TRUST BUSTING

Tony Molloy QC

Preview

There is a hankering at the moment for busting trusts that evidently are thought to be enabling financiers to hold on to impressive assets said to have been financed with, or with profits made from, "other people's money" which the "other people" now see no other chance of recovering.[1] And there is a hankering, too, at the family law bar, to bust trusts thought to be keeping erstwhile spouses or partners out of their just financial deserts.

Ill-conceived arguments are being submitted by counsel, or thought up by judges, whose hearts are in the right place, but not necessarily their heads. The first part of this paper [to page 10] considers the importance to New Zealand of having its act together in the specialist field of trustee and fiduciary law, and to the mess we are making of it because we cannot see the obvious.

The main part [pages 10 to 25] considers the core trust principles that are so badly understood. This want of understanding is the main source of that mess.

The final part [from page 25] is a quick and incomplete list of enhancements that may be helpful once a given problem has been properly analysed in terms of the principles in the main part.

What is this about, and why does it matter?

The scheduling, and the colourful expression, of this topic at this Conference suggest that "trusts" can be a source of excitement, even apoplexy. The cause of the fuss is always ignorance of the nature of the trust relationship, and of the applicable legal principles.

The legal profession continues to fail to insist that counsel do not argue cases in areas of the law in which they are not of acknowledged competence. Parliament continues to fail to organize the High Court into divisions dealing with Crime, Family law, Equity (trusts and fiduciary matters), and other general litigation. And Parliament continues, also, to fail to insist that judges sit only on cases involving areas of law in which they have acknowledged expertise.[2]

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[1] In Justin Cartwright's *Other People's Money* (Bloomsbury, London, 2011) the dealers in the "bad bank" all seem, to a reporter intent on exposing them, "to have been guilty of a kind of fraud by pretending they knew what they were doing with other people's money. She read that in the dealing rooms they would shout 'OPM' gleefully as a deal went bad: *Other people's money.*" [Page 158.]

[2] See Tony Molloy QC "New Zealand: Cuckoos in the nest in an otherwise promising trust and investment jurisdiction" *Offshore Investment* Issue 201 (November 2009) 19.

While one would never wish it to happen, it seems that the only hope of change in this scandalous situation could be the development by a judge of a very serious brain tumour; and the discovery, just as she was about to be anaesthetised, that the surgeon scrubbing up was a gynaecologist, an orthopaedist, or a breast implant specialist—who nonchalantly explains that the neurosurgeon "is having a day off, but there is nothing to worry about because we are all trained doctors, and we can turn our hands to anything—just like judges and lawyers. So it doesn't matter that I have never done brain surgery before: once I've got a hole drilled through your skull, I'll have a look around in there and work things out in no time."

The carnage that would ensue in our hospitals on that scenario, or on our roads if viaducts could be designed by electrical or aeronautical or hydraulic engineers, has its forensic counterpart in the daily work of our senior courts: possibly more so in respect of fiduciary and trust matters than in respect of any other area of the law.

Thus, in *Matarangi Beach Estates Ltd v Dawson* (2008) 6 NZ Conv C 194,667, at paragraph [18] of his reasons, the learned Associate Judge set the scene:

> [18] The way in which the defendants have structured their financial affairs creates difficulties for the plaintiff if the Court were to refuse specific performance leaving damages as the only remedy available to the plaintiff. Because their home is in a trust, the plaintiffs own very few assets. If the trustee refused to permit the home to be sold, thereby releasing funds to the defendants to meet their obligations by way of damages to the plaintiff [from whom they had contracted to buy beach sections], the chances of the plaintiff receiving significant damages are nil. Indeed, the defendants could become bankrupt, thereby depriving the plaintiff of any effective remedy in damages. In these circumstances, I conclude that damages are not an appropriate remedy in this case.

Perhaps the outcome for the plaintiff would not have been as bad as the learned Associate Judge painted it. From paragraph [9] of his reasons it appears that the home was worth $800,000, and was mortgaged to a Bank by way of security for around $530,000. It may be that the defendants were guarantors of that liability. If so, bankruptcy may have triggered a mortgagee sale of their home. Further, the husband had a business: paragraph [12]. His bankruptcy could have had very adverse effects on this, also.

So the chances were that the defendants would prefer to arrange for the sale of the trust's house, in order, either, to perform their contract with the plaintiff, or to pay the damages for its breach: because bankruptcy, the likely alternative, might have cost them their home and their business.

But that is beside the point: which is that nothing in the case justified the grand pronouncement that—without even the slightest genuflection towards authority, much less towards principle—his Honour had made in paragraph [14], viz, that his Honour considered that:

> the appropriate way of looking at the defendants' financial situation is to do so globally and *ignore the fact that the home is settled in a trust*. This is a device which has been used for the benefit of the defendants.

By and large, and provided it is fully known, the law will yield a just result. But even were that not so, it is a matter of concern when a judge proceeds by suggesting the "ignoring" of legal relationships on grounds of apparent convenience. The learned Associate Judge's "way of looking" at the matter was entirely inappropriate.

Harrison v Harrison [2009] WTLR 1319 is another High Court trust decision that causes concern. In the face of the agreement of counsel for both sides that the trust in question was a valid trust, the learned judge—who is universally accepted as a fine judge in other areas of the law—conjured up a series of embarrassingly incoherent and untenable arguments to the contrary. I have described these arguments in detail elsewhere.[3]

In *Harrison v Harrison* [2009] NZFLR 687, at 22, the Court of Appeal gave the judge's decision the charity of confining its comment to asserting the obvious:

> The legal structures which the parties have mutually created *must* be the starting point for an assessment of what property is available for distribution at an interim stage and later, in relationship property proceedings, unless or until the framework is altered. [Emphasis added.]

Undeterred by that, the same learned judge has recently reconfirmed that he is all at sea in trusts and equity. The case is *B v X* (High Court, Auckland, CIV 2010-404-002861, 16 March 2011). In this case, at paragraphs [84]-[86], as he had done in *Harrison,* his Honour rejected the possibility that the trust was a sham. In both cases, in my respectful view, he was clearly correct in this.

The learned judge's next proposition was that it *did not "follow* that the deed [of trust] and subsequent transfer of assets *created a trust relationship between the father and any of the discretionary beneficiaries*, prior to exercise of his power of appointment" in their favour: paragraph [89].

His Honour's expressed reason was that, prior to the exercise, in their favour, of the power of appointment, discretionary beneficiaries have "no rights enforceable in equity". The learned judge cited case law promiscuously. Unfortunately none of the citations were relevant to his proposition. He missed the only relevant point, and the only critical authorities.

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[3] See Tony Molloy QC, "Still more on settlor control: the 18 September 2008 reserved decision of the New Zealand High Court in *Harrison v Harrison*" [[2009] WTLR 1319], *Trusts & Trustees* Vol 16, No 2, March 2010, 73.

To begin with, as Millett LJ famously put it in *Armitage v Nurse* [1998] Ch 241, 253-254 (italics added):

> there is an irreducible core of obligations owed to the trustees by the beneficiaries and enforceable by them which is fundamental to the concept of a trust. *If the beneficiaries have no rights enforceable against the trustees there are no trusts. … 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.*

It is irrelevant that membership of a discretionary class confers no proprietary rights in the trust estate. The important thing is that the "duty of the trustees to perform the trusts honestly and in good faith" is owed to *all* beneficiaries, *including* the members of the discretionary class. *All* beneficiaries, *including* the members of the discretionary class, accordingly are entitled to the assistance of the court, in its equitable jurisdiction, in enforcing the due performance of that duty and the due administration of the trust. For example, the court will prevent the trustee paying out the trust estate to persons who are not members of the class of beneficiaries. The House of Lords so held in *Gartside v Inland Revenue Commissioners* [1968] AC 553, particularly at 605-606.

This is an aspect of what, in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, at [51] and also at [66], the Privy Council affirmed as:

> the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention *does not depend on entitlement to a fixed and transmissible beneficial interest*. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion: see Lord Wilberforce in *Gartside v Inland Revenue Commissioners* [1968] AC 553, 617-8 and in *McPhail v Doulton* [1971] AC 424, 456-7; Templeman J in *In re Manisty's Settlement* [1974] Ch 17, 27-8; and Warner J in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1617-8.

To anyone versed in equity and the law of trusts, this is all so elementary that it is dismaying that judges permit themselves, much less suffer themselves to be required, to sit on cases in areas of the law in which they do not possess acknowledged competence.

Counsel at the bar would be in breach of her duty of care, and exposed to a claim in negligence, were she to litigate, or to advise, in matters in which she was a straggler to the extent to which the learned judge—and his Honour is far from being the only judge in this position—in *Harrison* and *B v X* was a straggler when it came to equity and the law of trusts.

What sort of madness has infected our legal system when what would be misconduct for a barrister becomes routine—and consequence-free—for a judge? It is certainly not consequence-free for the hapless litigant who gets seriously short-changed for his court filing and hearing fees.

These and other cases raise disturbing questions of systemic integrity. The day is long past when anyone can master all of the law. Not even as eminent and as brilliant a judge as Lord Cooke was able to do that. So the mindless allocation of judges to fixtures on the basis of "the next available cab off the rank," with no guarantee that the allocated judge will have the capacity to give value for the considerable filing and hearing fees now being charged, is deplorable. Moreover there seems to be no way of ensuring that at least one member of the panel in the Court of Appeal will be of acknowledged proficiency in the relevant law either.

