interestingly, given the importance of this duty/right relation, this is not listed as an 'initial duty' of trustees at 1049-50); *Waters' Law of Trusts*, *supra* note 4 at 1069-70 (interestingly again, this duty/right relation is not listed as one of the 'duties of trustee upon acceptance' at 938-40). In New Zealand: Butler et al, *supra* note 28 at 135.

[365] *Uniform Trusts Code*, section 105(b)(8) and 813(b)(2) and (3), although interestingly the duty only applies to beneficiaries having attained 25 years of age. See Langbein, "Mandatory Rules", *supra* note 29 at 1125-26. *C.f. Scott and Ascher on Trusts*, *supra* note 70, vol 3, ("the trustee may have a duty, promptly after the creation of a trust, to inform at least certain of the beneficiaries of its existence, their status and right to obtain further information, and other basic information" at 1199).

yet beneficiaries, but merely objects of a discretionary power of appointment. In relation to all three classes of persons, notification of an entitlement, actual or potential, may be desirable because it enables those persons to be cognizant of their rights. But the crucial question is where to draw the line so that trusts are administratively workable and trusteeship is not overly onerous.[366]

In terms of the first class of persons (i.e. those lacking legal capacity), those persons commonly have a legal guardian or parent who manages that person's affairs and trustees should be obliged to inform the guardian or parent of the person's beneficial status.[367] It should not follow simply because a beneficiary is not *sui juris* that trustees are no longer accountable. If that were the case, trusts for persons under a more permanent legal incapacity (e.g. lunatics rather than minors) would never need to be notified of their beneficial status. This thesis suggests that such a position is unsatisfactory in a coherent, rational legal system. A legally incapacitated person can still enforce a trust through action commenced in that person's name, but with the assistance of a litigation friend.[368] And early notification would enable effective supervision of trusts (*accountability*) and the bringing of legal claims for misadministration in a timely fashion (*enforceability*).[369] In terms of the second class of persons (beneficiaries with a defeasible interest), those persons have an interest in the trust, which has vested and should, generally speaking, be notified of that status. In terms of the third class of persons (objects of discretionary powers), those persons may never stand to benefit from the trust at all. It may be incredibly onerous for a trustee to owe a (legal) *duty* to notify all of those persons of their *potential* beneficial status. Nothing in the idea of the irreducible core approach to trusts commands that all persons that can potentially

[366] One might usefully compare the scope of this duty/right relation (ie. informing beneficiaries of their status) with the following duty/right relation regarding duty/right (i.e. disclosure of trust information) (section 3.1.2). In this sense, it is worth comparing Millett LJ's broad statement of principle in *Armitage v Nurse*, *supra* note 3 ("[e]very beneficiary is entitled to see the trust accounts, whether his interest is in possession or not" at 261), which might be seen to go too far. Compare the position taken under English law with respect to estates: see e.g. *Re Lewis*, [1904] 2 Ch 656 (where it was accepted that an executor does not have a duty to inform legatees of their status with respect to a will); *Re Mackay*, *supra* note 287 ("I see very great difficulty in saying that an executor is bound to give notice to a legatee or to any one else who is entitled to claim against the estate of the benefits conferred upon him by the will - I mean bound in the sense that any consequences follow from his not performing the obligation. Bound in one sense he may be. There may be an imperfect obligation to disclose, but a perfect obligation, i.e., an obligation to which a sanction is attached, seems to me to be very difficult to hold" at 33 per Kekewich J).

[367] See *Lewin on Trusts*, *supra* note 28 ("[t]here appears, therefore, to be a case, albeit not reflected in judicial decisions, for disclosure without demand to parents of minor beneficiaries having parental responsibility...especially where the minors are the principal or only beneficiaries..." at 790).

[368] See *Armitage v Nurse*, *supra* note 3 at 261 per Millett LJ; *Lewin on Trusts*, *supra* note 28 at 790.

[369] The limitation period for commencing an action alleging breach of trust–other than fraud or fraudulent breach of trust– in the case of a beneficiary entitled to a future interest is six years from date when 'the interest fell into possession'; *Limitation Act 1980* (UK), c 58, s 21(1) and (3); *Lewin on Trusts*, *supra* note 28 at 789 (on notification to beneficiaries with future interests and discretionary beneficiaries); *Cf Re Lewis*, *supra* note 366 (on notification to minors).

benefit under a trust need to be notified of that status.[370] Although it may be difficult to discern the limit on notification, the *real* candidates are often readily ascertainable and should certainly be notified.[371]

Given the important, precursory nature of this core relation (i.e. it enables one to be cognizant of the other core legal relations), one curious feature deserves closer attention. Let's assume that X believes they have an entitlement under a particular trust and approaches Y, the trustee, to be informed of that status. If X is named as a beneficiary in the trust deed, X has a *right* to be notified of that status. If X is not named as a beneficiary in the trust deed, then X has *no-right* to be informed of any beneficial status under the trust because X is, after all, not a beneficiary and the right is only held by beneficiaries. Thus, Y cannot have breached any duty for failing to notify X of anything if X is not a beneficiary. The negation of Y's *duty* to inform X could be said to give rise to the legal relation, as between X and Y, such that Y has a *privilege* to notify X that X is not a beneficiary, with Y holding a *no-right* to be notified of anything relating to the trust. It is entirely a matter for Y to notify X of anything, but Y is not legally obliged to do so (i.e. *privilege* and no *duty* being Hohfeldian opposites).

But, what if X believes that Y is either lying or not complying with a *duty* to inform X of their beneficial status?[372] We have just observed that, on an orthodox understanding of the duty to inform beneficiaries of their status, Y only has a duty to inform *beneficiaries*. A chicken and egg problem, thus, arises: how could someone know whether they have a *right* to be notified that they are a beneficiary unless they know they are a beneficiary? Awareness of the existence of the *right* would seem only to arise *after* the content of the correlative duty to inform has been performed. This could present a serious lacuna for the juristic ambition of ensuring the accountability and enforceability of

[370] See Fox, "Non-Excludable Duties", *supra* note 35 ("[n]othing in the notion of an irreducible core compels the conclusion that a trustee must inform every beneficiary of their status...[t]he guiding principle is that the trustee must be accountable, not necessarily that every potential beneficiary must be equally placed to hold him to account" at 20); *Re Manisty*, *supra* note 111 at 25; *Re Hay*, *supra* note 148 at 208-10; *Hartigan Nominees Pty Ltd v Rydge*, (1992) 29 NSWLR 405 [*Hartigan v Ryde*](commenting on the uncertainty of the duty and stating that there is no "duty... to inform all persons who may possibly take under a discretionary power of the nature and extent of that possibility" at 432).

[371] See *Lewin on Trusts*, *supra* note 28 at 789; see e.g. *Re Gestetner*, *supra* note 111 (Harman J found no difficulty in ascertaining whether any given postulant was a member of the specified class of persons who were the objects of the relevant power and, thus, was not willing to find that the trust should fail for a want of certainty; furthermore, he held that the trustees need not "worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England" at 688-89 per Harman J). See also *supra* note 152 and accompanying text.

[372] Whilst this discussion might seem to run into the field of 'secret trusts', the discussion is just as relevant in standard express trusts where the person honestly believes they are a beneficiary and the trustee has failed to inform them of such or where the trust is not a 'secret trust' pursuant to the trust deed buy is expressed to be such in a lesser, possibly not legally binding document, such as a letter of wishes.

trusts because devious trustees could either lie or say nothing at all to beneficiaries without reproach and become free to loot the trust as they please.[373]

There are at least two possible ways of dealing with this problem: *first*, the person could apply to the court in its supervisory jurisdiction over trusts to be notified whether that person is named as a beneficiary or not; or *second*, if the person has a stronger case to allege a dereliction of the duty to inform, the person could file a claim alleging the trustee has breached the duty to inform them of their status and then, if it turns out on disclosure of the relevant trust documents through pre-trial discovery that the person is not a beneficiary, the claim could simply be dismissed. Either way, the person is able to find out conclusively whether that person is a beneficiary under the trust or not despite the fact that, even if it turns out that the person is not a beneficiary and the person never had a right to be informed in the first place. In terms of costs, the first route is likely to be much more straightforward and inexpensive than the second route, given that the former proceeds by way of application and the latter by way of claim (and pleadings). Given the considerable costs that might be incurred by the trustee in the second route (from the preparation of a defence to a claim, even if only preliminary work is undertaken to that end), there is also a higher risk of indemnity costs being awarded against the claimant, if it is evident to the court that the justification for the claim was thin.

An appeal should, of course, be made for transparency in the administration of trust affairs.[374] In this respect, this thesis joins Professor Hayton's "plea for more openness between trustees and beneficiaries" because, as Hayton quite rightly put it: "[t]he more one tries to hide things from people the more suspicious they become: no-one likes being treated like a mushroom, being kept in the dark and being fed you know what."[375] But irrespective of the willingness of trustees to adhere to that plea, the non-excludable, core relations will ensure the accountability of trustees and that beneficiaries are not kept in the dark. These remarks regarding trust transparency are equally applicable to, and form a neat segue into, the following duty/right relation regarding the disclosure of trust information.

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[373] Beneficiaries are, after all, the primary rank of right-holders that ensure effective accountability and enforceability of express private trusts in the common law tradition.
[374] See *Waters' Law of Trusts*, *supra* note 4 at 1069-70, n 576 (observing a growing trending throughout Commonwealth jurisdictions that trustees must act reasonably in notifying persons of a contingent interest where the likelihood of vesting is not remote).
[375] Hayton, "Discretionary Functions", *supra* note 255 at 504.

3.1.2. Disclosing trust information

Beneficiaries have a non-derogable right to trust information, which imposes a correlative, non-excludable duty on trustees to disclose that information.[376] There are essentially four qualifications on the right to trust information: *first*, the person must be entitled to make the request (standing);[377] *second*, the right is restricted to information that is associated with the administration of the trust (relevance); *third*, the right does not extend to certain confidential information (confidentiality);[378] and, *fourth*, information cannot be sought regarding, and documents need not be disclosed that reveal, the basis for the trustee's exercise of a discretion lawfully held and exercised (discretionary basis).[379] These qualifications seek to strike a balance between maintaining an effective, internal check-and-balance mechanism (*accountability*) and making sure that trusts remain administratively workable by not placing an excessive burden on trustees to deal with disclosure requests, as well as the additional tension of preserving an appropriate degree of confidentiality in trust affairs.[380]

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[376] See *Armitage v Nurse*, *supra* note 3 ("[e]very beneficiary is entitled to see the trust accounts, whether his interest is in possession or not" and "should be given the maximum opportunity to see the trust documents and to investigate the manner in which the trustees managed the affairs of the trust" at 261, 263 per Millett LJ); *Re Murphy's Settlement*, [1998] 1 WLR 282 [*Re Murphy*] ("as a discretionary object of the... settlement, the plaintiff is entitled to ask the trustees for information as to the nature and value of the trust property, the trust income, and as to how the trustees have been investing and distributing it" at 290 per Neuberger J); *Re Tillott*, [1892] 1 Ch 86 at 89 per Chitty J; *Schmidt v Rosewood*, *supra* note 111 at 724; *Tito v Waddell*, [1977] Ch 106 at 242–43 per Megarry VC; *Hartigan v Ryde*, *supra* note 370 at 431 per Mahoney JA; *Low v Bouverie*, [1891] 3 Ch 82 (the essence of the obligation was described as being "to give all his cestui que trust' on demand information with respect to the mode in which the trust fund has been dealt with and where it is" at 99 Lindley LJ); Fox, "Non-Excludable Duties", *supra* note 35 ("[t]rustees' duties to disclose information to beneficiaries are part of the irreducible core: adequate disclosure of information is essential to make the trustee's duty to the beneficiaries real" at 20); Sir Gavin Lightman, "The Trustees' Duty to Provide Information to Beneficiaries" [2004] Private Client Business 23 at 29-33.

[377] One of the difficult areas for analysis of this right is defining the class of right-holders–in traditional trusts with vested right being in defined beneficiaries it was much easier to identify a set of rights being held by each those persons individually with the correlative duty being in the trustee, but trusts conferring broad discretionary powers to appoint beneficiaries on trustees and other persons (e.g. protectors) are making making the analysis much more difficult ; *Low v Bouverie*, *supra* note 376 ("it should be noted that this duty is only limited to providing information duly requested by a qualified applicant for it—a trustee has generally no duty to volunteer information" at 99 Lindley LJ); *Re Murphy*, *supra* note 376 at 291 per Neuberger J; *Re Manisty*, *supra* at 111; L Smith, "Trust Information", *supra* note 115; *c.f.* Wei, *supra* note 78 ("[t]his means that beneficiaries with a life interest or an interest in remainder, whether in income or in capital, or vested or contingent, have accounting rights" at 480, n 13).

[378] See David Hayton, "English Fiduciary Standards and Trust Law" (1999) 32 Vand J Transnat'l L 555 at 573 [Hayton, "Fiduciary Standards"](referring to a discretionary trust instrument with a contemporaneous and contradictory letter from the settlor directing the income from the trust to be distributed to him for life); whilst that is no doubt plausible in the current state of trust practice, that kind of letter should not be considered confidential, as it is effectively the trust deed and not a mere expression of wish).

[379] See *Hartigan v Ryde*, *supra* note 370 (the two key questions for consideration were: a) whether a letter of wishes should be disclosed, despite its confidential nature; and b) how much weight trustees, in exercising their discretions, should give to a letter of wishes).

[380] See *Hartigan v Ryde*, *supra* note 370 (indicated that move should be taken away from the (restrictive) proprietary approach to disclosure adopted in England, which was said to result from an outdated, benevolent paternalism, and toward

In *Schmidt v Rosewood*, the Privy Council considered a request by Vadim Schmidt in his own right as a potential beneficiary of two Manx trusts (he being the object of a discretionary power of appointment in a broad class of potential beneficiaries) and in his capacity as administrator of the estate of his late father, Vitali Schmidt (he having received distributions from the trust and being entitled thereunder).[381] In remitting the matter to the High Court of the Isle of Man, the Privy Council gave strong directions favouring disclosure and upholding accountability of those trusts.[382] The Privy Council held that on an application for disclosure of trust documents, a court must exercise *discretion* with respect to: a) whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; b) what classes of documents should be disclosed, either completely or in redacted form; and c) what safeguards should be imposed (e.g. undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of the documents or information disclosed.[383] In setting out those discretionary factors, the Board moved away from the proprietary approach to disclosure of trust information, which viewed trust information as trust property to which the beneficiaries were prima facie entitled to access.[384]

Michael Gibbon, who acted as junior counsel for the respondent in *Schmidt v Rosewood*, has recently reflected that "[i]t is a widely held view that any decision other than the one reached [by the Privy Counsel in *Schmidt v Rosewood* (allowing Schmidt's appeal)] would have meant that (particularly in

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greater transparency in trust affairs that was driven by the view that "Australian society accepts a generally greater level of accountability than has, until now, been accepted by the law of England" at 422); Lightman, *supra* note 376 ("[i]f a settlor in arranging his affairs has recourse to a settlement and a confidential letter or indeed a confidential oral communication of wishes, he runs the risk that the due administration of the settlement, the accountability of the trustees and the safeguarding of the interests of the beneficiaries may require the confidence to be broken overridden by those other considerations" at 33); Fox, "Non-Excludable Duties", *supra* note 35 at 21. Palmer, "Theories of the Trust", *supra* note 80 ("[b]eneficiaries should not be required to prove their right to disclosure, but trustees ought to be required to prove any such right to, or interest in, confidentiality. Accountability is a fundamental characteristic of the trust; trustees' confidentiality is not" at 560). *C.f. Re Londonderry' s Settlements*, [1964] Ch 918 [*Re Londonderry*] (referring to the trustee's submission that "it was undesirable to wash family linen in public which would be productive only of family strife and also odium for the trustees and embarrassment in the performance of their duties" at 931 per Lord Harman).

[381] *Schmidt v Rosewood*, *supra* note 111.

[382] *Ibid* ("the Privy Council summarized its view that the appellant, as personal representative of his father's estate, had a "powerful case for the fullest disclosure in respect of [the trust] funds" and had a "strong claim to disclosure of documents or information relevant to the issue whether, but for breaches of fiduciary duty (such as for instance over charging) more funds would have been available for distribution to Mr Schmidt, and would or might have been allocated to him in practice" at 735; although the court declined to comment on the merits of the appellant's claim for disclosure of the trust information in his personal capacity, Privy Council observed that the appellant was a possible object with "exceptionally strong claims to be considered" at 735).

[383] *Ibid* at 730.

[384] See especially *Re Londonderry*, supra note 380 at 938 per Salmon LJ.

the offshore context) it would have been possible to create trusts that were effectively unpoliceable."[385] Insofar as the law and practice of trusts is concerned, both on and offshore, it is quite fortunate that Gibbon's client was unsuccessful, as 'unpoliceable' trusts would certainly undermine the irreducible core approach to trusts.[386]

The discretionary approach that was taken in *Schmidt v Rosewood* has been criticised, particularly with respect to the restrictions the court *may* impose on the use of disclosed information.[387] The court's approach has been said to reduce certainty and predictability regarding what should and should not be disclosed, which has a tendency to precipitate costly and unnecessary litigation.[388] However, the rival proprietary approach to disclosure of trust information stumbles over the treatment of trust information as being a kind of property capable of disclosure, whereas the precise content of the right concerns *access to information*.[389] Thus, the problem lies not in the recognition of the fundamental importance of the trustee's duty to disclose trust information, but in the nature of the beneficiary's correlative rights to disclosure of trust information. Mindful that the Privy Council's judgment in *Schmidt v Rosewood* was on appeal from the Isle of Man,[390] it has no binding quality anywhere in the Commonwealth (besides

[385] Michael Gibbon, "Beneficiaries' information rights" (2011) 17 Trusts & Trustees 27 at 30.
[386] See *Underhill & Hayton* (17th ed), *supra* note 30 ("[t]he core primary obligation created by the settlor is the personal obligation of the trustee of the trust fund to produce accounts of the trusteeship available to be falsified (for unauthorised conduct) or surcharged (for authorised but negligent conduct) by the beneficiaries. This is crucial so that the beneficiaries can monitor or 'police' the trustee's fundamental duty to keep within the terms of the trust instrument and in doings so... always to act exclusively in the best interests of the beneficiaries–and so act with undivided loyalty in their best interests" at 3) [citations omitted].
[387] See L Smith, "Trust Information", *supra* note 115 (alluding to the impediment caused by the judgment in terms of the pragmatic progression of equity, whereby "[t]he equity pragmatist would like to eliminate the legacy of discretion in equitable matters" at 6-7), citing Birks, "Rights, Wrongs and Remedies", *supra* note 356.
[388] See *Jacobs' Law of Trusts*, *supra* note 28 ("[f]or all trusts, [*Schmidt v Roswewood*] has opened up a spectre of a world in which solicitors will be unable to advise trustees whether they should accede to the requests of beneficiaries, because a beneficiary who applies to the court will be able to appeal to a very broad discretion. A decision apparently directed to widening the rights of beneficiaries may have made them less secure" at 385); Gibbon, *supra* note 385 (noting "the vital importance of [subsequent authority post-*Schmidt v Rosewood*] to practitioners trying to work out the correct practical approach in their day to day work in the context of the competing policy considerations at play (respect for confidentiality on the one hand, and the need for effective supervision on the other)" at 30), referring to *Breakspear v Ackland*, [2009] Ch 32 per Briggs J; L Smith, "Trust Information", *supra* note 115 ("[t]he usual fear is that an expansion of discretion leads to a loss of predictability, and consequent expansion of litigation" at 6). But see Ronald Dworkin, *Taking Rights Seriously* (London, UK: Duckworth, 1977)("[d]iscretion, like the hole in the doughnut, does not exist, except as an area left upon by a surrounding belt of restriction" at 31.
[389] See L Smith, "Trust Information", *supra* note 1115 ([i]n the 21st century, we know that it is no longer very helpful to think that information can be found only in documents. Efforts to describe information itself as a form of property are equally unhelpful, and often circular. Access to information is an intangible and non-proprietary event. Whether someone has a legal right of access to information cannot be answered y determining whether he or she owns something" at 5).
[390] On appeal from the Staff of Government Division of the High Court of Justice of the Isle of Man.

the Isle of Man) and the Commonwealth jurisdictions are split on the persuasive value of the judgment and whether its inherent logic should be followed.[391]

In Australia, the authorities are now split on the persuasiveness of *Schmidt v Rosewood* and fall into three categories: strongly in favour;[392] strongly against;[393] and, in the absence of clear appeallate guidance, that *Schmidt v Rosewood* should be followed.[394] It is likely that the discretionary approach taken in *Schmidt v Rosewood* will not be followed if and when the High Court of Australia has an opportunity to review its applicability to Australian law.[395] In Canada, *Schmidt v Rosewood* has broadly and consistently been followed, so as to favour an essential duty to disclose trust information incumbent on the trustee arising out of the administration of the trust property.[396] In England & Wales, the only significant case to consider *Scmidt v Rosewood* has strongly suggested that the broad discretionary approach employed in that case will not be followed.[397] In New Zealand, the discretionary approach adopted in *Schmidt v Rosewood* has found purchase and the courts have aligned the discretionary approach with the court's supervisory jurisdiction over trusts.[398] The irreducible core reasoning runs strongly through the New Zealand jurisprudence in favour of transparency in trust

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[391] See *Breakspear v Ackland*, *supra* note 388 ("[q]uite apart from the difficulty that I am bound by a decision of the Court of Appeal, it does not seem to me that *Schmidt v Rosewood Trust Ltd* justifies a departure from what I have described as the *Londonderry* principle" at 48 per Briggs J). *C.f. Lewin on Trusts*, *supra* note 28 ("though a decision on Manx law, [*Schmidt v Rosewood*] is based on English trust principles and mainly on English authorities, and should be take to be authoritative" at 788).

[392] See *Avanes v Marshall*, (2007) 68 NSWLR 595 per Gzell J.

[393] See *McDonald v Ellis*, (2007) 72 NSWLR 605.

[394] See *Silkman v Shakespeare Haney Securities Limited*, [2011] NSWSC 148 [*Silkman v Shakespeare*]("[m]y attention was not drawn to any appellate authority in Australia which has squarely considered whether the *Londonderry* approach or the *Schmidt* approach should now be followed" and "[a]bsent clear appellate guidance, I propose to follow the *Schmidt* approach" at paras 23, 27 per Hammerschlag J); Hammerschlag J did, however, go on to list a number of 'jurisprudential difficulties' with the *Londonderry* approach that he considered were absent in the *Schmidt v Rosewood* approach (*ibid* at para 27). The two approaches were fairly extensively considered by the Western Australian Court of Appeal two years earlier in *Schreuder v Murray (No 2)*, [2009] WASCA 145, but it was unnecessary to decide the issue.

[395] See *Jacobs' Law of Trusts*, *supra* note 28 (in advising whether *Schmidt v Rosewood* represents Australian law, it is observed that Lord Walker's comments in *Schmidt v Rosewood* are "only dicta in relation to strict trusts, since the case concerned a discretionary trust" and "have an unsatisfactory unsettling effect on received principles in relation to strict trusts" and that the Privy Council exaggerated and wrongly read the relevant authorities at 385).

[396] See *Webster-Tweel v Royal Trust Corporation of Canada*, (2011) Alta LR (5th) 91 at paras 62-63, 120-21 per CS Brooker J; *Re Martin Estate*, (2009) 99 BCLR (4th) 379 at paras 30-31 per Reg Blok; *Jachimowicz v Jachimowicz*, (2008) 270 N.S.R. (2d) 309 at paras 164-65 per MC Legere Sers J; *MacPherson v MacPherson*, [2005] BCSC 207 at paras 18, 26-27 per Humphries J, which moves somewhat away from a long line of Ontario jurisprudence favouring disclosure and in which caution was exercised against too readily treating trust information as confidential: *Ontario (Attorney General) v Ballard Estate* (1994), 20 OR (3d) 350 at 356 and *Sandford v Porter,* (1889) 16 OAR 565 ("[t]he duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required" at 571-72).

