

Self-Declarations of Trust

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According to Turner LJ in *Milroy v Lord*, express trusts may be constituted in one of two ways.

[The trust will be] effectual if [the settlor] transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds the holds it in trust for those purposes.¹

The focus of this article is on the latter method of constitution, typically called ‘self-declarations’ of trust. In such cases the settlor does not convey legal title to trust property to a third party, but ‘declares’ that they themselves hold it for the beneficiary.

The leading case is *Paul v Constance*², where the deceased partner of the defendant had frequently said to the defendant, in respect of a sum of money, ‘This money is as much yours as mine’. In finding that this amounted to a self-declaration of trust, Scarman LJ stated the principle: ‘... there must be a clear declaration of trust and that means there must be clear evidence from what is said or done of an intention to create a trust ...’³ In this article we attempt to explore the central role played by the ‘declaration’ in such trusts. Despite it being crucial to the conceptual coherence of this category of trusts, it is difficult to pin down precisely what is meant by the ‘declaration’ requirement. We seek to explain this, and in doing so, to offer some possible explanations as to why the courts recognise and enforce self-declared trusts.

A. The Role of the ‘Declaration’

In this section we aim to demonstrate the legal significance of the ‘declaration’. The declaration is a distinctive requirement for self-declarations of trust, and does much to mark them out as a separate category of transaction. We will show this by comparing self-declarations of trust to other, similar, transactions, specifically transfers on trust, gifts and constructive trusts. From this analysis two points will emerge. First, in the case of self-declarations of trust, the making of the ‘declaration’ is the sole constitutive act which creates the trust. Second, the formation and expression of an intention to hold rights in property for another will not, in and of itself, count as a ‘declaration’ for these purposes.

¹ [1862] 4 De GF & J 264.

² [1977] 1 WLR 527.

³ *ibid* 531. This was the formulation of the principle suggested by counsel, but adopted by Scarman LJ.

1. Self-declarations and transfers on trust

A self-declaration of trust is a comparatively recent mode of constituting a trust. Traditionally a settlor would create a trust by transferring rights to another, a trustee, to be held for a beneficiary. If a settlor skipped the first part, and simply declared that he was holding his rights for a volunteer beneficiary, courts would not give effect to the trust.⁴ This position changed as a result of Lord Eldon's judgment in *Ex parte Pye*.⁵ In *Pye*, the settlor had instructed his agent to purchase an annuity in his mistress' name. The agent ignored the instruction, and purchased the annuity in the settlor's name. Lord Eldon held that trusts could be created in one of two ways: the traditional method of transfer of the legal title, in a manner that would be effective at law, to a trustee, and by self-declaration.⁶ Applying this to the facts, it did not matter that the settlor had not transferred the annuity to a trustee, but had merely expressed a desire, in his instructions to his agent, to hold them for the beneficiary. In Lord Eldon's words, '...he has committed to writing what seems to me a sufficient declaration, that he held this part of the estate in trust for the annuitant.'⁷ The trust was created by a declaration rather than a transfer.

The significance of the change wrought by Lord Eldon in *Pye* becomes clear when one compares the two modes of constitution. In the case of a transfer upon trust, the trust cannot be constituted unless and until the settlor succeeds in conveying legal title to the trust property to, and vesting it in, the intended trustee by whatever means are necessary at common law to achieve this. If the trust property is land, then the settlor must execute a deed and register the trustee as proprietor; if it is shares, the settlor must complete the stock transfer form and have it approved by the company directors; if it is a chattel, there must be a deed or delivery to the trustee. In other words, there must be a recognised form of conveyance at law before the trust can arise in equity. Mee suggests that the constitutive act of these trusts is the conveyance, rather than the declaration, which, in his view, simply tells us something about the settlor's motive for the the conveyance: did he desire the recipient to take absolutely, or to hold for another?⁸ Consider the recent case of *The Charity Commission for England and Wales v Framjee*⁹, where donors made donations to particular charities through the defendant's website. The issue was whether the defendant held the donations upon trust for the intended charities before the money was paid over to them. It is notable that Henderson J (as he then was), in finding that there was a trust, was not troubled by the absence of a specific 'declaration' by the donors. Instead of a clear oral or written statement declaring a trust, we find contextual evidence of the purpose of the transfer, from which Henderson J could infer an unexpressed intention to create a trust. On

⁴ D. Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 206; A. Simpson, *A History of the Common Law of Contract* (Clarendon 1975) 357. However, meritorious consideration in the form of natural love and affection would suffice: *Colman v Sarell* (1789) 1 Ves Jun 50, 54-5, referred to by M. Macnair, 'Equity and Volunteers' (1988) LS 172, 181.

⁵ (1811) 18 Ves Jr 140. The case was preceded by Lord Eldon's decision in *Ellison v Ellison* (1802) 6 Ves Jun 656, where the consideration requirement had been dropped.

⁶ Macnair (n xx) 182.

⁷ (1811) 18 Ves Jr 140, 150.

⁸ J Mee, 'Presumed Resulting Trusts, Intention and Declaration' [2014] CLJ 86, 109.

⁹ [2014] EWHC 2507.

Mee's account, this approach makes sense: given the presence of a transaction – the conveyance of title to the moneys from donors to the defendant – an unexpressed intention to create a trust, inferred from background factors, satisfied the 'declaration' requirement. Mee's point is that in the case of trusts by transfer, the 'declaration' is relevant only because it reveals something about the settlor's intentions, and *not* as a specific act that constitutes the trust.

When one turns to self-declarations, because legal title remains with the settlor, there is no legally relevant act or transaction other than the 'declaration' itself. This alone is effective to change the settlor's status from absolute owner to trustee and give the beneficiary equitable title. It follows that the 'declaration' does more than simply provide evidence of the settlor's intentions. As Mee notes:

In the self-declaration situation, the declaration is not merely evidence of the settlor's motive in entering into a particular transaction in a situation where equity regards that motive as controlling the effect of the transaction – instead, the declaration of trust is *in itself* the transaction ...¹⁰

The difference between transfers on trust and self-declarations lies in the role played by the 'declaration'. In the latter case, because the declaration is the only legally relevant event, courts will require evidence of a specific act of 'declaration' in order to find a trust. This is what created problems in *Paul v Constance*. Whilst the deceased's mental state was clear, in that he intended to hold the money for himself and his partner, there was no obvious 'declaration' of this intent. Although Scarman LJ eventually concluded that a trust had been constituted, he described it as a 'borderline' case, where it was 'not easy to pin-point a specific moment of declaration'¹¹ Unlike transfers on trust, in the case of self-declared trusts, courts do insist on a 'declaration' as it is the very act by which a valid trust is created. What is needed, therefore, is some understanding of what kind of statement or act satisfies the 'declaration' requirement.

2. Gifts

The role of the 'declaration' also comes into focus when self-declarations are compared with gifts. It is a settled principle that a donor cannot make a gift of property merely by manifesting an intention to do so. In Knight Bruce LJ's words, '... a gratuitously expressed intention, a promise merely voluntary, or, to use a familiar phrase, *nudum pactum*, does not (the matter resting there) bind legally or equitably.'¹² In addition to manifestation of intention, the donor must complete the necessary act of conveyance, such as the execution of a deed or a physical delivery of the thing. The classic illustration of this principle is found in *Cochrane v Moore*.¹³ An owner of a horse called Kilworth purported to make a gift of one quarter of the horse to the defendant jockey, following the latter's riding of the horse to victory at a race in Paris. There was no doubt over the owner's intention, as his words to the defendant were perfectly

¹⁰ Mee (n xx) 109.