This matters terribly.

For one thing, there is the waste of expensive (both to the litigants themselves, and to the public purse) court time. Because judges who are less than competent inevitably will need more time, more of them are needed than would be necessary if they were to sit in specialist divisions and were to have the acknowledged competence to be there. That is a further burden on litigants (the wasted time) and on the public purse (funding more judges than it should be). And of course when messes like these are being made, more judges are needed on the Court of Appeal to handle the appeals that would not have been necessary if the High Court had devoted competent resources to the matter in the first place.

Because it is unacceptable to condone the forensic equivalent of foisting gynaecologists onto patients in need of neurosurgery, England and New South Wales long ago divided their High Courts into specialist divisions: crime, family law, equity and fiduciary matters, and general litigation.

It is sometimes claimed that New Zealand is too small to permit specialisation. Tell that to the medical, surgical, and engineering professions here.

Because the High Court in New Zealand *insists* on the utterly unacceptable—effectively telling litigants that they can like it or lump it—those with the necessary money frequently opt for arbitration, or neutral evaluation, of their cases by senior counsel of acknowledged expertise in the law relevant to their case.

There is another disturbing aspect of the charade being played out in our senior courts. It is making of New Zealand an international laughing stock at a time when we are aspiring to recognition as a recognized international trust and funds jurisdiction.

In 2010, the New Zealand Cabinet established the International Funds Services Development Group to consider and report on financial services opportunities for

New Zealand. In February 2011, the Group published *Exporting Financial Services: A Report from the International Funds Services Development Group*. The Executive Summary, at page 5, suggests that:

> The International Funds Services Development Group (IFSDG) believes that New Zealand can build on its existing capability as an exporter of financial services.
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> The major opportunity is as a funds domicile and funds administration centre, where collective investment funds can be incorporated and serviced. The IFSDG originally contracted the financial consultancy firm Oliver Wyman to analyse New Zealand's opportunity to be the domicile for Asia-Pacific retail funds. However, further analysis shows opportunities in other markets and fund types (for example, alternative assets). The domicile opportunity does not rule out attracting other parts of the financial services value chain, such as investment management or global custody, but considers it more likely that these will be located in other jurisdictions where fund managers are closer to their investors or the assets they manage.
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> Research conducted by Oliver Wyman indicates that the full realisation of the domicile opportunity would generate revenue in New Zealand of approximately NZ$0.5 billion to NZ$1.3 billion per year, tax revenue of between NZ$150 million and NZ$360 million per year, and 2,000 and 5,000 high-quality jobs by 2020/2030.[4]

At page 47 we find:

> **Foreign Trusts**
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> The New Zealand Foreign Trust industry has been growing steadily since tax changes were introduced on 1 April 1988, but particularly since global settlors exited blacklist jurisdictions in the 1990s. This growth has occurred without explicit government support. This industry is an example of New Zealand's aptitude in activities similar to those necessary for the prospective funds domicile industry since it provides trustee services (trust creation, settlement and administration services to foreign settlers and their foreign assets) where the New Zealand Government does not tax those assets. However, the New Zealand providers of these services—lawyers, accountants and administrators—are taxed. These are high-value jobs. Industry sources believe that in 2009 there were about 4,500 New Zealand Foreign Trusts registered in New Zealand, earning about $20 million per annum in fees.
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> There is potential for this industry to grow substantially. Industry estimates (Cap Gemini/Merrill Lynch 2007) indicate that there are 400,000 high net worth

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[4] See also page 24:

> **Size/Scope of the Opportunity for New Zealand and Timeframe**
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> If New Zealand can gain a 17 percent market share of the offshore Asia-Pacific asset pool, New Zealand could secure approximately NZ$444 billion assets under administration. This industry typically generates revenues of between 15–20 basis points of assets under administration, thus generating revenues in New Zealand of approximately NZ$951 million per year, resulting in around NZ$250 million per year in tax revenue. It is estimated between 2,000 and 5,000 high-value jobs would be required to service an industry of this size.

> individuals (those with greater than US$1 million in financial assets) in Latin America and 2.8 million in Asia.
> The competitor jurisdictions are Singapore, Delaware in the United States and The Netherlands. By comparison, New Zealand is seen as offering many advantages, including depth of infrastructure, good laws, good reputation, membership of the OECD, limited bureaucracy and appropriate regulation.

But, at page 7, we see that:

- A major concern, raised by many funds servicing companies, is a perceived lack of depth and requisite skills within the local labour market.
- The IFSDG believes that this is largely an issue of perception rather than fact. It has come to this conclusion based upon its collective knowledge of domestic labour supply conditions, the moderate increase in demand for the required skilled people over a decade or more, anecdotal feedback from the domestic industry and the large New Zealand expatriate community participating in this industry internationally (many of whom have indicated a willingness to return here).
- However, the IFSDG does consider that a strategy would need to be developed to reverse the market perception, based upon developing local talent, attracting foreign talent (including expatriate New Zealanders) and managing service provider constraints.

It seems that this list of concerns was intended to apply only in respect of the intended creation of New Zealand as a funds domicile and funds administration centre, and not to the offshore trust business in respect of which—in the eyes of the International Funds Services Development Group—New Zealand is thought to have a “good reputation”.

I have a longstanding involvement in this area. Apart from the advisory side of my practice, I regularly give lectures at overseas conferences, and, as co-editor of *Trusts & Trustees*, I have considerable contact with practitioners, trustees, and trust and investment managers, in the offshore centres.

These people are well aware of the mess the New Zealand court system is in with its “I’m a judge, so I can do everything” approach.

They know that former High Court judge, and now internationally acknowledged commercial arbitrator—David Williams QC, has observed that, in New Zealand:

> the commercial community is bailing out of civil litigation [because of] … “continuing, long running unhappiness” with the [apparent] refusal to let judges specialise in either commercial or criminal [or, one would have to add, equitable] matters’.”[5]

They know that Professor David McLauchlan, a distinguished academic in the field of contract law, whose work has been cited with approval in, and relied on by England’s

[5] “Jenni McManus “Litigants turn their backs on courts”, *The Independent*, 26 June 2008, 6.

highest courts, began a recent article "Defying Common Sense in Contract" thus:

> I spend a good deal of my working life reading contract cases. Naturally, many of these are New Zealand cases, but in recent times the numbers have diminished. Increasingly I find them not worth the effort. Far too often the judgments from the High Court and Court of Appeal leave me dismayed. There are exceptions of course, but overall the standard of judicial decision-making and reasoning is disappointing. *Judgments regularly apply textbook rules without displaying any feel for the underlying principles and purposes of contract law*. Decisions are reached that fail to reflect the reasonable expectations of the parties. And sometimes they simply defy common sense."[6]

The Professor proceeded to analyse a particular decision that had gone up to the Court of Appeal. Having begun with that swipe at the bench, he ended with a swipe at the bar. After having referred to a number of principles that, in his view, should have been recognised as in play in the case on which he was commenting, he concluded that "it is surprising that these arguments have not featured in the litigation to date"—notwithstanding that it had been argued both in the High Court and in the Court of Appeal.

They know, too, that the doyen of international trust lawyers, Professor Donovan Waters QC, of Canada, has been "taken aback"—strong language from this mildest of men—at the New Zealand High Court decision in *Harrison v Harrison* [2009] WTLR 1319 that I mention earlier in this paper: Donovan Waters QC, 'Settlor control—what kind of a problem is it?' (2009) 15 *Trusts & Trustees* 16.

Because he is well known in England, and throughout the Commonwealth, as the Editor of the leading English textbook on the Law of Agency, they also know that Professor Peter Watts is dismayed at the inadequacy of the arguments that have been submitted to the New Zealand courts in the "leaky homes" cases.[7]

And they are aware that the man widely and justly considered to be one of the greatest judges New Zealand has produced, Lord Cooke—a wonderful, and wonderfully gracious, judge, and a true giant of the common law, but a non-specialist in fiduciary law, with inevitable blind spots in the subject—caused the very distinguished editors of the leading Australian fiduciary textbook, *Equity: Doctrines and Remedies* (Butterworths LexisNexis, NSW, 4th edition, 2002) to write in their preface that:

> In New Zealand, the prospect of any principled development of equitable principle seems remote short of a revolution on the Court of Appeal. The blame is largely attributable to Lord Cooke's misguided endeavours. That one man could, in a few years, cause such destruction exposes the fragility of contemporary legal systems and the need for vigilant exposure and rooting out of error.

[6] "Defying Common Sense in Contract" [2005] NZLJ 300.

[7] "Directors' and Managers' Liability—Turning the Blowdryer on Leaky Building Torts" [2009] *Company & Securities Law Bulletin* 85.

To like effect, Cambridge University's Matthew Conaglen, *Fiduciary Loyalty* (Hart Publishing, Oxford, 2010) 25-26, describes New Zealand's case law on fiduciary matters, under the influence of Lord Cooke, as "without clear guiding principles."

That this can be said is an indictment, not only of the judiciary, but also of the practising New Zealand legal profession. Too many of its members will "have a go" at anything in any area of law. Without any sufficient understanding of their significance, they will pluck out of textbooks words such as "sham", "constructive trust", "bare trust", resulting trust", or, time and time again, "fiduciary"[8]: without, to repeat Professor McLauchlan's phrase, "displaying any feel for the underlying principles and purposes" of the relevant law. They are of no help to their clients, and they leave the judges bereft of the help they are entitled to expect: in the form of rigorous, and principled, submissions on the law.