[397] See *Breakspear v Ackland*, *supra* note 388 at 48 per Briggs J; see also Gibbon, *supra* note 385 at 30-32.

[398] See *Rauch v Maguire HC Auckland*, [2010] 1 NZHC 1109 at para 30 per Asher J; *Foreman v Kingstone,* [2004] 1 NZLR 841 at 861 per Potter J; see also Butler et al, *supra* note 28 at 135-36.

affairs, even overriding confidential letters of wishes unless exceptional circumstances can be shown.[399] So, while the Privy Council had considered that "[t]he tide of Commonwealth authority, although not entirely uniform, appears to be flowing in [the discretionary] direction [and against the proprietary classification]",[400] there appears to be backwater building up in the subsequent cases and commentary toward greater openness and accountability, as well as clearer guidance on what trust information must be disclosed.[401]

In the United States, the position is much clearer post-codification, where the *Uniform Trust Code* upholds the strength of this duty/right to trust information by making it a mandatory rule that trustees must "respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust."[402] In terms of the objects of a power of appointment, however, it remains somewhat unclear how far the mandatory rule extends and, thus, the extent of the trustee's disclosure obligations to those persons.[403] Langbein has suggested that the policy underlying the rule is protective in that "a term that prevents the beneficiary from obtaining the information needed to enforce the trust entails the risk of making the trust unenforceable and illusory" and that such a term "places the trustee's misuse of the trust property beyond effective

[399] *Foreman v Kingstone*, *ibid* ("[b]ut when a trust is established, obligations and correlative rights are created. Otherwise there is no trust. The fundamental duty of the trustees is to be accountable to all beneficiaries. That cannot be compromised by a settlor's desire for confidentiality in relation to his and the trust's personal and financial affairs unless there exist exceptional circumstances that outweigh the rights of the beneficiaries to be informed")at 857 per Potter J.
[400] *Schmidt v Rosewood*, *supra* note 111 at 734.
[401] See *Lewin on Trusts*, *supra* note 28 ("The judicial trend is therefore towards disclosure" at para 23-53); *Underhill & Hayton* (17th ed), *supra* note 30 ("[s]ince disclosure of information to beneficiaries is now based on the core accountability of trustees to them, this letter is a key document that needs to be available for inspection by beneficiaries if they are going to be in a position where it becomes possible for them to bring the trustees properly to account... [t]hus for the beneficiaries to have a meaningful right to make the trustees account for the exercise of their discretions, they will need to see the key letter of wishes as well as the trust instrument" at [60.51]).
[402] *Uniform Trust Code*, *supra* note 31, ss 105(b)(9) and 813(a). The comment to s 813 provides that "[t]he duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee" (*ibid* at s 813, Comment). See *Re Childress Trust*, (1992) 194 Mich App 319 ("[a]lthough the terms of the trust may regulate the amount of information that the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust" at 328); *Scott and Ascher on Trusts*, *supra* note 70, vol 3, at 1196-205; Langbein, "Mandatory Rules", *supra* note 29 at 1125-126.
[403] *Uniform Trust Code*, *supra* note 31, s 103(13) (defines 'qualified beneficiary'). In this respect, the comment to the mandatory rule provides that a 'general obligation' is imposed on trustees to keep beneficiaries informed of the trust affairs and the effect of the limitation provided by the use of 'qualified beneficiary' in the mandatory rule is that trustees are relieved of informing persons with a remote or remainder interest unless they have made a legitimate request to the trustee (see *ibid* at s 813, Comment),

remedy."[404] Again, the broad currents of *accountability* and *enforceability* run strongly through the mandatory rule regarding the disclosure of trust information.[405]

3.1.3. Keeping accounts and trust information

Framed both positively and negatively, this core duty/right relation compels trustees to retain trust information, not to destroy or lose trust information and to be ready to render accounts and information when called upon.[406] This duty/right relation is a natural and necessary precursor to the preceding duty/right relation regarding the disclosure of trust information. If a legitimate disclosure request is made, a trustee cannot simply say that the trustee no longer has the relevant information. That would be a dereliction of duty, but not of the duty to disclose trust information, for a person cannot disclose what they do not have in their possession or cannot access by reasonable means.[407] Nevertheless, there is a breach of a core duty, and it is important to frame the content of that obligation more explicitly than is usually seen. As presently conceived, the duty is to retain trust information and, where appropriate, perform the minimal degree of trust accounting required to ensure that pertinent trust information is available at all times, such as the identity of trust property. The duty also extends to keeping trust information, such as the trust deed, in a secure location.[408] The failure to keep accounts may result in orders for accounts to be taken at the expense of the trustees personally,[409] as well as the drawing of adverse inferences regarding the management of the trust affairs if trust records are destroyed.[410]

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[404] Langbein, "Mandatory Rules", *supra* note 29 at 1126.
[405] See *Pomeroy v Noud*, 145 Mich at 46, 108 NW 498 (1906) (describing the duty-to-account rule as "one largely of public policy"); *Raak v Raak*, 428 N.W.2d 778 (1988) (likewise noting the public policy concerns underlying the imposition of a 'duty to account'). See also *Scott and Ascher on Trusts*, *supra* note 70, vol 3, ("subject to very few exceptions, all beneficiaries are entitled to such information as is reasonably necessary to enable them to enforce their rights or to obtain relief for a breach of trust" at 1202).
[406] See *Smith v Stewart*, [2000] NSWSC 1224; *Re Craig*, (1952) 52 NSW St R 265 at 267; *Sandford v Porter*, *supra* note 396 at 571; *Kemp v Burn* (1863), 4 Giff 348 at 349, 66 ER 740; *Clarke v Earl of Ormonde* (1821), Jac 108 at 120, 37 ER 791 at 795; *Freeman v Fairlie* (1817), 3 Mer 27 at 42, 36 ER 12 at 17.
[407] *C.f. O'Rourke*, *supra* note 363 at 603-604, 620, 626; *Clarke v Earl of Ormonde*, Jac 108 at 120; *Re Cowin* (1886), 33 ChD 179 at 185; *AT & T Istel Ltd v Tully*, [1993] AC 45 at 65.
[408] In Australia: Dal Pont, Chalmers & Maxton, *supra* note 28 at 688-89; *Jacobs' Law of Trusts*, *supra* note 28 at 380-81; Lee et al, *supra* note 106 at paras 9.4010, 9.6010-9.6230; Ong, *supra* note 106 at 244. In Canada: *Oosterhoff on Trusts*, *supra* note 4 at 1099-102; *Waters' Law of Trusts*, *supra* note 4 1063-68. In England & Wales: *Lewin on Trusts*, *supra* note 28 at 800, paras 23-22; *Underhill & Hayton* (17th ed), *supra* note 30 at paras 60.1-60.8, 60.22. In New Zealand: Butler et al, *supra* note 28 at 135-36.
[409] See *Re Skinner*, [1904] 1 Ch 289 ("I am always very unwilling to make trustees pay costs; but, on the other hand, beneficiaries have a right to expect the performance of their duty by executors, and not the less when one of them has power to make professional charges" at 292 per Farwell J); *Heugh v Scard* (1875), 33 LT 659 ("[i]n certain cases of mere neglect or refusal to furnish accounts, when the neglect is very gross or the refusal wholly indefensible, I reserve to myself the right of making the executor or trustee pay the costs of litigation caused by his neglect or refusal" per Sir George Jessel).
[410] See *Gray v Haig* (1854), 20 Beav 219 at 226, 52 ER 587 at 590.

In the United States, the mandatory requirement for trustees to keep trust accounts and information is more clearly defined, such that trustees must "keep adequate records of the administration of the trust."[411] Although this duty does not feature explicitly on the list of mandatory rules, it should be seen as a precursory and necessary legal relation that gives content to the mandatory rule to disclose trust information and the beneficiary's right to request reports.[412]

3.1.4. Good faith

The duty of/right to good faith trust administration arises by force of law and irrespective of subjective intention of the settlor.[413] In short, the *carte blanche* sanction of bad faith trusteeship would cause trusts to no longer be a functional, let alone a fundamental, legal institution.[414] Whilst this core duty is often expressed in the (singular) expression of 'honestly and in good faith',[415] this thesis fastens upon *good faith* (only) in a conscious effort to move away from the multiplicity of terms that are used to describe the core content of this duty/right relation and, more particularly, to purge the ambiguous element of knowledge (i.e. honesty/dishonesty) from the formulation of this essential feature of trusteeship.[416] In advancing five reasons for isolating the concept of *good faith*, it is hoped that the following discussion will expose the content of this core duty/right relation.

First, the focus on good faith alone moves the attention away from problematic questions of knowledge and toward the core content of the duty. In *Armitage v Nurse*, Millett LJ said that it did not matter how "indolent, imprudent, lacking in diligence, negligent or wilful" the trustee was in causing loss or

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[411] See *Uniform Trust Code*, *supra* note 31, s 810(a); *Scott & Ascher on Trusts*, *supra* note 70, vol 3, at 1186-95.

[412] *Ibid* ("[a] trustee is under a duty to keep clear and accurate accounts... [t]he court will resolve all doubts against a trustee who fails to keep proper accounts. The trustee alone is in a position to know all of the facts concerning the administration of the trust and should gain no advantage from failing to keep proper records" at 1186-87). See also *Re Childress Trust*, *supra* note 402 ("a trust provision relieving the trustee of the duty to keep formal accounts does not abrogate the statutory duty to account to the beneficiaries..." at 327-28).

[413] See *Citibank v QVT*, *supra* note 191 (in response to Mr Popplewell QC's submission that the relevant trust structure reduced "the trustee's obligations below the irreducible minimum identified by Millet LJ in *Armitage v Nurse*", Arden LJ held that was incorrect and that "[t]he trustee continues at all times to have an obligation of good faith..." at [82]); *Armitage v Nurse*, *supra* note 3 ("[t]he duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts..." at 253-54 per Millett LJ); Hayton, "Irreducible Core", *supra* note 35 ("[t]he duty to act in good faith... cannot, of course, be excluded" at 57).

[414] See Hayton, "Irreducible Core", *supra* note 35 ("[t]he duty to act in good faith... in respect of any trust matter cannot, of course, be excluded. To do so would make a nonsense of the trust relationship as an obligation of confidence. It would make the trustees a law unto themselves free from the jurisdiction of the court and the court will not recognize this if the trustees were intended to be trustees and not absolute owners" at 57).

[415] See e.g. *Armitage v Nurse*, *supra* note 3 at 253; Law Reform Commission (Ireland), *Trust Law,* supra note 3 at 79-80; Butler et al, *supra* note 28 at 152.

[416] *C.f.* Hayton, "Irreducible Core", *supra* note 35 (describing the duty of good faith as "honestly and consciously" at 57); *Armitage v Nurse*, *supra* note 3 (emphasising honesty in relation to the duty of good faith at 253-54).

damage to the trust property, so long as the trustee did not act *dishonestly,* liability could lawfully be excluded.[417] The problem with Millett LJ's 'best intentions' approach,[418] is evident in the following example. Let's take the case of a trustee, who, unbeknownst to the settlor or the beneficiaries, is afflicted by gambling and has a predilection for horse racing. The trustee goes to the track and receives a hot tip on a young filly in the third race. The horse can't lose. Presented with such an immensely lucrative opportunity, and employing his best intentions, the trustee stakes the trust fund. Lo and behold, the horse is a dud and loses the race. The trustee has squandered the trust fund. Let's also assume that the money wagered cannot be followed and is utterly untraceable.[419] At no time did the trustee ever intend to keep any of the winnings personally nor was the trustee aware of a broad exclusion clause protecting him from all forms of liability bar fraud.[420] He simply wished to advance the interests of the beneficiaries as best he could.

Employing a purely subjective standard, the trustee would only be acting dishonestly (and unlawfully) if that person transgressed their own standard of honesty, even if that standard were contrary to that of reasonable and honest people (called the 'Robin Hood test' because it would absolve the honest thief).[421] At the other extreme, a purely objective test would risk excessive abstraction in judicial reasoning (i.e. imposing standards divorced from particularity). Thus, on Millett's LJ's account, the trustee *might not be* liable to recompense the beneficiaries for his foolishness and willful dereliction of duty. Whilst it might be thought that, even though the trustee has not breached the duty of good faith, the trustee might have breached the duty of care, skill and diligence–therefore, Millett LJ's approach to good faith is sufficient. But it should be recalled that the trustee's duty of care, skill and diligence *can*

[417] *Armitage v Nurse*, *supra* note 3 at 251 per Millett LJ.
[418] *Ibid* at 252 per Millett LJ.
[419] To deny any form of recovery akin to that allowed in *Lipkin Gorman v Karpnale*, *supra* note 52.
[420] To distinguish a rather confusing statement made in *Armitage v Nurse*; *Armitage v Nurse*, *supra* note 3 ("[a]s Mr. Hill pertinently pointed out in his able argument, a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term" at 254 per Millett LJ). This strangely suggests that ignorance of one's legal position could somehow be more beneficial as a matter of law. Surely knowledge that one holds an *immunity* from certain kinds of liability cannot of itself disentitle a person from reliance on that protective clause when push comes to shove?
[421] See *Twinsectra Ltd v Yardley*, [2002] 2 AC 164 [*Twinsectra v Yardley*] at 172 per Lord Hutton; *Walker v Stones*, [2001] QB 902 ("[a] person may in some cases act dishonestly, according to the ordinary use of language, even though he genuinely believes that his action is morally justified. The penniless thief, for example, who picks the pocket of the multi-millionaire is dishonest even though he genuinely considers the theft is morally justified as a fair redistribution of wealth and that he is not therefore being dishonest" at 939 per Sir Christopher Slade). See also *Royal Brunei v Tan*, [1995] 2 AC 378 (PC) [*Royal Brunei v Tan*] ("[h]onesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated" at 389 per Lord Nicholls).

be excluded.[422] The irreducible core of the trust sets minimum requirements for lawful trust administration and, in this sense, *good faith* could well be understood as imposing a reserve and base-level standard for the trustee's conduct in managing the trust affairs.

The challenge, however, is in finding the appropriate mark on the good faith continuum between subjective and objective assessments. In *Twinsectra v Yardley*, Lord Hutton proposed a 'combined test', pursuant to which "it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest."[423] But that approach does not ameliorate the problem at all; if anything, it both confounds and compounds the problem further by combining the worst attributes of the subjective and objective tests. Lord Hutton's combined test skews the knowledge requirement further by requiring proof that a trustee was himself aware of the 'ordinary standards of reasonable and honest people', as though that hypothetical sector of the community kept some kind of running ledger of what those people abided by that could be checked from time-to-time.[424] The Privy Council later 'explained' Lord Hutton's remarks, and corrected the trajectory away from the artificiality of considering the defendant's views about the 'generally acceptable standards of honesty', to align with a more reasonable, objective formulation.[425]

Although it has not been stated explicitly as yet, an alternative middle ground might be a test of *reasonableness* having regard to the circumstances of the case and *without* any requirement to prove

[422] See e.g. *Armitage v Nurse*, *supra* note 3 ("I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient" at 253-54 per Millett LJ, [emphasis added]). *C.f. Speight v Gaunt* (1883), 9 App Cas 1 at 19. Compare the statutory imposition of standards: Butler et al, *supra* note 28 at 183; *Jacobs' Law of Trusts*, *supra* note 28 at 386-91; *Lewin on Trusts*, *supra* note 28 at 1213-21; *Waters' Law of Trusts*, *supra* note 4 at 959-63.

[423] *Twinsectra v Yardley*, *supra* note 421 at 172 per Lord Hutton, although *c.f.* Lord Hutton's later remarks ("dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct" at 174 per Lord Hutton). See also *Abbey National v Solicitors Indemnity Fund Ltd*, [1997] PNLR 306 at 310 per Steel J.

[424] For criticisms of Lord Hutton's combined approach, see e.g. Lord Walker, "Dishonesty and Unconscionable Conduct in Commercial Life–Some Reflections on Accessory Liability and Knowing Receipt" (2005) 27 Sydney L Rev 187 at 197; Rosy Thornton, "Dishonest Assistance: Guilty Conduct or a Guilty Mind?" (2002) 61 Cambridge LJ 524 at 525-26; Charles Rickett. "Quistclose Trusts and Dishonest Assistance" [2002] RLR 112.

[425] See *Barlow Clowes Ltd v Eurotrust Ltd*, [2005] UKPC 37, [2006] 1 WLR 1476 (PC) [*Barlow v Eurotrust* cited to WLR] (in light of the resultant ambiguity in Lord Hutton's 'combined approach', the Privy Council explained that Lord Hutton's "reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that [the defendant's] knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were" at 1480-81 per Lord Hoffman).

knowledge of those standards.[426] Beneficiaries should be entitled to impugn the conduct of trustees without needing to vault over the hurdle of proving the trustee's actual state of mind or awareness of any objective standards of reasonableness.[427] Even though a trustee might profess their (subjective) honesty, the court need not believe the trustee's testimony and could simply impute a contrary finding of dishonesty to the trustee regarding their state of knowledge and, thereby, uphold the subjective standard.[428] But even that approach must imply some objective considerations, for what would be the basis for imputation? It is contended that the (alternative) combined approach put forward in this thesis strikes the right balance on the subjective/objective spectrum by taking account of the relevant subjective and objective factors.[429]

A further point flows from the previous horse racing example, which assists in distinguishing the duties of good faith and of loyalty. In that example, we noticed that a trustee can breach a duty of good faith

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[426] See *Walker v Stones*, *supra* note 421 ("where the trustee's so-called 'honest belief', though actually held, is so unreasonable that, by any objective standard, no reasonable solicitor-trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries" at 939 per Sir Christopher Slade); there is no reason not to apply that principle to private express trust, more generally speaking; *Bonham v Fishwick*, [2008] EWCA Civ 373 (on a claim alleging breach of trust caused by 'wilful wrongdoing' the court effectively considered that the trustees had reasonably relied on the opinion of counsel regarding the scope of their powers having regard to the rule in *Samuel v Jarrah*, [1904] AC 323 and held that "[t]he [trustees] could not possibly be said to be guilty of wilful wrongdoing in accepting and acting on that opinion" at para 30 per Mummery LJ); *Cowan de Groot Properties Ltd v Eagle Trust*, [1992] 4 All ER 700 (a person will be dishonest when that person is "guilty of commercially unacceptable conduct in the particular context involved" at 761 per Knox J); *C.f. Royal Brunei v Tan*, *supra* note 421 (where it was held that "dishonesty... means simply not acting as an honest person would in the circumstances" and that "when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to [that person] at the time. The court will also have regard to personal attributes of [that person], such as his experience and intelligence, and the reason why he acted as he did" at 389, 391 per Lord Nicholls).

[427] See *Fattal v Walbrook Trustees (Jersey) Ltd*, [2010] EWHC 2767 [*Fattal*]("[a]fter all the twists and turns in the legal definition of dishonesty" the beneficiaries were entitled to impugn the trustee's conduct on the basis of reckless indifference to their interests or the objective standard of reasonableness per Lewison J), citing *Twinsectra v Yardley*, *supra* note 421; *Barlow Clowes v Eurotrust International Ltd*, [2006] 1 WLR 1476; *Abou-Rahmah v Abacha*, [2006] EWCA Civ 1492; see also *Walker v Stones*, *supra* note 421 per Sir Christopher Slade; c.f. this represents a significant and welcome departure from the strict test of conscious dishonesty pronounced in *Armitage v Nurse*, *supra* note 3 per Millett LJ; see also *Royal Brunei v Tan*, *supra* note 421("[u]ltimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct" at 391 per Lord Nicholls). Be that as it may, a plaintiff should not have to prove that the defendant was so aware of such 'normally accepted standards of honest conduct'.

[428] See e.g. *Royal Brunei v Tan*, *supra* note 421 ("subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour" at 389 per Lord Nicholls).

[429] See *Twinsectra v Yardley*, *supra* note 421 at Millett LJ, dissenting (accepting an objective approach to dishonesty, such that a plaintiff need not prove that the defendant had a dishonest state of mind at 197-201). Although these comments were made in the context of accessory, rather than trustee, liability, they seem to represent a marked departure from the subjective emphasis placed on dishonesty by Millett LJ earlier in *Armitage v Nurse*, *supra* note 3 at 251-54. The 'objective approach' arising adopted in *Twinsectra v Yardley, supra* note 421 to dishonesty was later explained and applied by the Privy Council, see *Barlow v Eurotrust*, *supra* note 425 at 1483-84 per Lord Hoffman.

whilst not breaching a duty of loyalty (i.e. acting in the interests of the beneficiaries) and at all times believing himself to be acting honestly;[430] likewise, a trustee may commit a beach of loyalty (by not acting in the interests of the beneficiaries) despite his acting in good faith[431]–tending to show the distinctness of those two core duties.[432] Placing too heavy of an emphasis on subjectivity threatens to pit one irreducible core duty–that of loyalty–against another–that of good faith–because a trustee would be seeking to offset his concerted efforts to act in the interests of the beneficiaries (however unreasonable they may be) against the trustee's duty to act in good faith (which requires the trustee at all times to act reasonably).[433] It would be rather bizarre if the trustee's duty of loyalty were allowed to trump the duty of good faith. And that would certainly not fit in a coherent, rational structure of the private law. Honesty is, thus, a red herring to the real enquiry of legal culpability for acting in bad faith: the heart of good faith is reasonableness, and not knowledge of reasonableness.[434]

Second, fixing solely upon good faith simplifies the prolixity surrounding this essential duty/right relation and unifies the diverse array of terminology used to express what is essentially *good faith*. It does not assist the clarity of the law on good faith trust administration that different standards are applied to pleadings, rather than substantive law, when determining whether an allegation has been properly made, as distinct from when the allegation has been proven (a stricter, more exacting standard

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[430] Specifically because the duty of loyalty essentially turns on motive, although the trustee's motive can be impeached by other extraneous factors that tend to prove an improper motive; whereas the nub of the duty of good faith is a question of reasonableness and does not turn on the trustee's state of mind.

[431] See *Boardman v Phipps*, [1967] 2 AC 46 (although that case was not taken against the trustees for breach of trust, but against the solicitor dealing with the trust and a beneficiary); *Regal (Hastings) Ltd v Gulliver*, [1967] 2 AC 134 ("[t]he rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides..." at 144 per Lord Russell, "[t]he issue, as it was formulated before your Lordships, was not whether the directors of Regal (Hastings), Ltd., had acted in bad faith. Their bona fides was not questioned... We must take it that they entered into the transaction lawfully, in good faith and indeed avowedly in the interests of the company. However, that does not absolve them from accountability for any profit which they made, if it was by reason and in virtue of their fiduciary office as directors that they entered into the transaction." at 153 per Lord MacMillan and, elsewhere, that the liability to account from a breach of the duty of loyalty "does not depend on fraud or corruption" at 154 per Lord Wright).

[432] See *Bristol & West Building Society v Mothew*, [1998] Ch 1 at 16-18; *Breen v Williams* [1996] HCA 57, 186 CLR 71 at 93; *Lewin on Trusts*, *supra* note 28 (commenting that the effect of the specific (prophylactic) rules comprising the fiduciary duty of loyalty "in no way depend on fraud or absence of good faith" at 575); Butler et al, *supra* note 28 ("[a] failure to exercise reasonable care–without more–is not a breach of a fiduciary duty. That is not to say, however, that lack of good faith cannot be evidence of a breach of fiduciary duty" at 477) [emphasis added].

