Beneficiaries' Consent to Trustees' Unauthorised Acts

YING KHAI LIEW AND CHARLES MITCHELL

1. INTRODUCTION

Trustees are not liable for breach of trust to a sui juris and fully informed beneficiary who has consented to the breach.[1] Moreover, such a beneficiary may have his interest impounded to indemnify the trustees against any liability which they incur to other beneficiaries who have not consented to the breach.[2] For the purposes of these rules, the beneficiary's 'consent' can take various forms, including instigation, concurrence, acquiescence, adoption, confirmation and release, and the rules shielding trustees from liability may work differently according to the type of 'consent' which the beneficiary has given.[3] Many cases, such as the instigation

[1] *Walker v Symonds* (1818) 3 Swan 1; 36 ER 751; *Stafford v Stafford* (1857) 1 De G&J 193; 44 ER 697; *Evans v Benyon* (1887) 37 Ch D 329; *Re Jarvis* [1958] 1 WLR 815; *Re Pauling's ST (No 1)* [1964] Ch 303; *Pullan v Wilson* [2014] EWHC 126 (Ch); [2014] WTLR 669.

[2] Trustee Act 1925, s 62; *Re Pauling's ST (No 2)* [1963] Ch 576; *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch); [2015] WTLR 373 [250]. Relief under s 62 can only be granted after a finding that a breach of trust has been committed, and so relief cannot be granted for contemplated future acts: *Mitchell v Halliwell* [2005] EWHC 937 (Ch) [64].

[3] J Payne, 'Consent' in P Birks and A Pretto (eds), *Breach of Trust* (Oxford, Hart Publishing, 2002) 301: '"consent" to breach of trust is not a single, simple concept to which a single, simple set of rules can necessarily be applied in order to determine whether the beneficiary should be allowed to sue the trustee'.

and concurrence cases, can be explained as an application of estoppel doctrine, but some, such as the acquiescence cases, do not lend themselves so readily to this analysis.[4]

This chapter concerns one group of cases which are governed by these rules, namely cases where the trustees perform acts which are unauthorised by the trust deed with the unanimous consent of the beneficiaries who are all sui juris and fully informed and collectively the owners of the entire beneficial interest.[5] Nowadays these conditions are not often satisfied because many trusts are drafted as discretionary settlements with wide classes of beneficiaries, including contingent beneficiaries such as future children in the case of family trusts and future spouses and dependents in the case of pension trusts.[6] However, trusts with fewer beneficiaries, all of whom had vested interests, were once much more common. Furthermore, trustees' investment powers and powers of delegation were once much more limited than they are today. Hence it often happened in the nineteenth century that trustees deliberately acted beyond the scope of their authority 'at the instigation of the beneficiaries' and that such breaches were 'the result of considered agreement' between trustees and beneficiaries who were sui juris and the owners of the whole beneficial interest.[7]

In cases of this kind, as in the more general run of cases, the trustees are not liable for their breaches of trust to the consenting beneficiaries. Unlike the more general run of cases,

---

[4] For further discussion, see *Spellson v George* (1992) 26 NSWLR 666 and *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253, critiqued in T Economou, 'The Defence of Acquiescence to a Breach of Trust' (2013) 15 *Flinders LJ* 115. See also Lusina Ho's chapter in the present volume.

[5] In other words, we do not discuss cases where trustees commit a breach of duty other than a duty to comply with the terms of the trust instrument, nor do we discuss cases where not all of the beneficiaries are sui juris and fully informed and in agreement.

[6] But see *Re Barton (Deceased)* [2002] EWHC 264 (Ch); [2002] WTLR 469; *Hughes v Bourne* [2012] EWHC 2232 (Ch); [2012] WTLR 1333.

[7] C Stebbings, *The Private Trustee in Victorian England* (Cambridge, Cambridge University Press, 2002) 96.

however, our cases also possess the unusual feature that the trustees' unauthorised actions, when performed with the beneficiaries' consent, take effect as though they were authorised. This is noticed in the main practitioner works on trusts law. *Lewin on Trusts*, for example, contains a discussion of the rules shielding trustees from liability to consenting beneficiaries in Chapter 39, under the heading 'Defence of Concurrence, Acquiescence or Release and Confirmation by a Beneficiary'; but the cases with which we are concerned then reappear in Chapter 45, on 'Lawful Departure from the Trusts', under the heading 'By Agreement'.[8]

This suggests that while estoppel reasoning (or some close variant of it) can be used to explain the trustees' escape from liability in all the 'consent' cases, a different explanation can also be given for our cases that does not work for the others. This is that the trustees' duties are changed as a result of the beneficiaries' consenting to their unauthorised actions, with the result that the trustees commit no breach of duty although they act in a way that is not permitted by the trust deed. This point was made by Master Matthews in *Pettigrew v Edwards*, where he said that in cases where beneficiaries all give their informed consent to a course of action taken by the trustees:[9]

> I do not think it is necessary to resort to any kind of estoppel. The beneficiaries have given their (fully informed) consent to the action. They have licensed the trustees to do what might otherwise be a wrong. So it is not a breach of trust and they cannot complain of it as such thereafter.

[8] L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* 19th edn (London, Sweet and Maxwell, 2015) [39.106]–[39.126], [45.03]–[45.04]. See too D Hayton, P Matthews and C Mitchell, *Underhill & Hayton: Law Relating to Trusts and Trustees* 19th edn (London, LexisNexis, 2016) [43.12], [95.1]–[95.24].

[9] [2017] EWHC 8 (Ch) [46].

This is interesting from a theoretical point of view because it tells us something about the ways in which new rights and duties can be created under existing trusts. It also has practical consequences, not because it affects the outcome of claims by the beneficiaries against the trustees (since the beneficiaries will lose either way), but because it affects the position of third parties with whom the trustees have dealt and the content of the beneficiaries' rights and the trustees' duties going forward. As James Penner has written, the 'substance' of a trust subsists for as long as there are trustee duties, and their character determines the nature of the trust whether or not the trustee incurs any liability for breaching them; furthermore, 'dealings with trust property in compliance with the terms of the trust are the justification in law for those transactions being valid for the parties involved'.[10]

It follows that the rules laid down in our cases merit consideration for two different reasons: first, because they can be understood to shield the trustees from liability for breach of trust in an unusual way, and, secondly, because they enable the trustees and beneficiaries to create new rights and duties under the trust. To analyse the first of these effects, one could adopt the method used by James Goudkamp in his study of tort defences, and ask whether the rule shielding the trustees from liability is a 'denial' that all the elements of a claim are present or a 'defence' which concedes that these elements are present but identifies another reason why there is no liability.[11] One would then have to identify the elements of the beneficiaries' claim where the trustees have done an unauthorised act, and discuss what difference it makes whether trustees owe a duty to hold and produce the trust property in an authorised form when called on to do so, exigible through an order for specific performance

[10] J Penner, 'Exemptions' in Birks and Pretto (n 3) 252.