Just a few days ago, in *Financial Markets Authority v Hotchin & Ors* (High Court, Auckland, CIV 2010-404-8082, 6 May 2011), Winkelmann J was moved to comment:

> [127] At the hearing in February, the Authority advanced a number of submissions as to the nature of the relationship between Mr Hotchin and the Trusts. Amongst arguments advanced were sham, emerging sham, resulting trust and that the Trusts held the assets on a bare trust for Mr Hotchin. I was not able to follow the Authority's argument. It appeared to shift and change through the course of exchanges with counsel. Counsel was unable to link the various tentative arguments identified with the available evidence. Although I had received several sets of submissions from the Authority which dealt with these issues it became clear that the current pleading no longer reflected the Authority's case, and more troubling, that the Authority was not itself clear as to how it could be said that KA3 Trustee and KA4 Trustee held property on behalf of Mr Hotchin.

Gynaecologists do not do brain surgery. Neurosurgeons do not deliver babies. Electrical engineers do not design harbour bridges. If New Zealand's courts are to be taken seriously, generalist judges should not sit, and generalist counsel should not present submissions, in cases in specialist fields of law.

Until the New Zealand legal profession, and courts, learn to exercise the restraint and integrity of surgeons and engineers, the widespread international unease as to the quality of New Zealand trust advice, submissions, and decisions will hobble the development of the potential of the New Zealand international trust industry, and will make a mockery of the efforts the International Funds Services Development Group.

To use the language at page 7 of *Exporting Financial Services: A Report from the International Funds Services Development Group*, the "lack of depth and requisite

[8] See, eg, the lament of Southin J in *Girardet v Crease & Co* (1987) 11 BCLR. (2d) 361, 362: "The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth."

[trust law] skills" in the High Court and Court of Appeal is emphatically an issue of fact; and it is emphatically *not* a mere issue of perception.

The present situation is risible when it is considered that this Group is focussing on how much trust work New Zealand is going to be able to take away from places, like Jersey, that have reason for pride in the quality of decision-making in their courts in trust and equity matters. For example, Lord Walker, a senior English Law Lord and member of the Supreme Court in the UK, wrote an article on "Fraud, Fault, and Fidiuciary Liability" in the June 2006 *Jersey Law Review* in which, at [31], he expressed his "deep and unfeigned admiration" for the trust law judgments of Deputy Bailiff [the Jersey name for Chief Justice] Michael Birt.

How much of your trust work would you shift from a jurisdiction in which the trust judgments command that level of admiration, to a jurisdiction in which incompetent trust advice, argument, and judgments such as those I have been describing are routine?

One could refer to other elements that make trusts—and therefore "trust busting"—problematic in New Zealand.

The Law Commission, for one: its composition of trust non-specialists does not deter it from undertaking a review of the Trustee Act 1956. Its latest report, *Perpetuities and the Revocation of Trusts*, April 2011, refers without apparent doubt or discussion, to at least one very dubious line of New Zealand cases asserting an alleged "inherent" jurisdiction that appears to flatly contradict—without any indication that the court knew of their existence—leading cases in other jurisdictions. In 44 years of specialist practice in this area, I have *never* encountered a situation in which the Trustee Act was a problem. In a compelling speech on law reform late last year, the Master of the Rolls, Lord Neuberger, expressed the very wise view that:

> where the present law is tolerably clear, well understood, and workable, particularly in a slightly technical field where there is no perfect answer, *leave the law alone*.[9]

Parliament's proclivity for incessant, and ignorant, tinkering with legislation is another problem area.[10]

Those are all for another day, but there is an additional problem that must be mentioned. This is the dangerous commodification of trusts, on a truly industrial scale,[11] by solicitors and accountants many of whom who have only a dangerously

[9] *Law Reform—Where will it all End?* Law Commission Lunchtime Seminar, 2 December 2010: a paper that his His Lordship started by citing Lord Astbury's witticism "reform, reform, aren't things bad enough already?"
[10] See Tony Molloy QC, "Putting lipstick on a pig: the rewrite that will foster the continued hegemony of the culture that already has caused the collapse of the UK economy" *Trusts & Trustees* Vol 17 No 3, April 2011, 149.
[11] 400,000 of them, or one for every ten New Zealanders: Damien Grant, "Trusts Industry a Costly Sham", *New Zealand Herald,* Sunday 8 May 2011.

vague idea of what they are doing, other than making a very great deal of money[12] for something that is worse than useless in almost every case. They drop their clients into trusts that are inimical to their interests, and that provide benefits to the lawyers and accountants alone.

Here we have a convenient starting point for the "busting" aspect.

Busting trusts on the ground of practitioner breach of fiduciary duty at the outset

The starting point is the person who undertakes—or who must be taken to have undertaken—to act for, or in the interests of, another or others.

Professor Finn has written that a fiduciary expectation" arises whenever the role of a person, supposed to be acting in the interests of another, is such as to implicate her so deeply in the interests of the other or others that "to allow disloyalty" in their relationship "would be to jeopardise its perceived social utility."[13] He adds that:

> a person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or [as in the case of partners] in their joint interest to the exclusion of his own several interest.[14]

When that is the nature of a given relationship, Professor Finn points out that the implication of the "fiduciary expectation" is that the fiduciary is subject to two prohibitions. He—

> (a) cannot use his position to his own or to a third party's possible advantage; [and he]
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> (b) cannot, in any matter within the scope of his service, have a personal interest *or an inconsistent engagement with a third party*
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> unless this is freely and informedly consented to by his beneficiary or is authorised by law.[15]

Trustees are the quintessential fiduciaries. Their loyalty to the trust estate must be absolute and undivided.

When it comes to setting up the trust in the first place, the responsible advisers—whether solicitor, accountant, or financial adviser—likewise will be fiduciaries. This means that, when it comes to obtaining "free and informed" consent to the terms of a trust being created by a solicitor acting for one's spouse or partner, there is only one way: by informed and competent legal advice. Advice that fits Lord Nicholls' disquieting description in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 will not do. At paragraph [68] of the judgment his Lordship said that:

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[12] "If each one paid their lawyer $2500 for a trust, a billion dollars was paid" for these 400,000 trusts, plus another "$70 million annually [that] is spent by taxpayers to comply with their gifting programmes."

[13] "The Fiduciary Principle" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, Ontario, 1989) 1, 47.

[14] Ibid, 54.

[15] Ibid, 27.

> the quality of the legal advice is the most disturbing feature of some of the present appeals. The perfunctory nature of the advice may well be largely due to a failure by some solicitors to understand what is required in these cases.

So, if your interest in busting a trust arises in respect of a client who is, or who was, a wife or partner, and if she was not independently advised by a fully-informed and competent solicitor before she signed the trust deed, here is your starting point.

In so many cases the solicitor, or the accountant, acting for the husband or partner in his business affairs will draft a trust deed and then call in both parties; give them a perfunctory explanation; and witness their signatures. So far as it concerns the wife in this situation, the adviser "has an inconsistent engagement with" the husband, within the passage I have just cited from Professor Finn.

Trusts in these situations can disadvantage the wife in many ways. A common one is that the Deed defines "beneficiaries" to include "The Settlor (ie, the husband), his wife, and their children and remoter issue." Once the parties have divorced, the woman who was the Settlor's "wife" ceases to fit that description, and is no longer a beneficiary or potential beneficiary.

Accordingly, and subject to any rights obtained in the meantime by other parties for value, she has a right to rescission of the trust deed: a right that—subject to rights of others acquired for value in the meantime—she will exercise if the trust placed her at a disadvantage, and if the husband's solicitor did not see to it that she received independent, competent, and fully informed legal advice.

The sham attack: establishing that there is no trust to bust

In that sort of case, the trust is valid, and it remains effective unless the wife elects to attack it.

But where a trust that appears to have been created is a sham, there is no effective trust at all. There is nothing to set aside.

In his reasons for judgment in *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 Neuberger J held that an attack seeking to show that a document is a sham must overcome the presumption that parties intend their documents to be effective and binding, not shams. The relevant part of his Lordship's reasons is a valuable resource, worth quoting more fully (italics added):

> *Conclusion on sham*
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> 59. In one sense, lawyers find it difficult to grapple with the concept of sham, presumably on the basis that, subject to questions of mistake (which can give rise to rectification or rescission), there is a very strong presumption indeed that parties intend to be bound by the provisions of agreements into which they enter, and, even more, intend the agreements they enter into to take effect. The difficulty is perhaps illustrated by the way in which Diplock LJ expressed

himself in *Snook v London and West Riding Investments Ltd* [1967]1 All ER 518 at 528, [1967] 2 QB 786 at 802 ("what, if any, legal concept is involved" and "if it has any meaning in law") and the fact that Lord Templeman found it necessary to reformulate the concept in *AG Securities Ltd v Vaughan* [1988] 3 All ER 1058 at 1067, [1990] 1 AC 417 at 462 (where, having referred to his formulation of "sham devices and artificial transactions" in an earlier case, he said it would have been better if he had used the word "pretences"). A sham provision or agreement is simply a provision or agreement which the parties do not really intend to be effective, but have merely entered into for the purpose of leading the court or a a third party to believe that it is to be effective. Because a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely upon the genuineness of a provision or an agreement, and because the court places great weight on the existence and provisions of a formally signed document, there is a strong and natural presumption against holding a provision or a document a sham. The fact that a document creates a tenancy, which is an estate in land, does not make it inherently more difficult to conclude that it is a sham: if the contract itself is a sham, then no tenancy can be created by it. However, a tenancy is a document which is particularly likely to be relied on by third parties (eg mortgagees and sub-tenants) which explains the court's reluctance to hold a tenancy to be a sham (see the observations of Sir Thomas Bingham MR in *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1996] 1 All ER 312 at 326, [1997] QB 858 at 876 cited above).