[433] *C.f.* RWC Lee, "Rethinking the Content of the Fiduciary Obligation" (2009) 73 Conveyancer and Property Lawyer 236 at 253.

[434] Again, although the duty of good faith has these overtones of reasonableness, which necessarily implies 'standards of conduct', this duty should be distinguished from the duty of care, skill and diligence because the latter duty can be excluded at this instance of the settlor, this thesis has proceeded on a 'worse case scenario' basis whereby it is assumed that anything that can be excluded has been excluded by a hypothetical, broadly-drafted exclusion clause. See also *supra* note 422 and accompanying text.

being applied to pleadings).[435] Some of the terms and phrases that are used to express the concept of good faith include: actual fraud;[436] equitable fraud;[437] fraud;[438] wilful and individual fraud or wrongdoing;[439] acting recklessly;[440] reckless indifference;[441]knowing and deliberate breach of duty;[442] lack/want of probity;[443] conscious impropriety;[444] contrived ignorance;[445] impropriety of conduct;[446] knowingly participating in a fraudulent breach;[447] Nelsonian knowledge;[448] conscious and wilful misconduct;[449] willful default;[450] and wilful wrongdoing.[451] The list simply goes on and on, and for such an essential part of trust law, this, too, is unacceptable.

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[435] See *Armitage v Nurse*, *supra* note 3 ("[i]n order to allege fraud it is not sufficient to sprinkle a pleading with words like "wilfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint" at 257 per Millett LJ); this follows a strong line of authority that fraud is essentially a very serious allegation and the defendant should, of course, be put on notice that that is what is being alleged, not that the specific words 'dishonesty' or 'fraud' must be used, but that the pleading must be clear and particular in order to make those allegations; *Davy v Garrett* (1878), 7 ChD 473 at 489 per Thesiger LJ; *Belmont Finance Corporation Ltd v Williams Furniture Ltd*, [1979] Ch 250 [*Belmont Finance*] at 268 per Buckley LJ. Why shouldn't those rigorous standards apply to the substantive issue?

[436] See *Armitage v Nurse*, *supra* note 3 at 252-53 per Millett LJ (excluding constructive or equitable fraud).

[437] *Ibid* at 253 per Millett LJ, where it was held that a trustee could not rely on the relevant exemption clause to exclude certain cases of equitable fraud, although Millett LJ's comments did seem to be directed more toward the duty of loyalty than the duty of good faith in this respect.

[438] *Ibid* at 246 ("[t]he essence of common law fraud is an absence of bona fides" per Bernard Weatherill QC (for the plaintiff)); it must follow from this proposition that good faith is simply the positive formulation of the duty not to commit fraud; see also *Jabob's Law of Trusts* (7th ed) at para 1620.

[439] See *Fattal*, *supra* note 427 at 69-82 per Lewison J; *Barnes v Tomlinson*, [2006] EWHC 3115 ("in the context of a trustee's duties, fraud means dishonesty and, wilful means a deliberate breach of trust" at para 77 per Kitchin J); *Bogg v Raper*, [1998] EWCA Civ 661 at para 25 per Millett LJ; *Caponi v Canada Life Assurance Company*, 2009 CanLII 592 (O SC) at paras 23-24 per Cullity J.

[440] See *Armitage v Nurse*, *supra* note 3 at 254 per Millett LJ.

[441] See *Ibid* at 252 per Millett LJ; see also *Jabob's Law of Trusts* (7th ed) at para 1620 (using similar language to Millett LJ in *Armitage v Nurse*).

[442] *Ibid* at 252 per Millett LJ.

[443] See *Royal Brunei v Tan*, *supra* note 421 ("acting dishonestly, or with a lack of probity, which is synonymous" at 389 per Lord Nicholls); although that statement was made in the context of accessorial liability, there is no plausible reason for applying separate standards of dishonesty internally (paucital relations) and externally (multital relations) in a trust context; *Eagle Trust v SBC Securities Ltd*, [1993] 1 WLR 484 (where it was stated that it could be taken as settled law that want of probity was a prerequisite to liability at 495 Vinelott J); *Polly Peck International v Nadir (No 2)*, [1992] 4 All ER 769 at 777 *per* Scott LJ; *Equiticorp Industries Group Ltd v Hawkins*, [1991] 3 NZLR 700 at 728 per Wylie J.

[444] See *Royal Brunei v Tan*, *supra* note 421 ("[t]hus for the most part dishonesty is to be equated with conscious impropriety" at 389 per Lord Nicholls).

[445] See *Twinsectra v Yardley*, *supra* note 421 at 195 per Lord Millett.

[446] See *Boardman v Phipps*, *supra* note 431 ("[l]iability to account must depend on there being some breach of duty, some impropriety of conduct on the part of those in a fiduciary position" at 94 per Viscount Dilhorne); although the line is somewhat blurred between good faith and loyalty in this respect.

[447] See *Wilkins v Hogg* (1861), 3 Giff 116, 66 ER 346 (Lord Westbury LC accepted that no exemption clause could absolve a trustee from liability for knowingly participating in a fraudulent breach of trust by his co-trustee).

[448] See *Twinsectra v Yardley*, *supra* note 421 (this is "as American lawyers describe it" at 195 per Lord Millett).

[449] See *Bonham v Fishwick, supra* note 426 (Evans-Lombe J accepted that a pleading of 'wilful wrongdoing' arising out of the terms of the trust deed meant, in effect, 'conscious and wilful misconduct' and was sufficient to fall within the language of *Armitage*; *Armitage v Nurse*, *supra* note 3 ("knowing and deliberate breach of duty or reckless indifference" at 252 per Millett LJ).

Responsibility for the proliferation of these terms cannot be sheeted to judges alone. Trust deeds are largely creatures of subjective expression, and judges construe the clauses put before them by interpreting the language employed in those deeds. Thus, trust drafters might be thought to be the root cause of the taxonomical problem. But, again, those persons cannot independently be slated with responsibility because trust drafting is often heavily influenced by precedents.[452] In turn, the authors of the precedent texts do not formulate those precedents in a vacuum. Precedents serve the useful purposes of synthesizing the general law applicable to trusts and providing a degree of certainty for settlors. And, so, we turn back to our judges with a furrowed brow realizing that we have come full circle and arrived where we started. One thing should certainly be clear: that this non-sensical cycle must be broken and responsibility should be shared equally for the proliferation of terms used to described *good faith*, as well as the resultant confusion.

Thirdly, given the duty is frequently formulated in the singular but refers to separate concepts of *honesty* and *good faith* (i.e. *the duty* to act honestly and in good faith), it may well be asked whether there is a difference between good faith and honesty? The leading Australian trusts commentary suggests there is no difference between the two concepts.[453] Framed in the negative, one can hardly detect a difference between the two: if a trustee acts dishonestly (or fraudulently for that matter), that person could hardly be said to be acting in good faith;[454] conversely, if a person acts in bad faith , that person could hardly be said to be acting honestly.[455] But the frequent use of 'and reasonably', which is typically attached to honesty in order to describe the concept of good faith, suggests that honesty alone

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[450] See *Leerac v Fay*, *supra* note 3 (where a common clause in a series of trust deeds purported to disentitle a beneficiary for commencing legal action "in respect of any matter arising under or in relation to a specified trust other than for wilful default on the part of the Trustee" Brereton J accepted that those clauses did not violate the irreducible core of trustee duties that must be owed on the basis that dishonesty was "a concept substantially equivalent to wilful default" at para 5, 14, 23-26, following *Re City Equitable*, *supra* note 244 per Romer J and applying *Armitage v Nurse*, *supra* note 3.

[451] See *Bonham v Fishwick*, *supra* note 426 at para 20 per Mummery LJ (although that particular wording is not that of Mummery LJ but arose from the wording of an exculpatory clause in the relevant trust deed exempting the trustees from liability for breach of trust, except in the case of "wilful and individual fraud or wrongdoing"; fraud not having been pleaded, the claim concerned 'wilful and individual wrongdoing').

[452] E.g. *Armitage v Nurse*, *supra* note 3 (the relevant clause, which exonerated trustees for "any loss or damage... unless such loss or damage shall be caused by his own actual fraud" was taken from VGH Hallett, *Hallett's Conveyancing Precedents*, 1st ed (London, UK: Sweet & Maxwell, 1965), although Millett LJ goes on to observe that "[a] more prolix clause to the same effect" was to be found in RRA Walker et al, *Key and Elphinstone's Precedents in Conveyancing*, 15th ed (London, UK: Sweet & Maxwell Ltd, 1953) at 250 per Millett LJ.

[453] *Jacobs' Law of Trusts*, *supra* note 28 ("[t]here is no distinction between 'honestly' and 'in good faith'" at 358, para 1608), citing *R v Holl* (1881), 7 QBD 575 at 580-81; it is unclear how that case stands as authority for that proposition.

[454] See Hayton, "Irreducible Core", *supra* note 35 ("[a] trustee will not be acting in good faith if he acts fraudulently or dishonestly i.e. to benefit himself or third parties at the expense of the beneficiaries" at 58).

[455] That is, of course, if we move away from the problematic fixation of proving knowledge of unreasonableness.

is not sufficient to capture the concept of good faith and that something else besides conscious wrongdoing will be enough to make out a case of bad faith.[456] It would be better to view *honesty* as the yolk of the (good faith) egg, rather than treating the two concepts as though they were Venn diagrams (representing the union of two sets), by which something might risk exclusion if *honesty* were removed. To move away from the problematic fixation on knowledge, and in an effort to alleviate tautology, it is considered that *honesty* is *part of* good faith and that the good faith umbrella is sufficient to cover the array of terminology canvassed previously, which often hovers around the expression of good faith.

Fourthly, framing the duty/right relation around *good faith* has the constructive capacity to open comparative lines of communication between the civil and common law traditions. Good faith has an impressive civilian pedigree and, although the concept is used quite differently, the focus on *good faith* in the common law tradition could assist in developing the concept more fully and independently through comparative analysis.[457] Likewise, it could be of great assistance to civilian lawyers to develop a more familiar concept in coming to terms with civil law trusts–again, through facilitating comparative analysis to excavate the normative roots of good faith. This could well enhance reciprocity in the contemporary trust discourse, in which both traditions could learn from one another and develop the core concept of *good faith*. It could also assist in reestablishing dialogue on this fundamental conception of trust law between the Commonwealth jurisdictions and United States, where 'honestly' is avoided and 'good faith' (alone) is employed.[458]

Fifthly, the non-excludable duty of *good faith* aligns with the statutory discretion of common law courts to relieve trustees of liability where those persons have acted "honestly and reasonably".[459] Again,

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[456] See *Jacobs' Law of Trusts*, *supra* note 28, ("[i]t follows that a Trust instrument cannot exonerate a trustee from the consequences of fraud in the sense of conduct carried out either in the knowledge that it is contrary to the interests of the beneficiaries or with reckless indifference to whether it is contrary to their interests" at para 1620); *Mango Boulevard Pty Ltd v Spencer*, [2008] QSC 117 [*Mango Boulevard*] at paras 69-70).

[457] Compare Reinhard Zimmermann & Simon Whittaker, eds, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000) at 39-48, 690-94; Ewan McKendrick, "Good Faith: A Matter of Principle?" in ADM Forte, ed, *Good Faith in Contract and Property* (Oxford: Hart Publishing, 1999) 39. Noteably, the United States has already taken the good faith path by isolating 'good faith' performance as one of the mandatory rules of trust law: *Uniform Trust Code*, *supra* note 31, s 105(b)(2).

[458] *Infra* note 459 and accompanying text. Compare *Trusts Law* (Guernsey), s 22 ("[a] trustee shall, in the exercise of his functions, observe the utmost good faith and act en bon père de famille").

[459] In Australia: *Trustee Act 1925* (ACT), s 85; *Trustee Act 1925* (NSW), s 85; *Trustee Act 1980* (NT), 49A; *Trusts Act 1973* (Qld), s 76; *Trustee Act 1936* (SA), s 56; *Trustee Act 1898* (Tas), s 50; *Trustee Act 1958* (Vic), s 67; *Trustee Act 1962*, (WA), 75. In Canada: *Trustee Act*, RSA 2000, c T-8 [*Trustee Act 2000* (A)] (A), s 41; *Trustee Act*, RSBC 1996, c 464 (BC), 96; *The Trustee Act*, CCSM, c T160 [*Trustee Act* (M)] (M), s 81; *Trustees Act*, RSNB 1973, c T-15 (NB) [*Trustees Act 1973*

nothing would be lost by emphasising the reasonableness test that informs the question of *good faith*, and allowing honesty (and knowledge) to fall away from the essential formulation of this duty/right relation; reasonableness must be sufficient to capture the concept of honesty/dishonesty and should be the yardstick for *good faith*.[460] Again, this should be understood as distinct from the trustee's duty of care, skill and diligence, which can be excluded by settlors. But this also assists in distinguishing the duty/right regarding good faith trust administration from the base duty to perform the trust, and correlative right to have the trust performed, which will be considered later.[461] The good faith requirement sets a bar to exclusion of personal liability for breaching the terms of the trust, whereas the enquiry into whether the trust has been performed or not, as well as the consequences that flow from that conclusion, is a distinct and separate exercise.[462] Thus, here (i.e. in relation to good faith) we are concerned with the extent to which a trustee will be culpable for breaching the trust but, later (i.e. in relation to performance), we will be concerned, more simply, with whether the trust has been performed or not and with what needs to be done in order to ensure that the trust can and will be performed, even after a breach of trust.

The English approach to the non-derogable nature of the duty of good faith has been consistently followed and found support elsewhere in the Commonwealth, as well.[463] Interestingly, some of the

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(NB)], s 42; *Trustee Act*, RSNL 1990, c T-10 (NL), s 32; *Trustee Act*, RSNS 1989, c 479 (NS), s 64; *Trustee Act*, RSNWT 1988, c T-8 (NWT), s 22; *Trustee Act*, RSO 1990, c T.23 (O), s 35; *Trustee Act*, RSS 1978, c T-23 (S), s 57; *Trustee Act*, RSY 2002, c 223 (Y), s 33. In England & Wales: *Trustee Act,* 1925 (UK), 16 Geo V, c 19, s 61. In New Zealand: *Trustee Act 1956* (NZ), 1956/61, s 73. All of those jurisdictions use the expression "honestly and reasonably" to ground the discretion to relieve a trustee of personal liability for breaches of trust. Interestingly, Prince Edward Island has not conferred the statutory discretion on the courts to excuse trustee's from liability. Compare *Trustee Act*, RSPEI 1988, c T-8 (PEI), s 3.2 (providing that a trustee will not be liable for trust losses arising out of investments that conform to a plan or strategy comprising reasonable assessments of risk and return). See also John Lowry & Rod Edmunds, "Excuses" in Birks & Pretto, *supra* note 77, 269.

[460] This also accords with the approach taken generally to the field of trust law known as 'fraud on a power', pursuant to which a trustee must exercise powers reasonably, which is to say in *good faith*, see *Duke of Portland v Topham*, *supra* note 177 ("settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power" at 54 per Lord Westbury LC); see also *Vatcher v Paull*, [1915] AC 372 (PC); Hayton, "Fiduciary Standards", *supra* note 378 at 564.

[461] See section 3.1.6 below.

[462] See e.g. *Re Spedding*, [1966] NZLR 447 ("[a] breach of trust consists in nothing more nor less than an act by the trustee in contravention of the duties imposed on him by the trust or in excess of his powers" at 463-64 per Turner J).

[463] In Australia: Dal Pont, Chalmer & Maxton, *supra* note 28 at 856; *Jabob's Law of Trusts* (7th ed) at para 1620; see also the GE Dal Pont, "The Exclusion of Liability for Trustee Fraud" (1998) 6:1 Austl Prop LJ 41. In Canada: *Hunter Estate v Holton*, (1992) 46 ETR 178 ("[t]rustees must act in good faith and be fair as between beneficiaries in the exercise of their powers" at 186 per Steele J), quoted with approval in *Fox v Fox Estate*, (1996) 10 ETR (2d) 229 per Galligan JA; *Boe v*

offshore jurisdictions have provided even greater protection to beneficiaries than their apparently conservative onshore counterparts, where trustees cannot be exonerated for gross negligence.[464] Recently, in *Spread Trustee v Hutcheson*, the Privy Council was provided with the opportunity to consider the customary law of Guernsey prior to the enactment of the *Guernsey Trust Law*, which forbade the exclusion of liability for gross negligence by a trustee.[465]

Despite broad cohesion and support for the irreducible core approach to trusts, and rather unusually for the Privy Council, each member of the Board delivered a separate judgment on the issue and, in the result, there are three concurring and two dissenting judgments.[466] Following the English position, a majority of the Board held that it was possible to exclude liability for gross negligence until the *Guernsey Trust Law* was amended to expressly prohibit the exclusion of gross negligence.[467] Relying on the duty of trustees to act *en bon père de famille*, which was imposed under Guernsey law and had Norman, and ultimately Roman (*bonus paterfamilias*), rather than English, law origins, a minority of the Board would have went further in banishing gross negligence from the realm of lawful exclusion; after all, a bon père could hardly be "permitted to act with impunity in a grossly negligent fashion."[468]

In the United States, "the duty of a trustee to act in good faith" is listed as a mandatory rule in the *Uniform Trusts Code*.[469] Nothing is mentioned in that formulation of 'honesty', presumably because

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Alexander, (1988) 41 DLR (4th) 520, 15 BCLR (2d) 106 at 527; *Re Jeffrey*, [1984] 4 DLR 704 at 710. In Ireland, Law Reform Commission (Ireland), *Trust Law*, *supra* note 3 at 79-80. In New Zealand: Butler et al, *supra* note 28 at 151-52.

[464] See *Trusts Law* (Jersey), s 30(10) (providing that "[n]othing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence"); *Trusts Law* (Guernsey), s 39(7)(a)("[t]he terms of a trust may not... relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence") and 39(8)(b)(i) ("[f]or the avoidance of doubt... a term of a trust is invalid to the extent that it purports to... relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence"). See also Robert Walker, "Fraud, Fault and Fiduciary Liability" online: (2006) J L Rev <http://www.jerseylaw.je> at paras 34-42. Compare Paul Matthews, "The Efficacy of Trustee Exemption Clauses in English Law" [1989] Conveyancer and Property Lawyer 42 [Matthews, "Trustee Exemption Clauses"] ("[i]t is very likely that neither liability for gross negligence nor duties leading to such liability can be validly excluded, nor powers to commit acts otherwise giving rise to such liability validly included" at 54). The English Court of Appeal disagreed with Professor Matthews' views in *Armitage v Nurse*, *supra* note 3 at 251-53, finding such a clause was valid under English law.

[465] *Spread Trustee v Hutcheson*, *supra* note 3; *Trusts (Amendment) Guernsey Law 1990* (Guernsey), 1990/30, s 34(7)(1)(f).

[466] *Ibid* at paras 1-80 per Lord Clarke, paras 81-113 per Lord Mance, at paras 114-27 Sir Robin Auld (comprising the majority); *ibid* at paras 128-40 per Lady Hale (dissenting), at 141-80 per Lord Kerr (dissenting).

[467] *Ibid* at paras 34-37 per Lord Clarke, 106-110, 112 per Lord Mance, 122-24 per Sir Robin Auld.

[468] *Ibid* at paras 179 per Lord Kerr, 139-40 per Lady Hale. See also The Law Commission (UK), *Trustee Exemption Clauses*, Consultation Paper No 171 (London, UK: TSO, 2003) at para 2.22; Harold Greville Hanbury, *Modern Equity*, 14th ed by Jill E Martin (London, UK: Stevens, 1993) at 473-74; Sir Arthur Underhill, *Underhill and Hayton Law Relating to Trusts and Trustees*, 14th ed by David J Hayton (London, UK: Butterworths, 1987) at 792; Kerry, *supra* note 48 at 349; Matthews, "Trustee Exemption Clauses", *supra* note 464; *ibid* (observing that these sources "are enough to show that this was not an eccentric or unusual view" at para 137 per Lady Hale).

[469] *Uniform Trusts Code*, s 105(b)(2).

the drafters of the code realised that the expression 'good faith' was sufficient to capture the subsidiary concepts of fraud and dishonesty.[470] Furthermore, and to put the issue beyond any doubt, the *Uniform Trust Code* goes on to forbid settlors from relieving a trustee of liability for a breach "committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries."[471] Again, no mention is made of knowledge or honesty. Although the use of 'reckless indifference' might seem somewhat superfluous, it can be seen as simply a descriptive way of linking the duty back to the trust purposes and the beneficiaries' interests and does not rely on any degree of knowledge or misplaced emphasis on subjectivity.[472]

3.1.5. Loyalty

The duty of the trustee to act in the interests of the beneficiaries seems almost to emanate from the essential nature of the trust itself, being a relationship in which someone agrees to administer and manage certain property on behalf of another person. Thus, *loyalty* is endogenous to the trust concept. If it is recalled that a *fiduciary* duty is essentially 'a duty to look after another's interests',[473] it is apparent that loyalty is *the* quintessential fiduciary duty/right relation between trustee and beneficiary in the common law tradition.[474] In a trust context, the essence of a trustee's duty of loyalty is that it

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[470] *Uniform Trust Code*, *supra* note 31, s 814 (the commentary to s 814 provides that "[t]he obligation of a trustee to act in good faith is a fundamental concept of fiduciary law although there are different ways that it can be expressed. Sometimes different formulations appear in the same source"–that comment goes on to reference different sources where the expression of the single concept of 'good faith' is expressed by an array of terms, both in the trust commentary and the case law).

[471] *Uniform Trusts Code*, ss 1008 and 105(b)(10).

[472] *Uniform Trust Code*, *supra* note 31, comment to s 1008 (the commentary to s 1008 (Exculpation of Trustee), does not mention the terms 'honesty', 'knowledge' or 'reckless indifference', but simply reinforces that "[e]ven if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard and, in reference to s 1008(a), the commentary provides that "a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries").

[473] See Andrew Burrows, "We Do This At Common Law But That In Equity" (2002) 22 Oxford J Legal Stud 1 [Burrows, "Common Law"]("[o]nce one realizes that a fiduciary duty is a duty to look after another's interests, it becomes plain that what may not be a wrong when committed by a non-fiduciary may be a wrong when committed by a fiduciary" at 9); Birks, "Fiduciary Obligation", *supra* note 187 ("[t]here are certainly other obligations incumbent on a trustee, but they are all ancillary to this core obligation to promote the interests of the beneficiaries" at 9-10); Keane, *supra* note 108 ("[t]he fiduciary obligation is absolute, subject to the knowing consent of the beneficiary, because nothing less is regarded as a sufficient protection for the interests of the beneficiary against the powerful temptations of self-interest. The fiduciary obligation is a special exception to the acceptance of selfishness as a fact of life. The common law recognises the legitimacy of selfish behaviour so long as it is honest and reasonable. Equity was not so liberal where it found a fiduciary relationship; but its intervention was exceptional" at 116).