[11] J Goudkamp, *Tort Law Defences* (Oxford, Hart Publishing, 2013). See too J Goudkamp and C Mitchell, 'Denials and Defences in the Law of Unjust Enrichment' in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Oxford, Hart Publishing, 2013).

or an order for substitutive performance by money payment, or owe a duty not to dispose of the property in an unauthorised way, breach of which triggers a secondary duty to pay compensation.[12]

Whichever of these explanations of the trustees' liability is correct, it seems most likely that in our cases (but not in the more general run of cases) the beneficiaries' consent would enable the trustees not to invoke a 'defence' but rather to deny that they owed the relevant duty in the first place. Interesting as it would be to work through the details of this argument, however, our purpose in this chapter is to discuss the second effect, and to consider the rules which produce it alongside other rules which determine when settlors, trustees, beneficiaries and other parties can validly create new rights and duties under existing trusts. We examine these other rules in Sections 2–4, before returning to our rules in Sections 5–6.

2. EXERCISE OF POWERS CONFERRED BY THE SETTLOR

We start by observing that when an express trust is first created the settlor may reserve powers to himself, or grant powers to others, the exercise of which at some later date will create new rights and duties under the trust. Modern settlors often seek to achieve flexibility accompanied by ongoing control over the exercise of dispositive and administrative discretions by the trustees. The devices used by trust drafters to achieve these objectives

[12] Following *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 and *AIB Group (UK) plc v Mark Redler & Co (a firm)* [2014] UKSC 58; [2015] AC 1503, most cases on trustee liability to reconstitute improperly depleted trust funds must still be analysed as though the first formulation were correct, but some cases must now be analysed as though the second formulation were correct, namely cases where the trust has been exhausted and the trust fund has become absolutely vested in possession and/or where money has been paid out of a bare trust arising as an incident of a wider commercial transaction: *Underhill* (n 8) [87.31]–[87.42].

include vesting wide powers in the settlor, trustees, beneficiaries, and/or other parties such as protectors. Examples are powers to revoke the trust, amend the trust instrument,[13] change the governing law of the trust, appoint or resettle trust property, buy or sell trust property, add or remove beneficiaries, appoint or remove trustees, and so on.[14] One can also have a power of veto over the exercise of a power by another power-holder, so that, for example, the trustees can only exercise powers of sale and investment or a power of appointment with the consent of the settlor or beneficiaries.[15]

Where the valid exercise of a power depends on another person's consent, a purported exercise of the power is void if the consent is not given. If the trust deed permits consent to be given retrospectively this problem may be cured by subsequent ratification.[16] Otherwise it cannot be,[17] and if trustees bring transactions into the trust account which are unauthorised for this reason, the account can be falsified and the trustees can be subjected to a personal

[13] Much litigated in the pensions context: D Pollard, *The Law of Pensions Trusts* (Oxford, Oxford University Press, 2013) ch 17.

[14] M Hubbard, *Protectors of Trusts* (Oxford, Oxford University Press, 2013) ch 6; J Kessler, *Drafting Trusts and Will Trusts: A Modern Approach*, 12th edn (London, Sweet and Maxwell, 2015) ch 12; *Underhill* (n 8) ch 14.

[15] G Thomas, *Thomas on Powers*, 2nd edn (Oxford, Oxford University Press, 2012) paras 7.107–7.128; Hubbard (n 14) paras 6.126–6.146; Kessler (n 14) paras 7.21, 7.23–7.24. Legislation also provides in some cases that the consent of beneficiaries is needed before trustees can exercise a statutory power: eg the Trustee Act 1925, s 32(1)(c) requires the trustees to obtain the life tenant's consent to the exercise of their statutory power of advancement.

[16] *Offen v Harman* (1859) 29 LJ Ch 307.

[17] *Bateman v Davis* (1818) 3 Madd 98; 56 ER 446; *Greenham v Gibbeson* (1834) 10 Bing 363, 374–75; 131 ER 944, 949; *Gilbey v Rush* [1906] 1 Ch 11, 22–23; *Whitmore-Searle v Whitmore-Searle* [1907] 2 Ch 332; *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 504–07.

liability to make up the shortfall.[18] Where the person upon whose consent the valid exercise of a power is predicated cannot give his consent it may be that the power can never be exercised; but although the court has no general power to dispense with consents required by a trust deed or statute,[19] it may do so where this is permitted by statute,[20] or even in exceptional cases when acting under its inherent jurisdiction – as it might do, for example, where the person whose consent is required cannot give it owing to a disability.[21] The decision whether to exercise a power of veto may also be taken by the court in the place of a fiduciary power-holder who is prevented from exercising the power by an inescapable conflict of interest.[22]

The creation of new rights and duties under a trust by the exercise of a power is not only sourced in the power-holder's intention to produce this effect: it is also sourced in the settlor's intention that the power-holder should be able to do this. Like the rules which determine whether a settlor has intended to create rights and duties under an express trust,[23] the rules which determine whether a settlor has intended to create powers require this question to be tested objectively: the question is whether a reasonable person would consider this to be the meaning of the settlor's words, or to follow from the settlor's words by

[18] *Cocker v Quayle* (1830) 1 Russ & M 535, 538; 39 ER 206, 207; *Re Massingberd's Settlement* (1890) 63 LT 296. However, a beneficiary cannot ask for the accounts to be falsified if he knowingly acquiesced in the trustee's unauthorised act: *Stevenson v Robinson* (1868) 37 LJ Ch 499.

[19] *Re Forster's Settlement* [1942] Ch 199.

[20] Eg, Trusts of Land and Appointment of Trustees Act 1996, s 14, considered in *Bagum v Hafiz* [2015] EWCA Civ 801; [2016] Ch 241.

[21] *Re Cardross's Settlement* (1878) 7 Ch D 728; *Re Cooper* (1884) 27 Ch D 565; *Saipem SpA v Rafidain Bank* [1994] CLC 253, further proceedings [2007] EWHC 3119 (Ch).

[22] *Scully v Coley* [2009] UKPC 29 [47]–[49], noting *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587.

