

The Creation of Express Trusts

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1. INTRODUCTION

‘As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust. ... First, if the words are so used, that upon the whole, they ought to be construed as imperative; ... Secondly, if the subject of the recommendation or wish be certain; and, ... Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.’

Lord Langdale MR’s words in *Knights v Knights*¹ are much cited in modern trusts textbooks where the impression is frequently given that the only reason why express trusts come into being is that a settlor manifests an intention that this should happen. In this article we argue, first, that such accounts are under-inclusive because trustees and beneficiaries also have a part to play in the creation of express trusts, and, second, that they are insufficiently nuanced because rights under express trusts do not all come into being for the same reasons.

To introduce the first of these points: where a settlor intends to make himself trustee, the question obviously does not arise whether the person he intends to serve in this capacity is willing to do so. However, where he intends someone else to be trustee, this person cannot be forced against his will to take on the full range of duties that the settlor will typically wish him to perform. Nor can the settlor force rights onto the beneficiaries in either case. It follows that it is only partly true to say, as Charles Rickett has said, that the settlor’s intention ‘brings the trust into being’, and it is actively misleading to say, as he has also said, that the intention to which an express trust responds is a ‘unilateral one’.² We agree with Rickett that settlors need not form an agreement with the beneficiaries and trustees, with the consensual meeting of minds that an agreement entails.³ However, we consider that these parties must all consent to the creation of the trust, either by agreement or by independent action,⁴ and since a settlor cannot create all the rights which typically vest in the beneficiaries of an express trust without

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¹ (1840) 3 Beav 148, 172-3; 49 ER 58, 68.

² C Rickett, ‘Instrumentalism in the Law of Trusts: The Disturbing Case of the Constructive Trust upon an Express Trust’ (2016) 47 Victoria University of Wellington LR 463, 466. See too M Lupoi, *Trusts: A Comparative Study* (Cambridge, CUP, 2000) 96-8; J Palmer, ‘Dealing with the Emerging Popularity of Sham Trusts’ [2007] NZ Law Rev 81, 94; R Chambers, ‘Liability’ in P Birks and A Pretto (eds), *Breach of Trust* (Oxford, Hart, 2002) 1, 29; M Bryan, ‘The Inferred Trust: An Unhappy Marriage of Contract and Trust?’ (2016) 39 CLP 377, 379.

³ Rickett (n 2) 466.

⁴ The distinction we make here between agreement and consent has also been made by Lionel Smith in work on fiduciary obligations: L Smith, ‘Contract, Consent, and Fiduciary Relationships’ in PB Miller and AS Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford, OUP, 2016).

the consent of the trustees and beneficiaries, the intentions which enliven these rights are not ‘unilateral’ but ‘multilateral’. We therefore prefer Rickett’s own previous statement that the ‘intention to be established must be that of both the settlor and the trustee’,⁵ though we would add that the beneficiaries’ consent is also required.

To introduce our second point: the beneficiaries of express trusts have various rights. Some of these correspond to the duties owed by the trustees in relation to their managerial and distributive functions; their content is determined by the trust deed, and by statute and case law which lay down mandatory rules that cannot be excluded or modified by the settlor, and default rules which take effect in the absence of contrary stipulations. The beneficiaries also have rights which find expression in the rule in *Saunders v Vautier*,⁶ and in rules which give them priority over the trustee’s creditors in his insolvency, rights in the proceeds of trust property acquired by the trustees and rights in misapplied trust property held by third party recipients other than bona fide purchasers for value without notice of the beneficiaries’ equitable interest.⁷ In this article, we describe rights of the first sort as ‘personal rights’, and rights of the second sort as ‘proprietary rights’.⁸ There is an ongoing scholarly debate about the juridical nature of beneficiaries’ proprietary rights,⁹ but we do not engage with that debate here: our goal is only to identify when and why such rights come into existence.

Settlors usually obtain the consent of trustees to act as such before conveying the trust property to them. In such cases, the full range of duties intended by the settlor come into existence from the moment when the trust is constituted because the trustees have consented to act as trustees; and the beneficiaries’ corresponding rights are sourced in the settlor’s and the trustees’ intentions, accepted by the beneficiaries. However, trustees do not always give their consent in advance, and when a settlor transfers property to a person who knows that the settlor intends him to be trustee but who does not consent (or has not yet consented) to do so, the law gives the beneficiaries personal rights against him, to stop him from dealing with the property in a way that would damage their beneficial interest. Furthermore, when a settlor transfers property to an intended trustee who neither consents to act as trustee nor even knows of the transfer, the beneficiaries’ proprietary rights come into being when the property is received. As the trustee has no intentions respecting the property, this effect can only be a response to the settlor’s intention to create these rights, accepted by the beneficiaries.

Our analysis has significant implications for the proper understanding of trust law rules which are often taken for granted. Many of these are brought out in the following discussion, but to highlight a few of them here: it explains why a settlor’s intention must be externally manifested and objectively assessed, since intended trustees and beneficiaries need to know what duties and rights the settlor means them to have before they can decide whether to consent to their creation; it is consistent with the rule that documents which purport to create a trust are not disregarded as a sham unless the supposed ‘settlor’ and ‘trustee’ had a common

⁵ C Rickett, ‘The Classification of Trusts’ (1999) 18 NZULR 305, 310. See too P Birks, *Unjust Enrichment* 2nd edn (Oxford, OUP, 2005) 28: ‘[express] trusts arise from declarations of trust accepted by the trustee.’

⁶ (1841) 4 Beav 115, 49 ER 282.

⁷ *Re Montagu’s ST* [1987] Ch 264, 272; *Foskett v McKeown* [2001] 1 AC 102, 127 and 130; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [77]–[80].

⁸ Cf *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 [15]–[16]; RC Nolan, ‘Equitable Property’ (2006) 122 LQR 232; P Jaffey, ‘Explaining the Trust’ (2015) 131 LQR 377, 393–5.

⁹ B McFarlane and R Stevens, ‘The Nature of Equitable Property’ (2010) 4 J Eq 1; S Gardner, ‘“Persistent Rights” Appraised’ in N Hopkins (ed), *Modern Studies in Property Law*, vol 7 (Oxford, Hart, 2013); J Edelman, ‘Two Fundamental Questions for the Law of Trusts’ (2013) 129 LQR 66; J Penner, ‘The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust’ (2014) 27 Canadian Journal of Law and Jurisprudence 473.

intention to deceive;¹⁰ it explains why trusteeship is said to be a ‘voluntary office’ and shows just what this means; and it shows just what it means to say that ‘a trust will not fail for want of a trustee’. The article also provides guidance for intended trustees and beneficiaries who are informed of the settlor’s intentions, particularly those who do not wish to become trustees and/or accept beneficial interests in the trust property; and it explains what settlors or their personal representatives should do in cases of disclaimer.

The article looks in turn at the parts played by settlors, trustees, and beneficiaries in the creation of proprietary and personal rights under express trusts.¹¹ Settlors are considered in part 2, trustees in part 3, and beneficiaries in part 4.¹²

2. THE ROLE OF THE SETTLOR

Although the settlor’s unilateral manifestation of intention does not suffice to create rights under an express trust for beneficiaries, there can be no such trust unless the settlor decides to create one and manifests this intention. When deciding whether a settlor intended to create an express trust, the courts do not ask whether a reasonable person in the settlor’s position would have formed such an intention: what matters is whether the settlor did form such an intention. Three points will be made about this: first, the settlor must intend to create duties for the trustees and corresponding rights for the beneficiaries in relation to the trust property; second, his intention must be externally manifested; and third, the question whether he intended to create a trust is tested objectively.

2.1. Content of the Settlor’s Intention

What must the settlor intend? The obvious answer is that he must intend to create a trust. However, there are many cases which hold that ‘it is not necessary for a settlor to use the word “trust” or any other formal language, or to have any knowledge of trust law’.¹³ Hence it is more accurate to say that the settlor must intend beneficiaries to have rights in relation to the relevant property, and must intend to impose duties on trustees in relation to their handling of the property that can be enforced by the beneficiaries.¹⁴

2.2. Manifestation of the Settlor’s Intention

A settlor cannot bring an express trust into being simply by forming an intention to create a trust. In Megarry J’s words:¹⁵

¹⁰ *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [190]; further discussion in YK Liew, ‘Intention and Sham Trusts’ (forthcoming 2018).