60. However, I would suggest that the possible prejudice of innocent third parties who have relied on the document or the provision should not stand in the way of the court concluding that the document is a sham as between the parties thereto and as against a party who claims to be prejudiced thereby (and particularly the party against whom the sham is directed, if I can put it that way). If a tenancy agreement is a sham, and an innocent third party accepts it as security for a loan to the tenant, then it seems to me that the third party is entitled to treat the tenancy in existence as against the landlord and as against the tenant: it can scarcely lie in the mouth of either of them to contend that the tenancy agreement does not exist as against the mortgagee in such circumstances. However, difficulties could arise where the interests of one innocent party, who contends that the agreement is a sham, clash with the interests of another innocent party, who contends that it is genuine. That is a problem which will have to be considered if and when it arises. In the present case, there is no reason to think that the problem would arise: it is clearly in the bank's interest that the agreements are held to be a sham, and if any third party wished to contend otherwise, then its claim would have to be considered in due course.

…

68. In these circumstances, I have reached the conclusion that neither of the agreements was a sham. Each of them was an artificial transaction, and the points relied on by Miss Middleton serve to emphasise the extent of the artificiality. Both principle and the authorities indicate that the court is slow to find that an agreement is a sham, and that, *before the court can reach such a conclusion, it must be satisfied that the purported agreement is no more than a*

> *piece of paper which the parties have signed with no intention of it having any effect, save that of deceiving a third party and/or the court into believing that the purported agreement is genuine*. Taking all the evidence together, I think that the bank has plainly fallen short of discharging the onus, which it undoubtedly has, of establishing that either of the agreements was a sham.

So, where a trust is concerned, the attack must be based on evidence that makes it, at best, uncertain that the "settlor" intended to create a trust in the first place.

Browne, *Ashburner's Principles of Equity* (1933, 2nd edn) 93, writes that "Absence of communication may be evidence against an intention to make a binding declaration." The learned author cites *Re Cozens* [1913] 2 Ch 478, 486, where Neville J said:

> It is somewhat startling to find, if that indeed be the case, that a man can declare a trust in the secrecy of his chamber, uncommunicated to any living creature, on the eve of bankruptcy, by which he can determine which of his creditors shall be paid in full and which shall go without their money … .
>
> In my opinion the absence of communication raises a strong inference against an intention to make an appropriation irrevocable. In the absence of evidence to the contrary I think the inference is that silence was intended to enable the declarant to adhere to or abandon the declaration as best served his advantage for the time being.

The significance of non-communication is that it ensures that there is no one able to enforce the "trust"; and, as will be seen below, a "trust" that cannot be enforced against the trustee is no trust at all.

The decision in *Midland Bank plc v Wyatt* [1995] 1 FLR 697 supports this. After the "settlor" had executed a deed, declaring that he held the family home on trust, he put it away in a drawer. He said nothing about it to his supposed beneficiaries. He said nothing to the bank to which he had mortgaged the land. He even made a subsequent declaration as to his assets in which he averred that he was the beneficial owner of the land.[16]

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[16] At 707 the learned judge said: "I do not believe Mr Wyatt had any intention when he executed the trust deed of endowing his children with his interest in Honer House, which at the time was his only real asset. I consider the trust deed was executed by him, not to be acted upon but to be put in the safe for a rainy day—as Mr Wyatt states in his affidavit, as a safeguard to protect his family from long term commercial risk should he set up his own company. As such I consider the declaration of trust was not what it purported to be but a pretence or, as it is sometimes referred to, a 'sham'. The fact that Mr Wyatt executed the deed with the benefit of legal advice from Mr Ellis does not in my view affect the status of the transaction. It follows that even if the deed was entered into without any dishonest or fraudulent motive but was entered into on the basis of mistaken advice, in my judgment such a transaction will still be void and therefore an unenforceable transaction if it was not intended to be acted upon but was entered into for some different or ulterior motive. Accordingly, I find that the declaration of trust sought to be relied upon by Mr Wyatt is void and unenforceable.

I should add as a general matter it is clear that when it was expedient to do so Mr Wyatt was prepared to allow the bank to remain in ignorance of the true position (both with regard to the loan being unsecured and with regard to the existence of the trust deed and/or the fact that he no longer had any beneficial interest in Honer House) or even to mislead (as he admits was the case with Mr Hawick over outstanding debts to him). From his dealings with his own solicitors, it appears that when it suited him to do so he did not disclose the full

In circumstances like that, it would seldom be open to a court to find it to be more probable than not that there has been an intention to create a trust. There would be nothing for Equity to recognize as a trust. The "trust" would be a mere façade.

What if, intending to create a façade, rather than a trust, a "settlor" persuades a solicitor to sign the deed as co-trustee; and requests him to hold the deed in his strong room without giving any instructions, or saying anything, to alert the solicitor to his shamming intent.

In *Shalson v Russo* [2003] WTLR 1165, at para 190, Rimer J held:

> When a settlor creates a settlement he purports to divest himself of assets in favour of the trustee, and the trustee accepts them on the basis of the trusts of the settlement. The settlor may have an unspoken intention that the assets are in fact to be treated as his own and that the trustee will accede to his every request on demand. But unless that intention is from the outset shared by the trustee (or later[17] becomes so shared), I fail to see how the settlement can be regarded as a sham. Once the assets are vested in the trustee, they will be held on the declared trusts, and he is entitled to regard them as so held and to ignore any demands from the settlor as to how to deal with them. I cannot understand *on what basis a third party could claim, merely by reference to the unilateral* intentions of the settlor, that the settlement was a sham and that the assets in fact remained the settlor's property. One might as well say that an apparently outright gift made by a donor can subsequently be held to be a sham on the basis of some unspoken intention by the donor not to part with the property in it. But if the donee accepted the gift on the footing that it was a genuine gift, the donor's undeclared intentions cannot turn an ostensibly valid disposition of his property into no disposition at all. To set that sort of case up the donee must also be shown to be a party to the alleged sham. In my judgment, in the case of a settlement executed by a settlor and a trustee, it is insufficient in considering whether or not it is a sham to look merely at the intentions of the settlor. It is essential also to look at those of the trustee.[18]

A sham trust can become a real trust, but a real trust cannot become a sham

Munby J held to the same effect in *A v A* [2007] 2 FLR 467 at [45]-[46]. His Lordship then added that:

> [47] [Counsel for the intervening trustees] put the point quite neatly when he submitted that, even if the earlier trustee was party to a sham, a new trustee

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facts, in particular his failure to tell either Mr Minton or Mrs Bevis about the trust deed can only be explained on the basis of Mr Wyatt having forgotten all about it or deliberately concealing it."

[17] I agree completely with Hamlin and Kleiner, "Shams—The application of the Snook test to trusts" (2005) 3 *Trust Quarterly Review* 20, 22: "The comment by Mr Justice Rimer about a 'later' intention should not (in the authors' view) be taken to mean that a transaction can be genuine when it is made and subsequently 'become' a sham. If at the time of creation of the trust the intention of the trustee is that the transaction is genuine, any later change of intention by the trustee might constitute a breach of trust but would not of itself undermine the validity of the trust."

[18] In the passage as cited, a couple of minor typographical errors have been corrected, and the italicised phrase inserted, by reference to the original judgment.

> cannot become an unknowing party to the sham. Once the new trustee becomes legal owner of the trust property, provided he exercises his powers and fulfils his duties in accordance with the terms of the trust instrument, the trust cannot be regarded as a sham, no matter what may have passed before. I agree.
> …
> [49] The corollary of all this can be stated very simply. Whatever the settlor or anyone else may have intended, and whatever may have happened since it was first created, a trust will not be a sham—in my judgment cannot as a matter of law be a sham—if either:
> (i) the original trustee(s), or
> (ii) the current trustee(s),
> were not, because they lacked the relevant knowledge and intention, party to the sham at the time of their appointment. In the first case, the trust will never have been a sham. In the second case, the trust, even if it was previously a sham, will have become a genuine—a valid and enforceable—trust as from the date of appointment of the current trustee(s).

Poulton, "Trusts and divorce: 'sham' revisited," *Trusts & Trustees* (2008) Vol 14, 225, 231, questions this conclusion on the ground that:

> it fails to consider the impact of the settlor's intention, or lack of it, to create a valid trust. In the case of a sham, by definition the settlor's intention to create a trust … never exists. In consequence, the trust never exists. The fact that a subsequent trustee may be appointed to manage the assets is nothing to the point, for no trust can be created without the settlor's donative intent. Accordingly, unless the settlor at that point in time evinces an intention for a trust to come into existence on the terms of the original trust deed and confirms the new gift to the new trustee, the requirements for the existence of a trust have not been satisfied.