¹¹ [1977] 1 WLR 527, 532.

¹² *Kekewich v Manning* (1851) 1 De GM & G 176, 188.

¹³ (1890) 25 QBD 57.

clear and were followed up with a letter to the stable owner informing him that the defendant now held a share in the horse. However, the Court of Appeal held that the gift failed due to the absence of a delivery. Lord Esher stated:

... actual delivery in the case of a “gift” is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence.¹⁴

Self-declarations, by contrast, have no such requirements. The settlor need not execute a deed¹⁵ or physically deliver the trust property to another in order to constitute the transaction. He can confer rights by mere words alone.

The line between self-declarations and gifts is a fraught one. When a gift has failed for want of delivery, there is an obvious temptation to argue that the donor’s words amounted to a self-declaration of trust in the alternative. This is precisely what happened in *Cochrane v Moore*. Fry LJ’s scholarly judgment, which sets out at length the authorities for delivery requirement, finishes with the almost casual conclusion that the owner’s words could, nonetheless, amount to a declaration of trust: ‘[The owner’s statement] constituted [him] a trustee for Moore of one-fourth of the horse Kilworth.’¹⁶ It is an odd feature of *Cochrane v Moore*, the case which authoritatively established the delivery requirement, that the donor was still able to achieve something very similar to a gift by mere words.

The potential for self-declarations of trust to undermine the substantive requirements of gifts is perhaps the ‘unfortunate’¹⁷ consequence of Lord Eldon’s decision in *Ex parte Pye*. In the well known case of *Richards v Delbridge*,¹⁸ Lord Jessel MR asserted that it should not be possible to save a failed gift by treating it as a self-declaration of trust. The distinction between them is a fine one. The question is whether the donor’s words merely convey general donative intent, or whether they amount to a declaration of trust. As Alexander notes: ‘Stating ‘I give’ without delivering possession has no legal effect; stating ‘I declare a trust’ effectively transfers beneficial ownership, i.e., everything except title.’¹⁹

This distinction was recently tested in the case of *Shah v Shah*.²⁰ Dinesh Shah signed a letter, which purported to dispose of shares in favour of his brother, Mahendra. He delivered the letter to Mahendra, together with the executed share transfer forms but without a share

¹⁴ *ibid* 75.

¹⁵ Formality requirements may be present due to the subject matter of the trust, such as s. 53(1)(b) of the Law of Property Act 1925 if it is a trust of land.

¹⁶ (1890) 25 QBD 57, 73.

¹⁷ *Jones v Lock* (1865) LR 1 Ch App 25, 28 (Lord Cranworth LC).

¹⁸ (1874) LR 18 Eq 11.

¹⁹ G Alexander, ‘The Transformation of Trusts as a Legal Category 1800-1914’ (1987) 5 *Law and History* 303, 331.

²⁰ [2010] EWCA Civ 1408.

certificate (which was held by the company). The letter stated, 'I am as from today holding 4,000 shares in the above company for you subject to you being responsible for all tax consequences and liabilities [arising] from this declaration and letter.' Dinesh argued that the letter merely contained an expression of an intention to make a gift, which was never completely constituted, and therefore was ineffective to vest title in Mahendra. The Court of Appeal disagreed, and held that in fact the letter contained a valid self-declaration of trust in Mahendra's favour. Arden LJ²¹ held that the wording of the letter evinced an intention that it would take effect immediately, and as a matter of law this could only involve a disposition of the beneficial interest in the shares, as legal title could not pass before the share transfer forms had been registered.²² As Dinesh had executed and delivered a stock transfer form, he clearly intended registration to occur in due course. The idea that Dinesh would *hold* (rather than give or assign) the shares for Mahendra pending registration could only be made effective by the imposition of a trust and this was what Dinesh had to be taken in law to have intended. Arden LJ remarked that although it could take some time to complete a gift of shares by registration, '[O]ne of the ways of making an immediate gift is for the donor to declare a trust. In my judgment that is what happened in this case.'²³

The outcome in *Shah* may be contrasted with that in *Gorbunova v Berezovsky Estate*²⁴ where the Russian oligarch, Boris Berezovsky, had promised his partner, in a deed, any proceeds from a successful outcome in litigation that he was conducting. The material words were that '[Mr Berezovsky] hereby irrevocably and unconditionally covenants with [Ms Gorbunova] that he will pay or procure the payment to [her]' of the proceeds. The issue was whether this amounted to a trust or a purported gift, with Arnold J stating that for a trust to arise: '... the words used must show that the settlor intended to dispose of property so that someone else acquired the beneficial interest to the exclusion of himself ... A mere intention to make a gift is insufficient for this purpose.'²⁵ He construed the words in the deed as a promise to make a gift of the proceeds to Ms Gorbunova, rather than a declaration of trust, as they did not evince an intention to dispose immediately of the beneficial interest in the proceeds.²⁶

The principal distinction between gifts and self-declarations of trust is that in the former the donor *transfers* his rights to another, whereas in the latter the settlor *holds* his rights for another. These transactions are completed in different ways. In the case of a gift, the donor's donative intent must be backed up with some act, such as a physical delivery or the execution of a deed, that evinces the donor's intention irrevocably to transfer rights. In the case of a self-declaration of trust, because the settlor continues to hold his rights, something a little more subtle is required: the settlor must do some act, which the law can take cognizance of, which demonstrates that he is now holding his rights in a different capacity, i.e. an act that shows that he no longer holds them for himself, but for a beneficiary. The most obvious act is the settlor's 'declaring' of this intention. It is this declaration, as

²¹ Elias and Norris LJ concurring.

²² *ibid* [13].

²³ *ibid* [22].

²⁴ [2016] EWHC 1829.

²⁵ *ibid* [55].

²⁶ *ibid* [60]-[61].

opposed to general donative intent seen in the context of a gift, that marks out self-declared trusts.

3. Constructive Trusts

The final boundary that puts pressure on the 'declaration' requirement is that with constructive trusts. The category of constructive trusts is a miscellaneous one, encompassing several trusts 'constructed' by law for different reasons.²⁷ Some of these, such as trusts arising in response to wrongdoing²⁸ or (controversially) unjust enrichment,²⁹ are not important for present purposes. The difficult cases are those that are said to arise in response to the intention of the parties. The prime example of this, found in the context of family property,³⁰ is the 'common intention constructive trust'.³¹

In the typical 'sole name' case a cohabiting couple occupy a house as their family home, but the legal title is registered in one of their names only.³² There is usually some form of agreement between the parties, which can be express or inferred from their conduct, to share the value of the home, and a detrimental reliance by one of the parties on this agreement.³³ Take the case of *Thompson v Hurst*³⁴, where the claimant and defendant, who had been co-habiting as council tenants, bought their house under a right-to-buy scheme. As the claimant's employment history was quite uneven, they were advised to make the mortgage application, and acquire the title to the land, in the defendant's sole name. They continued to live together in the house and, although the defendant was responsible for mortgage repayments and other major costs, the claimant did contribute to household expenses. When the relationship broke down, the claimant successfully argued that he had an interest under a common intention constructive trust. The basis of this trust was the trial judge's finding that, while the parties had not intended to become legal co-owners, they had intended to share in the value of the home. This common intention was inferred from the initial discussion between the parties as well as their subsequent conduct. The claimant had also relied upon this agreement to his detriment.