¹¹ In some cases, the consent of third parties is required before legal title to the relevant property can be transferred to the trustee: e.g. the directors of private companies commonly have a power to veto share transfers. We do not discuss these cases, as we consider that the third parties’ consent is relevant only insofar as it forms one of the preconditions for the constitution of the trust by the settlor: it relates only to the transfer of legal title to the trustees, and not – in any event, not directly – to the creation of rights *under the trust*.

¹² The focus of our discussion is on express trusts for persons. The parts played by settlors and trustees in the creation of trusts for charitable purposes are similar, but beneficiaries obviously have no part to play in this.

¹³ *Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch), [2015] 1 WLR 16 [28]. See too *Richards v Delbridge* (1874) LR 18 Eq 11, 14; *Paul v Constance* [1977] 1 WLR 527; *Clarence House Ltd v National Westminster Bank Plc* [2009] EWCA Civ 1311, [2010] 1 WLR 1216 [43].

¹⁴ Cf R Chambers, ‘The Importance of Specific Performance’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, Lawbook Co, 2005) 455: the ‘essential feature common to all trusts ... [is] that the trustees are required by the rules of equity to use the trust assets at least partly for the [beneficiaries’] benefit’.

¹⁵ *Re Vandervell’s Trusts (No 2)* [1974] Ch 269, 294. See too *Cook v Fountain* (1676) 3 Swan 585, 591; 36 ER 984, 987: ‘express trusts are declared either by word or writing’. Cf *Scott and Ascher on Trusts* 5th edn (New York, Aspen Publishers, 2006) vol 1, §4.1.

‘Normally the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result.’

A settlor might manifest his intention by communicating it to others through writing, spoken words, conduct,¹⁶ or a combination of these,¹⁷ but communication is unnecessary provided that the settlor records his intention in a form which is capable of later inspection. Several nineteenth century cases hold that a trust can be validly created when a settlor executes a trust deed which he keeps in his possession and the contents of which he does not communicate to the trustee or beneficiary – provided that they consent to the trust when they eventually learn about the settlor’s intentions. In *Standing v Bowring*, for example, a settlor put stock into her own name and the name of her godson as trustees for their joint benefit. She then changed her mind before telling him anything. Lindley LJ held that she could not recover the stock when her godson affirmed the arrangement, because a trust ‘vests the property in [the beneficiary] subject to his dissent.’¹⁸

When deciding whether a settlor formed an intention to create a trust, the courts may draw a contrary inference from the fact that the settlor never communicated such an intention. In *Re Cozens*,¹⁹ for example, pencilled notes on a deceased person’s accounts were submitted in evidence to support an argument that he had manifested an intention to create a trust during his lifetime. These notes had been found among the deceased’s papers by his executor and had never been communicated to anyone. Neville J held that:²⁰

‘the absence of communication raises a strong inference against an intention to make an appropriation irrevocable. In the absence of evidence to the contrary I think the inference of silence was intended to enable the declarant to adhere to or to abandon the declaration as best served his advantage for the time being.’

What matters, therefore, is whether a settlor has manifested a ‘present and irrevocable intention’ to create a trust,²¹ a question of fact which must be decided in light of all the evidence, including evidence of communication or lack of communication.

The need for an external manifestation of intention makes it unnecessary for the court to answer a difficult, if not impossible question, namely what thoughts were in the settlor’s mind at some past moment. Another reason for this requirement is that intended trustees and beneficiaries must be able to ascertain what the settlor intended so that they can decide whether to consent to the trusteeship or beneficial interest. This consideration also explains our next point, that a settlor’s intention is objectively assessed: it would be too hard for intended trustees and beneficiaries to make their decisions on the basis of a settlor’s (possibly undiscoverable, possibly idiosyncratic) subjective intention rather than on what a reasonable person would understand to have been his intention in the light of his words and actions.

¹⁶ *ex parte Pye* (1811) 18 Ves Jun 140, 34 ER 271; *Re Kayford Ltd (in liquidation)* [1975] 1 WLR 279.

¹⁷ *Paul v Constance* [1977] 1 WLR 527.

¹⁸ (1885) 31 Ch D 282, 290. See too *Fletcher v Fletcher* (1844) 4 Hare 67, 67 ER 564; *Alexander v Brame* (1854) 19 Beav 436, 52 ER 419; *Muggeridge v Stanton* (1859) 1 De G F & J 107, 45 ER 300; *Middleton v Pollock, ex p Elliott* (1876) 2 Ch D 104. Cf *Rose v Rose* (1986) 7 NSWLR 679, 686: a ‘declaration of trust would be fully effective even though it did not come to the notice of the beneficiary’.

¹⁹ [1913] 2 Ch 478.

²⁰ *Cozens* (n 19) 486; followed in *Hyhonie Holdings Pty Ltd v Leroy* [2003] NSWSC 624 [43], affirmed [2004] NSWCA 72.

²¹ *Cozens* (n 19) 487.

2.3. Objective Assessment of the Settlor's Intention

In *Twinsectra Ltd v Yardley*, Lord Millett held that a settlor 'must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant'.²² This dictum was followed in *Challinor v Juliet Bellis & Co (a firm)*, where Briggs LJ said that:²³

'A person creates a trust by his words or conduct, not by his innermost thoughts. ... In the *Twinsectra* case, a *Quistclose* trust was established despite the transferor having no subjective intention to create a trust. But the objectivity principle works both ways. A person who does subjectively intend to create a trust may fail to do so if his words and conduct, viewed objectively, fall short of what is required. As with the interpretation of contracts, this process of interpretation is often called the ascertainment of objective intention. In the contractual context the court is looking for the objective common intention, whereas in the trust context the search is for the objective intention of the alleged settlor.'

Whether the settlor objectively intended to create a trust is decided by assessing his words and acts,²⁴ taking 'all the relevant circumstances' into account,²⁵ including 'other language used by [the parties], ... the nature of the transaction and ... the circumstances attending the relationship between the parties'.²⁶ Context is all. Words that might ordinarily be construed as a statement of intention to make an outright gift of legal title to property might be interpreted as a statement of intention to create a trust if that is their 'only possible meaning' in all the circumstances.²⁷

The question arises whether a different approach is taken in cases where a settlor has entered a contract with a trustee and/or beneficiary, which allegedly evidences an intention to create a trust? In such cases, two issues arise, namely whose intentions matter, and what interpretive approach should be taken by the court? As to the first issue, Michael Bryan has argued that the court should only concern itself with the question whether the settlor intended to create a trust, noting that:²⁸

'A declaration of trust must be made by the party identified as the settlor. In principle there is no reason why the declaration could not be independent of any contract subsisting between the settlor and the intended trustee. But the contract will be decisive in most cases since, in the absence of other documentation, it will provide the only evidence of the settlor's objective intention to create a trust.'

We agree that it is irrelevant whether the settlor formed a common intention with the trustee and/or beneficiary to create a trust. There is no need for the parties to have agreed about this before an express trust can be created; all that is needed is for each of the parties to have intended rights under the trust to be created. Further to Bryan's point, however, we would add that the contract is also likely to be the best evidence of the trustee's and/or beneficiary's

²² [2002] 2 AC 164 [71]. See also *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253.

²³ [2015] EWCA Civ 59, [2016] WTLR 43 [58].

²⁴ For cases where the courts were asked to infer an intention to create a trust from the settlor's conduct, see *Heartley v Nicholson* (1874-75) LR 19 Eq 233, 242-3 (where the evidence did not support the argument) and *Levin v Ikiua* [2010] NZCA 509, [2011] 1 NZLR 678 [43] (where it did).

²⁵ *Byrnes* (n 22) [54].

²⁶ *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 [34].

²⁷ *T Choithram International SA v Pagarani* [2001] 1 WLR 1.