[23] *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253.

necessary inference.[24] To decide whether a power has been created by a trust deed, and if so, what are the conditions for its exercise, its content and duration, etc, the court is therefore thrown upon 'the ordinary canons of construction; the instrument will need to be construed as a whole against the factual matrix from which it emerged'.[25]

Powers may not be forced onto the intended donees of powers who do not want them. Thus, the Law of Property Act 1925, s 156(1) provides that:

> A person to whom any power, whether coupled with an interest or not, is given may by deed disclaim the power, and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

If a settlor purports to confer a power on several people whom he intends to be the trustees of a settlement, and one disclaims the office while the others accept it, the power never vests in the 'disclaiming trustee', but as a general rule the power vests in the others who may then exercise it.[26] However, if a settlor intends that rights and duties under an express trust should

[24] *Re Pope's Contract* [1911] 2 Ch 442: a power to vary trust investments and so a power to sell these can be implied from a power to invest. Cf *Re Evans's Settlement* [1967] 1 WLR 1294: a power vested in trustees to advance out of the trust fund a sum 'not exceeding £5,000' necessarily excluded a simultaneous exercise of the trustees' power of advancement under the Trustee Act 1925, s 32.

[25] *Howell v Lees-Millais* [2009] EWHC 1754 (Ch); [2009] WTLR 1163 [8]. See also *National Grid Co plc Mayes* [2001] UKHL 20, [2001] 1 WLR 864 [16]–[63]. Earlier times: *Bishop of Oxford v Leighton* (1700) 2 Vern 376, 377; 23 ER 837, 838: 'although the proviso be unskilfully penned, it amounts unto a power of revoking, and limiting new uses'; *Thornton v Hawley* (1804) 10 Ves Jun 129, 137; 32 ER 793, 796: words annexed to a clause empowering trustees of marriage settlement to purchase land 'after request' from a married couple 'tend strongly to shew, the meaning could not be, that request should be a condition precedent'.

[26] *Adams v Taunton* (1820) 5 Madd 435; 56 ER 961; *Sands v Nugee* (1836) 8 Sim 130; 59 ER 52; *Earl Granville v M'Neile* (1849) 7 Hare 156; 68 ER 64; *Crawford v Forshaw* [1891] 2 Ch 261.

arise only if a power is exercised by a particular person, then these rights and duties may never come into existence if that person is unable to act or declines to do so.

The question whether a power-holder may exercise the power in a self-interested way depends on whether it is held in a personal or fiduciary capacity. This in turn depends on the settlor's intention, discoverable by examination of his words and the context in which they were expressed. If the settlor intended that the power-holder should be able to exercise the power to benefit himself then he can do that;[27] if the settlor intended that the power-holder should exercise it exclusively in the interests of the beneficiaries then he cannot validly exercise it in his own interest where this differs from the beneficiaries' interest.[28]

The rules governing the question whether a power may be released also turn on the question whether the power is held in a fiduciary capacity. This is so despite the wide wording of the Law of Property Act 1925, s 155, which states that:

> A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power.

This rule holds good where the power has been given to a power-holder in a personal capacity: consistently with the rule which says that such a power-holder need not even consider whether to exercise the power,[29] he is free to release the power if he wishes and the

[27] *Re Ryder* [1914] 1 Ch 865; *C v C (Ancillary Relief: Trust Fund)* [2009] EWHC 1491 (Fam); [2010] 1 FLR 337 [15], [19].

[28] *Re Skeats' Settlement* (1889) 42 Ch D 522; *Eclairs Group Ltd v JKX Oil & Gas plc* [2014] EWCA Civ 640; [2014] Bus LR 835 [119]: 'the exercise of a fiduciary power for reasons which are even in part based on the trustee's self-interest will be voidable, even if the trustee was actuated by other legitimate considerations'.

[29] *Re Park* [1932] 1 Ch 580, 582.

effect of doing so is to destroy the power.[30] However, where the power has been given to him in a fiduciary capacity, the power-holder must consider whether to exercise it from time to time,[31] and so he cannot release it unless release is authorised by the terms of the trust.[32]

In *Re Wills' Trust Deeds* Buckley J distinguished cases where the settlor confers a power to benefit the power-holder, who can therefore exercise it as he chooses, or not at all, from cases where the settlor means to constitute the power-holder as his 'mandatory' (meaning his agent), where the power-holder is subject to constraints. In the latter case, if:[33]

> the power is granted as a means of achieving an end which the settlor desires but which involves making a selection or decision which at the time of the creation of the trust the settlor feels unable to make, or of a kind which the settlor considers the donee to be better qualified to make than he himself is, then the proper inference may be that the settlor confers the power on the donee because he reposes a confidence in him to perform vicariously on his, the settlor's, behalf a function which the settlor would himself perform were it not that the circumstances are, or may turn out to be, such that he is bound to entrust its performance to someone else, or that they are such that he chooses to entrust it to the donee because of his peculiar qualifications to perform it. … [Whereas] in respect of what I have called beneficial powers the donee is unlikely to be under any obligation to the settlor, either legal or moral, to exercise such a power, and so could not be regarded as acting unconscientiously in debarring

[30] *Smith v Houblon* (1859) 26 Beav 482; 53 ER 984; *Re Hancock* [1896] 2 Ch 173, 183, approving Sir G Farwell, *A Concise Treatise on Powers*, 2nd edn (London, Stevens & Sons, 1893) 15; *Re Gestetner Settlement* [1953] Ch 672, 687.

[31] *Re Gulbenkian* [1970] AC 508, 518; *Re Baden's Deed Trusts* [1971] AC 424, 456.

[32] *Re Mills* [1930] 1 Ch 654, 661; *Muir v IRC* [1966] 1 WLR 1269, 1283.

[33] [1964] Ch 219, 228–29.

> himself from its use, in the case of what I have called a vicarious power the donee, even if under no legal or moral obligation to exercise the power, ought not in good conscience to deprive himself of the capacity to exercise it until the period within which it must be exercised, if at all, has run out …

When the donee of a power exercises it to create new rights and duties under a trust, and the trustees act in accordance with these new rights and duties, no question arises of the trustees committing a breach of the duties which they previously owed but no longer owe following the donee's exercise of the power. This is consistent with the settlor's and trustees' intentions when the trust was created, on terms which authorised future variations; nor can the beneficiaries complain if their rights are altered or destroyed in this way since these rights were always inherently amenable to authorised alteration or destruction. As Barrett JA said in the New South Wales Court of Appeal, in *Re Dion Investments Pty Ltd*:[34]

> Where the trust instrument contains a provision allowing variation by a particular process, the situation is one in which the settlor, in declaring the trust and defining its terms, has specified that those terms are not immutable and that the original terms will be superseded by varied terms if the specified process of variation (entailing, in concept, a power of appointment or a power of revocation or both) is undertaken. The varied terms are in that way traceable to the settlor's intention as communicated to the original trustee.