The precise requirements of the common intention constructive trust are a matter of some dispute.³⁵ The courts have traditionally applied a restrictive approach to the question

²⁷ See YK Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' [2016] CLJ 306, for a helpful overview of the category.

²⁸ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

²⁹ *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, cf *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12.

³⁰ Other examples might include the *Pallant v Morgan* equity.

³¹ See *Marr v Collie* [2017] UKPC 17 for the most recent judicial analysis of the 'common intention constructive trust'.

³² This is in contrast to joint names cases, such as *Stack v Dowden* [2007] 2 AC 432, where the parties are jointly registered as proprietors and a statutory trust arises under s. 34 of the Law of Property Act 1925.

³³ See *Abbott v Abbott* [2007] UKPC 53 for an example of a 'single name' family home case.

³⁴ [2012] EWCA Civ 1752.

³⁵ The case law and academic literature on this topic is huge. For an excellent account of the current state of the law, see B Sloan, 'Keeping up with the Jones case: establishing constructive trusts in the 'sole legal owner' scenarios' (2015) 35 LS 226.

of what types of evidence might be admitted of a common intention³⁶, but more recent cases have been much more liberal in this regard.³⁷ What is entailed in the 'detrimental reliance' requirement is also a difficult question. What is not disputed, however, is that a common intention is necessary for the creation of such trusts. Etherton LJ made this clear in *Thompson v Hurst* when he said:

In the case of a single legal owner, such as the present, where there is no express declaration of a trust, the claimant has first to establish some sort of implied trust, normally what is now termed a common intention constructive trust ... The claimant must show that it was intended that he or she was to have a beneficial interest at all. That can only be achieved by evidence of the parties' actual intentions, express or inferred, objectively ascertained.³⁸

This was also made clear in the leading case of *Jones v Kernott*³⁹, where Lord Walker and Lady Hale said: 'The first issue is whether it was *intended* that the other party have a beneficial interest in the property at all.'⁴⁰

In a case such as *Thompson v Hurst*, if the court finds that the parties have a 'common intention', then it must also be true to say that the legal proprietor has formed an intention to hold her title, in part, for the other party. Given this fact, one might ask why this is not simply categorized as an express trust, rather than a constructive trust? One answer might be found in s. 53(1)(b) of the Law of Property Act 1925, which provides that an express trust of land must be manifested and proved in writing. The intention of the legal proprietor in *Thompson v Hurst* was established by parol evidence, not written. For some commentators this means that these trusts can only take effect as constructive trusts, as these have no formal requirements.⁴¹ We would suggest that this is a slightly superficial answer to the question. If Parliament, for instance, were to abolish s. 53, would we be happy to reclassify the trust in *Thompson v Hurst*, and other family homes cases, as 'express trusts', constituted by self-declarations? Perhaps not. What typically happens in these cases is that the intention of the parties, so far as it exists, emerges over time, and is inferred from vague discussions and a pattern of behaviour. There is rarely anything that might be called a 'declaration'; rather, it is the cumulative conduct and discussions of the parties which gradually leads to an understanding between them.⁴² Given that intent is inferred in this way, perhaps the category of 'implied trusts'⁴³ would be the natural home for these cases. However, ever since Maitland

³⁶ *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

³⁷ *Stack v Dowden* [2007] 2 AC 432, per Baroness Hale at para [69].

³⁸ [2012] EWCA Civ 1752, [22].

³⁹ [2011] UKSC 53.

⁴⁰ *ibid* [52] (emphasis added)

⁴¹ For critical discussion of this view, see W Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, Oxford 2010).

⁴² A good comparison might be personal property cases involving similarly vague commitments to share the value of the thing, where courts have adopted a constructive trust analysis. See *De Bruyne v De Bruyne* [2010] EWCA Civ 519 for an example, but cf *Rowe v Prance* (n xx).

⁴³ Reference to trusts created by 'implication of law' are found in the Statute of Frauds 1677, s. viii. The modern equivalent, s. 53(2) of the Law of Property Act 1925, continues to refer to 'implied trust'. Early editions of some trusts treatises contained sections on 'implied trusts' (e.g. see J Flint (ed), *Lewin on Trusts* (8th ed, Charles Edson, Boston 1888) at 108).

argued that there is no such thing as an 'implied trust'⁴⁴, it does not appear that any court or scholar has taken them seriously as a category of trust.⁴⁵ Maitland's argument was that whenever intention was 'implied' or 'inferred' from words and conduct, there was simply an express trust. This is problematic as it fails to recognize that it is not intention per se that creates the trust, but the declaration of the intent. In cases where intention has to be 'implied' or 'inferred', it will always be difficult to say that the settlor has 'declared' her intent.

What this analysis shows is that not all trusts based upon intention are 'express trusts'. Some intention-based trusts are classed, in the absence of an 'implied trust' category, as 'constructive'. Further, the line between express and constructive trusts seems to relate to the role played by intention. In the common intention constructive trust, intention is necessary, but not usually sufficient, for the creation of the trust. Courts tend to consider other factors, such as detrimental reliance of the co-habiting partner, as important for the creation of the trust. By contrast, in self-declarations, the settlor's intention, or rather, the form in which the intention is manifested, the declaration, is sufficient for the creation of the trust. As Bryan recently put it:

The difference lies in the distinction between an objective manifestation of intention as a constitutive act for the creation of express trust obligations, and an intention which is not a constitutive act but which, in conjunction with other factors, justifies the imposition of a constructive trust.⁴⁶

Pulling these threads together, we can see the importance attached to the declaration of trust. It is not merely a necessary fact for the establishment of the trust; it is the legally relevant transaction, the existence of which constitutes the trust.

B. What is a Declaration?

In the last section we saw that simply because a person has formed the intention to hold their rights for the benefit of another, does not mean that there has been a 'self-declaration' of trust. If it did then the line between express trusts, and intention-based constructive trusts, would break down. As French CJ recently warned, 'The ascertainment of an express trust may come to resemble the imposition of a constructive trust ...'⁴⁷ To avoid this the law needs to conceptualise the thing that distinguishes self-declarations from other types of trust, namely the 'declaration'.

The origins of the word, 'declaration' are to be found in the Latin, *declarare*, which means to make clear. A 'declaration' is therefore defined as: 'the action of explaining or

⁴⁴ Maitland, *Equity and the Forms of Action*, 75-76.

⁴⁵ See G Costigan, *The Classification of Trusts as Express, Resulting and Constructive* (1914) 27 HLR 437, 438-439 for discussion of Maitland's arguments.

⁴⁶ M Bryan, 'The Inferred Trust: An Unhappy Marriage of Contract and Trust' (2016) 69 CLP 377.

⁴⁷ *Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 6, [8].

making clear'; 'the action of setting forth, stating, or announcing, publicly, formally, or explicitly; a positive statement, an emphatic or solemn assertion'; or, in law, 'a formal affirmation or statement, usually made in writing'.⁴⁸ In linguistic terms, a declaration is a particular kind of illocutionary (or speech) act,⁴⁹ which is performative, in that its propositional content (i.e., its object) may be achieved merely by its utterance, i.e., where 'saying makes it so'.⁵⁰ As Searle explains, 'If I successfully perform the act of declaring a state of war, then war is on.'⁵¹ In the following sections we will consider the different ways in which we might think of this 'illocutionary act' as a legal concept.