²⁸ Bryan (n 2) 383.

consent to the creation of these rights. In relation to the second issue, Bryan has cautioned against the wholesale adoption of interpretive principles from contract law. In particular, while the courts may think it appropriate to imply contractual terms on the basis of business efficacy when they interpret a commercial contract,²⁹ that is an insufficient basis for discovering an intention on the part of a settlor to create a trust. Even in a contractual setting, it remains necessary for the court to discover ‘the objectively manifested intention of one contracting party – the party whose property is being settled on trust.’³⁰

Where a settlor unequivocally states in a written document that he is creating a ‘trust’, how much weight should such evidence carry when the court comes to ascertain his intention? This question arose in *Byrnes v Kendle*.³¹ The defendant bought a house in his sole name, and executed an ‘Acknowledgment of Trust’ in which he declared that he held the house on trust for himself and his then wife. At trial, the defendant gave evidence that he had not intended to create a trust, and that when he signed the Acknowledgment of Trust he thought that he was merely promising to share half the proceeds of sale of the property with his then wife when it was eventually sold. The High Court of Australia held that the defendant’s subjective intentions were irrelevant, and that the declaration of trust contained in the Acknowledgment conclusively established that the settlor had intended to create an express trust. In Gummow and Hayne JJ’s words:³²

‘The fundamental rule of interpretation ... is that the expressed [written] intention of the parties is to be found in the answer to the question, “What is the meaning of what the parties have said?”, not to the question, “What did the parties mean to say?”’

The court revisited its earlier decision in *Commissioner of Stamp Duties (Queensland) v Jolliffe*,³³ which concerned a statute that forbade anyone to earn interest on more than one bank account. The defendant opened two accounts at his bank, and to circumvent the statute he declared that he held the monies in the second account ‘as trustee’ for his wife. However, he did not inform her of this declaration, and when she died, he withdraw all the money in the account, including accumulated interest, for his own use. On the basis of the defendant’s evidence that he had not intended to create a trust, the majority of the High Court held that no trust had been created, since it would be ‘contrary to the real intention of the person alleged to have created it.’³⁴ In *Byrnes*, however, the decision in *Jolliffe* was overruled, or at least confined to the context of the relevant statutory provision.³⁵ The *Byrnes* court also approved

²⁹ See e.g. *Korda v Australian Executor Trustees (SA) Ltd* [2014] VSCA 65; reversed [2015] HCA 6, (2015) 255 CLR 62; both discussed in MJR Crawford, ‘Inferences and Intentions in the Law of Trusts’ (2015) 9 J Eq 290, who rightly warns of the risk created when the courts imply terms on the basis of ‘commercial necessity’ (viz that they will slide from asking what the parties agreed into asking what they ought to have agreed), but who wrongly assumes that the canons of contractual interpretation can all be applied unproblematically in the trusts context.

³⁰ Bryan (n 2) 395. See too *Nguyen v Phan (No 2)* [2015] VSC 634 [232]: ‘To determine whether an agreement was entered into with the effect of creating a trust as alleged, essentially the following is involved: (1) Deciding what was said and agreed to by [the alleged settlor], the legal and beneficial owner of the [alleged trust property]. (2) [Deciding] whether [the alleged settlor]’s conduct (by what [he] said or agreed to) manifested an intention to create a trust. (3) If (2) is answered affirmatively, was it a trust as alleged by the plaintiffs?’

³¹ *Byrnes* (n 22).

³² *Byrnes* (n 22) [53]

³³ (1920) 28 CLR 178.

³⁴ *Jolliffe* (n 33) 181.

³⁵ *Byrnes* (n 22) [17], [65] and [116].

Isaacs J's dissenting judgment in *Jolliffe*,³⁶ where he said that a written declaration of trust could not be contradicted by 'a secret mental reservation not to fulfil what [the settlor] has openly undertaken' or by 'subsequent evidence of his then undisclosed intention, contrary to the unambiguous declaration he made'.³⁷

It might be thought that the effect of *Byrnes*, and its overruling of *Jolliffe*, is that a court must always hold that a trust was intended in cases where a settlor has used the term 'trust' in writing. However, the courts have made it clear that use of the word 'trust' in a document is not necessarily conclusive of a settlor's intentions if the word is taken in isolation:³⁸ all his words must be read in light of the whole document.³⁹ Moreover, written documents may differ in their degrees of formality,⁴⁰ ranging from a deed or other signed document drafted by a professional legal advisor to a scribbled note or a hastily written email,⁴¹ and it would be very surprising if a trust were always created whenever the term 'trust' is used in writing, whatever type of writing that might be. There are also different contexts in which a document containing the term 'trust' might be created. So, for instance, it has been suggested that where:⁴²

'the [t]rustee provides the document, a standard trust deed he has created in cookie-cutter fashion, which the settlor, at best, paid little attention to ... the search for certainty of intention [is not limited] to that document alone.'

It is therefore best to say that, as a general rule, the settlor's intentions must be found by objectively assessing all their external manifestations, whatever form these take. Stated in this way, the rule still excludes the settlor's undisclosed intentions from consideration, but it does not admit that a written declaration is necessarily conclusive. So, for example, in *Jolliffe*, Isaacs J came to the conclusion that a trust had been created, both by 'looking at the [relevant] documents', and by considering 'the uncontroverted circumstances, which include the Bank's acting on [the defendant]'s direction in treating the account as one in trust for [his wife]'.⁴³ The judge also commented that 'had [the defendant] told his wife that he had placed the money there nominally but not really for her, the case might have been stronger for him'.⁴⁴ These dicta indicate that evidence of objective intention apart from any writing can be taken into account, which may either corroborate or contradict a written declaration.

Of course, a formal document containing a declaration of trust will strongly suggest that, objectively, the settlor intended to state an intention to create a trust.⁴⁵ Hence, as Glazebrook J observed in *Official Assignee v Wilson*:⁴⁶

³⁶ *Byrnes* (n 22) [15]-[17], [62], [65] and [116].

³⁷ *Jolliffe* (n 33) 187 and 191.

³⁸ Thus, although the phrase 'in full confidence' was used in both of the wills considered in *Re Adams and the Kensington Vestry* (1884) 27 Ch D 394 and *Comiskey v Bowring-Hanbury* [1905] AC 84, a trust was found in the latter case but not in the former.

³⁹ *Lambe v Eames* (1870) LR 10 Eq 267, 271.

⁴⁰ *Jolliffe* (n 33) 187.

⁴¹ See *Singha v Heer* [2016] EWCA Civ 424, [2016] WTLR 1189 [62]: 'it is likely to be correct to assume that [the word "trust"] had its legal meaning in a document that was actually drawn up by lawyers acting in their professional capacity, but the documents in question are short letters written informally by a person acting under pressure with no professional practising qualification, even if he did have legal training.'

⁴² *Antle v R* [2009] TCC 465, [2009] DTC 1305 [44].

⁴³ *Jolliffe* (n 33) 190.

⁴⁴ *Jolliffe* (n 33) 192. See also *Challinor v Juliet Bellis & Co (a firm)* [2011] EWHC 3249 (Ch) [62].

⁴⁵ *Byrnes* (n 22) [9]. See also *Associated Alloys Pty Ltd v ACN 001 452 106 Pty (in liq)* (2000) 202 CLR 588. Execution of a formal document is also likely to provide evidence that the settlor intended the document

‘While factual matrix and subsequent conduct can be used to interpret a written document, they cannot normally (absent duress or mistake for example) be used to contradict it.’

In particular, significant weight should be accorded to a formal document if one of the reasons why it was executed was to enable others to rely on its wording. So in *Re Sigma Finance Corporation*, where the Supreme Court had to interpret a complicated security trust deed, Lord Collins observed that:⁴⁷

‘Where a security document secures a number of creditors who have advanced funds over a long period of time it would be quite wrong to take account of circumstances which are not known to all of them.’