[474] See Scott, "Trustee's Duty of Loyalty", *supra* note 186; Devonshire, *supra* note 173 ("[a] duty of loyalty is increasingly regarded as the touchstone of a fiduciary relationship" at 390); Cope, *supra* note 234 ("[t]he fiduciary standard which requires the fiduciary not to act out of self interest lies at the heart of such relationships" at para 14); L Smith, "The Motive", *supra* note 209 ("[w]ithin the common law tradition, I mean [the duty of loyalty] to be the same as fiduciary duty" at 54); Lee et al, *supra* note 106 ("[t]he fundamental duty of all fiduciaries is that of undivided loyalty" at para 9.210, the authors go on to cast the "duty of loyalty" as on of the duties of trustees that are "so fundamental that they may be termed 'core duties'" at para 9.270); see *supra* note 186 and accompanying text.

obliges the trustee to act *in the interests of the beneficiaries*.[475] The nature of the beneficiary's correlative right is one of legitimate expectation that the trustee will utilise that privileged position to further the beneficiary's interests.[476] To avoid conflictual duties arising in a trust with multiple beneficiaries, a trustee must act *impartially* (or even-handedly) amongst the correlative right-holders to whom paucital (identical) duties of loyalty are owed.[477] The notion of *impartiality* could be understood as part of the default law as it assists in moulding the fundamental duty of loyalty to avoid conflicts, but can itself be abrogated where the trust deed provides for another kind of ranking as between the beneficiaries.

Although the duty of loyalty was not explicitly stated in Millett's LJ's formulation of the irreducible core of the trust in *Armitage v Nurse*, this thesis contends that the duty of loyalty was imported by the expression "for the benefit of the beneficiaries."[478] In trusts, the *duty of loyalty* is non-excludable as it would be inconceivable to establish a trust for which the trustee could act *disloyally* and *against the interests of the beneficiaries*.[479] Even in the case of broad exemption clauses, secondary, remedial

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[475] See *Scaffidi v Montevento*, *supra* note 3 ("[t]he office of trustee exists for the benefit of the beneficiaries" at 149 per Murphy JA & Hall J; *Letterstedt v Broers* (1884), 9 App Cas 371 (PC) ("[i]t must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate" at 386 per Lord Blackburn); *Keech v Sandford* (1726), Sel Ca t King 61, 25 ER 223 at para 61-62; L Smith, "The Motive", *supra* note 209 (loyalty "is the duty to put another's interests ahead of one's own interests" at 54); Finn, *Fiduciary Obligations*, *supra* note 173 ("what is clear is that [the courts] have in fact imposed a general obligation on fiduciaries–an obligation to act 'in the interests of' or 'for the benefit of' their beneficiaries–and that this sets the ring to the fiduciary's freedom of action in his office" at 15); Burrows, "Common Law", *supra* note 473 ("an even more illuminating way of thinking about a fiduciary duty is that it is a duty to look after another's interests" at 8).

[476] See *Arklow Investments Ltd v MacLean*, [2000] 1 WLR 594 (the duty of loyalty "encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal" at 598 per Henry J); see also Finn, "Fiduciary Principle", *supra* note 186 ("[w]hat must be shown... is that the 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... It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the 'fiduciary expectation'. Such a role may generate an actual expectation that that other's interests are being served" at 64); L Smith, "The Motive", *supra* note 209 ("[t]he beneficiary is owed a duty of loyalty; this means that he has an entitlement *that the fiduciary shall act with the right motive"* at 75), [emphasis in original].

[477] See Penner, "Exemptions", *supra* note 77 ("the duty of even-handedness must be regarded as one of the trustee's fiduciary obligations for only by being even-handed between the beneficiaries does a trustee meet his obligation of good faith and loyalty to all the beneficiaries. Indeed, the duty of even-handedness is just a specification of the duty of loyalty and good faith where there is more than one beneficiary" at 247-48).

[478] *Armitage v Nurse*, *supra* note 3 ("[t]he duty of the trustees to perform the trusts honestly and in good faith <u>for the benefit of the beneficiaries</u> is the minimum necessary to give substance to the trusts" at 253-54 per Millett LJ)[emphasis added]; this reading is also supported by the preceding passage of the judgment where Millett J explained that the relevant exclusion clause "did not purport to exclude the liability of the fiduciary..." (*ibid* at 253).

[479] See L Smith, "Mistaking the Trust", *supra* note 55 ("[t]rust drafters know that they cannot create a trust in which the trustees do not owe a duty of loyalty; it is not obvious that they should be allowed to get around this principle by giving significant powers to a protector and then seeking to alleviate the protector of the same duty" at 793); L Smith, "The Motive", *supra* note 209 ("[t]he obligation of loyalty is irreducible and cannot be put on a scale" at 77).

relations arise that emanate from the core duty of loyalty, such as the power to set aside transactions amounting to self-dealing by the trustee, as well as the right to disgorgement of unauthorized profits.[480]

Many conceptual accounts, both unifying and disparate, have been given of the content and nature of fiduciary obligations.[481] Professor Lionel Smith has persuasively argued that "the heart of the fiduciary obligation is the surveillance and the justiciability of the motive."[482] Smith gives an excellent account of the prophylactic duties that serve to protect the duty of loyalty itself and states that a trustee "must act in what [the trustee] perceives to be the best interests of the beneficiaries."[483] However, Smith's comments should not be taken too literally, such that an excessive emphasis would be placed on subjectivity.[484] Although Smith suggests that motive alone should be used to judge loyalty, which might seem to employ an overly subjective bias, it must be remembered that the court need not believe the trustee's account of his allegedly loyal behaviour. Thus, a trustee cannot simply say that he considered the action taken was, in his own view, in the best interests of the beneficiaries.[485] That

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[480] See *Armitage v Nurse*, *supra* note 3 at 252-55 per Millett LJ; JE Penner, *The Law of Trusts*, 7th ed (New York: Oxford University Press, 2010)[Penner, *Law of Trusts*] at 339; see *supra* note 356 and accompanying text (on the distinction between primary and secondary rights).

[481] See e.g. AJ McClean, "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 Alb L Rev 218; Austin W Scott, "The Fiduciary Principle" (1949) 37:4 Cal L Rev 539 at 540; Charles Harpum, "Fiduciary Obligations and Fiduciary Powers–Where Are We Going?" in Birks, *Privacy and Loyalty*, *supra* note 187, 145 at 147-49; DSK Ong, "Fiduciaries: Identification and Remedies" (1986) 8 U Tasm L Rev 311 (implicit dependency by one person upon another in the execution of specific tasks is a common element in all fiduciary relationships at 313-15); Finn, *Fiduciary Obligations*, *supra* note 173 at 15-17; Finn, "Fiduciary Principle", *supra* note 186; JC Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981); JC Shepherd, "Towards a Unifying Concept of Fiduciary Relationships" (1981) 97 Law Q Rev 51; Joshua Getzler, "Inconsistent Fiduciary Duties and Implied Consent" (2006) 122 Law Q Rev 1; Laura Hoyano, "The Flight to the Fiduciary Haven" in Birks, *Privacy and Loyalty*, supra note 187, 169; Patrick Parkinson, "Fiduciary Obligations" in Patrick Parkinson, ed, *The Principles of Equity* (North Ryde, NSW: LBC Information Services, 1996) 325 at 331-32; Robert Flannigan, "The Fiduciary Obligation" (1989) 9 Oxford J Legal Stud 285; Austin, "Moulding Fiduciary Duties", *supra* note 174 at 159-61.

[482] L Smith, "The Motive", *supra* note 209 at 67.

[483] L Smith, "The Motive", *supra* note 209 at 75. See also *Williams v Barton*, [1927] 2 Ch 9 ("[i]t is a well established and salutary rule of equity that a trustee may not make a profit out of his trust. A person who has the management of property as a trustee is not permitted to gain any profit by availing himself of his position" at 11 per Russell J); *Bray v Ford*, [1896] AC 44 ("[i]t is an inflexible rule of a Court of Equity that a person in a fiduciary position .... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict" at 51 per Lord Herschell); see also Finn, *Fiduciary Obligations*, *supra* note 173 ("[a] fiduciary must act honestly in what he alone considers to be the interests of his beneficiaries" at 15).

[484] L Smith, "The Motive", *supra* note 209 ("[l]oyalty is not measured by results" at 69; "[a]ny argument based on a breach of the duties of care, skill and diligence requires proof that a particular objective standard was not met. Motive is irrelevant. Looking at the fiduciary obligation, we find the reverse" at 70; "[d]isloyalty is a matter of motive. It is never judged by result" at 73.

[485] See *Re VR Trust*, *supra* note 155 (the beneficiaries founded their application for removal of the appointor of the trust on the basis that the appointor had acted "unreasonably" at 213; the trustee agreed and "raised its concerns as to [the appointor's] motives for appointing [an additional trustee]", having regard to an obvious conflict of duty and interest, the Court held that "[the appointor's] power to appoint an additional trustee is a fiduciary power and, having exercised that power when in a clear position of conflict, [the appointor] will now have to satisfy the court that it was a reasonable decision to make and was not influenced by the conflict" at 216 [emphasis added]; the court proceeded to assess reasonableness objectively albeit that the appointor had filed a lengthy (85 page) affidavit deposing that he did not believe

cannot be a complete answer to an allegation of disloyalty; a trustee must properly answer such an allegation.[486] As such, recourse may be made to the objective facts of the case in order to assess the plausibility and reasonableness of the trustee's claims, as well as the trustee's credibility, and to ultimately determine whether the trustee acted disloyally in the circumstances, albeit that the trustee might protest otherwise.[487]

In addition to Smith's justifications for treating the prophylactic and remedial rules as analytically distinct from the *duty of loyalty* itself, this thesis advances an additional justification.[488] Put simply, the prophylactic rules can be expressly altered or excluded to allow for certain eventualities by court order or by the subsequent agreement of those to whom those rules are designed to protect (i.e. the beneficiaries), but the fundamental duty of loyalty cannot be so excluded. The duty of loyalty persists despite:

1. the presence of a conflict of interest or duty;[489]
2. the legitimate waiver of one of the prophylactic rules that comprise the duty of loyalty, such as the *no-conflict* or the *no-profit* rule;[490]
3. the termination of the fiduciary relationship giving rise to the duty;[491]
4. any express *inclusion* of the duty into the trust deed;[492] and

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himself to be in a true position of conflict and that he did not believe he was acting unreasonably in refusing to step down as appointor and protector of the trust (*ibid* at 203, 214).

[486] See *Mango Boulevard*, *supra* note 456 ("[i]f, somehow the use of trust property by [the trustee] to meet his own debts, and the application of trust money at the trustee's discretion for his own purposes as though it were his own, did not extinguish the 'irreducible core of obligations' owed by a trustee, the pleading should have explained how it did not" and, further, "[i]f [the trust deed] permitted [the trustee] to take that trust asset for himself without being in breach of trust it must be by reason of facts and circumstances known to [the trustee] which allowed the essence of the trust to be preserved notwithstanding the trustee's appropriation of trust assets" at para 70 per Chesterman J).

[487] See *Re VR Trust*, *supra* note 155 (in considering whether a person had acted unreasonably in refusing to resign as appointor and protector of the trust in spite of an egregious conflict of interest and duty the Court consider that "we cannot envisage any circumstances in which anyone in his position could reasonably contemplate remaining in office" at 214; and further "we find the conduct of [the appointor and protector] to be wholly unreasonable and in flagrant breach of his duty as protector and appointor to the beneficiaries" at 215 [emphasis added]. Compare L Smith "The Motive", *supra* note 209 at 69, 73.

[488] See L Smith, "The Motive", *supra* note 209 at 63-64.

[489] Whilst the presence of conflicts between duty and interest are relatively obvious and straightforward, conflictual duties may be a little more difficult and require caution to be exercised; again, the conflict between duties of loyalty in the presence of multiple beneficiaries is resolved by the trustee acting even-handedly amongst those persons by managing trust affairs *for the benefit of* [all] *the beneficiaries*.

[490] See e.g. *Re Penrose*, [1933] Ch 793; *Re Beatty*, [1990] 3 All ER 844 at 846; *Re Hart*, [1943] 2 All ER 557.

[491] See L Smith, "The Motive", *supra* note 209 ("if a fiduciary is at liberty to take personal advantage of an opportunity, then he need not resign to do so; whereas if he is not, resigning in order to do so will not change anything, because the resignation itself will be disloyal, and in any even will breach the rule against conflicts of interest and duty" at 78).

[492] See Finn, "Fiduciary Principle", *supra* note 186 (the fiduciary expectation of loyalty "may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has

5. any express *exclusion* of the duty itself.[493]

To expand upon an example given by Smith regarding a trustee taking out insurance from a firm in which he had a financial interest (conflict of duty and interest), if that trustee obtained the prior consent of the beneficiaries, the insurance policy would be lawfully undertaken despite the conflict.[494] But the trustee cannot use the consent of the beneficiary as a *carte blanche* sanction to then act disloyally in relation to obtaining or maintaining that insurance policy (e.g. by paying four times the commercial rate for the policy). To do so would amount to a breach of the duty of loyalty because that duty persists and the trustee must continue to place the interests of the beneficiaries above his own.[495] The trustee is only permitted to act according to the mandate given to him by the beneficiaries. Independent financial or legal advice regarding the terms of the insurance policy or adherence to an objective formula or standard to determine the key features of that policy will provide transparency and assist in monitoring the loyalty of the trustee.[496] Another deviation may seem to be required to allow a trustee to exercise powers for the purposes for which they were conferred, and not for some ulterior purpose.[497] At times this may appear to subordinate the interests of the beneficiaries, such that the trustees are serving phantom beneficiaries;[498] however, it must be seen as fulfilling the purposes of the trust and the trust terms will assist in determining whether the trustee has acted beyond or within the powers conferred by the trust deed.[499] If a power-holder is classed as a fiduciary that person must owe the duty of loyalty to the objects contemplated by that power, which may be extended to new trust offices (e.g. appointors, enforcers, protectors, etc.).[500]

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adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility" at 64).

[493] In essence, the trustee cannot be alleviate of the obligation to act in the interests of the beneficiaries as it would defeat the very purpose of the trust relationship and, more specifically, the voluntarily undertaken office of trustee.

[494] See L Smith, "The Motive", *supra* note 209 at 59, *c.f. Williams v Barton*, *supra* note 483; the trustee must disclose the full extent of any interest and/or duty that conflicts with that owed to the beneficiaries.

[495] See *Keech v Sandford*, *supra* note 475 at paras 61-62; Langbein, "Contractarian", *supra* note 77 at 667 (for a comparable example in a typical family trust).

[496] *C.f. Smith*, *supra* note 209 at 69-73.

[497] See *Walker v Stones*, *supra* note 421 ("[a] trustee's powers must be exercised reasonably and in good faith and for the purposes for which they were created; he must exercise them in a proper way for the legitimate purposes of the trust" at 916 per Sir Christopher Slade), citing *Halsbury's Laws of England* ,4th ed, vol 48 (1995) at 452-53); *Re Bryant*, [1894] 1 Ch 324.

[498] See e.g. *Hayim v Citibank NA*, [1987] 1 AC 730 (PC).

[499] See *Citibank v MBIA*, *supra* note 188; see *supra* notes 204, 205 and accompanying text.

[500] See Waters, "Protector", *supra* note 175 ("[i]f a power-holder is a fiduciary, that is, one who must act for the benefit of a class or enumeration of beneficiaries as a whole, he is subject to the duty of loyalty" at 76).

In Australia, it is widely regarded that a trust does not come into existence *unless* and *until* a fiduciary duty is superadded to a particular relationship in which one person is called upon to deal with property for the benefit of another.[501] In Canada, the duty of loyalty is recognised as the overarching fiduciary obligation, which comprises the constituent prophylactic rules.[502] Trustees cannot rely on clauses purporting to sanction breaches of fiduciary duty because it would be wholly offensive to equity's standards of integrity that the trustee could take personal advantage of the settlor's confidence.[503] In England, the fiduciary nature of the office of trustee is also deeply engrained in the commentaries and jurisprudence.[504] A steady stream of jurisprudence and literature has also firmly entrenched the (fiduciary) duty of loyalty in New Zealand, as well.[505]

In the United States, the duty of loyalty has become somewhat confused with the prophylactic duties designed to protect the duty itself.[506] Indeed, the leading text on American trust law observes that "[t]he most fundamental duty of a trustee is the duty of loyalty. It arises not from any provision in the terms

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[501] See Dal Pont, Chalmers & Maxton, *supra* note 28 ("[t]he classic relationship which gives rise to fiduciary duties is that of trustee and beneficiary" at 103, para 4.2 and "[t]he trustee is subject to a *fiduciary* obligation to manage the trust property for the exclusive benefit of the beneficiaries, which the latter have standing to enforce in a court" at 441, para 15.1.1 [emphasis in original]); *Jacobs' Law of Trusts*, *supra* note 28 ("[t]he trustee is the archetype of a fiduciary. Thus, the vendor of land will be under an equitable obligation to deal with property for the benefit of the purchaser, but will not be a true trustee until there is superadded a fiduciary duty owed to the purchaser" at 2, para 102 [citations omitted]); Lee et al, *supra* note 106 at paras 9.010-9.270; Ong, *supra* note 106 at 219.

[502] See *Saskatchewan Ltd v Thurgood*, (1992) 93 DLR (4th) 694, 100 Sask R 214 [*Saskatchewan v Thurgood*]("[t]he obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary" at para 21 per La Forest J); *Midcon Oil & Gas Limited v New British Dominion Oil Company Limited,* [1958] SCR 314 ("[t]he fiduciary relationship is that of a trust in one who is to act in relation to the beneficial interest of another. It creates a standard of loyalty that calls for a refined sensibility to duty, the exclusion of all personal advantage and the total avoidance of any personal involvement in the interests being served or protected, a sense of obligation not always appreciated by those who enter upon it." at 335 per Rand J); *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 ("[t]he essence of a fiduciary relationship ... is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core ... The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken" at 543 per McLachlin J); *Canadian Aero Service Ltd v O'Malley*, [1974] 1 SCR 592 (the fiduciary relationship was described as an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest" at 606 per Laskin J); see also *Oosterhoff on Trusts*, supra note 4 ("the duty of loyalty underlies all of the duties [of trustees]" at 1049).

[503] See *Saskatchewan v Thurgood*, *supra* note 502 at 227-30.

[504] See *Lewin on Trusts*, *supra* note 28 at 575, 1214; *Underhill & Hayton* (17th ed), *supra* note 30 at 3; Penner, *Law of Trusts*, *supra* note 480 at 18-21.

[505] See *Foreman v Kingstone*, *supra* note 398 para 82 per Potter J; Butler et al, *supra* note 28 at 475-76, 497-501; Robert Flannigan, "The Strict Character of Fiduciary Liability" (2006) NZL Rev 209 at 239; Charles Rickett, "Fiduciary Duties and Equitable Compensation" [2001] NZLJ 222; Kerry Ayers, "Fiduciary Obligations in Express Trusts" [1997] NZLJ 243; EW Thomas, "An Affirmation of the Fiduciary Principle" [1996] NZLJ 405.

[506] See e.g. *Scott & Ascher on Trusts*, *supra* note 70 at 1077-173; Scott, "Trustee's Duty of Loyalty", *supra* note 186 ("[b]y the terms of the trust the trustee may be permitted to do what in the absence of such a provision in the trust instrument would be a violation of his duty of loyalty" at 536).

of the trust but simply on account of the relationship that is inherent in every trust";[507] but, strangely enough, the 'duty of loyalty' falls on the list of default law in the *Uniform Trust Code*,[508] leading one prominent author to claim that the duty of loyalty is not protected from settlor modification.[509] How can this be? Even the comment to the 'Duty of Loyalty' provision informs the reader that "[t]his section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee."[510] Well, it is simply because of the way in which the duty of loyalty is conceived: "[a] trustee shall administer the trust *solely* in the interests of the beneficiaries."[511] The reference to 'solely' in the formulation of the duty is intended to refer to the prophylactic rules and not the overarching duty of loyalty.[512] The requirement for the trustee to act even-handedly as between multiple beneficiaries is provided for under the rubric of 'impartiality' and, quite reasonably, forms part of the default law.[513]

The more apposite duty/right relation of loyalty contended for in this thesis (i.e. *loyalty* is found in the expression '*in the interests of the beneficiaries*'[514]) is preserved in the list of mandatory rules.[515] In the *Uniform Trust Code*, we find that the terms of the trust cannot prevail over "the duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries", as well as "the requirement that a trust and its terms be for the benefit of its beneficiaries".[516] To put the situation beyond any doubt, the mandatory rules go on to provide that an exculpatory term in the trust deed that purports to relieve "the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries" is unenforceable.[517] Thus, the protection afforded by the mandatory rule requirement for the performance and terms of the trust to be *for the benefit of beneficiaries* in United States trust law

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[507] *Scott and Ascher on Trusts*, *supra* note 70, vol 3, at 1077. See also *Pegram v Herdrich* 530 US 211 (2000) at 224.
[508] *Uniform Trust Code*, *supra* note 31, ss 105(a), 802.
[509] See Langbein, "Mandatory Rules", *supra* note 29 at 1122, n 93 (citing "prominent decisional authority on the point").
[510] *Uniform Trust Code*, *supra* note 31, s 802, Comment.
[511] *Ibid*, s 802(a) [emphasis added]; John H Langbein, "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?" (2005) 114 Yale LJ 929 [Langbein, "Questioning Loyalty"] at 931-32.
[512] *Uniform Trust Code*, *supra* note 31, s 802(b)-(h); although s 802(i) of the *Uniform Trust Code* presents as somewhat of an oddity because it permits the court to appoint 'special fiduciaries' to approve certain, conceivably risky, transactions, which somewhat delegates the supervisory jurisdiction of the court over trusts and the actions of trustees.
[513] *Ibid,* s 803 ("[i]f a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests").
[514] See *supra* note 475 and accompanying text.
[515] *Uniform Trust Code*, s 105(b)(2), (3).
[516] *Ibid*, ss 105(b)(2) and (3) [emphasis added]; it should also be noted that the non-excludable duty of the trustee to act in accordance with the terms of the trust, which must be for the benefit of the beneficiaries, serves to reinforce the more explicit duty that the trustee must act in the interests of the beneficiaries.
[517] *Ibid*, ss 105(b)(10), 1008.

preserves and upholds, in substance, the (fiduciary) duty of loyalty.[518] The distinction between the default law and the mandatory rules relating to the duty of loyalty bring out the demarcation between the core duty of loyalty and the prophylactic rules that serve to protect its content.[519] The heart of the fiduciary obligation is the duty of loyalty and it persists despite permitted deviations allowed from time-to-time (i.e. through the default nature of the prophylactic rules regime).[520]

3.1.6. Performance

Although it is possibly so obvious as to be overlooked, trustees must perform the trust.[521] Indeed, the trustee's duty to perform the trust, and the beneficiary's correlative right to have the trust performed, is the paramount duty/right relation emanating from a trust.[522] This duty/right relation ties in with the supervisory jurisdiction of the courts over trusts.[523] Juridical classification of the trust within the

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[518] See Langbein, "Burn the Rembrandt", *supra* note 203 ("[a] trust term providing that the trustee owes no duty of loyalty would leave the interests of the beneficiaries unprotected against a trustee who set out to loot the trust. Such a term would violate both the principle that fiduciary duties may not be entirely eliminated, and the rule against capricious purposes, that is, in UTC parlance, the rule that a trust and its terms must be for the benefit of the beneficiaries" at 384); Langbein, "Questioning Loyalty", *supra* note 511 ("[a]djusting the duty of loyalty as suggested would eliminate that strain on our fundamentally sound tradition of encouraging faithful trusteeship" at 990).

[519] *Uniform Trust Code*, *supra* note 31, ss 105(2), (3), (10), 801-803,1008; *c.f.* Langbein, "Questioning Loyalty", *supra* note 511 at 963-67.

[520] See Langbein, "Contractarian", *supra* note 77 ("[w]e see constantly in real-world practice some version of the case in which my father names me trustee for my mother for life, remainder to a group including me, with a power in the trustee to invade the corpus of the trust for the benefit of my mother in the event the life interest becomes inadequate for her comfort and support. My father has insisted on choosing a conflict-tainted trustee, making the judgment that I am to be trusted not to pauperize my mother to enrich myself" at 667); the 'trust' alluded to by Langbein reveals precisely the persistent nature of the duty of loyalty, which persists despite (limited) sanction to act in a conflictual situation.