1. The 'declaration' as a pure formality

One way to conceptualise the 'declaration' is purely as a legal formality. In this model one draws a distinction between the substantive fact which is stated, and the form in which it is expressed, the *declaration*. A formality, as Birks explains, may be thought of as an 'additional requirement':

[A] formal requirement will be one which either adds to what would 'naturally' be done or restricts the modes in which it could so be done by excluding some which would seem to work just as well if the law would let them.⁵²

Whilst there is no single type of formality⁵³, the rules that we tend to refer to as 'formalities' have similar functions, such as the promotion of caution, the provision of evidence of the intention of the parties, and the prevention of fraud.⁵⁴ Can we think of a declaration as something that performs these functions, by imposing an additional requirement on what would otherwise 'naturally' be done to create a trust?

Judges sometimes appear to think of 'declarations' in other areas of law as a type of formality. Take the case of *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald*⁵⁵ where the court considered the requirement under s.317 of the Companies Act 1985 that a director who had an interest in a contract with the company must 'declare' the nature of that interest at a meeting of the company. Here, the relevant substantive fact was the director's interest. Lightman J explained that the effect of s.317 was to ensure that that this would be drawn to

⁴⁸ R. Trumble & A. Stevenson (eds), *Shorter Oxford English Dictionary* (5th ed) (Oxford University Press 2002), vol I, 606.

⁴⁹ On illocutionary acts generally, see R. Searle and D. Vanderveken, *Foundations of Illocutionary Logic* (Cambridge University Press 1985) 1; D. Vanderveken, *Meaning and Speech Acts, Volume 1 Principles of Language Use* (Cambridge University Press 1990-1991) 8.

⁵⁰ R. Searle, 'A Taxonomy of Illocutionary Acts' in R. Searle, *Expression and Meaning, Studies in the Theory of Speech Acts* (Cambridge University Press 1979) 16.

⁵¹ *ibid* 17.

⁵² P Birks, *The Roman Law of Obligations* (OUP, Oxford 2014) 34.

⁵³ Consider, for instance, the different formal rules for the creation and disposition of equitable interests found in s. 53(1)(b) and s. 53(1)(c) of the Law of Property Act 1925: the former is an 'evidential rule' which requires written evidence of the transaction, whereas the latter is 'constitutive rule' where the formality is the transaction.

⁵⁴ P. Mechem, 'The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments' (1926-1927) 21 Ill L Rev 341, 348-349; L. Fuller, 'Consideration and Form' (1941) 41 Colum L Rev 799, 800-801.

⁵⁵ [1996] Ch 274.

the attention of all the directors, but this must happen in a particular way. He held that the making of the declaration 'should be the occasion for a statutory pause for thought about the existence of the conflict of interest and of the duty to prefer the interests of the company to their own'.⁵⁶ The disclosure of the interest had to be 'a distinct happening at the meeting' and recorded in the minutes.⁵⁷ Where more than one director was present at the meeting, the declaration had to be made out loud, and a failure to record it in the minutes would not preclude proof that it had been made. Where the company was run by a sole director, he could make the declaration alone, and even silently, but it had to be recorded in the minutes, as otherwise 'the court may well find it difficult to accept that the declaration was made'.⁵⁸ Lightman J's remarks suggest that he clearly regarded the declaration as performing some or all of the functions of a legal formality. He explicitly referred to its cautionary effect and, where it was made in the presence of other directors, its evidentiary function. It was also likely to perform a channeling function, by providing a process which – in the absence of any objections at the meeting - would enable the director to proceed with the transaction despite the apparent conflict of interest.

In trusts cases, the substantive fact is the settlor's intention, as no trust can arise without proof of it.⁵⁹ If a court is satisfied that a settlor formed the intention to hold rights for the benefit of another, that finding of fact may 'naturally' justify the creation of a trust. If the 'declaration' is significant purely as a legal formality, we would be saying that it imposes an 'additional requirement' to the proof of the settlor's intention, specifically, the need to express the intention in a particular way. Conversely, we would also be saying that the 'declaration' could lead to the creation of a trust even if the substantive underlying fact, the intention, was absent.

In some self-declared trust cases the courts appear to regard the 'declaration' as having formal significance. We can perhaps see this in *Paul v Constance* where, it will be recalled, a settlor had told his partner on several occasions that a particular sum of money was 'as much yours as mine'. The court, in construing these terms, had little doubt that the necessary fact of intention was present. What troubled the court was whether this intention was expressed in the appropriate form, with Scarman LJ noting the trouble in pinpointing '... a specific moment of declaration ...'⁶⁰ If the declaration is a form, separate from the underlying fact of the settlor's intention, then what does the form consist of? Is there a particular set of words that, when uttered, produce the effect of the trust regardless of whether or not the underlying fact of intention is present? An analogy might be found in the Roman contract of *stipulatio*, which required parties to contract by a question and answer that used corresponding verbs ('Will you give?', 'I will give'; 'Do you promise?', 'I do promise' etc). Failure to express the agreement in this way would render the contract void, notwithstanding the fact that the parties were in agreement with each other. Is there anything comparable in trusts? If there were 'magic words', the obvious ones would be 'I declare myself trustee,' which would, by their utterance, have a performative effect.

⁵⁶ Ibid 283.

⁵⁷ Ibid.

⁵⁸ Ibid 284.

⁵⁹ *Knight v Knight* (1840) 3 Beav 148; 49 ER 58.

⁶⁰ [1977] 1 WLR 527, 532.

However, it is clear that the failure to use words such as 'declare' and 'trust' does not prevent a self-declared trust from arising, and that in fact, for these purposes, 'a declaration' is a fairly loose concept. The 'declaration' does not require the settlor's intention to be expressed in any particular way, and it may be written⁶¹ or oral.⁶² There is also authority that a 'declaration' may also be inferred from conduct,⁶³ or, at the very least, from what the settlor has said or done.⁶⁴ Where words are used, they must be 'clear, unequivocal and irrevocable, but it is not necessary to use any technical words'.⁶⁵ Thus, 'any expressions will suffice, from which it is clear that the party using them considers himself a trustee, and adopts that character'.⁶⁶ Although, occasionally, the solemnity of the circumstances in which the 'declaration' is made has been emphasized by the courts,⁶⁷ generally this does not seem to be a relevant feature when assessing whether a 'declaration' has been made. Furthermore, there appears to be little, if any, discussion about the cautionary or evidentiary effect of the 'declaration', which one might expect to see if the courts were concerned with its status as a formality.

Take, for example, *Rowe v Prance*⁶⁸, where the defendant, who was in a relationship with the claimant, acquired title to a yacht and invited the claimant to live on it with him. The defendant had casually referred to the yacht as 'ours' on a few occasions. When coupled with other background factors, such as the claimant's giving up of her lease and their treating the yacht as their residence, this led the court to conclude that a trust had been created. Warren QC, sitting as a high court judge, said:

I am satisfied that Mr Prance effectively constituted himself an express trustee of the boat; writing is not required since we are dealing with personal property in relation to which there is no formality.⁶⁹

The facts of *Rowe v Prance* could not be further removed from the paradigm 'declaration' where a settlor solemnly executes a deed which states 'I declare a trust'. The notable feature of the case is the casualness of the communications.