3. ACTIONS BY THE SETTLOR

[34] [2014] NSWCA 367; (2014) 87 NSWLR 753 [45].

Once a trust is up and running the settlor has no power to create new rights and duties under it unless he expressly reserved such a power to himself at the time when the trust was created. As Cory J held in the Supreme Court of Canada, in *Air Products Canada v Schmidt*:[35]

> The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

If a settlor has no reserved powers and he directs trustees to exercise a discretionary power in a certain way and they act in accordance with his instructions without using their own independent judgment, their acts can be set aside.[36] If a settlor has no reserved powers and he directs trustees to apply the trust property in a manner that is not authorised by the trust deed, and they obey his instructions, one of two possible conclusions may be drawn. Either the trustees commit a breach of trust, or the trust deed is a sham, and does not accurately record the arrangement which the settlor and trustee made at the outset regarding the property.

[35] [1994] 2 SCR 611, 643.

[36] *Turner v Turner* [1984] Ch 100.

The settlor and the trustee must have had a common intention to deceive before the sham doctrine will apply. As Rimer J held in in *Shalson v Russo*:[37]

> 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 becomes so shared), I fail to see how the settlement can be regarded as a sham.

Where the settlor and trustee share a common intention to deceive, the rights and duties specified in the trust deed never come into existence and instead the property is held from the outset in accordance with some other arrangement agreed by the settlor and trustee. The parenthesised words in the foregoing passage of Rimer J's judgment suggest that rights and duties recorded in a trust deed can come into existence, but can be altered or extinguished if the settlor and trustee later form a different common intention respecting what should happen to the trust property. As Justice David Hayton has observed, however, in extra-judicial writing endorsed by His Honour Judge Weeks QC in *Hill v Spread Trustee Co Ltd*,[38] there can be no 'halfway house': a trust deed cannot accurately record the settlor's initial intention to create a trust, but afterwards become a sham document if the settlor changes his mind and agrees with the trustee that the trustee will do something else with the property.[39]

[37] [2003] EWHC 1637 (Ch), [2005] Ch 281, 342. See too *Hitch v Stone* [2001] EWCA Civ 63; [2001] STC 214 [69]; *Re Esteem Settlement* [2003] JRC 092; 2003 JLR 188 [53]; *A v A* [2007] EWHC 99 (Fam); [2007] 2 FLR 467 [34].

[38] [2005] EWHC 336 (Ch); [2005] BPIR 842.

[39] D Hayton, 'Shams, Piercing Veils, Remedial Constructive Trusts and Tracing' (2004) 8 *Jersey LR* 1, 8.

Once a trust has been created it cannot be revoked by the settlor, even with the trustee's agreement, unless the settlor has a reserved power of revocation.[40] Unless the settlor is a beneficiary of the trust he has no standing to enforce its terms against the trustee,[41] and a fortiori he cannot validly direct the trustee to commit an act that is unauthorised by the terms of the trust deed.

It follows that the true position in relation to shams is as Munby J stated in *A v A*:[42]

> [As] a matter of principle a trust which is not initially a sham cannot subsequently become a sham. … 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.

[40] Lindsay J described this as an 'elementary proposition' in *Dhingra v Dhingra* (1999) 2 ITELR 262, 265. See also *Naas v Westminster Bank Ltd* [1940] AC 366, 389.

[41] *Barclays Bank Ltd v Attorney General* [1944] AC 372, 380.

[42] *A v A* (n 37) [42]–[43]. See too *Re Reynolds* [2008] NZCA 122; [2008] 3 NZLR 45 [57]; *Lewis v Condon* [2013] NSWCA 204; (2013) 85 NSWLR 99 [80]–[82]. In *A v A* Munby J added at [44] that 'The only way … in which a properly constituted trust which is not, ab initio, a sham could conceivably become a sham subsequently would be if all the beneficiaries were, with the requisite intention, to join together for that purpose with the trustees'. However, this would not only require that the trustees and beneficiaries must have agreed that the terms of the trust should be changed (as discussed in Section 6 below), but also that they must have agreed to conceal this change from others.

A trustee who has bona fide accepted office as such cannot divest himself of 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.

The same points were also made by Barrett JA in *Re Dion Investments Pty Ltd*:[43]

Where an express trust is established … by a deed made between a settlor and the initial trustee to which the settled property is transferred, rights of the beneficiaries arise immediately the deed takes effect. The beneficiaries are not parties to the deed and, to the extent that it embodies covenants given by its parties to one another, the beneficiaries are strangers to those covenants and cannot sue at law for breach of them. The beneficiaries' rights are equitable rights arising from the circumstance that the trustee has accepted the office of trustee and, therefore, the duties and obligations with respect to the trust property (and otherwise) that that office carries with it.

Any subsequent action of the settlor and the original trustee to vary the provisions of the deed made by them will not be effective to affect either the rights and interests of the beneficiaries or the duties, obligations and powers of the trustee. Those two parties have no ability to deprive the beneficiaries of those rights and interests or to vary either the terms of the trust that the trustee is bound to execute and

[43] *Dion* (n 34) [41]–[43].

uphold or the powers that are available to the trustee in order to do so. The terms of the trust have, in the eyes of equity, an existence that is independent of the provisions of the deed that define them.

Let it be assumed that on Monday the settlor and the trustee execute and deliver the trust deed (at which point the settled sum changes hands) and that on Tuesday they execute a deed revoking the original deed and stating that their rights and obligations are as if it had never existed. Unless some power of revocation of the trusts has been reserved, the subsequent action does not change the fact that the trustee holds the settled sum for the benefit of beneficiaries named in the original deed and upon the trusts stated in that deed. The … equitable rights and interests of a beneficiary cannot be taken away or varied by anyone unless the terms of the trust itself (or statute) so allow.

4. ACTIONS BY THE TRUSTEES

As the foregoing passages of Munby J's and Barrett JA's judgments indicate, trustees are prima facie in the same position as the settlor once the trust is up and running: they cannot unilaterally create new rights and duties under the trust unless the settlor gave them a power to do this at the time when the trust was created. They are bound to observe the limits on their authority,[44] and in particular they may not enter unauthorised transactions affecting the trust property or make unauthorised appointments of the trust property.[45]

[44] *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 [32]: 'Perhaps the most important duty of a trustee is to obey the terms of the trust'.

[45] *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 210; *AIB* (n 12) [51].