[521] See *Wilden v Green*, *supra* note 3 ("[a] trustees prescriptive duties include the duty to perform and adhere to the terms of the trust" at para 166 per McLure JA); *Youyang Pty Ltd v Minter Ellison Morris Fletcher*, [2003] HCA 15, 212 CLR 484 ("[p]erhaps the most important duty of a trustee is to obey the terms of the trust" at para 32 per Gleeson CJ, McHugh, Gummow, Kirby & Hayne JJ); *Armitage v Nurse*, *supra* note 3 ("[t]he duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts..." at 253-4 per Millett LJ)[emphasis added]; *Attorney-General v Downing* (1767), Wilm 1 at 23, 97 ER 1 at 9; *Raby v Ridehalgh* (1855), 7 De G M & G 104 at 108, 44 ER 41 at 43; Birrell, *supra* note 34 (commenting that trustees must "adhere to the terms of his trust in all things great and small, important, and seemingly unimportant"). *C.f. Perrins v Bellamy*, [1899] 1 Ch 797 (for the rather curious remark that "[m]y old master, the late Selwyn LJ, used to say "The main duty of a trustee is to commit *judicious* breaches of trust'" at 798 per Sir Nathaniel Lindley MR).

[522] See The Hon. Mr. Justice Gummow, "Compensation for Breach of Fiduciary Duty" in TG Youdan, *Equity Fiduciaries and Trusts* (Toronto: Carswell, 1989) 57 ("[t]he paramount obligation of the trustee is to observe the terms of the trust" at 67); *Fry v Fry* (1859), 27 Beav 144, 54 ER 56; *Harrison v Randall* (1851), 9 Hare 397 at 407, 68 ER 562 at 567.

[523] See *Letterstedt v Broers*, *supra* note 475 ("the jurisdiction which a Court of Equity has no difficulty in exercising [to remove trustees] is merely ancillary to its principal duty, to see that the trusts are properly executed" at 386 per Lord Blackburn); *Leerac v Fay*, *supra* note 3 ("a condition against the taking of any proceedings whatsoever having the effect of preventing any question of administration of a trust or Will, or securing the due administration of the trust or Will by the trustees, is too wide and will be void for ousting the jurisdiction of the Court, although one which merely discourages disputing the validity of the Will or trust will not offend that rule" at para 23 per Brereton J), citing *Permanent Trustee v Dougall*, *supra* note 247 at 86-87 per Harvey CJ in Eq; Brereton J went on to observe that was "nothing irreconcilable about the observations of Harvey CJ in Eq in *Permanent Trustee Company v Dougall* and those of Millet LJ in *Armitage v Nurse*" (*ibid* at para 24).

structure of the private law permits settlors the broad freedom to fashion their own trust, but commands that trusts cannot be created that are *non-legal*, in the sense of being outside the realm of the supervisory jurisdiction of the courts.[524] Trusts, fixed or discretionary, must be performed and the court's supervisory jurisdiction to ensure trusts are performed cannot be ousted.[525] A claim may be instituted with respect to the trustee's duty to perform the trust either by a beneficiary (alleging that a particular course of action, taken or proposed, is other than in accordance with the trust) or by the trustee (seeking guidance from the court as to the appropriate and lawful course of conduct).[526] A beneficiary can move the court for an injunction to restrain an anticipated derivation from the trust terms; a trustee can obtain an injunction to prevent co-trustees from breaching the trust; and an injunction may be obtained against third parties to prevent dealings with the trust property.[527] And, quite independently of any potential liability of the trustee for breach of trust, a trustee may be removed and replaced for failing to perform the trust.[528] This highlights the importance of articulating this duty/right relation in its primary sense (i.e. performance), as well as conceptualising this essential legal relation simply as *the* duty/right relation that buttresses the entire corpus of trust law known as *breach of trust*, which hosts an array of remedial tools to provide redress where necessary and justified.[529]

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[524] See Hayton, "Irreducible Core", *supra* note 35 at 48.

[525] See *Schmidt v Rosewood*, *supra* note 111 ("[i]t is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust" at 724 per Lord Walker); David Hayton & Charles Mitchell, *Hayton and Marshall: Commentary and Cases on the Law of Trusts and Equitable Remedies*, 12th ed (London, UK: Sweet & Maxwell, 2005)("the jurisdiction of the court as to pure matters of law cannot be ousted by provisions in the trust instrument giving the trustees power to determine all questions arising in the execution of the trusts under the instrument" at 659); *Hartigan v Ryde*, *supra* note 370 at 416 per Kirby P, citing *Randall v Lubrano* (unreported), 31 October 1975 (NSWSC) ("no matter how wide the trustee's discretion in the administration and application of a discretionary trust fund and even if in all or some respects the discretions are expressed in the deed as equivalent to those of an absolute owner of the trust fund, the trustee is still a trustee" per Holland J).

[526] See e.g. *Citibank v MBIA*, *supra* note 188.

[527] See *Park v Dawson*, [1965] NSWR 298; *Wearing v Baynard* (1855), 20 Beav 583, 52 ER 729; *Ackerley v Palmer*, [1910] VLR 339; Wright, *supra* note 355 at 118, 190-91; *Lewin on Trusts*, *supra* note 28 at 1543-46.

[528] See *Letterstedt v Broers*, *supra* note 475 ("[the duty of the courts to see that trusts are properly executed] is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed" at 386 per Lord Blackburn); *Hunter v Hunter*, [1938] 1 NZLR 520 at 534-35; Joseph Story, *Commentaries on Equity Jurisprudence, as administered in England and America*, 13th ed by Melville M Bigelow, vol 2 (Boston: Little Brown, 1886)("the appointment of new trustees is an ordinary remedy, enforced by Courts of Equity in all cases where there is a failure of suitable trustees to perform the trust, either from accident, or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause" at 631, para 1287); see also Penner, "Exemptions", *supra* note 77 at 252.

[529] In Australia: Dal Pont, Chalmers & Maxton, *supra* note 28 at 822; Lee et al, *supra* note 106 at para 17.110; In Canada: *Waters' Law of Trusts*, *supra* note 4 at 1208. In England & Wales: *Lewin on Trusts*, *supra* note 28 at 1541-42; *Snell's Equity* (31st ed), *supra* note 28 at 665. In New Zealand: *Re Spedding*, *supra* note 462 at 463-64 per Turner J; Butler et al, *supra* note 28 at 258.

The trustee's duty to perform the trust is fairly well entrenched in the trust commentaries throughout the Commonwealth jurisdictions.[530] Similarly, in the United States, the *Uniform Trust Code* provides that "*the duty of a trustee to act* in good faith and *in accordance with the terms and purposes of the trust*" is a mandatory rule of trust law.[531] A settlor cannot "interfere with the court's routine powers of judicial administration."[532] Trust clauses attempting to oust the supervisory jurisdiction of the courts, and pushing trusts outside of the legal arena, will be struck down on the grounds of public policy.[533] Notwithstanding the core duty placed on trustees to obey the trust deed, certain departures from the terms of the trust are allowed to accommodate a variety of circumstances and further the trust purposes. There are two exceptions to the trustee's core duty to perform the trust: *variation* and *termination*, each of which will be considered in turn below.

3.1.6.1. Variation

This thesis puts forward the reserve power to vary the trust terms as an essential legal relation being one of power/liability as between a trustee and each of the beneficiaries that forms part of the irreducible core of the trust.[534] The circumstances requiring variation of trusts are diverse and, responsively, the powers of variation must be broad enough to capture that diversity. The trustee's power to vary the trust may be express or implied in the trust deed or, alternatively, may draw on a general power to vary the trust to meet unforeseen circumstances or fulfill an overriding purpose.

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[530] In Australia: Dal Pont, Chalmers & Maxton, *supra* note 28 ("[i]t is the trustee's plainest and overriding duty to obey the terms of the trust" at 687); *Jacobs' Law of Trusts*, *supra* note 28 at 369-78; Lee et al, *supra* note 106 at para 9.2010; In Canada: *Oosterhoff on Trusts*, *supra* note 4 at 1049-50; In England & Wales: David Hayton, *Underhill & Hayton* (17th ed), *supra* note 30 ("[t]his is the most important of all the rules relating to the duties of trustees" at 614, para 47.2); In New Zealand: *Smith v Hugh Watt Society Inc*, [2004] 1 NZLR 537 at para 62 per Randerson J; *Mendelssohn v Centrepoint Growth Trust*, [1999] 2 NZLR 89 at 95; Butler et al, supra note 28 at 125.

[531] *Uniform Trust Code*, *supra* note 31, s 105(b)(2). See *Scott & Ascher on Trusts*, *supra* note 70, vol 3, at 1077.

[532] *Uniform Trust Code*, *supra* note 31, s 105(b)(4)(referencing the court's power to reform a trust instrument to correct mistaken terms), s 105(b)(13)(court's power to take action and exercise jurisdiction that is "necessary in the interests of justice"); s 105(b)(14)(rules of jurisdiction and venue). See *Scott & Ascher on Trusts*, *supra* note 70, vol 3, at 1030-74.

[533] See *McNeil v McNeil*, 798 A2d 503 (2002) (where the Delaware Supreme Court refused to enforce a provision of a trust purporting to make decisions of the trustees 'not subject to review by any court').

[534] In Australia: Dal Pont, Chalmers & Maxton, *supra* note 28 at 724-41; *Jacobs' Law of Trusts*, *supra* note 28 at 370-78; Lee et al, *supra* note 106 at paras 15.000-15.300. In Canada: *Oosterhoff on Trusts*, *supra* note 4 at 341-43; *Waters' Law of Trusts*, *supra* note 4 at 1287-98. In England & Wales: *Lewin on Trusts*, *supra* note 28 at 1853-62, 1867-73; *Underhill & Hayton* (17th ed), *supra* note 30 at 618-56. In New Zealand: Butler et al, *supra* note 28 at 235-253. Although it should be noted that the power/liability relation regarding variation was altered significantly in *Chapman v Chapman*, [1954] AC 429, 1 All ER 103; see OR Marshall, "Deviations from the Terms of a Trust" (1954) 17 Mod L Rev 420 (for an analysis of the implications of *Chapman v Chapman*, *ibid*, and observing a conceptual paradox between *Chapman v Chapman*, *ibid*, and the rule in *Saunders v Vautier*, *infra* note 553 and accompanying text, and suggesting that settlors may provide further empowerment to trustees to vary trusts at 433). Although the common law jurisdictions have responded differently to counter that rebuff from the House of Lords on variation, broad statutory powers of variation still subsist in all jurisdictions; see *infra* note 536.

Beneficiaries, too, hold powers to vary the terms of the trust in certain circumstances.[535] Statutory powers of variation have widened the scope of variations that were traditionally permitted by equity and commonly confer a broad statutory power of variation, coupled with specific powers of variation that can be exercised in narrow circumstances and curtailed by the trust deed.[536] A trustee may have recourse to the court to approve or authorise a variation of the trust,[537] and apply to the court for directions concerning the administration and management of the trust property or the exercise of a power or discretion,[538] which is generally advisable where there is any prospect of controversy surrounding the variation because the trustee is protected when acting under court direction.[539]

In the United States, the court's power to modify a trust is on the list of mandatory rules that prevail over trust terms.[540] The obvious tension between the trustee's core duty to perform the trust in accordance with its terms and any power to modify or vary those terms is resolved through the fulfillment of the material purpose of the settlor, which is said to be "consistent with the principle that preserving the settlor's intent is paramount."[541] The *Uniform Trust Code* provides settlors with a continued role to play in relation to the functioning of the trust, most notably in two respects: a) the beneficiaries require the settlor's consent to modify the trust where that modification is inconsistent

[535] See *Re Holmden's Settlement Trusts*, [1968] AC 685, 1 All ER 148 ("[u]nder the Variation of Trusts Act the court does not itself amend or vary the trusts of the original settlement. The beneficiaries are not bound by variations because the court has made the variation. Each beneficiary is bound because he has consented to the variation. If he was not of full age when the arrangement was made he is bound because the court was authorised by the Act to approve of it on his behalf and did so by making an order. If he was of full age and did not in fact consent he is not affected by the order of the court and he is not bound. So the arrangement must be regarded as an arrangement made by the beneficiaries themselves. The court merely acted on behalf of or as representing those beneficiaries who were not in a position to give their own consent and approval" at 701 per Lord Reid).

[536] In Australia: *Trustee Act 1925* (ACT), s 81; *Trustee Act 1925* (NSW), s85; *Trustee Act 2007* (NT), s 50A; *Trusts Act 1973* (Qld), s 94; *Trustee Act 1936* (SA), s 59B; *Trustee Act 1898* (Tas), ss 47, 55; *Trustee Act 1958* (Vic), s 63; *Trustees Act 1962* (WA), 89; In Canada: *Trustee Act 2000* (A), s 42; *Trust and Settlement Variation Act*, RSBC 1996, c 463 (BC); *Trustee Act* (M), s 59; *Trustees Act 1973* (NB), s 26; *Variation of Trusts Act*, RSNS 1989, c 486 (NS); *Variation of Trusts Act*, RSNWT 1988, c V-1 (NWT); *Variation of Trusts Act*, RSO 1990, c V-1 (O); *Variation of Trusts Act*, RSPEI 1988, c V-1 (PEI); *Variation of Trusts Act*, RSS 1978, c V-1 (S); *Variation of Trusts Act*, RSY 2002, c 224 (Y); In England & Wales: *Trustee Act,* 1925 (UK), 16 Geo V, c 19, s 57; *Variation of Trusts Act,* 1958 (UK), 6 & 7 Eliz II, c 53. In New Zealand: *Trustee Act 1956* (NZ), ss 64, 64A; See also The Law Reform Commission (Ireland), *Report on the Variation of Trusts* (LRC 63/2000) (December 2000), online: Irish Law Reform Commission <http://www.lawreform.ie> at paras 1.1, 4.01 (on the need for variation of trusts legislation in Ireland see 1.11-1.21).

[537] See e.g. *Trusts Act 1973* (Qld), s 95; *Trustee Act 1936* (SA), s 59C; *Trustee Act 1958* (Vic), s 63A; *Trustee Act 1956* (NZ), 1956/61, ss 64 and 64A; see *Re New*, [1901] 2 Ch 534 at 545, [1900-3] All ER 763 at 768 per Romer LJ.

[538] See e.g. *Trustee Act 1925* (ACT), s 63(1); *Trusts Act 1925* (NSW), s 63(1); *Trusts Act 1973* (Qld), s 96; *Trustee Act 1936* (SA), s 91; *Trustee Act 1962* (WA), s 92; *Re Permanent Trustee Australia Ltd*, (1994) 33 NSWLR 547 at 548; *Trustee Act 1956* (NZ), 1956/61, s 66.

[539] See e.g. *Trustee Act 1963* (ACT), s 63(2); *Trusts Act 1925* (NSW), s 63(2); *Trusts Act 1973* (Qld), s 97; *Trustee Act 1936* (SA), s 93; *Trustee Act 1962* (WA), s 95; *Trustee Act 1956* (NZ), 1956/61, s 69.

[540] *Uniform Trust Code*, *supra* note 31, ss 105(b)(4), 410-16.

[541] *Ibid*, Overview to the *Uniform Trusts Code* (commenting on ss 410-417 (modification and termination)); *Scott & Ascher on Trusts*, *supra* note 70 at 1032-33.

with a material purpose of the trust;[542] and b) a settlor may commence a proceeding to approve or disapprove a proposed modification of the trust.[543] Without the settlor's involvement, the mandatory rules on modification of trusts proceed as follows:

1. beneficiaries can consent to a variation of trust if that modification is not inconsistent with a material purpose of the trust;[544]
2. the court can vary the administrative and dispositive terms of the trust if modification would further the purposes of the trust in unanticipated circumstances (in accordance with the settlor's probable intention to the extent practicable);[545]
3. additionally, the court can modify the administrative terms of the trust if the existing terms are impracticable or wasteful or impair the trust's administration;[546]
4. trusts may be modified where the value of the trust property is insufficient to justify the costs of administration (i.e. the trust has become 'uneconomic');[547]
5. trusts may be 'reformed' where the settlor's intent and the trust terms were affected by a mistake of fact or law, whether in expression or inducement, to conform to the settlor's intention;[548]
6. trusts may be modified by the court in a manner not contrary to the settlor's probable intention in order to achieve the settlor's tax objectives, which may have retroactive effect;[549] and
7. trustees have a power to combine or divide trusts where the beneficiaries' rights are not impaired or the purposes of the trust/s are not adversely affected.[550]

The combined effect of those provisions is to convey broad, non-displaceable powers of variation on the various trust parties contemplated by the *Uniform Trust Code* to modify the trust in light of the trust purposes and unforeseen circumstances, albeit that significant variations require court sanction. Despite the continued involvement of the settlor after establishment of trusts in the United States, the breadth and depth of permissible deviations from the terms of the trust rests somewhat uncomfortably with the

[542] *Uniform Trust Code*, *supra* note 31, s 411(a).
[543] *Ibid*, s 410(b); settlor intervention was expanded in the commentary to the 2004 Amendment.
[544] *Ibid*, s 411(b).
[545] *Ibid*, s 412(a).
[546] *Ibid*, s 412(b).
[547] *Ibid*, s 414.
[548] *Ibid*, s 415.
[549] *Ibid*, s 416.
[550] *Ibid*, s 417.

contractarian theory of trusts and rather supports the trust as a distinct legal institution having a separate existence from, and answering to masters other than, the settlor.[551]

3.1.6.2. Termination

Succinctly stated, a beneficiary, or group of beneficiaries acting in unison, have a *power* to request an outright conveyance of the trust property to that person, or group of persons having a concurrent or successive interest, where that request represents the entire beneficial interest/s held in the trust property.[552] This power/liability relation between beneficiaries and trustees is often referred to as 'the rule in *Saunders v Vautier*'.[553] The power is confined to directing the trustees to convey the property so held to those entitled, either according to the beneficial interests stipulated in the trust deed or as agreed by the beneficiaries.[554] Beneficiaries are not empowered to impose additional duties, nor alter or abrogate existing duties, powers, etc. of the trustees or direct the trustees to act in any other way (e.g. by directing the exercise of a certain discretion or power).[555] The power simply brings the trust to an end and, as such, exhausts the corpus of duties owed by a trustee to all persons that stand to benefit from the trust.[556] A sensible qualification on the right exists to allow the trustee to retain a portion of

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[551] There appears to be unresolved antinomy in Professor Langbein's work: *Langbein*, "Mandatory Rules", *supra* note 29 (providing a lucid account of, and justifications for, the mandatory rules regime); *contra* Langbein, "Contractarian", *supra* note 77 ("virtually all trust law is default law–rules that the parties can reject. The rules of trust law apply only when the trust instrument does not supply contrary terms... [b]ecause the parties can oust the trust default regime, we say that they choose it by deciding not to oust it" at 650, "[b]y calling their deal a trust, the parties automatically incorporate an extensive body of default terms that have proven highly suitable for implementing deals of this type. The contractarian account views the parties as choosing this default regime for their particular deal, except to the extent they modify it" at 660). Langbein glosses over the acute antinomy in those two trust theories by suggesting, rather awkwardly for the contractarian theory, that "the traditional, property-based account is easy to reconcile with the contractarian account: Trust is a hybrid of contract and property, and acknowledging contractarian elements does not require disregarding property components whose convenience abides" (Langbein, "Contractarian", *ibid* at 669).

[552] See *Berry v Green*, [1938] AC 575 (PC); *Re Smith*, [1928] 1 Ch 915; Hayton, "Irreducible Core", *supra* note 35 at 48.

[553] *Saunders v Vautier* (1841), 1 Cr & Ph 240, 41 ER 482 [*Saunders v Vautier*] per Lord Cottenham LC, affirming *Saunders v Vautier* (1841), 4 Beav 115 per Lord Langdale MR; although the rule bears the name of those cases, *Saunders v Vautier* did not establish, but merely carried forward, the right of a *sui juris* legatee to demand the transfer of a vested interest in an estate (*ibid* at 485). See eg. *Josselyn v Josselyn* (1837), 9 Sim 63. Compare *Booth v Booth* (1838), 1 Beav 125 (finding that a trustee who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust).

[554] See *Don King*, *supra* note 325 at 321 per Lightman J; Geraint W Thomas, *Thomas on Powers*, 1st ed (London, UK: Sweet & Maxwell, 1998) at 176; Maclean, *Trusts and Powers*, *supra* note 14 at 32-33.

[555] See *Re Brockbank*, [1948] Ch 206, [1987] 1 All ER 287 per Vaisey J (where the beneficiaries absolutely entitled to the trust could not direct the trustees to exercise a power to appoint an additional trustee).

[556] See Harris, "Trust, Power and Duty", *supra* note 14 ("[b]y breaking up the trust, the beneficiaries do not compel the trustees to carry out any part of their office as active trustees; on the contrary, they bring that office to an end" at 63), favourably quoted by the High Court of Australia in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*, [2005] HCA 53, 224 CLR 98 [*CPT Custodian*] at para 44 per Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ; see also *Herdegen v Federal Commissioner of Taxation*, [1988] FCA 419, 84 ALR 271 (although the beneficiary has, or the beneficiaries together have, a power to extinguish the trust, the trustee retains active duties to administer the trust and will not be considered a 'bare trustee' with a mere obligation to convey the trust property on request at 281 per Gummow J); *Goulding v James*, *supra* note 184 ("what varies the trust is not the court, but the agreement or consensus of the

the trust property to meet expenses incurred in administering the affairs of the trust, including bringing about its premature termination.[557] This power/liability relation persists despite any contrary provision in the trust deed, letter of wishes or ancillary agreement.[558] For this reason, this legal relation between the beneficiary and the trustee–by which the beneficiary holds the *power* and the trustee the correlative *liability*–forms part of the irreducible core of the trust in jurisdictions that continue to adhere to this rule.[559]

In Australia, the power of beneficiaries to extinguish the trust is fairly well entrenched in the general law of trusts,[560] and has been enshrined in some trust statutes.[561] The rule underlying the power has even come to be used by the Australian Tax Office to inform the crucial question of 'absolute entitlement' for the purposes of capital gains tax assessment.[562] The characterisation of this legal relation according to the Holfeldian schema has even been considered by the High Court of Australia, where it was held per curiam that "there is force for Anglo-Australian law in the statement that the rule

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beneficiaries" at 247 per Mummery LJ); *c.f. Oosterhoff on Trusts*, *supra* note 4 (emphasizing that "the trustee is required to transfer the trust property to the beneficiary; but the beneficiary cannot bring about the transfer. Not even the court can do so; although it can order the trustee to make the transfer, and punish him for non-compliance" at 40).

[557] See *Stephenson v Barclays Bank Trust Co Ltd*, [1975] 1 WLR 882 at 889; *Hayman v Equity Trustees Ltd*, (2003) 8 VR 548; *Law Debenture Trust Corp v Elektrim Finance NV*, [2006] EWHC 1305.

[558] See *Wyndham v Egremont*, [2009] EWHC 2076 at paras 19 and 21 Blackburne J (commenting that the statutory power to of the beneficiaries to terminate a trust embodied the 'consent principle'); *Goulding v James*, *supra* note 184 ("[t]he [consent] principle [embodied in the rule in *Saunders v Vautier*] recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument" at 247 per Mummery LJ); *Variation of Trusts Act,* 1958 (UK), 6 & 7 Eliz II, c 53, s 1(1).