It may well be that this criticism does not sufficiently recognize that Munby J's views expressly postulate the new trustee having become legal owner of the trust property. Moreover, it does not address the possibility of estoppel. In this regard, in *Hitch v Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214, at para 87, Arden LJ said:

> No authority has been cited to us which would suggest that a sham transaction could *on its own* be other than a void transaction. There being no statutory provision in point here, that consequence would in my judgment follow. However, if a third party in good faith and for valuable consideration enters into a transaction to acquire rights created by the sham transaction, the question would arise whether he could acquire rights from one party only, and if so whether the transaction would cease to be void and, if so, with effect from what date. He may well be able to rely on the doctrine of estoppel or be protected by the law in some other way.

If that be so, then, where that new trustee had no reason to suspect that the trust was hitherto void as a sham,[19] and was not recklessly indifferent[20] to its validity: it appears

[19] In *Midland Bank plc v Wyatt* [1995] 1 FLR 697, 699, Deputy Judge Young QC said that: "I consider a sham

to be at least arguable that the appointment of a new trustee to what began as a sham trust, could estop the shamming settlor from denying its validity.

But the reverse situation cannot arise. A trustee might go off the rails and depart from the terms of a valid trust, but the trust itself will remain valid, and the trustee will be accountable to the trust estate for his failure to adhere to the terms of the trust. He is not allowed to say that he acted in breach, and he is made to account on the basis that he had not been in breach. That is, he has to account for everything that he should have got in to the trust estate, and his account will be surcharged to ensure that this happens; and he is not allowed to say that he has paid trust funds to non-beneficiaries, or that he has otherwise misapplied them, and his account will be falsified to prevent that happening.[21]

Munby J's judgment in the Family Division in *A v A* [2007] EWHC 99 (Fam); [2007] 2 FLR 467, at paras [21], and [42]-[44] reminds us that, where the document which recalcitrant trustees are ignoring evidences the creation of a fully constituted trust, it is not in the nature of Equity to roll over and yield to a submission that it has all become a sham and can be disregarded.

> [T]he typical case in the Family Division may differ from the typical case in (say) the Chancery Division. But what it is important to appreciate (and too often, I fear, is not appreciated at least in this division) is that the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions. There is not one law of 'sham' in the Chancery Division and another law of 'sham' in the Family Division. There is only one law of 'sham', to be applied equally in all three Divisions of the High Court, just as there is but one set of principles, again equally applicable in all three divisions, determining whether or not it is appropriate to 'pierce the corporate veil'.
>
> …
>
> Once a trust has been properly constituted, typically by the vesting of the trust property in the trustee(s) and by the execution of the deed setting out the trusts upon which the trust property is to be held by the trustee(s), the property cannot lose its character as trust property save in accordance with the terms of the trust itself, for example, by being paid to or applied for the benefit of a beneficiary in accordance with the terms of the trust deed. Any other application of the trust property is simply and necessarily a breach of trust; nothing less and nothing more.
>
> A trustee who has bona fide accepted office as such cannot divest himself of

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transaction will still remain a sham transaction even if one of the parties to it merely went along with the 'shammer' not either knowing or caring about what he or she was signing. Such a person would still be a party to the sham and could not rely on any principle of estoppel such as was the case in *Snook*—the defendant there not being a party to the transaction at all."

[20] *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467 (FD, Munby J), at para 52: "What is required is a common intention, but reckless indifference will be taken to constitute the necessary intention."

[21] Lord Millett, "Proprietary Restitution" in S Degeling and J Edelman (eds) *Equity in Commercial Law* (Law Book Co, Sydney, 2005) 309, 310.

> his fiduciary obligations by his own improper acts. If, therefore, a trustee who has entered into his responsibilities, and without having any intention of being party to a sham, subsequently purports, perhaps in agreement with the settlor, to treat the trust as a sham, the effect is not to create a sham where previously there was a valid trust. The only effect, even if the agreement is actually carried into execution, is to expose the trustee to a claim for breach of trust and, it may well be, to expose the settlor to a claim for knowing assistance in that breach of trust. Nor can it make any difference, where the trust has already been properly constituted, that a trustee may have entered into office—may indeed have been appointed a trustee in place of an honest trustee—for the very purpose and with the intention of treating the trust for the future as a sham. If, having been appointed trustee, he has the trust property under his control, he cannot be heard to dispute either the fact that it is trust property or the existence of his own fiduciary duty.

Professional conduct implications of "sham" allegations

The allegation of sham involves imputations of dishonesty: *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 at para 59 (Neuberger J). The case for sham therefore has to have serious foundations before it is pleaded or advanced. The lawyer who alleges sham without grounds commensurate with the gravity of the allegation is in serious breach of a fundamental rule of professional conduct. Rule 13.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides that:

> 13.8.1 A lawyer *must not be a party* to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

Apart altogether from that duty, there is the more general duty identified by New South Wales Court of Appeal Justice David Ipp, in "Lawyers' Duties to the Court" (1998) 114 LQR 63:

> that counsel is obliged to act reasonably and to raise only genuine issues which have some prospect of success.
>
> …
>
> There is a strong case to be made that while the duty to take every possible point might be a duty owed by lawyers to the client, the paramount duty to the court is to advance only points that are reasonably arguable.

In *Richard Buxton (a firm) v Mills-Owens* [2010] 4 All ER 405 at paras [45], [57], and [58], the English Court of Appeal has now has laid it down that, if an advocate does not consider a point to be properly arguable it is his professional obligation to refuse to argue it. And it is misconduct for him to try to please his client—while weaseling around his duty to the court—by the old trick of making the submission anyway while using the code "I am instructed that ... " as a sign to the judge that counsel thinks that the submission isn't worth a damn.

Munby J's judgment in the Family Division in *A v A* [2007] EWHC 99 (Fam); [2007] 2 FLR 467, is important in this respect also. At paras [86], [87], as well as in the costs judgment at [2007] EWHC 1810 (Fam), [2008] 1 FLR 1,428 at [221], his Lordship made it clear that the wife's case on sham was hopeless; probably should never have been brought; and, even if it had been properly brought, it should not have been pursued.

The result was that her award of £1,339,650 netted her only £584,837.65, or 43.65%, after costs. As his Lordship said at para 271 of the costs judgment:

> That is a heavy price for the wife to have to pay, but it is the *consequence of the misplaced zeal with which she chose to conduct a case built on exiguous foundations. I only hope that others will pay heed and that similar cases will in future be pursued with more circumspection.*

Other grounds for a total "bust" where sham is not involved

Sham is to do with disregarding "trusts" that are *intended not to be* trusts, but only to look like them. If a "trust"—that is certain as to subject matter and objects—*is intended to be* a trust, it is not vulnerable to sham attack. However, other possibilities remain for branding it a failure that the law will disregard.

Want of accountability

First, an intended trust will fail where the sole "trustee" is trustee for herself alone. There can be no trust in that situation because:

i There is no one in whose favour any equity exists to derogate from the "trustee's" legal ownership. There is no one whose interests affect the "trustee's" conscience.

ii There is no one to whom the "trustee" is accountable, and accountability is the core element without which no trust can exist.

> If the beneficiaries have no rights enforceable against the trustees there are no trusts. [*Armitage v Nurse* [1998] Ch 241, 253 (Millett LJ).]

Thus, in *Q v Q* [2010] SC (Bda) Civ (16 April 2010); [2011] WTLR 373, noted by Frank Hinks QC in *Trusts and Trustees* Vol 17, No 3 (April 2011) 219, Ground CJ had little trouble ruling against the validity of a purported trust, of which the settlor was the sole trustee, and which provided:

> The written approval by the Donor of any trust transaction during his lifetime shall be a complete release of the Trustee (including the Donor) of any liability or responsibility of the Trustee to any person with respect to this transaction.

"Trustee" is merely an agent

Secondly, even though the "trust" property shall have been transferred to an "independent trustee," a trust will still fail if the "settlor" shall have reserved control to such an extent that the "trustee" is accountable *only to the "settlor"* and effectively holds the property as the settlor's agent. For the reasons expressed in the passage I have cited from the judgment of Millett LJ in *Armitage v Nurse*, the trust will not get off the ground for lack of *beneficiary* capacity to hold the trustee accountable [[1998] Ch 241, 253].

Put another way: if the trust was to have been founded on an understanding or agreement, between the settlor and the trustee, that the trustee would not exercise an independent discretion, but would defer to everything the settlor proposed or desired, the trustee would not be accountable to the beneficiaries and there would be no trust.

No certainty of objects

Thirdly, if a valid trust is to be created there must be certainty of objects. Unless convinced that the settlor has made it clear who his intended beneficiaries are to be, the court will not be able to control the administration of the trust estate for their benefit. In that case there will be no trust at all on the terms of the deed. So, on appeal from the Master of the Rolls in *Morice v Bishop of Durham* (1805) 10 Ves Jun 522, 539-540, Lord Eldon LC held [emphasis added]:

> As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in case of maladministration could be reformed; and a due administration directed; and then, *unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform maladministration, nor direct a due administration*.

In the latter state of things, as the Lord Chancellor pointed out during argument in the case, there will be only a resulting trust for the settlor: to whom, or to whose estate, the trust estate must be returned intact, and not paid out to anyone else [(1805) 10 Ves Jun 522, 527].