Situations may arise, however, where trustees believe that it would be in the beneficiaries' best interests to enter an unauthorised transaction – in Lord Lindley's phrase, where trustees wish to commit what they believe to be a 'judicious breach of trust'.[46] It may be, for example, that a limit on their investment powers prevents the trustees from managing the trust fund in what they believe would produce the best financial return for the beneficiaries.[47] Where they cannot obtain the beneficiaries' consent, the question arises whether there is anything else that they can do?

Three possibilities are worth mentioning. First, the trustees might be protected by an exemption clause if the clause covers deliberate breaches of duty done in good faith and the reasonable belief that the beneficiaries will benefit from them.[48] Whether a court would find that the trustees were protected in such a case might be an uncertain matter, however. Second, the court might relieve the trustees from liability after (but not before[49]) they have performed their unauthorised action under the Trustee Act 1925, s 61. Again, though, the exercise of the court's power to relieve the trustees under the section is unpredictable because

[46] *Perrins v Bellamy* [1899] 1 Ch 797, 798 (Lindley MR): 'My old master, the late Lord Justice Selwyn, used to say, "The main duty of a trustee is to commit judicious breaches of trust"'; amended in *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373, 375–76 (Lord Lindley): 'The words "main duty" are a mistake. They ought to be "great use"'. See also *Lewis v Lynch* (CA, 13 March 1980).

[47] A common event prior to the Trustee Act 2000 reforms of trustee investment powers: J Holmes and P Milner, 'Trust Law Reforms: Are We Nearly There Yet?' [2000] *PCB* 114, 119. See also *Target* (n 12) 433 (Lord Browne-Wilkinson): it 'often occurs' that 'a trustee commits a judicious breach of trust by investing in an unauthorised investment'.

[48] *Armitage v Nurse* [1998] Ch 241, 250–51; *Walker v Stones* [2001] QB 902, 935, 939–41.

[49] *Perrins v Bellamy* [1898] 2 Ch 521, 527; *Re Rosenthal* [1972] 1 WLR 1273, 1277–78.

everything turns on the facts.[50] The third and safest course for the trustees would therefore be to make an application for prior approval from the court under the Trustee Act 1925, s 57.[51] This section applies where trustees lack the power under the trust deed and the general law to enter transactions in the course of managing and administering the trust property which the court accepts to be expedient, and it authorises the court to make an order conferring the necessary power on the trustees, either generally or in a particular instance.[52]

Where trustees successfully take one of these three routes to perform unauthorised acts without incurring liability, the question arises whether the exemption clause or the court order changes the duties that the trustees would otherwise owe, or merely exempts them from liability for breach of their duties? So far as exemption clauses are concerned, the answer depends on their wording. Many clauses exclude liability for breach of trustee duties without changing the content of the duties, but clauses can also be drafted to achieve the latter effect. An example is provided by *Hayim v Citibank NA*,[53] where Citibank was appointed executor

[50] For cases where trustees have been relieved of liability for unauthorised acts, see *Perrins v Bellamy* [1898] 2 Ch 521, affirmed [1899] 1 Ch 797; *Re Allsop* [1914] 1 Ch 1. For cases where they have not, see *Santander UK v RA Legal Solicitors* [2014] EWCA Civ 183; [2014] PNLR 420; *AIB* (n 12).

[51] Recommended in eg S Laing, 'To Whom Do the Accumulations under an A & M Trust Belong? The Impact of Section 31 of the Trustee Act 1925' [1998] *PCB* 323, 330; R Williams and I Lambert, 'Exemption Clauses under Scrutiny' [1999] *PCB* 87, 93; R Wilson, 'How Safe Is a "Judicious Breach of Trust"?' (2010) 121 *TELTJ* 9.

[52] Section 57 puts into statutory form a power which formerly devolved on the courts as part of their inherent jurisdiction: the leading case before 1925 was *Re New* [1901] 2 Ch 534, approved in *Chapman v Chapman* [1954] AC 429. The courts continue to exercise their non-statutory inherent jurisdiction to sanction transactions which are authorised by the trust deed but objected to by the beneficiaries, as in eg *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312; [2015] WTLR 39.

[53] [1987] AC 730. See also *Citibank NA v MBIA Assurance SA* [2007] EWCA Civ 11; [2007] 1 All ER (Comm) 475, discussed in Philip Sales' chapter in the present volume.

of a testator's American will on terms that it 'shall have no responsibility or duty with respect to' a Hong Kong house until the deaths of the testator's elderly brother and sister who resided in the house. This house was given by a Hong Kong will to another executor on trust for Citibank as executor of the American will. Citibank declined to take steps to have the house sold for the benefit of the beneficiaries under the American will who wanted the house to be sold and the siblings to be evicted from it. Substantial losses flowed from the delayed sale of the house, but the Privy Council held that the clause enabled Citibank to permit the siblings to remain living in the house without incurring any liability for losses because it owed no duties regarding the house (other than a duty not to use it for Citibank's own purposes).

The wording of the Trustee Act 1925, s 61 makes it clear that the section authorises the court to excuse a trustee from liability for breach of trust but does not negate the trustee's duty.[54] It follows that court orders relieving trustees from liability under the section do not change the content of the trustees' duties and the beneficiaries' corresponding rights against them. In contrast, the Trustee Act 1925, s 57 authorises the court to change the scope and content of the trustees' powers and hence of the trustees' duties and the beneficiaries' rights. In *Chapman v Chapman*,[55] the House of Lords held that the object of the section is to make it possible for trust property to be managed as advantageously as possible for the beneficiaries, but that it does not empower the court to alter the beneficial interests under trusts – a finding which led to the enactment of the Variation of Trusts Act 1958 because Parliament considered that the courts should be able to sanction such alterations in cases where the beneficiaries could not do it for themselves because they were not all sui juris and owners of the entire beneficial interest.[56] However the courts have also held that the partitioning and

[54] *MCP Pension Trustees Ltd v AON Pension Trustees Ltd* [2010] EWCA Civ 377; [2012] Ch 1 [18].

[55] [1954] AC 249, affirming [1953] Ch 218, 248.

[56] Discussed in Section 5.

sale of trust property in the interest of good administration and management may be sanctioned under s 57 even though the result of this is to vary the beneficiaries' interests, provided that this is only an 'incidental' effect of the court's order.[57] This rule leaves them with the difficult task of deciding when a variation of the beneficial interests is merely 'incidental'. For present purposes the significance of this rule is that trustees can sometimes win orders whose effect is to alter the beneficiaries' rights in the trust property even if the beneficiaries themselves have not all consented to this.