[559] See *Underhill & Hayton* (17th ed)*, supra* note 30 ("[c]learly, any rights of enforcement of an English trust that would encroach upon [the *Saunders v Vautier*] principle must be ineffective so as not to encroach upon the core of the English trust concept" at 153); *Oosterhoff on Trusts*, *supra* note 4 ("[a] repugnant condition is one that interferes with or restricts the enjoyment of the property. Gifts which offend the rule in *Saunders v Vautier*, that is, which postpone enjoyment to a time after the person or persons solely entitled to the property become *sui juris*, fall into this category" at 304). See also Matthews, "Saunders v Vautier", *supra* note 264 ("the rule [in *Saunders v Vautier*] reflects a fundamental rule of English private trust law.... that the trust must be for the benefit of *persons* rather than for *purposes*" at 275).

[560] See *Glenn*, *supra* note 258 at 495 per Isaacs J; *CPT Custodian*, *supra* note 556 at para 44 per Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ; *Plimsoll v Drake*, (1995) 4 Tas R 334 at 339 per Zeeman J; Dal Pont, Chalmers & Maxton, *supra* note 28 at 866-68; *Jacobs' Law of Trusts*, *supra* note 28 at 627-33; Lee et al, *supra* note 106 at para 16.090.

[561] See e.g. *Trustee Act 1898 (No 4)* (NSW), s 18(4) ("[t]his section does not affect such right as an infant may have in consequence of the *Minors (Property and Contracts) Act 1970*, upon reaching the age of eighteen years or otherwise, to call for payment or transfer of property to which he is absolutely entitled."; *Law of Property Act 1936* (SA), s 62A ("[t]his Part does not affect the principle under which a beneficiary who is *sui juris* may put an end to an accumulation and require distribution of his or her presumptive share of property subject to the accumulation").

[562] Australian Tax Office, "Income tax: capital gains: meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the Income Tax Assessment Act 1997", Tax Ruling 2004/D25 (Canberra, ACT: Australian Tax Office, 15 December 2004) at paras 51-68 (the Australian Tax Office may use the rule in *Saunders v Vautier* to 'look through the trust' and consider whether the beneficiary or beneficiaries should be regarded as the relevant taxpayer for the assessment of capital gains tax on the assests held in trust by virtue of the empowerment to call for the trust property at any time).

in *Saunders v Vautier* gives the beneficiaries a Hohfeldian 'power' which correlates to a 'liability' on the part of the trustees, rather than a 'right' correlative to a 'duty'".[563] For example, in unit trusts, the holder/s of all of the units will have a power to terminate the trust.[564] The rule also applies to discretionary trusts; although, the practicability of its exercise will vary in every trust depending on the practicality of unifying all beneficiaries that stand to benefit under the trust.[565] New Zealand has taken a similar approach to termination as Australia.[566]

In Canada, the rule has a splintered existence, having been embraced in all of the common law provinces except Alberta and Manitoba, where the rule has been abolished by statute.[567] Although the Ontario Law Reform Commission attacked the rule in *Saunders v Vautier*, and advocated for its abolition, the Ontarian courts have continued to uphold its validity.[568] Like other legal conceptions and relations deriving their existence from the common law or equity, the power/liability relation protected by the rule in *Saunders v Vautier* can, of course, be abrogated or altered by statute.[569] And, even in the common law provinces where the rule subsists, it cannot, of course, be used to circumvent legislation that governs pension trusts, which provide tax incentives for establishing an investment that can be accessed upon retirement.[570] The rule in *Saunders v Vautier* conflicts with the "underlying social policy objective of the legislation" and, to that extent, is inoperative.[571]

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[563] *CPT Custodian*, *supra* note 556 at 119 per Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ, quoting Harris, "Trust, Power and Duty", *supra* note 14 at 63.
[564] See *Arjon Pty Ltd v Commissioner of State Revenue*, [2003] VSCA 213, 8 VR 502 ("quite apart from the terms of the trust deed, the holder of all of the units will ordinarily have the power to bring the trust to an end and, if it so chooses, appropriate the trust assets to itself" at 515 per Phillips JA).
[565] See *Sir Moses Montefoire Jewish Home v Howell & Co (No 7) Pty Ltd*, [1984] 2 NSWLR 406.
[566] See *Re Kirkpatrick*, [2006] 1 NZLR 559 at 36; *Re Phillips New Zealand Ltd*, [1997] 1 NZLR 93 at 101; Butler et al, *supra* note 28 at 52, 147-48, 237
[567] In Alberta: *Trustee Act*, RSA 2000, c T-8, s 42(2); In Manitoba: *The Trustee Act*, CCSM, c T160, s 59(2); although in both cases early termination is still possible, it just requires the consent of the court; see also *Oosterhoff on Trusts*, *supra* note 4 at 210;. *Waters' Law of Trusts*, *supra* note 4 at 1197-201.
[568] Ontario Law Reform Commission, *supra* note 4 at 413, 424. See also Lee, "Report on Trusts", *supra* note 4 at 158; *c.f. Re Campeau Family Trust*, (1984) 4 DLR (4th) 667, affirmed (1984) 18 DLR (4th) 159. See *Oosterhoff on Trusts*, *supra* note 4 at 149; *Rose v Rose*, (2006) 24 ETR (3d) 240.
[569] See Matthews, "Saunders v Vautier", *supra* note 264 at "[i]t is for each legal system to strike its own position on the issue" on the whether, and to what extent, trust interests should be inalienable at 291.
[570] See *Buschau v Rogers Communications*, [2006] 1 SCR 973 [*Buschau*] at paras 2, 27-33 per LeBel, Deschamps, Fish and Abella JJ and at paras 92-94, 97, 100 per McLachlin CJ and Bastarache and Charron JJ; see also B Austin & P Dumitriadis, "Not All Trust Law Principles Apply to Pension Trusts: The Supreme Court of Canada Decision in Buschau v. Rogers Communications Inc." (2007) 26 ETPJ 217.
[571] See *Buschau*, *supra* note 570 at para 96 per McLachlin CJ and Bastarache and Charron JJ; a similar approach was taken by the Federal Court of Australia in *Re Kirkland; Ex Parte: Official Trustee in Bankruptcy*, [1997] FCA 684 per Heerey J (where the trustee in bankruptcy sought premature payment of the bankrupt's benefit from a superannuation fund).

In the United States, the various powers to terminate a trust are on the list of mandatory rules that prevail over trust terms and, depending on the circumstances, the power to terminate may be exercised by the beneficiary, the court, the settlor or the trustee.[572] As with modification, the court can terminate a trust if unanticipated circumstances emerge and to do so would further the purposes of the trust.[573] Trustees are permitted to terminate an 'uneconomic trust' (i.e. where the value of the trust property is less than $50,000 and, as such, does not justify the administration costs).[574] Beneficiaries cannot collectively, albeit absolutely entitled to the trust property, exhaust the trust if to do so would be inconsistent with a material purpose of the trust. Such termination requires the consent of the settlor.[575] The beneficiaries can only consent to a termination of the trust if the continuance of the trust is not necessary to achieve any material purpose of the trust and they must petition the court to do so.[576] In the United States, the rule in *Saunders v Vautier* has been displaced for quite some time and represents a significant break in the conceptualization of the trust from the Commonwealth jurisdictions that continue to empower beneficiaries to terminate the trust.[577] The United States trust law more readily accommodates the continued control (or dead-hand[578]) of the settlor, which is reflexive of the idea that a "private trust is basically a gift projected on the plane of time and, meanwhile, in need of management."[579] Beyond the obvious problem of treating all private trusts as 'gifts',[580] the common law distinction is drawn when appreciating the power of beneficiaries to significantly truncate that plane of time as and when they (collectively) please.

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[572] *Uniform Trust Code*, *supra* note 31, 105(b)(4), 410-412, 414.
[573] *Ibid*, s 412.
[574] *Ibid*, s 414.
[575] *Ibid*, s 412(a); [a discussion of some of the older US cases is provided in *CPT Custodian, supra* note 556]
[576] *Uniform Trust Code*, *supra* note 31, s 411(b).
[577] See *Shelton v King*, [1913] USSC 178, 229 US 90; *Nichols v Eaton*, [1875] USSC 122, 91 US 716 at 725 per Miller J; *c.f. Goulding v James*, *supra* note 184 ("[t]he principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument" at 247 per Mummery LJ); Matthews, "*Saunders v Vautier*", *supra* note 264 at 282-87.
[578] See Alexander, "Dead Hand", *supra* note 67 at 12621-62.
[579] Frederick Henry Lawson & Bernard Rudden, *The Law of Property* (Oxford: Clarendon Press, 1982) at 55. See also Graham Moffat et al, *Trusts Law: Text and Materials*, 4th ed (Cambridge, UK: Cambridge University Press, 2005) at 355; *c.f. supra* note 184 and accompanying text.
[580] See Alastair Hudson, *Equity and Trusts*, 6th ed (New York: Routledge-Cavendish, 2010) at 297-298; Langbein, "Contractarian", *supra* note 77 at 632 and especially 632, n 31.

3.2. Outer core of the trust

The outer core of the trust comprises three *multital* legal relations that are essential to trusts in the common law tradition: a) the *power* to convey good title to trust property to good faith purchasers for value and the *liability* to have that title so conveyed ('good faith purchase'); b) the *duty* not to *knowingly* participate in a breach of trust and *right* to non-interference in the performance of the trust ('accessorial liability'); and c) the *duty*/*right* not to *unknowingly* participate in a breach of trust ('innocent recipient liability'). The last two of those relations (i.e. (b) and (c)) complement the legal relations forming the inner core of the trust by radiating the core principle of non-interference in trust performance to parties outside of the internal trust dynamic, whereas the first relation ((a) good faith purchase) provides an exception to the non-interference rule in the externality of trust by empowering trustees to give good title to good faith purchasers for value.[581]

3.2.1. Good faith purchase

Beyond exigibility, there is another bright line that serves to distinguish the inner and outer core of the trust: *breach of trust*. If a trustee disposes of trust property (either by gift or sale) or otherwise encumbers the trust property (by charge or mortgage), the beneficiaries have no cause for complaint if that transaction occurred *within* the powers conferred on the trustee by the trust deed or the default law applicable to the trust. Quite simply, the trust has been performed. If, however, a trustee acts *beyond* the powers conferred by the trust deed or the relevant default law, then, the beneficiaries may have recourse against third party recipients (subject to the good faith purchaser defence) and those persons who have otherwise knowingly participated in that breach of trust.[582] The existence of the good faith purchaser defence effectively gives all trustees the power to convey title to a good faith purchaser for

[581] See Honoré, "Rights of Exclusion", *supra* note 293 ("[t]he aim of the primarily general rights of exclusion, is, rather, to secure interest or advantages which have two features. On the one hand they are so vital that the law ought not to leave it to the initiative of the individual to secure them. On the other hand they could be so easily damaged or destroyed by persons generally in the absence of legal regulation that a general rule of exclusion is desirable" at 461).
[582] See *Re J Leslie Engineers Co Ltd*, [1976] 2 All ER 85, 1 WLR 292; David Fox, *Property Rights in Money* (Oxford: Oxford University Press, 2008) [Fox, *Property Rights in Money*] at 277-303 (for an analysis of the historical development and elements of the good faith purchaser defence at law and in equity); David Fox, "Bona Fide Purchase and the Currency of Money" (1996) 55:3 Cambridge LJ 547 [Fox, "Bona Fide Purchase"] at 548, 564.

value (whether that transaction was a breach of trust or not), thereby divesting the beneficiary of any 'equitable title' in that specific property.[583]

The eventuality of good faith purchase *for value* can be expressed in terms of a power/liability relation of a multital kind (i.e. it exists between trustees and third parties) and is an essential feature of the outer core of the trust in the common law tradition.[584] Insofar as the beneficiary/trustee relationship is concerned, the beneficiary's legal *disability* (being the opposite of the trustee's correlative legal *power* to give good title) evidently conflicts with the beneficiary's equitable *right* to have the trust performed lawfully and the trustee's correlative equitable *duty* to perform the trust accordingly.[585] That conflict is resolved in favour of the *legal*, and not the *equitable*, relation, and serves the public policy imperative of preserving the objectivity and sanctity of bargains without those transactions being susceptible to the hidden and undetectable interests of beneficiaries.[586]

In addition to this essential legal relation between trustees and third parties, this thesis will consider the remaining two multital legal relations that necessarily form part of the beneficiary's package of entitlements under a trust: *first*, a beneficiary's right against third parties not to *knowingly* participate in a breach of trust (accessorial liability); and, *second*, a beneficiary's right to recover trust property from an innocent recipient (innocent recipient liability).[587] With the exception of the good faith purchaser

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[583] See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 10 ("[t]he power of a trustee to convey an unincumbered 'legal title' to a *bona fide* purchaser for value without notice,–the equitable rights, privileges, etc., of the *cestui que trust* being thereby extinguished" at 105); Fox, "Bona Fide Purchase", *supra* note 582 at 564. See also David Fox, "Overreaching" in Birks & Pretto, *supra* note 77, 95; Charles Harpum, "Overreaching, Trustees' Powers and the Reform of the 1925 Legislation" (1990) 49:2 Cambridge LJ 227.

[584] In Australia: Dal Pont, Chalmers & Maxton, *supra* note 28 at 1109; *Jacobs' Law of Trusts*, *supra* note 28 at 680. In Canada: *Oosterhoff on Trusts*, *supra* note 4 at 1213; *Waters' Law of Trusts*, *supra* note 4 at 104; In England & Wales: *Lewin on Trusts*, *supra* note 28 at 1720-34; Penner, *Law of Trusts*, *supra* note 480 at 31-36; *Snell's Equity* (31st ed), *supra* note 28 at 65-78, 686; *Underhill & Hayton* (17th ed), *supra* note 30 at 1208. In New Zealand: Butler et al, *supra* note 28 at 1006. In the United States: *Scott & Ascher on Trusts*, *supra* note 70, vol 5, at 1952-57. In some sense, the point seems to be picked up by Professor Stevens when using Hohfeldian terminology, see Stevens, *supra* note 278 ("I may have a claim right that you do not use my car *because* the factor who conveyed the car to me had the *power* to confer good title upon an innocent purchaser" at 143, [emphasis in original]).

[585] This idea extends Hohfeld's analysis provided in Examples 35, 36, 40: Hohfeld, "Relations", *supra* note 85 at 555. See also diagrams Hohfeld 1 and Hohfeld 2 accompanying *supra* note 281.

[586] See *Royal Brunei v Tan*, *supra* note 421 ("ordinary, everyday business would become impossible if third parties were to be held liable for *unknowingly* interfering in the due performance of such personal obligations. Beneficiaries could not reasonably expect that third parties should deal with trustees at their peril, to the extent that they should become liable to the beneficiaries even when they received no trust property and even when they were unaware and had no reason to suppose that they were dealing with trustees" at 387-388 per Lord Nicholls); Lionel D Smith, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 Law Q Rev 412 [L Smith, "Structure of Trusts"] at 432; Honoré, "Rights of Exclusion", *supra* note 293 (reconciling "the social interest in security with that of the free circulation of things" at 468).

[587] Depending on the view taken, innocent recipient liability is restricted by an identification process (tracing in the proprietary analysis) or subject to the change of position defence (in a restitutionary analysis).

defence, equity ensures that trusts are performed in accordance with their purposes and terms. These non-derogable, multital relations extend the core themes of *accountability* and *enforceability*, which are evident in the inner core of the trust.

3.2.2. Knowing participation in a breach of trust

This duty/right relation has provoked significant academic and judicial comment on the kind of claims that can be made to ensure that third parties do not interfere with the trustee's lawful performance of the trust.[588] Indeed, while the trust generally suffers from a lack of juridical classification, the field of third party liability for wrongful interference in trust affairs may suffer from *over classification*.[589] A full exposition of its variants is not required at present because a reductionist approach will be taken to the various claims in order to reveal the essential nature of the protection afforded to a beneficiary vis-a-vis third parties as a matter of law. In essence, a non-trustee will be made liable to a beneficiary if that person *knowingly participates in a breach of trust*.[590] The underlying rationale for this rule was perhaps best explained by Lord Nicholls: "[beneficiaries] are entitled to expect that third parties will refrain from intentionally intruding in the trustee-beneficiary relationship and thereby hindering a beneficiary from receiving his entitlement in accordance with the terms of the trust instrument."[591]

The various claims that provide for these third party effects essentially establish innumerable (*multital*) legal relations between beneficiaries and third parties that are designed to ward off third parties from

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[588] See Paul Finn, "The Liability of Third Parties for Knowing Receipt or Assistance" in Donovan WM Waters, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1993) [Waters, *Equity, Fiduciaries and Trusts*] 195 [Finn, "Liability of Third Parties"] (describing the literature and international case law on the funding case of Barnes v Addy as "Babel-like" at 196. And, it must be remembered, that comment before two additional decades of (much) further literature and international case law, which has still failed to articulate precisely an underlying or unifying principles in this important field of trust law. See *Barnes v Addy* (1874), LR 9 Ch App 244 at 251-52 (for Lord Selborne LC's famous apothegm).

[589] See The Hon Sir Anthony Mason, "Themes and Prospects" in PD Finn, *Essays in Equity* (London: Sweet & Maxwell Ltd, 1985) [Finn, *Essays in Equity*] 242 ("the law relating to constructive trusts as it is presently understood, suffers from over much classification at the expense of sound underlying principle and that more attention should be given to the identification and description of the rules which entitle a party to relief in the form of a constructive trust" at 247). See also Butler et al, *supra* note 28 (constructive trusts are "complex and, oftentimes, elusive" at 335)

[590] In Australia: *Consul Development Pty Ltd v DPC Estates Pty Ltd*, (1975) 132 CLR 373 [*Consul Developments v DPC*] at 397; Lee et al, *supra* note 106 at 1072-85; *Jacobs' Law of Trusts*, *supra* note 28 at 282-92. *C.f.* In Canada: *Air Canada v M & L Travel Ltd*, [1993] 3 SCR 787 [*Air Canada v M & L Travel*] (in addition to liability for trustees *de son tort*, "strangers to the trust can also be personally liable for breach of trust if they knowingly participate in a breach of trust" at para 34 per Iacobucci J); Oosterhoff on Trusts, supra note 4 ("[i]t typically is said that liability is incurred if a stranger knowingly participates in a breach of an express trust" at 963); In England & Wales: *Snell's Equity* (31st ed), *supra* note 28 at 690 (although using the word 'involved' rather than 'participated'). In New Zealand: Butler et al, *supra* note 28 at 576ff; JK Maxton & CEF Rickett, "Equity" [1995] NZ L Rev 246. It should be noted that the language of 'knowingly participating in a breach of fiduciary obligation/trust is particularly strong in the Australia jurisprudence post-*Consul Developments v DPC*.

[591] *Royal Brunei v Tan*, *supra* note 421 at 387 per Lord Nicholls.

interfering in various ways with the lawful performance of trusts. This ensures that strangers coming into contact with trusts conduct themselves in good faith and do not derail the trustee's core (*paucital*) duty to perform the trust.[592] These core legal relations assist in the rational classification of trusts within the private law schematic by providing a protected space for trusts to exist without wrongful interference by third parties.[593] An analogy could be drawn with the multital right held by a contracting party against third parties not to induce a breach of that contract by the counter-contracting party.[594] The normative force of the principle has also been extended beyond trusts to fiduciary obligations, more generally speaking.[595]

Broadly speaking, the well-entrenched view is that unlawful participation by third parties in breach of trust essentially falls into three categories: *knowing assistance*; *knowing receipt*; and *trustees de son tort*.[596] Once any of those claims are made out, the conventional understanding is that the third party is elevated to the status of being a *constructive trustee*.[597] Although *constructive trusts* share the same 'institutional features' as proper trusts,[598] there is good reason to be wary of the 'constructive trustee'

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[592] See also *Royal Brunei v Tan*, *supra* note 421 ("[a]ffording the beneficiary a remedy against the third party serves the dual purpose of making good the beneficiary's loss should the trustee lack financial means and imposing a liability which will discourage others from behaving in a similar fashion" per Lord Nicholls at 386-87).

[593] See *Royal Brunei v Tan*, *supra* note 421 ("a trust is a relationship which exists when one person holds property on behalf of another. If, for his own purposes, a third party deliberately interferes in that relationship by assisting the trustee in depriving the beneficiary of the property held for him by the trustee, the beneficiary should be able to look for recompense to the third party as well as the trustee" at 386 per Lord Nicholls).

[594] See *Royal Brunei v Tan*, *supra* note 421 ("[t]here is here a close analogy with breach of contract. A person who knowingly procures a breach of contract, or knowingly interferes with the due performance of a contract, is liable to the innocent party. The underlying rationale is the same" at 387 per Lord Nicholls); Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in Cornish, *supra* note 48, 231 [Lord Nicholls, "Knowing Receipt"] ("[d]ishonest participation in a breach of trust, whether by receiving trust property or otherwise, is itself an equitable wrong, rendering the participants accountable in equity. It is the equitable counterpart of the common law tort of interfering with contractual relations" at 244); see also McFarlane, "Third Parties", *supra* note 80 at 308-09, 315.

[595] In Australia: *Farah Constructions v Say-dee Pty Ltd*, (2007) 230 CLR 89 [*Farah Constructions*]; in Canada: *Waxman v Waxman*, (2004) 44 BLR (3d) 165 ("there is no reason in principle to differentiate between the beneficiary of a trust obligation and the beneficiary of a fiduciary obligation. Both are equally deserving of the protection of equity as against a third party who knowingly assists in the dishonest breach of that obligation") In England & Wales: *Karak Rubber Co Ltd v Burden*, [1972] 1 WLR 602 [*Karak Rubber*]; *Selangor United Rubber Estates Ltd v Cradock (No 3),* [1968] 1 WLR 1555 [*Selangor United*](applying *Barnes v Addy, supra* note 588 in a conventional banking context (not an express trust)).

[596] In Australia: Dal Pont, Chalmers & Maxton, *supra* note 28 at 1072-85. In Canada: *Air Canada v M & L Travel*, supra note 590 at paras 31-37; *Oosterhoff on Trusts*, *supra* note 4 at 961-62. In England & Wales: *Lewin on Trusts*, *supra* note 28 at 1627-28. In New Zealand: Butler et al, *supra* note 28 at 358-64. See *Barnes v Addy*, *supra* note 588 at 251-52.

[597] In Australia: *Giumelli v Giumellii*, (1999) 161 ALR 473 (HCA) at 475; Dal Pont, Chalmers & Maxton, *supra* note 28 at 1079, 1085. See also Simon Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996) 112 Law Q Rev 56; Philip Podzebenko, "Redefining Accessory Liability" (1996) Sydney L Rev 234 at 245-48; Patricia Loughlan, "Liability for assistance in a breach of fiduciary duty" (1989) 9 Oxford J Legal Stud 260 at 268-69; Charles Harpum, "The Stranger as Constructive Trustee" (1986) 102 Law Q Rev 114 & 267.