The view that the courts are not always confined to evidence of a written document when they determine a settlor’s intention explains some nineteenth century English cases which might otherwise be thought inconsistent with *Byrnes*.⁴⁸ For instance, take *Field v Lonsdale*.⁴⁹ By statute the amount a person could deposit at a bank in his own name was limited, but he could hold money in a separate account on trust for another, up to a prescribed limit for each trust. An alleged ‘settlor’, who had reached the limit of savings he could deposit in his own name, opened another account ‘in trust’ for one of his sisters without her knowledge. After her death, he continued depositing money until the account reached the statutory limit. He then opened a third account ‘in trust’ for another sister, and acted similarly. After his death, the question arose whether the money in the latter two accounts was held on trust. Lord Langdale MR held not, briefly stating that:⁵⁰

‘the only intention was to evade the provisions of the Act of Parliament, and not to create a trust. The declaration is, therefore, ineffectual ...’

Field can be explained on the basis that the written ‘declarations’ of trust were not the only evidence from which the intentions of the supposed ‘settlor’ could be inferred. His actions of opening successive accounts, and – in particular – of continuing to deposit money after his sister’s death, were also evidence of his intentions on the basis of which the court could make the objective determination that he had not intended to create trusts for his sisters’ benefit.

3. THE ROLE OF THE TRUSTEE

A person ‘cannot be compelled to accept the burdens of ... trusteeship against his or her will’,⁵¹ and an intended trustee ‘may choose whether he will accept the trust, or not’.⁵² Thus

exhaustively to define the trust. Where such intention is found, the ‘parol evidence’ rule will apply where courts are concerned with ascertaining the *terms* of the trust.

⁴⁶ [2007] NZCA 122, [2008] 3 NZLR 45 [107].

⁴⁷ [2009] UKSC 2, [2010] 1 All ER 571 [37].

⁴⁸ As argued in S Douglas and B McFarlane, ‘Sham Trusts’ in H Conway and R Hickey (eds), *Modern Studies in Property Law*, vol 9 (Oxford, Hart, 2017) 243.

⁴⁹ (1850) 13 Beav 78, 51 ER 30.

⁵⁰ *Field* (n 49) 13 Beav 81, 51 ER 31.

⁵¹ *Scarpuzza v Scarpuzza* [2011] WASC 65 [47].

⁵² *Robinson v Pett* (1734) 3 P Wms 249, 251; 24 ER 1049, 1050.

an express trust is ‘one which is deliberately established and one which the trustee deliberately accepts’.⁵³ It follows that an intended trustee’s consent is also needed to bring the full range of rights and duties intended by the settlor into being, as he has a choice whether to accept or disclaim the trusteeship.⁵⁴ As we explain in section (1), however, the beneficiaries have different rights which do not all arise for the same reasons. In section (2) we discuss how the courts should decide whether an intended trustee has accepted or disclaimed in cases where this is unclear. In section (3) we examine the legal effects of disclaimer.

3.1. Beneficiaries’ Rights Come into Being for Different Reasons

To explain the role of the trustee in the creation of rights under an express trust, it is helpful to distinguish three cases. First, there is the case where a settlor transfers legal title to property to an intended trustee who is ignorant of the transfer and of the settlor’s intention to create a trust. Second, there is the case where a settlor transfers legal title to property to an intended trustee who knows of the transfer and the settlor’s intention, but who has not decided whether to accept or disclaim trusteeship or who disclaims. Third, there is the case where a settlor transfers legal title to property to an intended trustee who knows of the transfer and the settlor’s intention to create a trust, and who accepts the trusteeship.

3.1.1. Ignorant ‘Trustees’

If a settlor transfers legal title to property to an intended trustee who is ignorant of the transfer and of the intended trusteeship, the beneficiary nevertheless acquires proprietary rights in the property. Three groups of cases bear out this proposition. One group concerns the death of an intended trustee who predeceases the settlor before constitution of the trust. It has been said of this situation that:⁵⁵

‘a devise to trustees doth not become void by the death of the trustees in the life-time of the testator, but is good for the use, and the heir at law is considered as a trustee.’

A second group concerns the appointment of trustees in an official capacity followed by abolition of the relevant office before the trust is constituted; in such cases, where:⁵⁶

‘the testator has named, as trustee, an officer who in his official character no longer exists, ... his intended trust in that respect fails; but the failure of a trustee will be supplied by this Court’.

A third group concerns the appointment of legally incapable persons or institutions as trustees, where:⁵⁷

⁵³ *Fortex Group Ltd (in rec and liq) v Macintosh* [1998] 3 NZLR 171, 172.

⁵⁴ To gain maximum flexibility during the lifetime of their settlements, settlors also often wish to vest powers in certain individuals e.g. to amend the trust instrument, appoint or resettle trust property, buy or sell trust property, add or remove beneficiaries, and so on: M Hubbard, *Protectors of Trusts* (Oxford, OUP, 2013) ch 6; J Kessler, *Drafting Trusts and Will Trusts: A Modern Approach*, 12th edn (London, Sweet & Maxwell, 2015) ch 12; D Hayton, P Matthews and C Mitchell, *Underhill & Hayton: Law Relating to Trusts and Trustees* 19th edn (London, LexisNexis, 2016) ch 14). Powers of this sort cannot be forced onto intended power-holders, who may disclaim if they do not want them (Law of Property Act 1925, s 156(1)). Note, however, that unlike trustee disclaimer, disclaimer of such powers does not normally mean that the trust ceases to exist

⁵⁵ *A-G v Lady Downing* (1766) Amb 550, 552; 27 ER 353, 353. See too *Re Smirthwaite’s Trusts* (1871) LR 11 Eq 251.

⁵⁶ *A-G v Stephens* (1834) 3 My & K 347, 352; 40 ER 132, 134.

‘[a]lthough the devise ... be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise.’

These cases all hold that beneficiaries acquire equitable proprietary rights in property which the settlor intends to be held on trust, although the person designated as trustee does not exist or lacks capacity and therefore does not know of the transfer and intended trusteeship. These cases strongly suggest that the same result should follow where the settlor’s intended trustee is a legally capable person who lacks knowledge of the transfer and the intended trusteeship, albeit that he can acquire such knowledge afterwards.

In the next two sections, we make the point that an intended trustee must know that the settlor intends him to be a trustee before he can incur any duties towards the beneficiary, either because these are imposed to prevent him from acting unconscionably, or because he consents to perform them once he knows that the settlor intends there to be a trust. It follows that although beneficiaries have equitable proprietary rights in property held by an ignorant recipient whom the settlor intends to be trustee, they can have no personal rights against him. It has been disputed whether one can properly use the word ‘trust’ to describe an arrangement where legal rights to property are vested in one party and equitable rights are vested in another, but where the legal owner owes no duties to the equitable owner. Some courts have said that a ‘trust’ comes into existence whenever the legal and equitable ownership of property is split,⁵⁸ while others have said that a ‘trust’ cannot exist unless the legal owner owes some duties to the equitable owner.⁵⁹ The semantic aspect of this debate does not matter for present purposes. What matters is that where property is transferred by a settlor to an ignorant recipient, it is ring-fenced from the recipient’s personal estate and if the recipient incurs a debt which he charges on this property, the creditor cannot defeat the beneficiary’s equitable proprietary interest. The beneficiary can also recover the property from a third party to whom the recipient transfers it unless the third party is a bona fide purchaser for value without notice of the equitable interest.⁶⁰

3.1.2. *Knowing ‘Trustees’*

In *Westdeutsche Landesbank Girozentrale v Islington LBC*, Lord Browne-Wilkinson said that a recipient of property: ⁶¹

‘cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an [express trust].’

His Lordship should not, however, be taken to mean that, once an intended trustee knows that the settlor intended to create a trust, he will owe all the duties that the settlor intended him to owe, regardless of whether he consents to this. Pending the intended trustee’s acceptance or disclaimer of office, or following his disclaimer, a limited range of duties are imposed on him which persist for as long as he has the legal title, the point of which is to preserve the trust property and stop him from acting against the beneficiaries’ interests. However, he will owe no other duties to the beneficiaries unless he voluntarily assumes them.