5. ACTIONS BY THE BENEFICIARIES

The rule in *Saunders v Vautier* permits beneficiaries to terminate trusts and call for the transfer of legal title to the trust property if they are all sui juris and in agreement and owners of the entire beneficial interest.[58] Whether the rule also permits such beneficiaries to create new rights and duties under existing trusts is another matter.

Joel Nitikman has argued that it does.[59] He contends that if one ignores the tax consequences as irrelevant to the trust analysis, there is no difference in principle between a case where the beneficiaries wish to end the trust, take the property and create a new trust (something which they are clearly able to do) and a case where the beneficiaries wish to keep the trust on foot and create new rights and duties under it. He derives support for this proposition from the many cases which hold that the Variation of Trusts Act 1958 and equivalent Commonwealth legislation are underpinned by the rule in *Saunders v Vautier*,

[57] *Re Z Trust* [2011] WTLR 735; *Sutton v England* [2011] EWCA Civ 637; [2012] 1 WLR 326; *Dion* (n 34).

[58] The rule is named for *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282, although the principle is older. The definitive account is P Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 112 *LQR* 266.

[59] J Nitikman, 'Variation under the Rule in *Saunders v Vautier*: Yes or No?' (2015) 21 *T&T* 923.

insofar as they empower the court to supply the consent of beneficiaries who cannot consent for themselves (eg because they are not yet born), and which hold that this is the only thing needed for the variation to take effect when taken in combination with the consent of all the sui juris beneficiaries who can (and must[60]) speak for themselves.

Thus, for example, Nitikman instances *Goulding v James*, where Mummery LJ extracted the following propositions from the authorities:[61]

> First, what varies the trust is not the court, but the agreement or consensus of the beneficiaries. Secondly, there is no real difference in principle in the rearrangement of the trusts between the case where the court is exercising its jurisdiction on behalf of the specified class under the 1958 Act and the case where the resettlement is made by virtue of the doctrine in *Saunders v Vautier* … and by all the adult beneficiaries joining together. Thirdly, the court is merely contributing on behalf of infants and unborn and unascertained persons the binding assents to the arrangement which they, unlike an adult beneficiary, cannot give. The 1958 Act has thus been viewed by the courts as a statutory extension of the consent principle embodied in the rule in *Saunders v Vautier*. The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument.

[60] The court cannot supply the missing consent of sui juris beneficiaries: *Knocker v Youle* [1986] 1 WLR 934. But note the mechanism devised to circumvent this problem in *A v B* [2016] EWHC 340 (Ch).

[61] [1997] 2 All ER 239, 247. See too *IRC v Holmden* [1968] AC 685, 701, 710–11, 713; *Re Holt's Settlement* [1969] 1 Ch 100, 120; *Muhling v Perpetual Trustees WA Ltd* [2001] WASC 225 [25]–[26]; *Sutherland v Hudson's Bay Co* (2005) 74 OR (3d) 608; *Re IMK Family Trust* [2008] JRC 136; [2009] 1 FLR 664; *Wright v Gater* [2011] EWHC 2881 (Ch) [11]; *Perpetual Trustees Victoria Ltd v Barns* [2012] VSCA 77 [27].

> The role of the court is not to stand in as, or for, a settlor in varying the trusts. [Rather] … the court acts "on behalf of" the specified class and, in appropriate cases, supplies consent for persons incapable of consenting.

The opposing view, that the rule in *Saunders v Vautier* does not empower beneficiaries to create new rights and duties under existing trusts, has been taken by Donovan Waters,[62] whose reasons centre on the principle established by *Re Brockbank*.[63] It was held there that beneficiaries could not force one of two trustees, in whom a power to appoint new trustees was vested, to concur in the appointment of a new trustee which was demanded by the other trustee and all the beneficiaries, although these beneficiaries were sui juris and together entitled to the whole beneficial interest. This finding was later endorsed by Walton J in *Stephenson v Barclays Bank Trust Co Ltd*, who said that beneficiaries cannot 'at one and the same time override the pre-existing trusts and keep them in existence', and who thought that it also followed that 'the beneficial interest holders [are not] entitled to direct the trustees as to the particular investment they should make of the trust fund'.[64]

6. BENEFICIARIES AND TRUSTEES ACTING TOGETHER

[62] D Waters, 'Does the Rule in *Saunders v Vautier* Include the Power of Beneficiaries to Vary the Terms of the Trust?' (2014) 33 *Estates, Trusts & Pensions Journal* 78. See also *Lewin* (n 8) [24.024]–[24.026]; *Underhill* (n 8) [66.27]–[66.30].

[63] [1948] Ch 206.

[64] [1975] 1 All ER 625, 637. See too *Napier v Light* (1974) 236 EG 273, 278; *Holding & Management Ltd v Property Holding and Investment Trust plc* [1989] 1 WLR 1313, 1324; *Ingram v IRC* [1997] 4 All ER 395, 424; *Hotung v Ho Yuen Ki* [2002] 3 HKLRD 641; *Harb v Harb* [2010] NSWSC 1251 [13]; *Hancock v Rinehart* [2015] NSWSC 646 [161]–[162]; *Pettigrew v Edwards* [2017] EWHC 8 (Ch) [45].

The fact that creating new rights and duties under an existing trust would be contrary to the settlor's wishes does not suffice to justify a rule forbidding beneficiaries to do this, given that termination of the trust is permitted although this would run counter to the settlor's wishes. However, the courts have held that the wishes of the trustees must also be taken into account: the trustees only agree to take office on the basis that they will have a particular set of discretionary powers and duties owed to a particular set of beneficiaries, and so it would be unfair to them if the beneficiaries could rewrite the terms of the 'deal' which the trustees made with the settlor, regardless of whether the trustees themselves agreed to this. This was also brought out by Walton J in *Stephenson*, where he said that:[65]

> [O]nce the beneficial interest holders have determined to end the trust they are not entitled, unless by agreement, to the further services of the trustees. Those trustees can of course be compelled to hand over the entire trust assets to any person or persons selected by the beneficiaries against a proper discharge, but they cannot be compelled, unless they are in fact willing to comply with the directions, to do anything else with the trust fund which they are not in fact willing to do.