[598] See generally RP Austin, "Constructive Trusts" in Finn, *Essays in Equity*, *supra* note 589, 196; AJ Oakley, *Constructive Trusts*, 4th ed (London: Sweet & Maxwell Ltd, 2008); Malcolm Cope, *Constructive Trusts* (Sydney: Law Book Co, 1992); DWM Waters, *The Constructive Trust* (London: Atholone Press, 1964).

label for three reasons: *first*, the third party incurs *personal* liability (rather than simply being subjected to proprietary remedies); *second*, there may be no ascertainable property the subject of constructive trusteeship or ever held by a constructive trustee; and, *third*, the 'constructive' trustee does not owe the same core duties of trustees properly so-called.[599]

On the current state of the law, it is not possible to define a uniform standard regarding knowledge or notice required to engage personal liability of third parties for a breach of trust.[600] While a scale comprising five categories of knowledge to determine third party liability prevailed for a short while (i.e. '*the Baden scale of knowledge*'),[601] it has now been suggested that the *Baden scale of knowledge* is best forgotten altogether.[602] Instead, the recent trend has been away from knowledge criteria *per se* and toward a more simple, but perhaps amorphous, test of *dishonesty*.[603] The reticence shown earlier with respect to 'dishonesty' in the context of the trustee's core duty of good faith is equally applicable here because the dishonesty test lacks precision and seems to condone some fairly abhorrent conduct.[604]

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[599] See Snell's Equity (31st ed), *supra* note 28 at 691 (avoiding the terminology of 'constructive trustee' altogether "since it is misleading about the true nature of the defendant's liability"); Butler et al, *supra* note 28 (commenting that the language 'constructive trustee' is "misleading, imprecise, and analytically confusing" at 576); L Smith, "Constructive Trusts", *supra* note 110 at 294-95, 298-302; see also Lionel Smith, "Constructive Fiduciaries?" in Birks, *Privacy and Loyalty*, *supra* note 187, 249 at 264-67; *Jacobs' Law of Trusts*, *supra* note 28 at 255, 259; *Oosterhoff on Trusts*, *supra* note 4 at 959-61; Butler et al, *supra* note 28 at 337. See also *Paragon Finance v DB Thakerar & Co*, [1999] 1 All ER 400 at 409 per Millett LJ, quoting *Selangor United*, *supra* note 595 at 1582 per Ungoed Thomas J.

[600] See *Jacobs' Law of Trusts*, *supra* note 28 (""[t]he whole topic of the liabilities of third parties involved in breach of fiduciary duty has become bedevilled by an obsessive refinement of distinctions between degrees of knowledge and notice" at 284).

[601] *Baden Delvaux v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA,* [1993] 1 WLR 509, [1992] 4 All ER 161 [*Baden* citing to WLR] at 574-87 per Peter Gibson J.

[602] See *Royal Brunei v Tan*, *supra* note 421 (preferring an objective standard of 'honesty' and commenting that "'[k]nowingly' is better avoided as a defining ingredient of the principle, and in the context of this principle the *Baden*... scale of knowledge is best forgotten" at 389, 392 per Lord Nicholls). See also See also *Belmont Finance*, *supra* note 435 ("it would be dangerous and wrong to depart from "the safe path of the principle as stated by Lord Selborne L.C. to the uncharted sea of something not innocent . . . but still short of dishonesty" at 274 per Goff LJ).

[603] See *Barlow v Eurotrust*, *supra* note 425 at 1479-82 per Lord Hoffman; *Twinsectra v Yardley*, *supra* note 421 at 170 per Lord Hoffman, at 173-74 per Lord Hutton, at 200-02 per Lord Millett LJ, dissenting; *Royal Brunei v Tan*, *supra* note 421 at 387-89 per Lord Nicholls. *Fresh 'N' Clean (Wales) Ltd v Miah*, [2006] EWHC 903 (finding dishonesty by applying the *Barlow v Eurotrust* objective test of dishonesty). A useful analysis of the cases on dishonesty is provided in *Bryant v Law Society*, [2007] EWHC 3043, [2009] WLR 163 at 195-201 per Richards LJ.

[604] See e.g. *Tan v Royal Brunei Airlines*, [1994] 3 MLJ 51 (Brunei Darussalam CA) (although the evidence was said to reveal "a sorry tale of mismanagement and broken promises", Tan was not found guilty of fraud or dishonesty because "[a]s long standing and high authority shows, conduct which may amount to a breach of trust, however morally reprehensible, will not render a person who has knowingly assisted in the breach of trust liable as a constructive trustee if that conduct falls short of dishonesty" per Faud P); *Abou-Rahmah v Abacha*, *supra* note 427 (finding that a bank is not 'dishonest' if it suspects a class of transactions is a money laundering scheme but does not suspect a particular transaction within that class as being unlawful).

Although some prominent writers have proposed different forms of unification over the years, any attempt to articulate a unified standard of culpable knowledge in relation to third party liability for knowingly participating in a breach of trust encounters a significant difficulty in that the courts have generally applied a lower threshold to the knowing receipt claim than the knowing assistance claim.[605] There may well be plausible reasons to justify that distinction (e.g. persons are generally quite aware of the surrounding circumstances that give rise to their receiving property, whereas something more might need to be shown in mere *assistance* cases), but these different standards tend to plague this area of trust law with significant uncertainty.[606] A full exposition on the knowledge requirement to make out the constituent claims is unnecessary at present as we are only concerned with capturing the core content of the principle in broad terms, suffice to say that the constituent claims in this field of trust law remain works-in-progress for common lawyers.

Before moving on, however, it is useful to extricate and isolate the core trust category known as *recipient liability* and to set out some concluding remarks on how this is treated at present in the context of the irreducible core of the trust. Recipient liability is essentially divided in this thesis between persons who receive trust property with the requisite degree of knowledge to make out a knowing receipt claim (i.e. fault-based liability) and those persons that innocently receive trust property unaware that doing so is a breach of trust (i.e. innocent receipt liability). Broad principles are often stated regarding recipient liability,[607] but the two categories of knowing and *un*knowing receipt are

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[605] See *Royal Brunei v Tan*, *supra* note 421 at 382. See also *Westdeutsche*, *supra* note 71 at 707 per Lord Browne-Wilkinson; *Re Montague's Settlement Trusts*, [1987] Ch 264 [*Re Montague*] at 285 per Megarry VC.For some of the prominent uniform approaches to third party liability arising out of a breach of trust, see e.g.: AT Denning, "The Recovery of Money" (1949) 65 Law Q Rev 37 at 48-50; Finn, "Liability of Third Parties", *supra* note 588 (proposing a three part test for 'participatory liability', being: a) has a fiduciary committed a breach of fiduciary duty or breach of trust? b) has the third party participated in the manner in which the breach has occurred? c) in so doing, did that party know or have reason to know that a wrong was bein committed by the fiduciary on his or her beneficiaries at 217-18; Lord Nicholls, "Knowing Receipt", *supra* note 594 at 239-45. In the author's view, Professor Finn's three stage test, although ambitious, deserves special mention and closer attention.

[606] See e.g. *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*, [2001] Ch 437 [*Akindele*](it is "often helpful in identifying different states of knowledge which may or may not result in a finding of dishonesty for the purposes of knowing assistance" per Nourse LJ at 455); *United States Surgical Corporation v Hospital Products International Pty Ltd*, [1983] 2 NSWLR 157 [*US Surgical Corporation*] at 258 (finding that once the plaintiff had established facts that would put a reasonable person on notice to make inquiries, the onus shifts to the third party defendant to negative the existence of the requisite degree of knowledge); *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd*, [2001] NSWSC 448, 38 ACSR 404 at paras 469-72. See: also *Jacobs' Law of Trusts*, *supra* note 28 at 289, [1337]; MJ Brindle & RJA Hooley, "Does constructive knowledge make a constructive trustee?" (1987) 61 Austl L J 281; Adjunct Professor AJ Oakley, "Liability of a Stranger as a Constructive Trustee" in Malcolm Cope, ed, *Equity Issues and Trends* (Sydney: The Federation Press, 1995) 62 at 71-81.

[607] See *Nelson v Larholt*, [1948] KB 339 ("[a] man's money is property which is protected by law... If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the money from any person into

conceptually quite distinct: personal liability arises in the former case at the moment of receipt, whereas in the latter case personal liability does not arise unless and until the recipient becomes aware of the relevant facts giving rise to the breach of trust.

Despite some suggestions in the case law to the contrary, this thesis contends that the full ambit of recipient liability is not restitution-based.[608] In short, knowing receipt *is* fault-based and justifies the imposition of personal liability on the defendant; whereas, the ineluctable logic of autonomous unjust enrichment has liability arising absent fault.[609] A person who knowingly receives trust property in breach of trust commits an equitable wrong and cannot avail themselves of the change of position defence; and, as a logical extension of that proposition, if the recipient obtains the requisite degree of knowledge *after receipt*, but while the property or its traceable product are still held, personal liability will attach at that point in time.[610] Indeed, a remedial election may need to be made between the disgorgement of wrongful gains and compensation for losses occasioned by the breach of trust, which is not something that fits with autonomous unjust enrichment.[611] Thus, the defendant's gain, rather than

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whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority" at 342 per Denning J).

[608] See *Akindele*, *supra* note 606; *Farah Constructions*, *supra* note 595 at paras 152-58; Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Oxford Universtiy Press, 2005) [Birks, *Unjust Enrichment* (2nd ed)] at 156-58; Peter Birks, "Receipt" in Birks & Pretto, *supra* note 77, 213 [Birks, "Receipt"] at 223-35; Peter Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] NZL Rev 623 at 651. But see *El Ajou v Dollar Land Holdings*, [1993] 3 All ER 717 at 738 per Millett J; *Twinsectra v Yardley*, *supra* note 421 at para 105, *per* Lord Millett; *Criterion Properties v Stratford UK Properties*, [2004] UKHL 28, 1 WLR 1846 at para 4 per Lord Nicholls. *Contra Royal Brunei v Tan*, *supra* note 421 ("[r]ecipient liability is restitution-based; accessory liability is not" at 386 per Lord Nicholls); Lord Nicholls, "Knowing Receipt", *supra* note 594 (putting forward the case for a unified restitutionary claim in the field of recipient liability and stating that "recipient liability should cover all third party recipients. This would be a principle of strict liability in that it would apply to every recipient with an impeachable title irrespective of fault, but it would be restitutionary in nature. It would be confined to restoring an unjust gain. Change of position would be available as a defence accordingly" at 244); Peter Birks, "Misdirected Funds: Restitution from the Recipient" [1989] LMCLQ 296 [Birks, "Misdirected Funds"] (advocating strict liability for, inter alia, the unlawful receipt of trust property).

[609] See Lionel Smith, "Restitution: The Heart of Corrective Justice" (2000-2001) 79 Tex L Rev 2115 [L Smith, "Corrective Justice"] at 2133-34, 2147, 2157-58; this sidelines the other distinct (and controversial) part of the law of restitution being restitution for wrongdoing, also called *disgorgement for wrongdoing* (*ibid* at 2116); L Smith, "Structure of Trusts", *supra* note 586 at 415; Lionel Smith, "W(h)ither Knowing Receipt?" (1998) 114 Law Q Rev 394 [L Smith, "W(h)ither Knowing Receipt?"] ("[c]laims in unjust enrichment depend on an absence of genuine intention on the part of a transferor to make the transfer; they do not depend on blameworthy conduct by the defendant" at 394); Peter Birks, "The Role of Fault in the Law of Unjust Enrichment" in Gareth Jones and William Swadling, eds, *The Search for Principle: essays in honour of Lord Goff of Chieveley* (New York: Oxford University Press, 1999) 235, 268-71.

[610] See *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 291 per Millett J, aff'd [1991] Ch 547; *Snell's Equity* (31st ed), *supra* note 28 at 690; Lord Nicholls, "Knowing Receipt", *supra* note 594 ("[d]ishonest participation in a breach of trust, whether by receiving property or otherwise, is itself an equitable wrong, rendering the participants accountable in equity" at 244); Birks, "Receipt", *supra* note 608 at 225-28; L Smith, "W(h)ither Knowing Receipt?", *supra* note 609 at 396. *C.f. Twinsectra v Yardley*, *supra* note 421 at paras 105 per Lord Millett.

[611] See *Oosterhoff on Trusts*, *supra* note 4 at 964, citing M Clapton, "Gain-Based Remedies for Knowing Assistance: Ensuring Assistants Do Not Profit From Their Wrongs", (2008) 45 Alb L Rev 989; P Ridge, "Justifying the Remedies for Dishonest Assistance" (2008) 124 Law Q Rev 445.

the plaintiff's loss, may be the reckoner for the quantification of the remedial obligation.[612] Again, this does not gel well with unjust enrichment logic.[613] Whilst the currents of corrective justice run strongly through recipient liability, it is precisely in the allowance or leeway afforded to the recipient in having to account for what has been received, which assists in distinguishing the two categories of recipient liability: knowing and *un*knowing receipt–the latter of which will be considered in the following section under the rubric of *innocent recipient liability*.[614]

3.2.3. Innocent recipient liability

The other key duty/right relation that completes the outer core of the trust from the beneficiary's perspective is the right to recover trust property transferred to an innocent third party for which consideration has not been paid, subject to certain limitations. Those limitations arise from the two distinct ways that the corresponding legal claim is conceptualised: one proprietary (fault-based); and one restitutionary (fault-free).[615] For comparative purposes, each of those claims will be considered in turn. The crucial distinction in understanding the two different approaches is the moment that liability is said to arise and, consequently, the way allowance is made to ensure that the scope of liability imposed on an innocent recipient is not inequitable.[616]

The key authorities–*Re Diplock* and *Ministry of Health v Simpson*–do not authoritatively decide the case either way, but allude to the existence of both proprietary and restitutionary claims.[617] The facts

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[612] See *Oosterhoff on Trusts*, *supra* note 4 at 964, citing *Warman International Ltd v Dwyer*, [1995] HCA 18, 182 CLR 544; *Fyffes Group Ltd v Templeman*, [2000] 2 Lloyd's Rep 643 at 660-68; *US Surgical Corporation*, *supra* note 606 at 817.

[613] See Lionel D Smith, "Three-Party Restitution: A Critique of Birk's Theory of Interceptive Subtraction" (1991) Oxford J Legal Stud 481 [L Smith, "Three-Party Restitution"] at 483, 488-89, 492, 502, 517-19; L Smith, "Corrective Justice", *supra* note 609 at 2146-48.

[614] On the notion of corrective justice in the private law, see the fairly short but pithy account given by Professor Weinrib: Ernest J Weinrib, "Corrective Justice in a Nutshell" (2002) 52 UTLJ 349. For an excellent critique of Professor Weinrib's fuller account of corrective justice in Weinrib, *Idea of Private Law*, *supra* note 6, in the context of restitution law, which will be relevant to the following discussion on innocent recipient liability, see L Smith, "Corrective Justice", *supra* note 609. For a recent critique of corrective justice theory that reveals its limitations and helps situate the present project on the irreducible core of the trust–being concerned with juridical classification and distinct from corrective justice theory–see S Smith, "Rights of Private Law", *supra* note 284 at 114-17.

[615] In accordance with the approach taken by the courts, this thesis approaches the beneficiaries claim against third parties as being *direct* (i.e. beneficiaries have a multital legal relation vis-a-vis third parties) and does not treat the beneficiaries claim as being inderect (i.e. the beneficiaries are simply claiming *through the trustee*), see *Re Diplock*; *Diplock v Wintle*, [1948] Ch 465 (CA) [*Re Diplock*] ("the beneficiary's direct claim in equity against those overpaid or wrongly paid" at 503 per Lord Greene).

[616] Via an identification process in the proprietary claim and the change of position defence in the restitutionary claim, both of which are designed to ascertain the value remaining in the hand of the innocent recipient.

[617] *Re Diplock*, *supra* note 615. See also *Ministry of Health v Simpson*, [1951] 1 AC 251. It should be noted that these cases related to the distribution out of a deceased estate and, therefore, there is some conjecture over whether the precedents

underlying both cases–the latter (*Ministry of Health v Simpson*) being the appellate affirmation of the former (*Re Diplock*)–concerned the mistaken payment by executors under a will to charitable institutions in the belief that doing so was in accordance with the terms of the will. The House of Lords held the will to be invalid and the distributions to have been unlawfully made.[618] The next-of-kin reached a compromise on their claim against the executors and then claimed against the third parties that had innocently received payments from the estate for the residual losses incurred from the unlawful distributions. The next-of-kin were entitled to recover against those third parties *in personam* and *in rem*.[619] Although mistaken distributions under a will are a different kind of wrongful distribution than unlawful gifts of trust property (without knowledge on the part of the donee), those cases will be regarded as being broadly analogous in principle to distributions by a trustee to innocent recipients in breach of trust because in either case the recipient has, without wrongfulness on their part, received something to which they are not entitled and are essentially being asked to give it up.[620]

The proprietary claim against third party recipients furthers the view that, in equity, the beneficiary *is* the owner of the trust property and the beneficiary's claim to recover trust property transferred to a third party in breach of trust simply vindicates a subsisting *equitable proprietary right* in relation to that property.[621] Although the proprietary claim parallels broadly with the common law claim to recover property from a person with a weaker title, equitable proprietary rights are somewhat weaker because claims to vindicate those rights are vulnerable to the good faith purchaser defence.[622] Under a proprietary analysis, fault arises at the moment when the recipient is given notice of the beneficiary's claim or otherwise becomes aware that the property was transferred in breach of trust; fault lies in the

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provided cases should be rationally extended to trusts. In the author's view they can and should be extended because it is the innermost kernel of rational principle that these cases possess that is being transported and has found such attraction for commentators by which those cases can logically be extended in order to achieve a closer approximation of justice in trusts, as well as estates. See also e.g. Lord Nicholls, "Knowing Receipt", *supra* note 594 at 231.

[618] See *Chichester Diocesan Fund and Board of Finance (Inc) v Simpson*, [1944] AC 341.

[619] *Re Diplock*, *supra* note 615. See also *Ministry of Health v Simpson*, *supra* note 617.

[620] See Denning, *supra* note 605 at 49-50; Lord Nicholls, "Knowing Receipt", *supra* note 594. But see *Ministry of Health v Simpson*, *supra* note 617 (Lord Simonds confined himself to the question of recovery by legatees in the case of mistaken payments to a third party by an executor and did not state the principle more broadly to apply to trusts at 265-6). *C.f. Hawkesley v May*, [1955] 3 WLR 569, [1956] 1 QB 304 at 322 per Havers J.

[621] See *Re Diplock*, *supra* note 615 ("the payers in the present case (namely the executors) were handling not their own money but the money of others who had a proprietary interest unknown to and unrecognized by the executors" at 481); David Fox, "Relativity of Title at Law and Equity" (2006) 65:2 Cambridge LJ 330 [Fox, "Relativity"]; Lionel Smith, "Tracing in Taylor v Plumer: equity in the Court of King's Bench" [1995] LMCLQ 240 at 263-65, 268. See also Nolan, "Equitable Property", *supra* note 17; *c.f.* McFarlane & Stevens, "Equitable Property", *supra* note 105.

[622] See Fox, "Relativity", *supra* note 621; Nolan, "Equitable Property", *supra* note 17. See section 3.2.1 above.

unconscientious retention of property belonging to another (in equity).[623] The imposition of a constructive trust is said to be justified because the recipient's conscience is sufficiently affected at the point of notice, which could also be said to enliven the equitable jurisdiction that acts on the defendant's conscience.[624] The resultant injustice that would arise from compelling an innocent recipient to pay back the entire value of the property received is remedied through an identification process (following and tracing[625]) by which only property identifiable at the moment of notice, or its value remaining, can be recovered.[626] Any innocent dissipation or onward conveyance in the interim (i.e. between receipt and notice) must be followed or traced elsewhere or its loss recovered from the trustee personally. The recipient no longer has that property and, therefore, cannot be made liable to account for its value on a proprietary analysis.[627] If the proprietary claim is made out, the beneficiary may be entitled to a charge over the traceable product of the trust property, thereby affording security in insolvency, and may also be allowed to claim interest for the period of loss of those assets.[628]

The restitutionary claim is one of strict liability imposed at the moment of receipt of the trust property transferred in breach of trust, and in accordance with conventional restitutionary logic, the imposition of liability does not require any fault on the part of the recipient because unjust enrichment liability is

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[623] An analogy may be drawn with the logic behind the action for money had and received in Australia; see e.g. *Roxborough*, *supra* note 27 at paras 20, 24, 27 per Gleeson CJ, Gaudron and Hayne JJ and at para 69 per Gummow J; *Baltic Shipping Co v Dillon*, [1993] HCA 4, 176 CLR 344 at 359 per Mason CJ; *South Australian Cold Stores Ltd v Electricity Trust of South Australia*, [1957] HCA 69, 98 CLR 65 at 75 per Dixon CJ and McTiernan, Williams, Webb and Taylor JJ; *c.f. Kelly v Solari* (1841), 11 LJ Ex 10, 152 ER 24 [cited to LJ Ex] at 19 per Rolfe J; see also Ross Grantham, "Restitutionary Recovery Ex Aequo Et Bono" [2002] Sing JLS 388 at 398-99.

[624] See *Re Diplock*, *supra* note 615 at 488, 492, 503; *Re Montague*, *supra* note 605 at 277-78 per Sir Robert Megarry V-C; *Karak Rubber*, *supra* note 595 ("a person who is a constructive trustee because... he acquires notice subsequent to such receipt and then deals with the property in a manner inconsistent with the trust" at 632 per Brightman J); see also *Westdeutsche*, *supra* note 71 at 705 per Lord Browne-Wilkinson; see also Paul Key, "Change of Position" (1995) 58 Mod L Rev 505 at 507 (the change of position defence demands persistent *good faith*).

[625] On the distinction between following, tracing and claiming, as well as the treatment of tracing as a process (rather than a right or a remedy) see Lionel D Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997)[L Smith, *Law of Tracing*] at 5-10; *Foskett v McKeown*, [2001] 1 AC 102 at 129-30 per Lord Millett; *Boscawen v Bajwa*, [1995] 1 WLR 328 at 334 per Millett LJ.

[626] See DJ Hayton, "Equity's Identification Rules" in Peter Birks, ed, *Laundering and Tracing* (Oxford: Oxford University Press, 1995) [*Birks, Laundering and Tracing*] 1 [Hayton, "Equity's Identification Rules"] at 16-19; Paul Matthews, "The Legal and Moral Limits of Common Law Tracing", in Birks, ed (*ibid* at 23) (""in the common law tradition, 'tracing' is a term applied to a set of rules for identifying property to which, or to a share in or a charge over which, a claim is made. But strictly speaking it is not in itself a claim, or (at least not at common law) a cause of action" at 31); Peter Birks, "Overview: Tracing, Claiming and Defences" in Birks, ed (*ibid* at 289) ("[the identification] rules tee us whether one asset is traceable to another. Put slightly differently, they say whether on *res* can stand in the place of another" at 289). But see *Selangor United*, *supra* note 595 ("[equity] will trace trust property into the hands of a volunteer, where it is not inequitable to do so" at 1582 per Ungoed-Thomas J).

[627] See Lord Nicholls, "Knowing Receipt", *supra* note 594 ("[t]he approach adopted was that, in general, the mere receipt of another's property did not trigger any personal liability. If the recipient still had the property or its identifiable proceeds, he must return it. If not, he incurred no personal liability unless he had been at fault in some way" at 233).

[628] See *Re Diplock*, *supra* note 615 at 517, 557; *Jacobs' Law of Trusts*, *supra* note 28 at 680-682.

autonomous in this respect.[629] The restitutionary formulation stands in stark contrast to the general equitable mantra that equity acts on the conscience of the defendant and, whereas accessorial liability was concerned with *participation* in the breach of trust, innocent recipient liability responds to *non-participatory enrichments* that are nevertheless reversible (or unknowing participation).[630] The obvious injustice caused from the imposition of strict liability (i.e. at the moment of receipt) is remedied by the change of position defence, pursuant to which a recipient is not liable to the extent that the person has so changed their position in the belief that the property received was not encumbered by the claim of any beneficiary (i.e. innocent, *extra*ordinary dissipations of that property are not recoverable).[631] If the divestment or expenditure has occurred in the ordinary course (e.g. the payment of personal debts) or with knowledge of the impropriety (i.e. knowing the facts giving rise to the breach of trust/bad faith), the change of position defence is unavailable.[632]

One of the difficult questions that subsists is whether both the proprietary and restitutionary claims can co-exist or whether one must prevail over the other. A full analysis of the arguments for and against the

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[629] See L Smith, "Corrective Justice", *supra* note 609 at 2133-34, 2147, 2157-58. It should be noted, however, that Professor Smith does not accept that innocent recipient liability flowing from a breach of trust is restitutionary in the sense of being a response to autonomous unjust enrichment (*ibid* at 2132, 2168-69, 2174); L Smith, "Three-Party Restitution", *supra* note 613 at 492, 497-504.