Indeed, it seems that the existence of a 'declaration' does not depend on the utterance by the settlor of any particular words at all. For example, in *Re Kayford*,⁷⁰ a mail order company took advice from its accountants as to how ensure that any customers who had paid it money but not yet received goods, could be refunded if the company became insolvent. The accountants advised the company to transfer the customers' moneys from its current account to a separate savings account, to be designated 'Customers' Trust Deposit Account'. The moneys were transferred into a dormant company account but the bank did not give the account the required designation until the day after the company went into

⁶¹ e.g., *Middleton v Pollock* (1876) 2 Ch D 104.

⁶² e.g., *M'Fadden v Jenkyns* (1842) 1 Ph 153, 157 (Lord Lyndhurst LC); 41 ER 859; *Paul v Constance* (n xx).

⁶³ *Heartley v Nicholson* (1874-1875) LR 19 Eq 233, 242 (Bacon VC).

⁶⁴ *Paul v Constance* (n xx) 531 (Scarman LJ).

⁶⁵ *Grant v Grant* (1865) 34 Beav 623, 625 (Romilly MR).

⁶⁶ *Dipple v Corles* (1853) 11 Hare 183, 184; 68 ER 1239.

⁶⁷ e.g., *Choithram International SA v Pagarani* [2001] 1 WLR 1, 12 (Lord Browne-Wilkinson).

⁶⁸ [1999] 2 FLR 787.

⁶⁹ *ibid.*

⁷⁰ [1975] 1 WLR 279.

voluntary liquidation. Nevertheless, Megarry VC had no doubt that a trust had been established. He held that there was no need to use the words 'trust' or 'confidence', and the question was 'whether in substance a sufficient intention to create a trust has been manifested.'⁷¹ The purpose of transferring the moneys into the savings account was 'to ensure that the moneys remained in the beneficial ownership of those who sent them', and a trust was 'the obvious means of achieving this'.⁷² A trust could be created by the company if it took 'suitable steps on or before receiving the money' and this would be sufficient to transform the company's obligations towards the customer 'from contract to property, from debt to trust'.⁷³ The segregation of money in a separate account was unnecessary, but it was a 'useful' indication of the company's intention to create a trust. Megarry VC clearly regarded the segregation of the moneys as sufficient to support the finding that a trust had been declared, as the trust was held to cover *all* moneys paid in by customers, including those which had been paid in before the account had been expressly designated as a trust account..

Together, these cases⁷⁴ suggest that the 'declaration' requirement may be satisfied not by the presence of particular words, but because the court is satisfied, as a result of the settlor's words and conduct around the time the trust is alleged to have been created,⁷⁵ that he or she has formed an intention to hold the rights for the benefit of another. Conversely, using the magic words of 'declaration' and 'trust' do not lead to the creation of the trust, if the underlying fact of intention (objectively interpreted⁷⁶) is not present. Take the recent case of *Singha v Heer*⁷⁷, which involved a dispute between business partners. The claimant had provided a loan to the defendant to fund the purchase of a home, the defendant granting a mortgage in return. In written correspondence between the parties, the defendant had referred to his holding the title to the land 'on trust' for the claimant. The court held that this did not automatically constitute a trust, but that the court must ask what intention is reasonably conveyed by these words. In the context they meant no more than an admission of the claimant's security interest. A similar point emerges from *Re B (child; property transfer)*,⁷⁸ where a stipulation that a mother was to hold 70% of the proceeds of sale of the family home 'for the benefit of' her daughter was held to be no more than an incantation of certain relevant statutory wording, and did not create a trust for the daughter.

In light of the above, it seems clear that the 'declaration' does not operate purely as a formal requirement, as it neither adds anything to, nor is a substitute for, the settlor's intention. It is difficult, therefore, to prize apart the 'declaration' requirement from the need to establish the settlor's intention to hold rights for another. If this is right, then the crucial question is what type of intention is required. This brings us back to the difficulty, averted to earlier, of distinguishing such trusts from intention-based constructive trusts where, it will be

⁷¹ *ibid* 282.

⁷² *ibid*.

⁷³ *ibid*.

⁷⁴ See also *Re English and American Insurance Co Ltd* [1994] 1 BCLC 649; *Re Branston & Gothard Ltd* [1999] 1 All ER (Comm) 289; *Re Lewis's of Leicester Ltd* [1995] 1 All ER 192, [1994] 1 WLR 1181 – all cases where the fact of, and reasons, for segregation, were crucial to the recognition of the trust.

⁷⁵ *Bentley v Mackay* (1851) 15 Beav 12, 19; 51 ER 440, 441 (Romilly MR).

⁷⁶ *Commissioner of Stamp Duties (Queensland) v Jolliffe* (1920) 28 CLR 178, 187 (Isaacs J, dissenting); applied, *Byrnes v Kendle* (n xx) [28] (Doyle J).

⁷⁷ [2016] EWCA Civ 424.

⁷⁸ [1999] 3 FCR 266; [1999] 2 FLR 418 (CA).

recalled, there is also a requirement that settlors form an intention to hold rights for another. Why, it may be asked, is the 'declaration' requirement not equally satisfied in those cases?⁷⁹

2. Declarations as 'intention to be bound'

If the declaration requirement is not a matter of form, then this would suggest that it is a matter of substantive fact. If so, then what fact must be proved under the 'declaration' requirement? We would suggest that it is concerned with the settlor's intention. Not, it should be stressed, the settlor's basic intent to hold rights for the benefit of another. Rather, it is the settlor's intention that, by their words or actions, they thereby hold rights for the benefit of another. To put it a little differently, we are suggesting that for an express trust to be effectively declared, two separate intentions must be manifested: (a) An intention to hold rights for the benefit of another, and (b) An intention that by the settlor's very words or action, the trust relationship should be immediately constituted.

(a) An intention to hold rights for the benefit of another

The settlor's intention to hold rights for the benefit of another is itself a composite intention. The effect of the trust is not only to confer the right to beneficial enjoyment of the property on the beneficiary but also to subject the settlor to the obligations of a trustee. Therefore, the settlor's intention must be to retain his or her legal rights to the property, whilst conferring the benefit of the property on another *and* coming under 'an onerous obligation' to that person.⁸⁰ The courts tend to emphasise the first element, i.e., the intention to confer a benefit on another. The key question is said to be whether the settlor has divested himself or herself of the entire interest in the property,⁸¹ such that whatever legal right he or she retains is held in trust for the beneficiary.⁸² Fewer authorities dwell on the obligations of trusteeship. However, on occasion the courts have asked whether the settlor 'intended to subject himself to all the consequences of the liability to account ...'⁸³

One reason why the courts focus more on whether the settlor had an intention to part with the beneficial interest in the property is perhaps because many self-declared trusts will be bare trusts. This is the likely consequence, at least in cases where the 'declaration' was oral or has been inferred from the settlor's conduct. If the trust is a bare trust, the settlor-trustee will not be subject to management or administrative duties.⁸⁴ However, there are cases relating to transfers on trust, which suggest that bare trustees are not necessarily free of the core fiduciary obligation of loyalty, at least where they have accepted the terms of the

⁷⁹ e.g., *Royal Bank of Scotland v Brogan* [2012] NICH 21.

⁸⁰ A. Chaytor & W. Whittaker (eds), J. Brunyate, *F. Maitland, Equity, a Course of Lectures* (Cambridge University Press 1936) 72.

⁸¹ *Bentley v Mackay* (1851) 15 Beav 12; 51 ER 440,

⁸² *Warriner v Rogers* Law Rep 16 Eq 340, 348 (Bacon VC); cited with approval in *Richards v Delbridge* (1874) LR 18 Eq 11. For similar statements, see *Grant v Grant* (1865) 34 Beav 623, 625 (Lord Romilly MR); *Jones v Lock* (1865) 1 Ch App 25, 29 (Lord Cranworth LC); *Paul v Constance* (n xx) 531.