No validity means no power. It means no discretion. If the trustee makes a disposition in any event, it will be unauthorized and void. So, if you attack the trust on this ground, and money has been paid out, you can recover it from the trustee.

Whether settlor "control" indicates "sham" or otherwise presents a trust-busting opportunity

At pages 10-11 above I have referred to the commodification of trusts by lawyers and, even more dangerously, accountants.[22] The "success" of the process has enmeshed hundreds of thousands of New Zealanders in legal toils out of all proportion to the "benefits" they were told they were buying. Most of them have no idea how they should be administering their trust, and so they break every rule in the book.

In the *Herald On Sunday* for 3 August 2008, at page 43, under the by-line "Avoid Family Trusts Being Shams" Martin Hawes wrote that this mess shows:

> trustees dealing with a property as if it is their own, and would be good evidence if someone was trying to show the trust is really your alter ego.

Earlier in the article, Mr Hawes stated that, in his experience (my italics):

> 75% of family trusts in New Zealand could be overturned as shams. This is not because of the way they have been established—most trusts here are reasonably well set up. *Instead it is the way they are managed that creates the risk they could be set aside*. … [I]f trustees continue to treat assets as their own personal property, someone attacking the trust can claim there was no genuine intention to form a trust. They would effectively be saying you have established a trust but the way you have managed it and treated its assets shows there has been no substance to its arrangement.

A more reliable way of looking at settlor control appears from Robertson J's reasons for judgment in the Court of Appeal in *Official Assignee v Wilson* [2008] 3 NZLR 45; [2008] WTLR 1235, at paras [69], [70], and [71]:

> The assumption of factual control by someone other than a trustee (or a sole trustee if there is more than one trustee) or by someone without legal right to exercise such power *cannot of itself invalidate a trust*. … Actual control alone does not provide justification for looking through/invalidating a trust. The uptake of control by someone other than an authorised person *cannot be sufficient to extinguish the rights of the beneficiaries under a trust*. … Factual control of a trust by someone other than those authorised to have such power is not an irrelevant consideration. Such control may give rise to a claim for breach of trust.

So, if mere "factual control" cannot invalidate a trust, the interesting question is "how far can you go with settlor direction and control before you reach the critical point at which the beneficiaries have no rights enforceable against the trustees, and at which there are therefore no trusts?"

The cases that apply the principles that come into play when trusts are attacked for an excess of settlor control suggest that the answer to that question is "rather a long way."

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[22] Who, the matter being a legal matter, will be held to the same duties of care and competence as those to which lawyers are held.

Authorities on settlor control

In *Re Mulligan* [1998] 1 NZLR 481, without asking questions, the independent trustees carried out the instructions of the life tenant trustee efficiently: to the detriment of the capital beneficiaries. They soon learned to their cost, from the judgment of Panckhurst J, that it is “not open for one trustee to defer to the wishes of another trustee in the absence of proper reasons for doing so.”

So a case based on the assumption that a settlor could just “make and unmake trustees until he has secured a body which will prove compliant to his wishes” is always going to be up against it.

Trusteeship and defective conscience are impossible bedfellows, for it is “the duty of trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries” [*Armitage v Nurse* [1998] Ch 241, 253 (Millett LJ).]

The court will not presume a defective conscience. As Latham CJ remarked, a court “does not … presume impropriety” [Richard *Brady Franks Ltd v Price* (1937) 58 CLR 112, 135]. “The commercial world bases its transactions, not upon the hypothesis of fraud, but upon the hypothesis of honesty” [*Easton v London Joint Stock Bank* (1886) 34 Ch D 95, 115 (Bowen LJ)].

Like the common law—which it follows, albeit “not slavishly nor always” [*Graf v Hope Building Corp* 254 NY 1, 9 (1930) (Cardozo J, dissenting: New York Court of Appeals)]—*equity accordingly proceeds on the basis that trustees and other fiduciaries will obey the law*, not flout it. The maxim is that “equity regards as done that which ought (in conscience) to have been done.” So it is that,

> If a trustee or fiduciary has committed a breach of trust or fiduciary duty, Equity makes him account as if he had not done so, and allows his beneficiary to surcharge or falsify the account accordingly. This is a radically different approach [to that of the common law]; indeed it is the converse approach. It does not treat the defendant as a wrongdoer; it disregards his wrongdoing, makes him account as if he had acted properly throughout, and does not permit him to deny that he has done so. By this means it not only requires him to make good any loss suffered by the beneficiary, but makes him disgorge his gain. [Lord Millett, “Proprietary Restitution” in S Degeling and J Edelman (eds) *Equity in Commercial Law* (Law Book Co, Sydney, 2005) 309, 310.]

And trustees largely do just that. That they do it, sometimes, in the face of pressure appears from the unreported decision of the Jersey Royal Court in *Re the M Settlement* [2009] JRC 140 (14 July 2009). A settlor/protector attempted to have his way by exercising his power to remove uncomplaisant trustees, who—for good reasons—were refusing to transfer the balance of the trust estate to him. The settlor appointed a replacement trustee in the evident expectation that he would be putty the settlor’s hands. The settlor’s expectation was frustrated. The replacement trustee surrendered his discretion to the court. The court exercised it to benefit the beneficiaries as a whole, and excluded the settlor/protector from the distribution altogether.

Against that background, it is clear that Winkelmann J was right to have held, in a very high profile case late last week, that:

> [131] Powers of appointment of trustees, and even of discretionary beneficiaries, are not sufficient to give Mr Hotchin control over the assets of the Trusts, because that control rests, at law, with the trustee once appointed. [*Financial Markets Authority v Hotchin & Ors* (High Court, Auckland, CIV 2010-404-8082, 6 May 2011).]

Propositions on settlor "control"

Commissioners of Inland Revenue v Schroder [[1983] STC 480; (1983) 57 TC 94] and *Re the Esteem Settlement, Grupo Torras SA v Al-Sabah & ors* [2004] WTLR 1 are useful leading cases on this "settlor control" fallacy. They appear to support these propositions:

1 The mere likelihood of the settlor's wishes influencing the trustees will not bring the trust to its knees: *Schroder* and *Esteem*. Indeed, it is to be hoped that the trustees *would* at least consider the Settlor's wishes and views. As Glazebrook J said in the Court of Appeal in *Official Assignee v Wilson* [2008] 3 NZLR 45; [2008] WTLR 1235 at [127]:

> Settlor control may often occur with the view of benefiting the beneficiaries and thus be quite consistent with the existence of an intention on behalf of the settlor that the trust be operative.

2 Neither will a trust be brought to its knees by a power to remove trustees, or a power appoint new trustees, which is vested in a *committee that includes* the settlor: *Schroder*.

3 Even when vested *solely* in the settlor, such a power will not cross the line. The trustees' duty is to go about their business ignoring the very existence of that power: *Esteem*.

4 The presumption is that the trustees will do just that: and that they will obey the law and not flout it: *Richard Brady Franks Ltd v Price; Easton v London Joint Stock Bank*, and *Graf v Hope Building Corp*—all of which are listed on page 20 above.

5 Whether it be in the hands of a committee that includes the settlor, or solely in the hands of the settlor: the power to remove trustees, and the power to appoint replacement or additional trustees, cannot properly be used—and the presumption is that it will *not* be used—to "pack" the committee, or to ensure that the trustees are mere puppets who, in breach of trust, will exercise no independent discretion or judgment: *Schroder* and *Esteem*.[23]

[23] Cf *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78, 89-90 (Full Court).

6 *Esteem* makes an important addition to *Schroder* on the use of a trustee-removal power to clean out a trustee who may be refusing to permit a breach of trust desired by the settlor (or even by *some* of the beneficiaries, in a situation where the Rule in *Saunders v Vautier* (1841) 10 LJ Ch 354 therefore cannot apply). The Royal Court points out that "it is likely that, in such circumstances, one or more of the removed trustees would seek the Court's direction as to whether the power of removal was being exercised for improper purposes."

7 But even if a great deal of actual "control" was to have been made out—and assuming no evidence of any agreement between the settlor and the trustee that meant that the trust was a sham—the position will remain as stated by the Royal Court in para [103] of *Esteem*:

> … trustees who allow a third party such as a settlor to assume substantial and effective control would have abdicated their fiduciary duties and would be in breach of trust. The control and misuse therefore only arises because of a breach by the trustees of their fiduciary duties under the trust. Is it right that a court should deprive beneficiaries of their beneficial interest and transfer their beneficial interest to the settlor simply because the trustees have not properly fulfilled the obligations imposed upon them by law?

As long as, in the eyes of the court, the conscience of the trustee is affected, and the obligations of the trustees are enforceable by the beneficiaries, there is only one, negative, answer to that question.

Accordingly, notwithstanding occasional judgments misguidedly suggesting that "control" could vitiate a settlement all on its own,[24] the correct position is as suggested by *Schroder* and *Esteem*, and as stated by AW Scott, WF Fratcher, and ML Asher, *Scott and Ascher on Trusts* (5th edn, Aspen, New York, 2006) vol 1, §8.2.2 p 409.