⁵⁷ *Sonley v The Clock-Makers’ Co* (1780) 1 Bro CC 81, 81; 28 ER 998, 999.

⁵⁸ *Hardoon v Belilios* [1901] AC 118, 123; *Guerin v Canada* [1984] 2 SCR 335.

⁵⁹ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 707.

⁶⁰ For the priority rules that would apply in such a case, see *Underhill & Hayton* (n 54) paras 99.13-99.59.

⁶¹ *Westdeutsche* (n 59) 705.

The position occupied by an intended trustee who receives property which he knows the settlor intends him to hold on trust resembles that of a person who knowingly receives property which is transferred to him by a trustee in a breach of trust.⁶² And in both situations, the law's response is the same: to impose a duty on the recipient not to disburse the property to anyone other than the beneficiaries, breach of which will render him liable to a claim for substitutive performance,⁶³ and possibly also a duty to take reasonable care of the property, breach of which will render him liable to a reparation claim.⁶⁴ In both situations, also, the beneficiaries have the power to turn an ignorant recipient into a knowing recipient, and thereby acquire personal rights against him, by drawing the existence of their proprietary rights to his attention.⁶⁵

3.1.3. Consenting Trustees

The foregoing duties are imposed on an intended trustee who receives property from a settlor knowing that the settlor intends a trust, to prevent him from acting unconscionably towards the beneficiaries. There is no need for this, however, in cases where he accepts the trusteeship in advance, or immediately on receipt of the legal title, as in such cases the trustee voluntarily assumes such duties, along with such additional duties as the settlor intends him to perform. The expression 'bare trust' is often used to describe trusts where the trustee's 'only active duty is ... [to] convey the property as directed on request' by the beneficiaries,⁶⁶ and such arrangements are often created consensually – a common example is a solicitor's client account. But settlors often intend that their trustees should owe a more elaborate set of duties than this and trustees often accept trusteeship on this basis.

The role played by the trustee in accepting his duties is subservient to the role played by the settlor, in the sense that the settlor initiates the process by which the duties are created and this initiative is completed by the trustee's consent. On its own, the trustee's consent cannot produce this effect. A person who voluntarily acts as though he were a validly appointed trustee when in fact he is not will instead become a trustee *de son tort*.⁶⁷ His position is then analogous to that of a person who receives property knowing that the settlor intends it to be held on trust but who does not validly accept the trusteeship: duties are imposed on him whose function is to protect the beneficiaries' property rights, but he owes no other duties and he cannot validly exercise the powers of a properly appointed express trustee. As Mann J held in *Jasmine Trustees Ltd v Wells & Hind (a firm)*:⁶⁸

'[A trustee *de son tort*] will be liable for breach of trust much as a properly appointed trustee would be but the doctrine is more about liabilities than anything else. The trustee *de son tort* will be obliged to hold the property for, and to account to, the beneficiaries, but ... will not have the powers of the trustee conferred by the settlement.'

⁶² For discussion of which, See C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart, 2010) 115.

⁶³ Cf *Green v Weatherill* [1929] 2 Ch 213, 222-3.

⁶⁴ Cf *Evans v European Bank Ltd* [2004] NSWCA 82, (2004) 7 ITEL 19. But note *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552 [285], suggesting that an equitable duty to avoid causing economic harm through carelessness must be voluntarily assumed in the same way as such a tort duty.

⁶⁵ B McFarlane, 'Trusts and Knowledge: Lessons from Australia' in J Glister and P Ridge (eds), *Fault Lines in Equity* (Oxford, Hart, 2012) 169, 179.

⁶⁶ P Matthews, 'All about Bare Trusts' [2005] PCB 266, 267.

⁶⁷ e.g. *Jasmine Trustees Ltd v Wells & Hind (a firm)* [2007] EWHC 38 (Ch), [2008] Ch 194; *Re BB's Representation* (2011) 15 ITEL 51;.

⁶⁸ *Jasmine Trustees* (n 67) [42].

Further consequences flow from the principle that the trustee's intention is subservient to the settlor's intention. It is the settlor's, rather than the trustee's, intention that determines whether a new settlement is created in cases where the settlor transfers new property to the trustee of an existing trust,⁶⁹ and it is the settlor, not the trustee, who normally decides what duties the trustee will owe: the trustee cannot normally cherry-pick which duties he will perform and which he will not,⁷⁰ nor can he accept responsibility for one part of the trust property designated by the settlor, but disclaim responsibility for another part.⁷¹ This is why trustees must familiarise themselves with the trust terms:⁷² a trustee who consents to act as such consents to perform all of the duties which the settlor intends him to perform and he cannot later plead ignorance or an inconsistent understanding of the objective terms of the trust as a defence to an action for breach of duty.

For example, in *Jones v Higgins*,⁷³ the defendants signed a trust deed in the character of trustees after it had been read to them and its contents explained by lawyer. Many years later, when the beneficiary sued them for the replacement of a portion of the funds which had been disbursed without authority, the trustees alleged that they thought they had signed the deed merely as witnesses and did not mean to accept any duties as trustees. Kindersley VC rejected this, holding that:⁷⁴

‘It is impossible for me to accept such an excuse as [the trustees] now set up. None but an idiot could go through such an operation without understanding what he was about. I must hold, then, that these [trustees] accepted the trust, and bound themselves as trustees.’

3.2. Evidence of Acceptance and Disclaimer

In many cases acceptance of trusteeship is easily determined because the trustee expressly accepts office.⁷⁵ However acceptance can also be inferred from conduct, such as receiving rents from trust property with notice of the trust's existence,⁷⁶ or bringing legal proceedings in relation to trust business;⁷⁷ it can also be inferred from a combination of knowledge and inaction, as in *Siggers v Evans*.⁷⁸ There a settlor assigned property to his trustee-creditor to hold on trust in order to repay debts owned by the settlor to the trustee-creditor and other creditors. After the settlor had communicated this to the trustee-creditor, but before the latter had accepted trusteeship, another judgment creditor won an order against the settlor's

⁶⁹ *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 [185]. Cf *CIR v Dick* [2002] 2 NZLR 560.

⁷⁰ *Re Lysaght* [1966] Ch 199, 206-7.

⁷¹ *Re Lord and Fullerton's Contract* [1896] 1 Ch 228; *Re Lister* [1926] Ch 149, 166: ‘a renunciation ... has to be of the totality of the office and estate.’

⁷² *Hallows v Lloyd* (1888) 39 Ch D 686, 691: ‘when persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of incumbrances and other matters affecting the trust.’

⁷³ (1866) LR 2 Eq 538.

⁷⁴ *Jones* (n 73) 544. See too *Lister v Pickford* (1865) 34 Beav 575, 583; 55 ER 757, 760: ‘Suppose that [the trustees] had imagined bonâ fide that they themselves were personally entitled to the property, and that they were not trustees of it for any one, it would nevertheless have been certain that they would have been trustees for the *cestuis que trust*.’

⁷⁵ Although where the trustee's purported acceptance through spoken words are ambiguous, the court may hold that a later deed of disclaimer takes effect: *Doe d Chidgey v Harris* (1847) 16 M&W 517, 153 ER 1294.

⁷⁶ *Conyngham v Conyngham* (1750) 1 Ves Sen 522, 27 ER 1181.

⁷⁷ *Lord Montford v Lord Cadogan* (1810) 17 Ves Jun 485, 489; 34 ER 188, 189.

⁷⁸ (1855) 5 E & B 367, 119 ER 518.

property. Lord Campbell CJ held that the judgment creditor could not force the settlor to revoke the trust, and therefore that the trustee-creditor could accept trusteeship and take beneficial ownership of the property for himself. A positive act of assent was not required for acceptance of trusteeship, provided that the trustee did not disclaim.