⁸³ *Dipples v Corles* (n xx) 186 (Page Wood VC); see also *Lyell v Kennedy, Kennedy v Lyell* (1889) 14 App Cas 437, 457 (HL) (Lord Selborne)

⁸⁴ *Christie v Ovington* (1875) 6 Ch D 279, 281 (Hall VC); *Re Docwra* (1885) 29 Ch D 693, 696 (Bacon VC).

trust;⁸⁵ *a fortiori* in the case of self-declared trustees. Moreover, a self-declared trustee is also likely to be subject to minimal custodial obligations, such as not to dispose of the property for his or her own benefit.

(b) An intention that by the settlor's very words or action, the trust relationship be constituted

It is quite common for a settlor to intend not only the creation of a trust, but its creation by a specific utterance or action. Take the case of *Rabin v Gerson*⁸⁶ where the claimant expressed, in instructions to counsel, a wish to advance money to a Jewish educational association upon a charitable trust. However, the trust deed subsequently executed by the claimant did not reflect this, with the words in the deed conveying an intent to make an absolute gift to the association. The court held that it was not permissible to consider the communications with counsel as evidence of the terms of the transfer. Fox LJ said: 'Such evidence, I think, is simply parol evidence of the intention of the grantor ... The result, in my view, is that the opinions cannot be referred to generally for the assistance that their contents may give.'⁸⁷ One may argue that this ignores the intention of the settlor, as it was clear from the earlier communication that a charitable trust, not an outright gift, was desired. However, to take this view would be to ignore the role of the document. Where a settlor has created a trust by executing a trust deed, the normal inference is that they intended the transaction to take effect according to terms contained in the document. Earlier drafts and other statements of intent may be vague or inconsistent, reflecting changes or refinements of their wishes. The final document is usually meant to supersede these earlier expressions by giving a final statement of the terms.⁸⁸ The important point for present purposes is that the settlor did not merely intend a transaction; they also intended that the transaction take effect according to a specific utterance, the execution of the deed. The court would have frustrated this intention had they admitted evidence of earlier statements in ascertaining the terms of the trust.

Although concerned with an issue of interpretation, rather than constitution, what *Rabin v Gerson* illustrates is the double nature of a settlor's intention, which must be present in order that a self-declared trust may be constituted. There may be an underlying desire to hold rights for another's benefit, but the settlor must also intend, by a specific statement or act, for those legal consequences to follow. For this to happen, it is unnecessary that the settlor understand precisely the mechanics of trust law; it is sufficient if he or she broadly understands the consequences of his or her actions, i.e., that he or she is holding rights for another person's benefit.⁸⁹

⁸⁵ *Brown v IRC* [1965] AC 244 (HL), 265 (Lord Upjohn); *Clarence House Ltd v National Westminster House Ltd v National Westminster Bank plc* [2010] 1 WLR 1216 [43] (Ward LJ)

⁸⁶ [1986] 1 WLR 526.

⁸⁷ *ibid* 531-532.

⁸⁸ As some scholars have pointed out, the parol evidence rule functions in a way that is similar to 'entire agreement' clauses. For discussion see D McLauchlan, 'The Entire Agreement Clause: Conclusive or a Question of Weight?' (2012) 128 LQR 521.

⁸⁹ *Byrnes v Kendle* [2009] SASC 385.

It follows that expressing a desire to create a trust in the future will not constitute a 'declaration'.⁹⁰ This is clear from *Bayley v Boulcott*,⁹¹ where a mother was entitled to property under the will of a relation. In a conversation with the executor of the will, she expressed an intention to make a settlement of part of that property upon her daughter, and requested him to instruct her solicitor to prepare the settlement. When it was brought to her for execution, she had changed her mind and refused to sign it. Leach MR held that a declaration of trust of personal property could be made orally, but the mother's conversation with the solicitor could not be considered 'as being, on her part, a fixed and concluded declaration of trust in favour of the daughter.'⁹² It was no more than an expression of her intention to make a declaration of trust in the future by an instrument which she had authorised the executor to prepare, the terms of which had not yet even been considered.

The same approach can be seen in the case of *Re Farepak Food and Gifts Ltd*.⁹³ A company officer, aware that the company was about to go bankrupt, telephoned the company's solicitors and instructed them to draw up a deed declaring a trust over the company's current account (which contained customer moneys) for the benefit of the customers. When the deed was drafted, owing to some confusion on the solicitor's part, the deed referred to an (empty) savings account. In an attempt to avoid having to plead rectification of the trust deed, it was argued that, prior to the execution of the flawed document, a trust over the current account had already been constituted: the settlor had, it was pointed out, already expressed a clear intention to create a trust over the current account in the conversation with the solicitor when the instructions were initially given. Rejecting the argument, Mann J said:

The directors clearly manifested an intention to create a trust, but they have to do something in the nature of a declaration in order actually to create it. What they did was execute the deed of trust. There is no evidence of any other act going beyond a mere declaration of intention, apart from the execution of the deed, that is even a candidate. Accordingly an express trust arises out of the deed or not at all.⁹⁴

It is worth pausing to consider this. The company officer had, in the telephone conversation prior to the execution of the deed, expressed in the clearest terms a desire to hold moneys on trust for the benefit of its customers. Why could that not amount to a declaration of trust? The answer, it is suggested, is because, as in *Bayley v Boulcott*, the officer did not intend those particular words – uttered in the course of the telephone conversation – to constitute the trust. This is obvious from the fact that they were desirous of executing a more formal document shortly after. There may have been an intention to create a trust, but not by those particular words. Both cases may be contrasted with *Shah v Shah*,⁹⁵ where the words 'I am as from today holding ... for you' in a letter were held to evince a clear intention that the letter would immediately confer a beneficial interest in the shares, and thereby create a trust.

⁹⁰ *Grant v Grant* (1865) 34 Beav 623, 625 (Lord Romilly MR).

⁹¹ (1828) 4 Russ 345; 38 ER 835. See also *De Bruyne v De Bruyne* [2010] EWCA Civ 519.

⁹² *ibid* 347 (Leach MR).

⁹³ [2006] EWHC 3272, [2008] BCC 22.

⁹⁴ [45].

⁹⁵ (n [xx]) and accompanying text.

In light of the cases discussed above, it seems fair to say that the expression – through words or acts – of an intention to be immediately bound is a necessary prerequisite to a finding that a trust has been successfully declared.⁹⁶ Two further observations may be made in this regard. First, even though the courts do not require proof of a performative illocutionary act such as ‘I declare a trust’, the underlying intention which they look for is the same as that which underpins such an explicit declaration. Second, the type of intention required to create an enforceable self-declared trust is very similar, if not identical to that required for the valid non-physical delivery of deeds⁹⁷ and, arguably, the making of promises,⁹⁸ i.e., an intention that the words or acts of the maker of the deed or the promisor immediately bind him or her and thus have peremptory effect.

3. Declarations as open or public acts, or acts of communication

If the argument in the previous section is accepted, the question then arises whether the *only* significance of the ‘declaration’ lies in the fact that it constitutes an expression of the settlor’s intention. Is there anything to suggest that to constitute a ‘declaration’ for these purposes, the settlor’s words or acts must also be communicated to someone else, or made public in some way? In other words, will an entirely private ‘declaration’ suffice to create a trust?