This suggests that the difference of opinion described in the previous section can be resolved if we distinguish between acts done by beneficiaries acting unilaterally without the trustees' agreement and acts done by beneficiaries with the trustees' agreement. The rule in *Saunders v Vautier* permits beneficiaries to override the wishes of the settlor and terminate

[65] *Stephenson* (n 64) 637. See too *Tempest v Lord Camoys* (1882) 21 Ch D 571, 578 (Jessel MR): 'It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the court does not enforce the exercise of the power against the wish of the trustees'.

the trusts and they do not need the trustees to agree to this because the trustees will have no further duties to perform once the trust has been ended.[66] However, the rule does not entitle the beneficiaries to require the trustees to keep the trust going on different terms, or to serve as the trustees of a new trust declared by the beneficiaries,[67] because although it empowers the beneficiaries to override the wishes of the settlor it does not empower them to force new duties onto the trustees which the trustees do not wish to perform and did not agree to perform when they took office.

This understanding of the law is supported by judicial statements which envisage that the beneficiaries can change the terms of existing trusts, or declare new trusts which will be operated by their existing trustees, provided that the trustees consent to this arrangement. This principle is sometimes said to be grounded in the rule in *Saunders v Vautier*, but it would be more accurate to say that it is an extension of the rule, which depends on the trustees' consent as well as the beneficiaries' consent to the new arrangement.

For example, Lord Wilberforce said in *IRC v Holmden* that:[68]

---

[66] Cf JW Harris, 'Trust, Power and Duty' (1971) 87 *LQR* 31, 63: '[b]y breaking up the trust, the beneficiaries do not compel the trustees to carry out any part of their office as active trustees; on the contrary, they bring that office to an end'.

[67] If these are different, as to which note Lord Wilberforce's comments in *Holmden* (n 61) 713, and Megarry J's findings in *Holt* (n 62) both discussed in P Luxton, 'Variation of Trusts: Settlors' Intentions and the Consent Principle in *Saunders v Vautier*' (1997) 60 *MLR* 719, 721–22, concluding that 'an arrangement approved under the [1958] Act has the same effect as a variation by sui juris beneficiaries under *Saunders v Vautier*' and that 'a variation under the Act … gives rise to new trusts replacing the old'.

[68] *Holmden* (n 61) 713 (emphasis added). See also *Re Chrimes* [1917] 1 Ch 30; *Timpson's Executors v Yerbury* [1936] 1 KB 645, 664; *Grey v IRC* [1960] AC 1; *Westpac Banking Corp v Bell Group Ltd (No 3)* [2012] WASCA 157 [2495]: beneficiaries can declare new trusts of the trust property 'with the consent of the trustee'.

> If all the beneficiaries under [a] settlement [are] sui juris, *they [can join] together with the trustees* and [declare] different trusts which would supersede those originally contained in the settlement.

Likewise in *Re Dion Investments Pty Ltd*, Barrett JA said that:[69]

> Under the principle in *Saunders v Vautier* … beneficiaries … are entitled to put an end to the trust and to require that the trust property be transferred to them. Their capacity to produce that result also enables them to require, as an alternative, that the property be held by the trustee upon varied trusts; but, if they do so require, the situation may in truth be one of resettlement upon new trusts rather than variation of the pre-existing trusts *(and the trustee may not be compellable to accept and perform those new trusts).*

Law reform bodies around the Commonwealth have made the same point. Thus, the Scottish Law Commission has argued that:[70]

> [I]f a beneficiary has a right to direct that trust assets be made over to him absolutely, it must follow that this right extends to directing that these assets be made over to a third party (such as new trustees) or, *provided that the trustees are willing to continue to act as such*, that the assets be held by them for new or amended purposes.

[69] *Dion* (n 34) [46] (emphasis added).

[70] Scottish Law Commission, *Report on Variation and Termination of Trusts* (Scot Law Com No 206, 2007) para 2.6 (emphasis added).

Similarly, the New Zealand Law Commission has recommended codifying legislation to make it clear that in their jurisdiction the rule in *Saunders v Vautier* empowers legally capable adult beneficiaries to effect a resettlement of a trust, as well as a variation or revocation, and that:[71]

> The agreement of the trustee will always be required in cases where the original trusts continue, to avoid the trustees being burdened by obligations to which they may not have agreed.

In this respect the position of the beneficiaries is analogous to the position of a settlor who wishes to create an express trust for the first time. A settlor can express the wish that certain parties should act as the trustees and hold the trust property subject to certain duties, and if the nominated parties agree these duties will become enforceable and the beneficiaries will have corresponding rights against them in their capacity as trustees of the settlement. However, the nominated parties can refuse to accept these duties: they can disclaim and the settlor or court must then find other people who are willing to accept the trusteeship. In just the same way, the beneficiaries of an existing trust can express the wish that the trustees should become subject to new duties, either under a varied trust or under a new settlement, and if the trustees agree then new rights and duties will be created.[72] But the trustees can

[71] New Zealand Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) para 10.6. See also para 10.3, where they cite *Re Philips New Zealand Ltd* [1997] 1 NZLR 93, 101 for the proposition that the law of New Zealand already permits beneficiaries 'to use the rule to confer new powers upon trustees or deviate from, or vary, the terms of the trust where the trustees are in agreement with the change'. See now New Zealand Ministry of Justice, *Draft Trusts Bill* (2016), s 109, especially s 109(2)(d)..

[72] As stated in n 66, a 'varied trust' may be functionally identical with a 'new settlement'. However, different formality rules may apply, depending on the mechanism by means of which the beneficiaries and trustees agree

decline to act on these new terms, and if the beneficiaries insist on the new or varied terms then either the trustees may choose to retire or the beneficiaries can force them to retire and appoint more compliant trustees under the Trusts of Land and Appointment of Trustees Act 1996, s 19.

Further support for the view that new rights and duties under existing trusts can be created by trustees and beneficiaries acting together can be drawn from a long line of cases which hold that where trustees wrongfully sell trust property or buy new property with trust money, the beneficiaries can adopt the sale or purchase. The sale proceeds or the new asset are then treated as having been acquired by the trustees in an authorised transaction and form part of the trust fund thereafter, to be held by the trustees in accordance with the trust terms. Cases to this effect include *Wright v Morgan*, where Viscount Dunedin held that:[73]

---

to effect the new arrangement. A variation authorised under the 1958 Act is not caught by the Law of Property Act 1925, s 53(1)(c) (which requires signed writing for 'dispositions' of equitable interests): *Holt* (n 61) 115. Nor can the sub-section be engaged if the beneficiaries take a conveyance of legal title to themselves (since it concerns dispositions of 'equitable' and not 'legal' interests) and then transfer this legal title to the trustees of a new settlement. This consideration seems to have led the judges in *Vandervell v IRC* [1967] 2 AC 291 to hold that s 53(1)(c) is not engaged where an absolute beneficial owner directs his trustee to transfer legal title to another person with the intention that his equitable interest shall thereby be extinguished. This finding should also logically extend to a case where the recipient of the legal title has previously agreed to hold it on a new trust. However, these were effectively the facts of *Grey* (n 71), which held that such an arrangement is caught by s 53(1)(c), although it is hard to see this because in *Grey* the trustees effectively 'conveyed' legal title from themselves in their capacity as trustees for the settlor to themselves in their different capacity as trustees of other pre-existing settlements for the settlor's grandchildren. This is well explained in B Green, '*Grey*, *Oughtred* and *Vandervell* – A Contextual Reappraisal' (1984) 47 *MLR* 385, especially at 389–90, 408–11.