Because a trustee's conduct may lead to a finding of implied acceptance of trusteeship, deeds of disclaimer commonly recite that an intended trustee has not intermeddled with trust affairs (or with the testator's estate in the case of executorships). The purpose of such a recital is to enable the trustee to argue that any acts he has performed were not done with the intention of acting as trustee. In all cases, however, it is for the court to decide whether his conduct amounts to acceptance. 'Intermeddling' acts from which a court will infer acceptance of trusteeship are closely analogous to acts which would lead a court to make a finding of trusteeship or executorship *de son tort* where the actor was not intended by the settlor or testator to be a trustee or executor.⁷⁹ But if the trustee is found on the facts to have acted only as the agent of another trustee and not as trustee in his own right, then he will not be held to have accepted the trusteeship;⁸⁰ however, for this rule to apply, there must be 'a principal for whom the alleged agent might have been acting as agent.'⁸¹

Once a trustee has accepted office, either expressly or impliedly, he cannot afterwards disclaim it. Thus, as Wigram VC held in *Fletcher v Fletcher*:⁸²

'where the relation of trustee and *cestui que trust* is constituted, as where property is transferred from the author of the trust into the name of a trustee, so that he has lost all power of disposition over it, and the transaction is complete as regards him, the trustee, having accepted the trust, cannot say he holds it, except for the purposes of the trust'.

The cases are inconsistent on the question whether a positive act is required to evidence disclaimer. In practice, the most prudent method of disclaiming is by executing a deed to that effect, which 'places the intention of the disclaiming trustee beyond doubt', but this is not the only possible method and disclaimer can also be inferred from conduct.⁸³ So, in *Stacey v Elph*,⁸⁴ an intended trustee was held to have disclaimed when he bought property from a person in whom the property could only have vested if the intended trustee had disclaimed. Given that the law deems acceptance of trusteeship unless and until the trustee disclaims, one might have thought that inaction could not amount to a disclaimer. However, this conclusion is contradicted by Lord Buckmaster's judgment in *Re Clout and Frewer's Contract*.⁸⁵ In that case, the trustee went 'for nearly thirty years without proving, acting, or applying for or receiving his official legacy', and this was held to be conclusive 'evidence that he never intended to act'.⁸⁶ His Lordship considered the cases of *Re Uniacke*⁸⁷ and *Re Needham*,⁸⁸ both judgments of Lord St Leonards LC, where trustees' inaction for 23 and 34 years respectively were held to indicate acceptance of trusteeship. Lord Buckmaster found these

⁷⁹ *Long and Feaver v Symes and Hannam* (1832) 3 Hag Ecc 771, 774; 162 ER 1339, 1340; *Re Stevens* [1897] 1 Ch 422, 426.

⁸⁰ *Lowry v Fulton* (1839) 9 Sim 104, 59 ER 298.

⁸¹ *Stevens* (n 79) 431.

⁸² (1844) 4 Hare 67, 74; 67 ER 564, 567.

⁸³ *Scarpuzza* (n 51) [47]-[48].

⁸⁴ (1833) 1 My & K 195, 39 ER 655.

⁸⁵ [1924] 2 Ch 230.

⁸⁶ *Clout* (n 85) 236.

⁸⁷ (1844) 1 J & Lat 1.

⁸⁸ (1844) 1 J & Lat 34.

cases ‘extremely difficult to accept or understand’,⁸⁹ and instead purported to follow the cases of *Re Gordon*⁹⁰ and *Re Birchall*.⁹¹ However, these two cases do not stand for the proposition which Lord Buckmaster purported to apply. In neither case was the intended trustee’s inaction or silence taken to be conclusive evidence of disclaimer: it was merely one piece of evidence that supported a finding of disclaimer when taken alongside other evidence. In *Re Gordon*, the trustee’s inaction over a period of three years was held by Jessel MR to be ‘not in itself conclusive’, although ‘[i]t is a strong proof that he does not intend to act’.⁹² And in *Re Birchall*,⁹³ the Court of Appeal unanimously upheld Birstowe VC’s first instance decision that the trustee had disclaimed, not merely because of his inaction for nine years, but also because he had told the beneficiaries that he would be disclaiming.

It follows that the true position was correctly stated in *Scarpuzza v Scarpuzza*: ‘merely remaining quiescent is equivocal and may, according to circumstances, be evidence of disclaimer or acceptance.’⁹⁴ Following their review of the law in this area, the New Zealand Law Commission recently came to the same conclusion, and found this to be unsatisfactory because of the uncertainty it creates. They accordingly recommended that the law be clarified by statute, and in line with their recommendation,⁹⁵ clause 93(3) of the New Zealand Trusts Bill 2017 provides that:

‘An appointee who gives no express indication of acceptance or rejection of the appointment and who for 90 days after the appointment is inactive in relation to the trust is taken to have rejected the appointment.’

We consider that other jurisdictions would also benefit from the introduction of such a rule.

3.3. Effects of Disclaimer

When considering the effects of disclaimer we should start by distinguishing the situation where a settlor exceptionally intends to create a trust only if a particular person will act as the trustee from the more common situation where his intention to create a trust is not qualified in this way. In the former case, according to Buckley LJ in *Re Lysaght*:⁹⁶

‘If it is of the essence of a trust that the trustees selected by the settlor and no one else shall act as the trustees of it and those trustees cannot or will not undertake the office, the trust must fail.’

In this case, a resulting trust arises for the settlor or his estate for the return of the legal title from the intended trustee to whom it was transferred.

In the more usual case, if a settlor conveys property to several intended trustees, one of whom disclaims, he is deemed never to have consented to the trusteeship and title to the

⁸⁹ *Clout* (n 85) 234. No other reason was given for rejecting those cases.

⁹⁰ (1877) 6 Ch D 531.

⁹¹ (1889) 40 Ch D 436.

⁹² *Gordon* (n 90) 534.

⁹³ *Birchall* (n 91).

⁹⁴ *Scarpuzza* (n 51) [48].

⁹⁵ New Zealand Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) paras 8.3-8.7.

⁹⁶ [1966] Ch 191, 207. See too *Reeve v A-G* (1843) 3 Hare 191, 197; 67 ER 351, 354; *Re Lawton* [1936] 3 All ER 378; *Re Armitage* [1972] Ch 438, 445; *Kynnersley v Wolverhampton CC* [2008] WTLR 65. Note, though, that these cases all concerned charitable trusts, and so there was no question of a beneficiary taking an equitable proprietary interest and the only issue was whether a duty to apply the property to a charitable purpose arose.

property is deemed never to have passed to him; legal title is deemed to have passed only to the others who then hold it in accordance with their duties as trustees.⁹⁷ However, if the settlor conveys property to one or more intended trustees, all of whom disclaim, the analysis is less straightforward. Let us assume for simplicity's sake that the settlor conveys to one person whom he intends to be trustee, and that this person disclaims. According to Byrne J in *Mallott v Wilson*, the general position⁹⁸ is that the intended trustee is then 'in respect of his liabilities, his burdens, and his rights, in exactly the same position as though no conveyance had ever been made to him.'⁹⁹ This cannot mean, however, that his disclaimer extinguishes the beneficiaries' proprietary rights,¹⁰⁰ nor that it extinguishes whatever duties arose by virtue of the fact that he knew of the settlor's intention: for as long as he has the legal title, he remains under a duty not to deal with the property in a way that prejudices the beneficiaries' equitable proprietary interest. Byrne J must therefore be understood to mean that the intended trustee has never taken on those additional personal duties which he would have owed had he consented to the trusteeship. When the intended trustee disclaims, a resulting trust is imposed on the property and the intended trustee must reconvey the legal title to the settlor or his estate, but this will not cause the beneficiaries' equitable proprietary rights to fail either:¹⁰¹ on receipt of the legal title the settlor or his personal representative will hold the property subject to these proprietary rights and will also owe the beneficiaries personal duties not to deal with the property in a way that would compromise their proprietary interest. The settlor or personal representative may then consent to act as trustee himself, in which case he will then take on the full-blown duties under the trust by accepting the trusteeship; otherwise, the court will appoint a new trustee (whose consent to act as such is required).¹⁰²

These rules give content to the general principle which has frequently been stated in the cases, that 'a trust does not fail for want of a trustee'.¹⁰³ *Mallott v Wilson*¹⁰⁴ illustrates the principle. This concerned the purported creation at different times of two trusts over the same property. The property was conveyed to the intended trustee of the first settlement, who disclaimed when he later found out about the trust. Holding that the first settlement was nevertheless valid and hence that the second settlement was of no effect, Byrne J said:¹⁰⁵

'I think that the [first settlement] was really created, and that the fact that the trustee subsequently disclaimed did not destroy the trust, but that upon the revesting the settlor himself held in trust; and I arrive at this conclusion, not by construing that which was intended to be a deed operating by a transmutation of possession and the creating a third person trustee, as though it had been a

⁹⁷ *Nicloson v Wordsworth* (1818) 2 Swan 365, 369-70: 'if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other.' See also *Bonifaut v Greenfield* (1586) Cro Eliz 80; *Townson v Tickell* (1819) 3 B & Ald 31; *Adams v Taunton* (1820) 5 Madd 435, 438; *Peppercorn v Wayman* (1852) 5 De GM & S 230, 64 ER 1094; *Birchall* (n 91).