There does not appear to be any legal requirement that for a ‘declaration’ to create a valid trust it must be made publicly. Thus, a settlor can make a valid ‘declaration’, even if he or she has not communicated their intention to the intended beneficiary. For example, in *Benbow v Townsend*,⁹⁹ the testator lent £2,000 by way of mortgage to the trustees of Tottenham Court Chapel, and subsequently said to them that he should receive the interest on the loan, but that the principal was to be his brother, Job’s. After the testator died, his will made no mention of the mortgage, and the question was whether the £2,000 belonged to his estate or to Job. The executor and residuary legatees argued that because the testator had not communicated his intention to Job, no trust was created and the testator’s act had been revocable, so the money resulted back to his estate. The court rejected this argument and held that the property belonged to Job, ‘by force of the testator’s declaration that the £2,000 should, after his own death, be the property of his brother, Job.’¹⁰⁰

Furthermore, a written ‘declaration’ will be valid, even if it is not contemporaneously communicated or shown to anyone else *at all*. *Middleton v Pollock*¹⁰¹ provides a vivid example. A solicitor, who had died insolvent, was found to have declared himself trustee of certain property for E. The ‘declaration’ took the form of a memorandum, by which the solicitor declared himself trustee of the property to secure the repayment of money he had

⁹⁶ *Stablewood Properties Ltd v Viridi* [2010] EWCA Civ 865, esp [28]-[29] (Arden LJ).

⁹⁷ *Xenos v Wickham* (1867) LR 2 HL 296, 312 (Blackburn J); *Halsbury’s Laws of England*, vol 32 (2012) [201].

⁹⁸ J. Raz, ‘Promises and Obligations’ in P.M.S. Hacker & J. Raz (eds), *Law, Morality and Society, Essays in Honour of HLA Hart* (Oxford University Press 1977) 211, 217, 224. See also J.R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969) 60.

⁹⁹ *Benbow v Townsend* (1833) 1 My & K 506, 39 ER 772; see also *Ex parte Pye* (n xx); *Wheatley v Purr* (1837) 1 Keen 551; 48 ER 419; *Stapleton v Stapleton* (1844) 14 Sim 186; 60 ER 328; *Standing v Bowring* (1885) 31 Ch D 282.

¹⁰⁰ *ibid* 510 (Leach MR).

¹⁰¹ *Middleton v Pollock* (1876) 2 Ch D 104.

received from E but failed to repay. The memorandum was found in his safe after he died, together with other similar memoranda in favour of other clients. Its contents had never been disclosed to E, and there is nothing in the case which suggests it had been disclosed to anyone else at the time it was made. The court held that even if the solicitor had executed the memorandum with knowledge of his insolvency, E was still entitled to the benefit of the security against the other creditors because the solicitor was not a bankrupt when he made the declaration of trust, and intended to give them security. This conclusion presupposes that the declaration of trust was valid even though it had not been communicated to E (or anyone else). There is also academic support for the view that a written 'declaration' may create a valid trust and thereby sever a joint tenancy by partial alienation, even where it is made entirely privately.¹⁰²

Turning to oral declarations of trust, a declaration made in the presence of witnesses will suffice to create a trust,¹⁰³ but it is unclear whether an oral declaration made privately will have the same effect. There are two reasons why this may seem difficult to envisage. First, a solitary expression of intention, a commitment made in private to oneself, is something that may give rise to evidential difficulties unless it is recorded or its maker attests to having made it. Second, the question arises whether such a 'declaration' would ever adequately demonstrate the settlor's intent for the trust to be immediately and irrevocably constituted by his or her very words or actions.

Lightman J's comments in the *Neptune* case¹⁰⁴ suggest that in a company law context the courts may be prepared to take cognisance of 'declarations' made privately. A sole director held a board meeting with the company secretary, at which he authorised a payment by the company to himself. The minutes of the meeting made no reference to his having declared his interest in the arrangement, as required by s.317 of the Companies Act 1985. On a summary judgment application by the company, Lightman J held that there was a triable issue as to whether in fact the relevant declaration had been made at the meeting, and so he granted the director leave to defend the action. He also went further and remarked (*obiter*) that it was possible for a director to make the relevant declaration aloud to himself or mentally at a solo meeting where no-one else was present, although if it were not recorded in the minutes, the court would find it difficult to take cognisance of it. This may be because, like an unexpressed mental resolution to hold property on trust, such a 'declaration' is objectively unknowable.¹⁰⁵ By analogy with *Neptune*, it may be argued that a private mental resolution to hold property on trust for another may be treated as a valid 'declaration' if it is recorded by the settlor and therefore capable of objective proof.

The more difficult question is whether an oral 'declaration' of trust, which was made privately but overheard by a third party, is sufficient to create a trust. The authors are unaware of any authority directly on point. On the *Neptune* analysis, a 'declaration' made in such a way would be capable of objective proof and therefore valid. However, there are differences between declarations of interest and declarations of trust, which arguably cast doubt on such a conclusion. The purpose of making a declaration of interest is exculpatory -

¹⁰² J. Brown, 'Severance of Joint Tenancy of Land by Partial Alienation' (2001) 117 LQR 477, 491.

¹⁰³ *Grant v Grant* (1865) 34 Beav 623.

¹⁰⁴ [1996] Ch 274.

¹⁰⁵ D. Klinck, *Lord Nottingham and the Conscience of Equity* (2006) 67 *Journal of the History of Ideas* 123, 129.

to obtain the company's consent to what would otherwise constitute a breach of fiduciary duty - and it does not give rise to any obligation on the director's part. The effect of a valid 'declaration' of trust is immediately and irrevocably to subject the alleged settlor to an obligation to hold the property for the benefit of another, and to transfer the beneficial interest in the property to that person. For this reason, it must be debatable whether equity should treat words privately spoken by a settlor to himself aloud as sufficient without more to evince an intention thereby irrevocably to bind himself as trustee. Intuitively, it seems preferable to conclude that for the settlor's words to be binding in law, they must be recorded, or communicated to, or said in the presence of, someone else.

C. Conclusion

We have argued that the 'declaration' is not purely a formality requirement. Rather, it requires proof of a substantive fact, i.e., the settlor's intention. As described earlier, a double intention is required. First, the settlor must intend to hold rights for the benefit of another. This is a composite intention, which involves an intention to confer the beneficial interest in the property on someone else, and to assume the obligations of a trustee. Second, the settlor must intend, by the very words said or acts done, to constitute the trust relationship. What is it about these features of the 'declaration' that justifies the recognition and enforcement of these trusts?

It is difficult to identify a clear historical explanation for Lord Eldon's decision in *Pye* and similar cases.¹⁰⁶ Previous concerns about enforcing declarations of trust in favour of volunteers had rested partly on the idea that any obligations owed to volunteers could only ever be moral and unenforceable in equity, and partly on the view that property should not be put beyond the reach of creditors.¹⁰⁷ Lord Eldon does not discuss these concerns in his judgments, and Macnair argues that the suggestion that equity would never enforce trusts which were merely voluntary may have been based on general statements in *obiter dicta* and would have been 'profoundly inconvenient'.¹⁰⁸ Macnair also suggests that Lord Eldon drew a sharp and coherent distinction between contract and trusts: while contracts and *promises* to create a trust would not be enforceable without consideration, a trust created by a legally effective transfer or a clear 'declaration' of trust *would* be enforceable against a trustee.¹⁰⁹ And it seems clear that contemporary treatise writers, such as Lewin, regarded this conclusion as supported by principle and authority.¹¹⁰

Pothier's *Traité des Obligations*, which placed significant emphasis on the intention and the will, was translated into English in 1806,¹¹¹ five years before *Pye* was decided. It was

¹⁰⁶ *Ellison v Ellison* (n xx).