> Thus, the unmistakable trend in the United States has long been to uphold clearly expressed *inter vivos* trusts, no matter how extensive the interests or powers are that the settlor has reserved. In other words, when the intent to create a trust is clear, the disposition is not subject to the statute of wills[25] merely because the

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[24] See Tony Molloy QC, "Still more on settlor control: the 18 September 2008 reserved decision of the New Zealand High Court in *Harrison v Harrison*" [[2009] WTLR 1319], *Trusts & Trustees* Vol 16, No 2, March 2010, 73.

[25] Which was the fate of the trust in *Q v Q* [2010] SC (Bda) Civ (16 April 2010); [2011] WTLR 373, cited earlier in this paper. In his reasons for judgment, the learned Chief Justice of Bermuda held that:

> 30 I also find as a fact that it was not the intention of the Settlor to fetter his unhindered control and enjoyment of the settled assets during his life-time. Rather, I find that when the Settlor executed the Trust Agreements he believed and understood that he would retain effective sole dominion over the settled assets during his life-time, and that that is borne out by the advice that he was receiving. In particular WW's memorandum referenced in paragraph 24 hereof must have conveyed to the Settlor that he had an unimpeded right to do what he wanted with the principal without accountability or control. That the Settlor's intention at the time was inimicable [sic] to the creation of a lifetime trust is further demonstrated by the informality of his subsequent administration of the assets, and by the way he treated them as his own, as in the case of the loan. There is nothing to suggest that he thought he could be held to account in any way, and everything to suggest to the contrary. I therefore consider, even were I wrong that the

> settlor has reserved a life interest, a power of appointment, the right to amend or revoke a trust, and the power to control its administration. These days, dispositions generally fail as *inter vivos* trusts only because of 'informal or casual manifestations of intention, or sheer carelessness or other types of conduct that leave a trier of fact in doubt about the alleged trust intent'.[26]

Busting the trustee

Personal liability and the right of indemnity

As is frequently forgotten, trust, like partnership, is a relationship, not an entity with legal personality. Creditors therefore are not dealing with "the trust" but with the trustee.

With some limited exceptions,[27] trustees are personally liable for contractual, tortious and tax liabilities incurred when acting as trustees. As Sir George Jessel MR succinctly put it, the creditor "has a personal right to sue [the trustee] and to get judgment and to make him a bankrupt".[28] The same applies to a corporate trustee.

Trustee's right of indemnity

However, while trustees may not make unauthorised profits out of a trust, they are not expected to run it at a personal cost to themselves. So they have a right of indemnity against the trust estate. This right is reflected, but not codified, in s 38(2) of the Trustee Act 1956.[29] The right of indemnity against trust assets extends to all liabilities properly incurred[30] by the trustee. So, for example, it extends to liability for a loan

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> lifetime Trusts were bad on their face, that they were in fact invalid as the Settlor did not have the necessary intent to create a trust during his lifetime, but rather only intended the settlement to take effect upon his demise as part of his estate plan.
>
> 31 In the circumstances I find that Articles I and II of the Trusts did not create valid trusts during the lifetime of the Settlor, and that the Trusts only came into real force and effect upon his death. They were, therefore, revoked by the Settlor's marriage to F in 1978, and had they not been they would have been revoked by the recitals of his subsequent Will of that same year. If it were to be suggested that the formal appointments of F and JJH as trustees, in 1982 respectively, in some way revived the trusts, in each case the Settlor's signature has only one witness, so they do not comply with the formal requirements for a testamentary document.

[26] See also American Law Institute, *Restatement of the Law (Third): Trusts* (St Paul, Mn, 2003), vol 1, §25(1).

[27] This will not be the case where the trustee has acted as an agent for the beneficiaries in incurring the liability or where the person to whom the liability is owed has clearly agreed to limit the trustee's personal liability: Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, 2009); Heydon and Leeming *Jacob's Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006) 564-565.

[28] *Re Johnson* (1880) 15 Ch D 548, 552.

[29] That section gives statutory force to the right of indemnity, but does not derogate from any wider rights enjoyed by trustees in equity: Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, 2009, 444.

[30] See generally Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, 2009) 449-450, and Heydon and Leeming *Jacob's Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006) 569-571. For elaboration on what the "properly" requirement might mean in different situations, see *Nolan v Collie* (2003) 7 VR 385 and *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* (2002) ATPR 41-864.

debt, as well as for tort claims (for example in negligence), at least where the trustee is not personally at fault.[31] The right survives the trustee's loss of office.[32]

Creditor subrogation to the trustee's right of indemnity
Where the trustee is bankrupt, or in liquidation, for example, a trust creditor can claim to be subrogated to that right of indemnity, and claim against the trust estate.

This can tempt settlors to make their trustee a company with no assets, and to include in the terms of the trust deed an express exclusion of any right of indemnity against the trust estate.

In my view, the right of indemnity against the trust estate is so inextricably part of the nature of trusteeship that it cannot be excluded. In its 2002 report, *Some Problems in the Law of Trusts*, R 79, at para 27, the Law Commission adopted that approach.[33]

It is unlikely that any court would uphold a provision in a trust deed purporting to exclude the trustee's right of indemnity against the trust assets and thereby frustrate creditor claims.[34]

Busting settlors in respect of dispositions of property post 31 December 2007
Subpart 6 of Part 6 of the Property Law Act 2007 empowers a court to unwind a debtor's disposition of property to a trust and to require the payment of compensation by the trustee or beneficiary who received that property. It replaces s 60 of the Property Law Act 1952, which still applies to dispositions of property made prior to 31 December 2007.

The subpart applies to dispositions of property made:[35]

a with the intention of prejudicing a creditor; or
b by way of gift; or
c without receipt of reasonably equivalent exchange value.

This is a wider range of dispositions than were caught by s 60 of Property Law Act 1952, which subpart 6 replaced. Under the old regime, it had to be shown in every case that the debtor intended to prejudice creditors in making the disposition. Under

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[31] See Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, 2009) 442. The learned authors of that chapter give the example of *Bennett v Wyndham* (1862) 4 De G F & J 529, where a trustee was held vicariously liable for loss caused by employees. The trustee not personally at fault had a right of indemnity against the trust assets in respect of the damages award.
[32] Heydon and Leeming *Jacob's Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006) 566.
[33] Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, 2009) 445-457 thinks it could be restricted, but the authorities on which it relies can be explained in other ways (as an application of the principle that a trustee cannot have a right of indemnity in respect of unauthorised activities); but agrees that it cannot be excluded entirely, and Heydon and Leeming *Jacob's Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006) 569 think it can neither be excluded nor even restricted.
[34] As well as the references in the immediately preceding footnote, see Thomas and Hudson *The Law of Trusts* (2nd ed, Oxford University Press, 2010) at [55.28].
[35] Section 346(1)(b).

the new regime, it suffices to show that the disposition was by way of gift[36] or that no reasonably equivalent value was received in exchange.

While the range of dispositions caught by this remedy has been widened, the circumstances in which such dispositions will be open to challenge have been narrowed. Under the old regime, a creditor who had been prejudiced by a disposition needed to show only that there had been an intention to defeat creditors. Now, a creditor must show that, at the time the disposition was made, the debtor:

a was insolvent, or became insolvent as a result, of making the disposition; or
b was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or
c intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.

A creditor must also prove prejudice from the disposition. A disposition of property will prejudice a creditor if it hinders, delays, or defeats that creditor in the exercise of any its rights of recourse in respect of the property. A disposition of property is deemed to be not made with intent to prejudice a creditor if it is made with the intention only of preferring one creditor over another.[37] There must be an actual or deemed intention to prejudice one or more unsecured creditors and not just the desire to advantage the recipient.[38]

A court may not make an order under the subpart if the recipient of the property (for example the trustee or the beneficiary) shows that:

a the property was acquired for valuable consideration;[39] and
b it was acquired in good faith and without knowledge of the fact that it had been the subject of a prejudicial disposition.[40]

The court is also given a discretion to decline or limit the effect of any order it might make if the recipient proves that:[41]

a the property was received in good faith and without knowledge of the fact that it had been the subject of a disposition to which this subpart applies; and
b his, her or its circumstances have so changed since the receipt of the property that it would be unjust to order that the property be restored, or reasonable compensation be paid, in either case in part or in full.

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[36] A gift includes a disposition made at an undervalue with the intention of making a gift of the difference between the value of the consideration for the disposition and the value of the property comprised in the disposition: s 345(1)(c).
[37] Section 345(1)(b).
[38] *Heath and Whale on Insolvency* at [24.96], citing Law Commission, A New Property Law Act (R29 NZLC 1994) at [311].
[39] Valuable consideration does not equal full or adequate compensation. Rather, it means consideration or real and substantial value, amounting to a quid pro quo in a commercial sense: *Heath and Whale on Insolvency* at [24.102], citing *Official Receiver v Klau* (1987) 74 ALR 67 (FCA).
[40] Section 349(1).
[41] Section 349(2).

Busting settlors in respect of dispositions of property pre 31 December 2007

Dispositions made before 31 December 2007 continue to be governed by s 60 of the Property Law Act 1952:

> **60 Alienation with intent to defraud creditors**
>
> (1) Save as provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
>
> (2) This section does not affect the law of bankruptcy for the time being in force.
>
> (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors.