⁹⁸ There are two exceptions which are discussed below: see main text from n 115 below.

⁹⁹ [1903] Ch 494, 501. See too *Harris v Sharp* (1989) [2003] WTLR 1541, 1549: 'A trustee can no doubt disclaim before accepting the trust; if he does so, the trust property will not vest in him'.

¹⁰⁰ *Harris v Sharp* (n 99) 1549 '[a trustee] cannot, by disclaimer, bring an end to the beneficial limitations which are contained in the trust'.

¹⁰¹ *Mallott* (n 99) 503; *Harris* (n 99) 1549.

¹⁰² *Harris* (n 99). See too Trustee Act 1925, ss 36 and 41.

¹⁰³ e.g. *Phillips v School Board for London* [1898] 2 QB 447, 459; *Re Frame* [1939] Ch 700, 703-4; *Rowlandson v National Westminster Bank Ltd* [1978] 1 WLR 798, 801.

¹⁰⁴ [1903] 2 Ch 494. Cf *Harris* (n 99), although the disclaiming parties there were neither trustees nor beneficiaries but institutions whose co-operation was needed to make implementation of trust possible. This raised different issues, discussed in D Partington 'Sharp Practice and the Law of Charities' [1998] Conv 288.

¹⁰⁵ *Mallott* (n 99) 502-3.

declaration of trust, but by construing it as having created the trust, and the settlor as having subsequently become trustee of it by reason of the action which took place. It is really imposing the trust on the legal owner in whom by operation of law the estate is re-vested after the creation of the trust.’

Byrne J also referred to *Jones v Jones*,¹⁰⁶ where a settlor declared a trust during his lifetime, but never communicated this to the intended trustee prior to his death. The trustee declined to act when he was made aware of the settlor’s intention. Hall VC rejected the argument that the trust was therefore inoperative, and held that the court could appoint a different trustee.

Contrary to the foregoing account of the law, Paul Matthews has argued that disclaimer always renders an intended trust void *ab initio*.¹⁰⁷ He contends that *Mallott* rests on a line of cases which decide a different question, namely that where a trustee consents to taking office, the trust takes effect from the time when the property is received rather than the time of the trustee’s consent.¹⁰⁸ Matthews argues that these cases are based on the reasoning that acceptance is presumed, and so the trustee’s later acceptance simply confirms that which was presumed. ‘Once the matter is put in this way,’ he says, ‘it becomes obvious that in cases where the transferee ultimately dissents the question of passing of property cannot be treated in the same way, for there the presumption of acceptance is rebutted’.¹⁰⁹ Matthews also makes a second argument based on Turner LJ’s statement in *Milroy v Lord*,¹¹⁰ that to constitute a valid trust a settlor can either declare himself trustee or transfer the property outright to another person to be trustee, but that the courts will not construe a failed attempt to achieve the second mechanism as a successful effort to achieve the first. A situation involving a trustee who disclaims after receiving the trust property should be understood as a failed attempt to achieve the second mechanism; therefore, Matthews argues, the trust ought not to be rescued by holding that the settlor should act as the trustee himself.

Several points can be made in reply. First, in *Milroy* Turner LJ was concerned lest a settlor who never intended to act as trustee himself should have to perform the full panoply of trustee duties if he failed in his attempts to constitute a trust with another person acting as trustee. On our view of the law, however, the settlor is merely exposed to a limited range of trustee duties pending appointment of another person as trustee, unless he voluntarily assumes all the duties of trusteeship himself. Second, it is clear that a beneficiary obtains equitable proprietary rights in the property at the moment it is received by an intended trustee; if these would be extinguished by the intended trustee’s later disclaimer, as Matthews argues, that would put him in an undesirably powerful position vis-à-vis the beneficiary. Thirdly, it is arguable that no English case clearly holds that trustee disclaimer entails that the express trust is void *ab initio*:¹¹¹ even those cases which hold that disclaimer renders a transfer ‘null’ or ‘null and void’¹¹² say nothing conclusive about the extinction or continued existence of the beneficiaries’ rights. Fourthly, several groups of cases suggest by way of analogy that disclaimer does not render an express trust void *ab initio*. Three of these have already been discussed,¹¹³ namely cases where an intended trustee predeceases the settlor before constitution of the trust, cases where trustees are appointed by reference to their

¹⁰⁶ *Jones v Jones* [1874] WN 190, discussed in *Mallott* (n 99) 503-4.

¹⁰⁷ P Matthews, ‘The Constitution of Disclaimed Trusts Inter Vivos’ [1981] Conv 141.

¹⁰⁸ *Thomson v Leach* (1690) 2 Vent 198, 86 ER 391; *Siggers v Evans* (1855) 5 El & Bl 367, 380; 119 ER 518, 523; *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535, 541-2.

¹⁰⁹ Matthews (n 107) 144.

¹¹⁰ (1862) 4 De G F & J 264, 274-5; 45 ER 1185, 1189-90.

¹¹¹ But cf *Smith v Stuart* (1866) 12 Gr 246; *Re Esteem Settlement* [2003] JRC 092, [2004] WTLR 1 [53].

¹¹² *Townson v Tickell* (1819) 3 B & Ald 31, 106 ER 575; *Standing v Bowring* (1885) 31 Ch D 282, 290.

¹¹³ See part 3.1.1.

official capacity and the office is abolished before constitution, and cases where legally incapable persons are appointed as trustees. A fourth group of cases concern the situation where the settlors of testamentary trustees simply overlook the need to appoint a trustee in their wills.¹¹⁴ These cases all demonstrate that a properly declared express trust is not defeated by the absence of trustees to take office, and that it is open to the courts to appoint someone else to act as trustee if the settlor or his personal representative choose not to do so. A fortiori, a properly declared express trust is also not void *ab initio* in cases where the reason why there is no trustee to take office is due to the trustee's disclaimer.¹¹⁵

As previously noted, *Mallott v Wilson* dictates the general position. There are two minor instances where the foregoing analysis does not apply. The first is where the settlor purports to constitute himself the sole beneficiary. Where the intended trustee disclaims, he holds property transferred to him by the settlor on resulting trust and must reconvey the legal title to the settlor. However, it is not conceptually possible to subject the settlor to a duty then to hold the property 'on trust' for himself, pending appointment of new trustees. This conceptual impossibility means that the express trust will necessarily fail. The second instance is where the settlor voluntarily covenants to confer the benefit of a covenant — a *chose in action* — on an intended trustee to be held on trust for a beneficiary who is not party to the covenant. It has been argued that, if the intended trustee disclaims when the covenant is brought to his knowledge, the *chose* reverts to the settlor, and because it is conceptually impossible for the settlor to hold the right to bring an action against himself, the express trust is necessarily at an end.¹¹⁶ These two instances are only exceptions to the general rule because the fact that these express trusts fail is not due to any of the reasons advanced by Matthews as discussed above, but simply because of the conceptual impossibility of the settlor acting as trustee after the trust property has revested in him. Moreover, these instances are unlikely to arise in practice: it is unlikely for a settlor to set up a trust for his sole benefit and transfer his property to the intended trustee without first securing the latter's consent to act as trustee; and it is in all but the rarest of cases that an obligor would not simply enter a voluntary covenant to confer the benefit of the covenant on the intended recipient of its benefit rather than doing so through the circuitous method of setting up a trust.