¹⁰⁷ W. Cornish *et al*, *The Oxford History of the Laws of England*, vol xii, 1820-1914: Private Law (Oxford University Press 2010) 255-256.

¹⁰⁸ Macnair (n xx) 181-182.

¹⁰⁹ Macnair (n xx) 182; *Ex parte Pye* (n xx) 150 (Lord Eldon); *Pulvertoft v Pulvertoft* (n xx) 99 (Lord Eldon).

¹¹⁰ Cornish (n xx); T. Lewin, *The Law of Trusts and Trustees* (1st ed) (A. Maxwell 1837) 110, 111; T. Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (3rd ed) (W. Maxwell 1857) 82.

¹¹¹ D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) 220, 236.

not cited in the case itself but by the mid-nineteenth century the influence of the will theory in English property law was apparent. Cornish explains that with the decision of *Kekewich v Manning*¹¹² the focus shifted away from voluntary recipients and towards 'the essential prerogatives of property owners', which 'necessarily involved the ability to give voluntarily and irrevocably' in a way the law would facilitate.¹¹³ We cannot say whether Lord Eldon's decision in *Pye* was influenced by Pothier, but the will theory may go some way towards explaining why we *now* recognise the proprietary aspects of a self-declared trust. The expression of the settlor's double intention is a clear manifestation of his or her will to divest himself of an interest in his property in that person's favour, and that is an inherent prerogative of ownership, which the law should facilitate.

We must also try to explain why the 'declaration' is sufficient to generate trust obligations, and here there are two possibilities. First, it might be argued that if the settlor has externally manifested or recorded his intention to create a trust, and broadly understands the effect of what he is doing,¹¹⁴ he ought to know that other people may rely on it, and this is reason enough to preclude him from resiling from it. In other words, the fact that the declaration is an expression of intention which *may* be relied on by other people explains its enforceability. A similar explanation has been used to justify promises. The idea is that if A communicates to B a firm intention to act in a particular way, knowing that B may rely on it, A ought to perform his promise and B can demand that A do so.¹¹⁵ As Raz points out, the difficulty with this explanation is that it does not tell us why a promise constitutes an *obligation*,¹¹⁶ when many other statements of intention to act do not. Given that not all expressions of intention to act are obligatory, the peremptory effect of a declaration of trust, i.e., the fact that it immediately imposes an enforceable obligation on its maker, cannot be fully explained by the fact that it is an expression of an intention to act on which other people may rely.

Raz puts forward another explanation of the promise as a species of voluntary obligation. In his view, A can subject herself to a voluntary obligation 'by behaving in a way which normally communicates an intention to undertake by that very act an obligation.'¹¹⁷ On this analysis, when A communicates 'an intention to undertake by the very act of communication an obligation to perform an action and invest [B] with a right to its performance', A 'ought to perform that action and [B] has a right that [A] will do so.'¹¹⁸ Raz argues further that promises are binding because at a general level they create a relation between A and B, which 'creates a special bond, binding the promisor to be, in the matter of the promise, partial to the promisee. It obliges the promisor to regard the claim of the promisee as not just one of the many claims that every person has for his respect and help but as having peremptory force.'¹¹⁹ For this reason, the explanation of promises as voluntary obligations 'can only be justified if the creation of such special relationships between people

¹¹² (1851) 1 De G M & G 176; 42 ER 519.

¹¹³ Cornish (n xx) 258.

¹¹⁴ *Byrnes v Kendle* (n xx) [28] (Doyle CJ).

¹¹⁵ J. Raz, 'Promises and Obligations' in P.M.S. Hacker & J. Raz (eds), *Law, Morality and Society, Essays in Honour of HLA Hart* (Oxford University Press 1977) 211.

¹¹⁶ *ibid* 217, also 223, 226.

¹¹⁷ *ibid* 224.

¹¹⁸ *ibid* 211.

¹¹⁹ *ibid* 227-228.

is held to be valuable.¹²⁰ He regards promises as ‘an extreme form of voluntary undertaking’,¹²¹ which tend to arise within the framework of ongoing relationships, and which the law regards as valuable. In his view, therefore, the purpose of contract law is to protect the practice of undertaking voluntary obligations.¹²²

Given the currency of the efficient breach theory, Raz’s theory may not adequately explain why we enforce contracts, but this does not detract from its utility in helping us to try to explain the personal aspects of self-declared trusts. We have shown that the key to a valid self-declaration of trust is that the settlor intends to undertake by the very words said or acts done an obligation to perform the actions of a trustee. In Raz’s view, this is precisely the type of intention which, if communicated, is sufficient to subject an individual to a voluntary undertaking, and it is consistent with one explanation of fiduciary obligations, according to which they arise as a result of one party’s voluntary assumption of responsibility towards another for the latter’s affairs.¹²³ As in the case of promises, a self-declaration of trust creates a special bond between the parties. However, the bond is stronger than it is in the case of a promise, as it requires the settlor-trustee not only to be, in the matter of the trust, partial to the beneficiary, but also to hold her property for the beneficiary and subjugate her own personal interests to those of the beneficiary, where they may conflict. For this reason, if it is to be enforceable, the creation of trust relationships must be something the law regards as valuable, and clearly it does.

It is striking that while promises and declarations are both examples of performative illocutionary acts, which have preemptory effect, a gratuitous promise is ineffective in law to transfer property or create an obligation, whereas a voluntary self-declaration of trust achieves both these ends. It is therefore an extreme and unusual example of an illocutionary act, which the law enforces directly as a voluntary undertaking. Ultimately, its enforceability may rest on a combination of factors: the desire to protect and encourage the practice of voluntary undertakings, the social benefits conferred by the ability to hold one’s own property for the benefit of another, and the fact that, as a result of the influence of the will theory, we regard a property owner’s intentions regarding the use and disposal of her property as paramount.

¹²⁰ *ibid* 228.

¹²¹ J. Raz, ‘Promises in Morality and Law’ (1982) 95 *Harv L Rev* 916, 928.

¹²² *ibid* 936-8.

¹²³ J. Edelman, ‘When do Fiduciary Duties Arise?’ (2010) 126 *LQR* 302, 316; L. Hoyano, ‘The Flight to the Fiduciary Haven’ in P. Birks (ed), *Privacy and Loyalty* (Oxford University Press 1997); see also P. Millett, ‘Proprietary Restitution’ in S. Degeling & J. Edelman (eds), *Equity in Commercial Law* (Thomson 2005) 309, 310; and J. Edelman, ‘The Fiduciary Self-Dealing Rule’ in J. Glistler & P. Ridge, *Fault Lines in Equity* (Hart 2012). For alternative explanations of fiduciary duties, see, e.g., M. Conaglen, *Fiduciary Loyalty* (Hart Publishing 2010); P. Birks, ‘The Content of Fiduciary Obligation’ (2002) 16 *TLI* 34, 41-44; S. Worthington, ‘Fiduciaries: When is Self-Denial Obligatory?’ (1999) 58 *CLJ* 500, 505; and E. Weinrib, ‘The Fiduciary Obligation’ (1975) *UTLJ* 1, 7, 15.