[630] See Burrows, *Law of Restitution*, *supra* note 339 at 99, 107; Birks, *Unjust Enrichment* (2nd ed), *supra* note 608 at 129, 155. See also *Ministry of Health v Simpson*, *supra* note 617 (Lord Simons rejected the submission that "[t]he Court of Chancery... acted upon the conscience, and, unless the defendant had behaved in an unconscientious manner, would make no decree against him... having received a legacy in good faith and having spent it without knowledge of any flaw in their title, [the innocent recipient] ought not in conscience to be ordered to refund" at 276, Lord Simons went on to state in that passage that "[t]he broad fact remains that the Court of Chancery, in order to mitigate the rigour of the common law or to supply its deficiencies, established the rule of equity which I have described and this rule did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid" at 276); Burrows, "Australian Law of Restitution", *supra* note 27 at 73-76; Birks, "Receipt", *supra* note 608 at 226. *C.f.* L Smith, "Corrective Justice", *supra* note 609 at 2116.

[631] The change of position defence has been adopted in the broader restitutionary context throughout the prominent Commonwealth jurisdictions. In Australia: *David Securities Pty Ltd v Commonwealth Bank of Australia*, (1992) 175 CLR 353 at 384-86 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, at 405-06 per Dawson J); *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation*, (1988) 164 CLR 662 (prima facie liability could be displaced by "some adverse change of position by the recipient in good faith and in reliance on the payment" at 673 per Mason CJ, Wilson, Deane, Toohey & Gaudron JJ); see also Elise Bant & Peter Creighton, "The Australian Change of Position Defence" (2002) 30 UWA L Rev 208; In Canada: *RBC Dominion Securities Inc v Dawson,* (1994) 111 DLR (4th) 230 at 237 per Cameron JA (change of position being preferred over etoppel as a defence); *Rural Municipality of Storthoaks v Mobil Oil Canada*, [1976] 2 SCR 147 at 163-64 per Martland J; In England & Wales: *Lipkin Gorman v Karpnale*, *supra* note 52 ("where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice requiring him so to repay outweighs the injustice of denying the plaintiff restitution" at 579-80 per Lord Goff); Andrew Burrows, "Change of Position: The View from England" (2003) 36 Loy LA L Rev 803; Denning, *supra* note 605 at 49-50. In New Zealand: *National Bank of NZ Ltd v Waitaki International Processing (NI) Ltd*, [1999] 2 NZLR 211 at 219 per Henry J, at 228 per Thomas J, 232 per Tipping J.

[632] See *Boscawen v Bajwa*, *supra* note 625 at 783 per Millet LJ; *Snell's Equity* (31st ed), *supra* note 28 at 690; Burrows, *Law of Restitution*, *supra* note 339 at 535-42; Birks, "Misdirected Funds", *supra* note 608 at 304; Richard Nolan, "Change of Position" in Birks, *Laundering and Tracing*, *supra* note 626, 135 [Nolan, "Change of Position"] at 158-70.

concurrency of both claims is beyond the scope of this thesis, but an overview of the most compelling arguments either way assists in capturing the antinomy and informing the content of this multital duty/right relation. Assuming the isolation position first, there is a difficulty in conventional restitionary logic with concurrent proprietary and restitutionary claims in two main respects. *First*, in the orthodox restitutionary claim, the defendant's *enrichment* must come *at the expense of* the plaintiff or, in the Canadian formulation, result in a *corresponding deprivation* to the plaintiff.[633] But if the recipient still has the property, and a proprietary remedy is available for its recovery (e.g. by vindicating a persisting equitable proprietary right), the plaintiff-beneficiary can hardly be said to have lost anything.[634] *Second*, to allow the beneficiary to recover directly from a third party (innocent) recipient would implicitly endorse an imbalance on the enrichment/expense scale of restitutionary recovery–there would be more expenses than there are enrichments, since the trustee may also have a claim to recover the trust property.[635] This would undermine the orthodox restitutionary logic, pursuant to which enrichment and expense go hand-in-hand: the plaintiff's loss (expense) must precisely *equal* the defendant's gain (enrichment).[636]

The contrary view holds that the existence of a proprietary claim should not of itself deny a concurrent restitutionary claim, for the following three reasons.[637] *First*, the proprietary claim encounters difficulty in identifying *value remaining* after property ceases to be separately and distinctly identifiable from other property of the innocent recipient (e.g. in the common case of innocent mixtures of misdirected trust funds with the innocent recipient's own money).[638] *Second*, and in a similar vein to the first

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[633] In Canada, a much stricter and more principled approach has been taken with the advantage of "corresponding deprivation" to the looser approach taken where the phrase "at the expense of" has been liberally applied; see e.g. *Attorney-General v Blake*, [2000] UKHL 45.

[634] See L Smith, "Structure of Trusts", *supra* note 586 at 431-33 (noting the argument that the recipient's enrichment is *factually* at the beneficiary's expense); Tim Akkouh & Sarah Worthington, "Re Diplock" in Charles Mitchell & Paul Mitchell, eds, *Landmark Cases in the Law of Restitution* (Oxford: Hart Publishing, 2006) 285 at 298-99.

[635] See L Smith, "Three-Party Restitution", *supra* note 613 at 482-83, 493.

[636] *Ibid* ("subtraction is about the movement of wealth, and hence that the plaintiff's loss necessarily equals the defendant's gain. One consequence of this is that substraction is a 'zero-sum game'. The sum of losses and gains must be zero. If somebody has been enriched by subtraction in the amount of £100, then there must be one or more people who have suffered expenses which total £100; not a penny more, not a penny less" at 483).

[637] See Lord Nicholls, "Knowing Receipt", *supra* note 594 ("[i]n some circumstances restitution and a proprietary remedy march hand-in-hand. The recipient may still have the property. When this is so, the existence of a proprietary remedy is not in itself a compelling reason for declining to impose concurrent personal liability covering the same ground" at 239).

[638] See *Re Diplock*, *supra* note 615 (" the equitable remedies pre-suppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself" at 521); *Jacobs' Law of Trusts*, *supra* note 28 at 679-86; AJ Oakley, "Proprietary Claims and their Priority in Insolvency" (1995) 54 Cambridge LJ 377 [Oakley, "Proprietary Claims"] at 404-424; *c.f.* L Smith, "Structure of Trusts", *supra* note 586; Dr Lionel D Smith, "Tracing and Electronic Funds Transfers" in FD Rose, ed, *Restitution and Banking Law* (Oxford: Mansfield Press,

scenario on mixtures, the proprietary analysis struggles to identify with any precision the *value-remaining* after an innocent recipient uses misdirected trust funds to discharge ordinary or pre-existing debts owed by the recipient.[639] *Third*, the inadequacy of proprietary remedies is a strong justification toward personal, rather than proprietary, remedies (e.g. an order for the payment of money by the defendant equivalent to the property so received, minus deductions for lawful changes of position).[640] Granting a fresh charge over property into which funds have been traced is far from a perfect solution in many cases; the plaintiff-beneficiary may have to wait for the sale of the relevant property to recoup the losses sustained from the breach of trust. Forcing an innocent recipient to sell the subject property or granting rights in respect of the whole of a mortgaged property would be an even more drastic and undesirable response.[641] And, furthermore, yoking parties together after an acrimonious property dispute should be a last resort.

It is highly unsatisfactory that the proprietary logic is strained by such common eventualities as innocent mixtures and redemption and that the meager remedial arsenal in the proprietary analysis is so ineffective at balancing the books between what is essentially two innocent parties (beneficiary and innocent recipient).[642] The restitutionary analysis enquires further into whether the recipient would have expended, or was required to expend, the money in the ordinary course and, if so, the defendant

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1998) 120; see also D Fox, "The Case of *Mixt Monies*: Confirming Nominalism in the Common Law of Monetary Obligations" (2011) 70:1 Cambridge LJ 144; Fox, *Property Rights in Money*, *supra* note 582 at 241-42, 247-50; Fox, "Bona Fide Purchase", *supra* note 582 at 549-54.

[639] See *Re Diplock*, *supra* note 615 at 548-50; *contra Boscawen v Bajwa*, *supra* note 625 at 340-41 per Millett LJ (recognising the relationship between subrogation and tracing to entitle a claimant to stand in the shoes of a mortgagee in an appropriate case). But see *Banque Financière de la Cité v Parc (Battersea) Ltd*, [1999] 1 AC 221 (where the fictional nature of equitable subrogation was stressed and was shown to be reflexive of the court's willingness to tailor appropriate remedies to alleviate injustice at 236 per Lord Hoffman) see also *Butler v Rice*, [1910] 2 Ch 277; *Heperu Pty Limited v Belle*, [2009] NSWCA 252 at paras 84-86 per Allsop P; *Jacobs' Law of Trusts*, *supra* note 28 at 679-86; *Underhill & Hayton* (17th ed), *supra* note 30 at 1103-04; Matthew Conaglen, "Difficulties with Tracing Backwards" (2011) 127 Law Q Rev 432; Oakley, "Proprietary Claims", *supra* note 638 at 426-427; *c.f.* LD Smith, "Tracing, 'swollen assets' and the lowest intermediate balance: Bishopsgate Investment Management Ltd v Homan" (1994) 8 Trust L Int'l 102 at 104; Lionel D Smith, "Tracing into the Payment of a Debt" (1995) 54:2 Cambridge LJ 290 [L Smith, "Tracing into Debt"]("whenever value is used to discharge an obligation, it is traceable into what was acquired in exchange for incurring that obligation" at 295); L Smith, *Law of Tracing*, *supra* note 625 at 146-152 and 215-217; Hayton, "Equity's Identification Rules", *supra* note 626 at 16-19; David Hayton, "Uncertainty of Subject-Matter of Trusts" (1994) 110 Law Q Rev 335 [Hayton, "Uncertainty"] at 337-338.

[640] See *Re Diplock*, *supra* note 615 ("insoluble problems might arise in a case where in the meanwhile fresh charges on the property had been created or money had been expended upon it" at 550); Lord Nicholls, "Knowing Receipt", *supra* note 594 ("[t]here are good practical reasons why a judgment for a payment of the value of property may be preferable to an order for the return of the property. Sometimes a money judgment is enforceable more easily and more speedily than, for instance, an order requiring the eviction of members of a family from their home" at 239).

[641] See *Re Diplock*, *supra* note 615 at 544-50; Gareth Jones & Robert Goff, *Goff and Jones*: *The Law of Restitution*, 6th ed (London: Sweet & Maxwell Ltd, 2002) at 111-12; *Jacobs' Law of Trusts*, *supra* note 28 at 681.

[642] See Akkouh & Worthington, *supra* note 634 at 288.

cannot make out the change of position defence and the money will be recoverable.[643] Simple orders may be made for the payment of the value received by the innocent recipient minus allowable deductions for lawful changes of position, which is essentially what the clumsiness of the proprietary analysis strives to achieve.[644] Thus, the restitutionary analysis seems to plot a straight-forward, equitable course that is unavailable on the proprietary charter.[645] So, although there are conceptual difficulties with accommodating the restitutionary claim, there are compelling policy incentives, as well as swelling support, in favour of its recognition.[646]

Fortunately enough, some common law jurisdictions have enacted trust legislation to enable a direct claim by beneficiaries against innocent third party recipients with a built-in change of position defence.[647] Unfortunately though, a rift throughout those jurisdictions has formed over whether beneficiaries should be required to exhaust remedies against the trustee for breach of trust before claiming against innocent third party recipients.[648] This thesis argues that beneficiaries should not be

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[643] See Peter Birks, *Restitution–The Future* (Sydney: The Federation Press, 1992) at 123-28; Nolan, "Change of Position", *supra* note 632 at 183-84. But see *Ministry of Health v Simpson*, *supra* note 617 at 276 per Lord Simmonds.

[644] See Burrows, *Law of Restitution*, *supra* note 339 at 547-48; Kit Barker, "After Change of Position: Good Faith Exchange in the Modern Law of Restitution" in Birks, *Laundering and Tracing, supra* note 626, 191 at 191-92, 196-98, 213-14; Nolan, "Change of Position", *supra* note 632 at 183-84. See also *Boscawen v Bajwa*, *supra* note 625 at 783 per Millett LJ; *Foskett v McKeown*, *supra* note 625 at 129 per lord Millett LJ; Sarah Worthinton, *Equity and Property: Fact, Fantasy and Morals* (Brisbane, QLD: University of Queensland Press, 2009) at 96-102.

[645] See *Jacobs' Law of Trusts*, *supra* note 28 at 681 ("it might not be thought against conscience for the volunteer to be put in the same position as if the debts had not been discharged with moneys acquired gratuitously and which the volunteer never should have had" at 681); Oakley, "Proprietary Claims", *supra* note 638 at 424-428.

[646] See Burrows, *Law of Restitution, supra* note 339 at 424-31 (commenting that "[t]he unjust enrichment 'strict liability subject to change of position' approach is persuasive and will ultimately prevail" at 430); Charles Mitchell & Stephen Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) ("[s]uch inconsistencies in the standard of liability of recipients of misapplied assets are intolerable. It is hoped that, when the opportunity next arises, the House of Lords will confirm that recipients of misapplied trust assets similarly owe a strict personal restitutionary liability in unjust enrichment, subject to defences" at 103-04); Akkouh & Worthington, *supra* note 634 at 297-301; Lord Walker, "Dishonesty and Unconscionable Conduct in Commercial Life: Some Reflections on Accessorial Liability and Knowing Receipt" (2005) 27 Sydney L Rev 187 at 202; Lord Nicholls, "Knowing Receipt", *supra* note 594 at 239-41; Peter Birks, "Receipt", *supra* note 608 at 236; *contra* L Smith, "Structure of Trusts", *supra* note 586 at 432.

[647] See *Trusts Act 1973* (Qld), s 113(3); *Trustees Act 1962* (WA), s 65(8); *Judicature Act 1908* (NZ), 1908/89, s 94B.

[648] In Queensland: *Trust Act 1973* (Qld), s 113(2)(forcing exhaustion of remedies against the trustee *before* a claim may be made against third party recipients–the harshness of that rule is mitigated to some extent by the precatory words "[e]xcept by leave of the court", which allows leave to be given to claim directly against a third party, but this should be the default position and should not require leave of the court); *Ron Kingham Real Estate Pty Ltd v Edgar*, [1999] 2 Qd R 439 (commenting that this provision "was designed to curtail the hardship considered to follow from the decision in *Re Diplock* [1948] Ch 465 in holding that recipients of trust funds mistakenly distributed should not be made to bear the primary liability to repay in priority to the errant trustee" at 445). In Western Australia: *Trustees Act 1962* (WA), s 65(7)(b)(forcing exhaustion of remedies of all remedies against other persons *before* a claim may be made against the trustee). In New Zealand: *Administration Act 1969* (NZ), 1969/52, s 50 (leaving it as a matter for the claimant to decide which to proceed against first, however, if the claimant proceeds against the trustee first, then, the trustee can effectively apply for a joinder of the third party recipient, which reduces the multiplicity of proceedings). Although the New Zealand approach is commonly preferred, the Western Australian approach achieves a similar result because there is no bar to concurrent proceedings against the trustee and third party recipients: *Corporate Systems Publishing Pty Ltd v Lingard (No 4)*, [2008] WASC 21 at

compelled to exhaust remedies against a trustee before being entitled to recover against an innocent recipient, but that there should be a residuary claim against the trustee to make good losses that could not be recovered. The argument against exhaustion of remedies will firstly take account of the relevant stakeholders concerned (beneficiary, trustee and innocent recipient) and then put forward three additional arguments on public policy grounds.

First, from the beneficiary's perspective, delay and expense caused by making beneficiaries exhaust remedies against a trustee is unsatisfactory, rather than simply allowing beneficiaries to recover the misdirected trust property from the person actually holding the property. *Second*, from the trustee's perspective, the forced exhaustion of remedies against the trustee makes trusteeship a rather risky affair, whereby beneficiaries are compelled to pursue trustees, perhaps even into insolvency, before a beneficiary could simply request the value of the loss from an innocent recipient, who it should be recalled is not entitled to the property anyway. The trust fund may be very large and the transfer may have arisen from an innocent mistake, so why should a trustee be pursued for personal liability when another person can simply give back what they are not entitled to? *Third*, from the innocent recipient's perspective, why should this person be seen to have a rational or reasonable claim to stand behind the trustee? That person has received property to which they are not entitled and they should be obliged to give it up.[649] It would be equitable and just to require them to do so, given that the person is sufficiently protected by the change of position defence. There is no possible justification for that person to retain the money while the trustee is pursued personally.

Fourth, the multiplicity of court proceedings caused by forced exhaustion of remedies is a waste of resources both for the court and the parties involved. Instead of one claim being made for recovery by the beneficiary against the innocent recipient, the exhaustion of remedies requirement causes three claims to be made: one by the beneficiary against the trustee (primary exhaustion); one by the beneficiary to recovery any residual loss caused by the breach of trust (secondary recovery); and one by the trustee to recover the property or its traceable product from the third party recipient (recoupment). *Fifth*, the time taken to resolve the whole affair is significantly delayed and this is unsatisfactory from the perspective of all concerned because there is a resultant uncertainty until the matter is finally resolved. In the interim, the innocent recipient cannot in good conscience do anything with the property

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para 184 per Beech J; *Jacobs' Law of Trusts*, supra note 28 at 682-83, para 2712; Lee et al, *supra* note 106 at paras 17.7010-17.7050; Butler et al, *supra* note 28 at 1096-97.

[649] See Burrows, *Law of Restitution*, *supra* note 339 at 424-31.

transferred in breach of trust because they have been given notice of the claim and any subsequent dissipation of that property may attract personal liability. *Sixth*, exhaustion of remedies has not been applied strictly or consistently anyway.[650] Assuming for a moment that exhaustion of remedies against a trustee is desirable, why should a trustee be allowed to compromise the beneficiary's claim? Compromise is hardly exhaustion, and the innocent third party may want the trustee to be pursued properly (i.e. *exhaustion* of remedies). This approach is incoherent, illogical and internally inconsistent and should be repealed where possible.[651]

Therefore, it is considered that there are weighty justifications in support of a direct claim by a beneficiary against an innocent third party recipient (i.e. the restitutionary claim) and for denying the forced exhaustion of remedies against a trustee before a beneficiary can simply recover the trust property or its traceable product from the innocent recipient.[652] However the claim is countenanced (proprietary or restitutionary), a beneficiary has a right to recover trust property transferred to an innocent recipient in breach of trust and this imposes correlative (multital) duties on a large and indefinite class of persons to return trust property transferred in breach of trust (subject to identification of the value remaining or relevant defences).[653] This is a unique feature of trusts in the common law tradition.[654]

In concluding Part 3 of this thesis, it should be clear that there are eleven legal relations that can clearly be defined as comprising the irreducible core of the trust, which collectively express the essential, juridical nature of the trust. The third and final part of this thesis analysed and exposed those fundamental legal relations and, by necessary implication, argued that any legal arrangement purporting to be a trust that fails to possess one of those eleven essential legal relations has broken away from the orthodox understanding of 'trust' in the common law tradition. In analysing and

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[650] See e.g. *Re Diplock*, *supra* note 615 (where the beneficiary's right to recover had been exhausted because the beneficiaries (or strictly speaking, legatees of the estate) had settled their claim for breach of trust against the trustee (executor) and were entitled to pursue the residue of the loss from the third party recipients at 503-504); *c.f. Re Montague*, *supra* note 605 (where the beneficiary had released the trustee from liability, the beneficiary could not be said to have exhausted remedies against the trustee and could not claim against the third party recipients at 286); beyond compromise by, or insolvency of, the trustee, the beneficiary's right might also be exhausted where a broad exemption clause applies to exculpate the trustee or the trustee has otherwise been released from liability by the court; L Smith, "Three-Party Restitution", *supra* note 613 at 499-500.
[651] See Akkouh & Worthington, *supra* note 634 at 292-93; see also Burrows, *Law of Restitution*, *supra* note 339 at 425.
[652] See Mitchell & Watterson, *supra* note 646 at 103-04.
[653] Most notably, the defences of good faith purchase (in any case) and change of position (to the restitution claim).
[654] See e.g. Honoré, *South African Law of Trusts* (1992), at 22-24, 107-110; Lusina Ho, "The Reception of Trust in Asia: Emerging Asian Principles of Trust?" [2004] Sing JLS 287 at 291-293.

exposing those fundamental relations of every express private trust, it is convenient and useful to demarcate those legal relations into internal and external spheres. As such, the essential legal relations that reflect the externality of the trust, and thereby order the relations of third parties having contact with trust parties, are also essential and non-derogable. Given the confusion and divergence of opinion that attends this area of trust law, there is considerable benefit in viewing the externality of the trust through an 'irreducible core' lens. Such an approach assists in distinguishing the important from the unimportant and revealing the normative structure of the trust within the broader framework of the private law, as well as holding great potential for developing a unified expression of principles to govern the effect of trusts on third parties.

Conclusion

Throughout the prominent Commonwealth jurisdictions of Australia, Canada, England & Wales and New Zealand, the notion of an irreducible core approach to trusts is not only gaining momentum, but is also capable of precise definition. The mandatory rules regime in the United States is living proof that this is possible. Whilst identifying the irreducible core content of trusts is a difficult task, the irreducible core approach to trusts is a worthwhile endeavour that holds great potential for addressing the many and varied challenges that arise in contemporary trust law and practice. A clear statement of the irreducible core content of trusts may also hold significant comparative value for civilian jurists contemplating the capture and translation of the trust concept.

In order to expose the content of the irreducible core of the trust, it is appropriate to apply to a relational theory of trusts, adhering to the Hohfeldian schema of jural relations, to the irreducible core approach to trusts in order to ensure a rational realisation of the irreducible core concept in trust law. The relational theory of trusts illuminates the juridical nature of the trust as essentially being made up of a series of legal relations that can be grouped together according to the Hohfeldian classification of paucital and multital legal relations. On this footing, it is argued that the irreducible core of the trust is comprised not only of internal legal relations, but also that the third party effects of trusts are also explicable by the logic of the irreducible core of the trust. And, as such, the following legal relations comprise the irreducible core of the trust:

Inner core of the trust

1. the duty/right to inform persons of their beneficial status under a trust;
2. the duty to keep, and right to have kept, trust accounts and information;
3. the duty of/right to disclosure of trust accounts and information;
4. the duty of/right to good faith trust administration;
5. the duty/right of loyalty;
6. the duty to perform the trust and the right to have the trust performed;
7. the power/liability to vary the trust;
8. the power/liability to terminate the trust.

Outer core of the trust

9. the trustee's power to convey title to trust property to good faith purchasers for value and the liability to have that title so conveyed;
10. the duty of third parties not to knowingly participate in a breach of trust and the beneficiary's correlative rights to non-interference in trust affairs and the lawful performance of the trust; and
11. the duty of innocent recipients of trust property to return or give up the value remaining of trust property transferred in breach of trust and the beneficiary's correlative rights attaching thereto.

In the common law tradition, trusts must comprise each and every one of these essential legal relations. The law should, and will, overbear any subjective intention to the contrary so as to adhere to the underlying normative themes of *accountability* and *enforceability*, both of which ensure that trusts remain a fundamental legal institution in the common law tradition. The juristic ambition of this thesis was to expose the irreducible core content of the trust as it is known throughout the prominent common law jurisdictions and it is hoped that this analysis will assist in the full and rational realisation of the irreducible core concept in trust law, as well as the proper juridical classification of trusts within a coherent structure of the private law.

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