Subject to the defence created by subsection (3), a creditor prejudiced by a debtor's transfer of property to a trustee or beneficiary, with intent to defraud creditors, is entitled to have that transfer reversed if it can show that it was made,

Intention to defraud creditors[42]

"Intent to defraud" connotes "intent to hinder, delay or defeat a creditor in the exercise of any right of recourse of the creditor in respect of property of the debtor", which is the definition in s 345(1)(a) of the 2007 Act:[43] *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433 at [52] per Blanchard and Wilson JJ.

The Court made clear that whenever:[44]

> the circumstances are such that the debtor must have known that in alienating property, and thereby hindering, delaying or defeating creditors' recourse to that property, he or she was exposing them to a significantly enhanced risk of not recovering the amounts owing to them, then the debtor must be taken to have intended this consequence, even if it was not actually the debtor's wish to cause them loss.

In other words the focus is on the debtor's knowledge of the consequences of the disposition, and a fraudulent purpose or motive is not required.

In that case, the defendant and his wife transferred their home, in November 1998, to a family trust of which they and their solicitor were trustees. At the time, the defendant was the personal guarantor of his company's indebtedness to the plaintiff.

In consideration for the transfer the trustees agreed to pay $230,000 in seven years' time. Over the next four years the defendant and his wife gradually forgave the debt.

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[42] *Health and Whale on* Insolvency, at [24.105], discuss factors pointing to or against a finding of intention to defraud.
[43] At [52].
[44] At [54].

In November 1998 trade between the defendant's company and the plaintiff company was running smoothly. The former's indebtedness to the latter was being progressively reduced. There was nothing to suggest that the defendant's company was in financial difficulty, or that the plaintiff was going to need to call up the defendant's personal guarantee.

Five years later, however, the defendant's company went into liquidation, and that is what happened.

The plaintiff's claim to set aside the transfer of the house to the trustees failed in the High Court, and again in the Court of Appeal. But the Supreme Court held that the defendant had intended to defraud the plaintiff company. It was able to do so because it considered that the defendant—however innocent his motive—must have known that, by transferring his only substantial asset to the trust, he would be exposing his creditors to a significantly enhanced risk of hindering, delaying or defeating recovery of the amounts owing to them.

The Court also made clear that, for the purposes of s 60:[45]

> It is not necessary to show that the debtor was actually insolvent. A transaction can expose creditors to risk in circumstances where the debtor remains presently able to pay his or her debts as they fall due, but there is a high level of probability that this situation will not continue. A gift or a transfer of property at an undervalue in these circumstances may be with the intention of hindering, delaying or defeating creditors.

The Rule in Freeman v Pope

The rule in *Freeman v Pope*[46] is that there is a legal presumption that, if a debtor is insolvent at the time she transfers property, the transfer was made with an intention to defraud creditors. In the Supreme Court in *Regal Castings Ltd v Lightbody*, Tipping J thought it to be a "very salutary" rule.[47] Elias CJ, as had the Court of Appeal below, considered that rule is not part of the law of New Zealand, and that the intent to defraud accordingly is one of fact to be proved by evidence in every case.[48] The other three members of the panel left the question open. In *Taylor v Official Assignee*,[49] Heath J since has sided with Elias CJ and the Court of Appeal, noting that an "irrebuttable presumption of fraud has the potential to work considerable injustice."

Bona fide purchasers for value and trustees

[45] At [56].
[46] (1870) 5 Ch App 538.
[47] At [104].
[48] At [5]-[9].
[49] (High Court, Auckland CIV-2006-404-7155, 26 August 2009) at [64]-[67].

Section 60(3) protects a transferee, from a debtor, in good faith, without notice any intention on the part of the debtor to hinder, delay, or defeat a creditor or creditors.[50]

Conversely, transferee awareness of such intent will debar transferee reliance on subsection (3) even where the debtor's transferee has given valuable consideration.[51]

In *Regal Castings* it was argued that, one of the three trustee-transferees from the defendant having been unaware of the defendant's debt to the plaintiff, the trustees were entitled them to rely on subsection (3). The Supreme Court held, to the contrary, that the onus is on transferees to establish that they had no notice of the transferor's intention to defraud creditors. Because one of them *did* know, the transferees collectively could not be heard to maintain that they had been unaware. As Blanchard and Wilson JJ put it, in their reasons:

> It is contended for the trustees that the trust acted in good faith in receiving the transfer of the property as the trustees collectively did not have, at that time, notice of Mr Lightbody's intention to defraud any creditor. That is no doubt true in respect of Mr Horrocks [the Lightbody's solicitor], who was not aware of the Regal debt until some years later. But his unawareness of the intent of Mr Lightbody cannot immunise the trust when Mr Lightbody himself was also a trustee and, of course, was the very person who was alienating the property with that intent. Mr Lightbody's knowledge taints the receipt by the trustees of the property. They received it as a unity. They did not have separate interests in it. Taking as joint tenants, they must be treated as one purchaser who has knowledge of the fraudulent intent.

Dispositions of land

The Supreme Court also considered what effect the indefeasibility provisions of the Land Transfer Act 1952 might have on the orders a court may make under s 60 of the Property Law Act 1952. Does registration of a transfer preclude creditor reliance on s 60?

Four of their Honours held that the indefeasibility of title principle is not inconsistent with the application of s 60, and one held that that section operates as an exception to that principle.

Section 350(4) of the 2007 Act expressly provides that, for post 31 December 2007 dispositions, the Property Law Act 2007 prevails over the indefeasibility provisions of the Land Transfer Act.

Busting settlors under the insolvency regime

Gifts

The Insolvency Act 2006 provides a number of indirect remedies to creditors of a debtor who has been adjudicated bankrupt. The Official Assignee may cancel any gift

[50] *Regal Castings* at [69].
[51] Ibid.

by that bankrupt (for example, a transfer of property to a trustee or beneficiary made without valuable consideration) if it was made within 2 years of the bankrupt's adjudication.[52]

Where the gift was made between 2 and 5 years prior to bankruptcy, the Official Assignee may cancel the transaction if the debtor was unable to pay his or her debts at any time, between the dates of the gift and of the adjudication, without the aid of the gifted property.[53]

There is no equivalent regime applying to trustee companies

Insolvent transactions

The Official Assignee may cancel any transfer of property to a trust made in the 2 years prior to the bankrupt's adjudication, if that transfer amounts to an "insolvent transaction".[54] An insolvent transaction is one that is entered into at a time when the bankrupt was unable to pay his or her due debts, and that enables a creditor to receive more towards satisfaction of a debt by the bankrupt than they would otherwise receive in the bankruptcy.[55]

The Companies Act 1993 has a nearly identical regime in respect of insolvent transactions entered into by companies.[56]

Trust busting in the family law context

On the dissolution of a marriage or civil union, s 182 of the Family Proceedings Act 1980 empowers the court to inquire into the existence of any "ante-nuptial or post-nuptial settlement" made by the parties to the marriage or civil union, and to make such order in relation to the property settled as the court thinks fit.[57]

"Settlement" has been interpreted widely:[58]

> in order to come within the term "settlement" as used in s 182 of the FPA, any arrangement must be one which, at the date of the hearing, makes some form of continuing provision for either or both of the parties to a marriage in their capacity as spouses, with or without provision for their children. The property transferred must be impressed with an extant obligation and not be an absolute transfer to one of the spouses.

A family trust, including a discretionary family trust, will come within the section if it meets those requirements. Most family trusts would do so.[59]

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[52] Insolvency Act 2006, s 204; Insolvency Act 1967, s 54.
[53] Insolvency Act 2006, s 205; Insolvency Act 1967, s 54.
[54] Insolvency Act 2006, s 194.
[55] Insolvency Act 2006, s 195
[56] See Companies Act 1993, s 292 and *Health and Whale on Insolvency* at [24.31].
[57] Section 182(1).
[58] *W v W* [2009] 3 NZLR 336 (CA) at [27]. The Supreme Court in its leave judgment said the Court of Appeal's approach on this point was "undoubtedly correct": at [2].

The Supreme Court has considered s 182 recently in *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31. It explicitly rejected the suggestion that principles of equal sharing underpin the section, or that general notions of justice and fairness govern its application.[60]

It held that s 182 powers should be exercised only if the applicant's expectations of the settlement have been wholly or partially defeated by the dissolution of the marriage (or civil union).[61] The order made should aim to restore, so far as possible, the reasonable expectations the parties had of the settlement immediately after it was made.[62]

In a very learned paper, which, together with the Supreme Court's judgment in *Ward,* will be the starting point for anyone considering the application of s 182, Professor Peart has noted that this approach steers the law away from earlier decisions in which courts had applied s 182 to put the parties in the position they would have been in *but for the trust*.[63] She points out that the Ward doctrine is that s 182 order should restore the parties to the position they would have been in *but for the dissolution of the marriage*.

Other trust busting essentials

There is much more that could be said. Indeed a substantial conference could be held on the subject of this paper alone.

Among other potential trust-busting topics that would require stand-alone papers are fraud, money laundering, the doctrines of tracing and following, and—for where the following hits certain walls—doctrines such as reviving subrogation.

But that is for another day.

TONY MOLLOY
Shortland Chambers
12 May 2011

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[59] See also *Kidd v Van den Brink* HC Auckland CIV-2009-404-4694, 21 December 2009, holding that the trust must have been set up in respect of a particular marriage and be primarily directed towards providing for the benefit of a particular family unit.
[60] At [29]-[30].
[61] At [27].
[62] At [27].
[63] Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" [2010] *New Zealand Law Review* 567, 595.