[73] [1926] AC 788, 799, adding that 'if there is not unanimity then it is not trust property, but the trustee who has made it must keep the investment himself. He is debtor to the trust for the money which has been applied in its purchase'. See also *Harrison v Harrison* (1740) 2 Atk 121; 26 ER 476; *Bostock v Blakeney* (1794) 2 Bro CC

> if a trustee has made an improper investment, the law is well settled. The cestuis que trustent as a whole have a right, if they chose, to adopt the investment and to hold it as trust property.

Likewise, in *Libertarian Investments Ltd v Hall*, Lord Millett NPJ said that if an account of a trustee's dealings with trust property discloses an unauthorised disbursement:[74]

> the [beneficiary] may falsify it, that is to say ask for the disbursement to be disallowed. … But [he] is not bound to ask for the disbursement to be disallowed. He is entitled to ask for an inquiry to discover what the [trustee] did with the trust money … [and if he] invested the money at a profit, the [beneficiary] … can treat it as an authorised disbursement, treat the property in which it has been invested as acquired with trust money, and follow or trace the property and demand that it or its traceable proceeds be restored to the trust in specie.

The trustees' unauthorised dealings with the trust property may precede the giving of the beneficiaries' consent, or they may not, since the trustees and beneficiaries may all agree in advance that the trustees will make the relevant sales and investments. Cases of the latter sort more obviously resemble cases where the trustees agree to take on new duties at the

---

653, 656; 29 ER 362, 364; *Pocock v Reddington* (1801) 5 Ves Jun 794, 800; 31 ER 862, 865; *Scott v Scott* (1963) 109 CLR 649, 660.

[74] (2013) 16 HKCFAR 681 [168]–[169]. Other recent statements of the principle can be found in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1513]; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd (in Administrative Receivership)* [2007] EWHC 915 (Ch) [113]; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195; [2013] Ch 91 [102]; *Tang v Tang* [2017] HKCFA 3 [23]–[25].

beneficiaries' request, but cases where the beneficiaries give their consent after the trustees' dealings are essentially no different from cases where they consent to these dealings beforehand. In either case, the trustees' motives for entering the relevant transaction do not matter, in the sense that it makes no difference whether they deal with the trust property with the subjective intention of acting for the beneficiaries, for themselves, or for someone else. All that matters is that the trustees have in fact sold the trust property or invested trust money in a transaction which is unauthorised by the trust deed but which the beneficiaries choose to adopt. This suggests that it may not be quite right to say that the sale proceeds or newly acquired investment become part of the trust fund because the beneficiaries and trustees have agreed that this should happen. In some cases there is no real agreement, and although the courts could deem an agreement to have taken place (for example, by refusing to let the trustees say that they acted with a contrary motive), there is no need for the courts to explain the cases in this way, since there is no need for an agreement at all: the beneficiaries and trustees need only to have 'acted together' in the sense that the trustees have in fact done something and the beneficiaries have consented to it.

In cases where beneficiaries adopt unauthorised sales or investments by trustees, some thought must also be given to the position of the third parties with whom the trustees have dealt. Unauthorised sales of trust property are not generally capable of overreaching the beneficiaries' equitable interests in the property because overreaching only occurs as a result of the trustees' exercise of their powers under the trust deed to subordinate the beneficiaries' interests to those of a purchaser.[75] Suppose, however, that a trustee sells trust property to a

[75] *State Bank of India v Sood* [1997] Ch 276, 281 (Peter Gibson LJ), endorsing C Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' [1990] *CLJ* 277, especially at 294–95. Note that the Trusts of Land and Appointment of Trustees Act 1996, s 6 gives trustees of land 'all the powers of an absolute owner' in relation to the land when exercising their functions as trustees.

third party purchaser in an unauthorised transaction which the beneficiaries subsequently adopt. In such a case overreaching comes into play again because the beneficiaries' adoption of the sale retroactively confers the necessary authority on the trustees to overreach their beneficial interest.[76] Support for this can be drawn from Jessel MR's statement in *Re Hallett's Estate* that the beneficiaries' ability to treat the proceeds of an unauthorised sale as trust property is the same as for an authorised sale.[77] Since the beneficiaries' ability to do this is the corollary of the overreaching doctrine, it follows that the purchaser's position is also the same in both cases. Jessel MR's words were as follows:

> The modern doctrine of Equity as regards property disposed of by persons in a fiduciary position is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds.

7. CONCLUSION

It may seem perverse to have written an account of the circumstances in which new rights and duties can be created under existing trusts for a collection of essays concerned with

[76] D Fox, 'Overreaching' in Birks and Pretto (n 3) 106–07. See also RC Nolan, 'Property in a Fund' (2004) 120 *LQR* 108, 111–16.

[77] (1880) 13 Ch D 696, 708–09.

‘Defences in Equity’. One point of our study, however, has been to show that legal rules can produce more than one effect, and that their significance for litigants may depend on the context in which they are invoked. It may suit trustees to defend a claim for breach of trust by arguing that they never committed a breach of duty because the effect of the beneficiaries’ unanimous consent to their actions was to change the content of the duties which the trustees owed. Or it may suit beneficiaries to say that they acquired new rights against trustees when they agreed with the trustees that the trust property should be held on different terms, or when they adopted the trustees’ unauthorised dealings with the trust property.

A wider point which emerges from our chapter is that rights and duties under express trusts are not only sourced in the intentions of settlors that they should come into existence. Settlors can only realise their intentions with the cooperation of other parties, such as their intended trustees and beneficiaries who must choose to accept (and not to disclaim) their duties and rights, and such as the intended donees of powers who must choose to exercise their powers, as discussed in this chapter in Section 2. The intentions of settlors can also be overridden, and new rights and duties can be created which the settlor may not have contemplated and may not have wished to be brought into existence. As discussed in Sections 4 and 5, trustees and beneficiaries have limited ability to achieve such effects if they act unilaterally, but as discussed in Section 6, they have more power if they act together.