4. THE ROLE OF THE BENEFICIARY

No one can be forced to accept a beneficial interest under a trust, and so an intended beneficiary's consent is needed before an express trust in his favour can be validly created. Thus in *Hardoon v Belilios*, the Privy Council held that:¹¹⁷

'No one can be made the beneficial owner of [property] against his will. Any attempt to make him so can be defeated by disclaimer.'

The law presumes that a beneficiary will accept, since acceptance will usually operate to his advantage, but this is not always so, and the presumption can be displaced where there is evidence that he has disclaimed. He might choose to do this, for example, where the ownership of trust property is burdensome (as where the property is shares that are not fully paid up, or

¹¹⁴ *Dodkin v Brunt* (1868) LR 6 Eq 580.

¹¹⁵ *Birchall* (n 91).

¹¹⁶ CH Tham, 'Resuscitating the Trust of a *Chose in Action*' (2005) 24 U of Queensland LJ 147, 158. Cf CEF Rickett, 'The Constitution of Trusts: Contracts to Create Trusts' (1979) 32 CLP 1, 7; JD Feltham, 'Intention to Create a Trust to Settle Property' (1982) 98 LQR 17, 18; both discussed in Tham, *ibid*, 151ff.

¹¹⁷ [1901] AC 118, 123.

where its ownership produces disadvantageous tax consequences), or where his unhappy personal relationship with the settlor leads him to refuse the settlor's gift.

In *JW Broomhead (Vic) Pty Ltd v JW Broomhead Pty Ltd*, Brooking J said that disclaimer requires positive action.¹¹⁸

‘In the absence of positive conduct by which the donee indicates acceptance, the right to disclaim is lost because the court makes a presumption of fact or draws an inference. The presumption or inference is that by remaining silent beyond the time when he would be expected to decline the gift if not accepting it, the donee has tacitly accepted. The inference in the case of a donee is easy to draw because it is human nature to accept gifts. With a gift such as one under a trust deed or a will it is not normally considered necessary to indicate acceptance, but a beneficiary who desires not to receive what is given would commonly indicate that desire. Inaction by the beneficiary is consistent with acceptance. ... The test for whether a beneficiary is entitled to disclaim is whether in the circumstances he has accepted by words or conduct or has remained silent for so long that the proper inference is that he has determined to accept the interest.’

Two elements are necessary for an effective disclaimer by a beneficiary, namely ‘knowledge of the interest alleged to be disclaimed, and ... an intention to disclaim it’.¹¹⁹ There is also a timing aspect to disclaimer: it must be made ‘within a reasonable period having regard to the circumstances of the particular case’.¹²⁰ Courts do not take allegations of disclaimer lightly, and will only find that disclaimer has occurred where ‘it is fully proved by the party alleging it’.¹²¹ For example, in *Re Young*¹²² a beneficiary who had a life interest under a trust was annoyed by the terms of the will which created the trust. She declined any income under the trust and instead directed the trustees to pay the income to her son. After her son's death, she changed her mind and told them that she wished to receive future income under the trust. Swinfen Eady J held that disclaimer had not occurred on these facts. Again, in *Re Hodge*,¹²³ a testatrix made a conditional gift of property to her husband, subject to a proviso that he must pay her sister an income or a lump sum if the property was sold. Had the husband disclaimed then the property would have come to him anyway as residuary beneficiary under the testatrix's will, without the condition attached. However, Farwell J held that the husband had accepted the gift and had not disclaimed. This was because he had taken no steps to disclaim over a five year period and had said in his affidavit that he had paid the surplus rent over to the testatrix's sister according to the terms of the testatrix's will because he thought he was acting as trustee for her in relation to the property.¹²⁴

¹¹⁸ [1985] VR 891, 931. See too N Crago, ‘Principles of Disclaimer of Gifts’ (1999) 28 UWALR 65, 71; J Hill, ‘The Role of the Donee's Consent in the Law of Gift’ (2001) 117 LQR 127, 142.

¹¹⁹ *Naas v National Westminster Bank* [1940] AC 366, 396. No formality rules affect disclaimer by a beneficiary; the Law of Property Act 1925, s 53(1)(c), which requires ‘dispositions’ of subsisting equitable interests to be in signed writing, does not apply because ‘a disclaimer operates by way of avoidance and not by way of disposition’: *Re Paradise Motor Co Ltd* [1968] 1 WLR 1125, 1143.

¹²⁰ *Broomhead* (n 118) 930.

¹²¹ *Naas* (n 119) 400.

¹²² [1913] 1 Ch 272.

¹²³ [1940] Ch 260.

¹²⁴ *Hodge* (n 123) 265.

Once a beneficiary has accepted property under a trust he cannot afterwards disclaim his interest. As Kelly CB said in *Bence v Gilpin*:¹²⁵

‘A disclaimer, to be worth anything, must be an act whereby one entitled to an estate immediately and before dealing with it renounces it; whereby, in effect, he says “I will not be the owner of this property.” But for a person who has already possessed himself of an estate and acted as its owner, to come and say “I will not be its owner”, is really a contradiction in terms.’

When considering the legal effect of disclaimer by an intended beneficiary we must distinguish two situations. First, the settlor may tell him about the trust before transferring the trust property to the trustee. If the intended beneficiary disclaims before the property is transferred, and the settlor nevertheless goes ahead and transfers the property to the trustee, no express trust can usually be created, and the trustee will usually hold the property on a resulting trust for the settlor. Only if the settlor transfers the property to the trustee on materially different terms than those which were communicated to the beneficiary might it be argued that his disclaimer does not affect the trust in relation to which constitution has occurred. In this case, a further positive act might be required for the beneficiary to disclaim.

Second, the settlor may declare and constitute the trust before the intended beneficiary disclaims. Prior to disclaimer, an express trust is validly created and rights under this trust vest in him.¹²⁶ When the intended beneficiary disclaims, however, his equitable interest in the property is extinguished, the express trust ceases to exist, and the trustee holds the property on a resulting trust for the settlor.¹²⁷ This happens with retrospective effect, as demonstrated by *Jervis v Wolferstan*.¹²⁸ There, partly paid up shares were settled on trust and calls were made on the shares. The beneficiaries disclaimed, and Jessel MR held that ‘there was a resulting trust for the testator’s estate.’¹²⁹ As the beneficiary under this resulting trust, the estate was liable to indemnify the trustee for payments made by the trustee to meet the calls on the shareholders.¹³⁰

A number of context-specific effects of beneficiary disclaimer are worth mentioning. Where the beneficial interest is held by two or more beneficiaries as joint tenants, one of whom does not want it, *Re Schar* holds that he may release his interest but may not disclaim because ‘the unity of the estate and of the interest in it enures for the benefit of each and all; and each and all have one undivided and indivisible property in the subject-matter of the

¹²⁵ (1868) LR 3 Exch 76, 81. Cf Trusts (Jersey) Law 1984, Art 10 A and Trusts (Guernsey) Law 2007, s 9, both of which allow a beneficiary to disclaim whether or not he has previously received a benefit under the trust.

¹²⁶ *Tate v Leithead* (1854) Kay 658, 69 ER 279; *Bill v Cureton* (1835) 2 My & K 503, 39 ER 276; *Standing v Bowring* (1886) 31 Ch D 282, 288 and 290; *Naas v Westminster Bank* [1940] AC 366, 375. Cf *Re Stratton’s Disclaimer* [1958] Ch 42, 54, where Jenkins LJ held that ‘a disclaiming legatee or devisee has between the testator’s death and the moment of disclaimer a right in respect of the legacy or devise, in that he is, during that period, entitled to call upon the executors to pay or transfer to him the subject-matter of the bequest or devise in due course of administration. It is none the less a right because it is defeasible by the beneficiary’s own act of disclaimer. That merely means that he is free to choose whether to avail himself of it or not until such time as he has either unequivocally disclaimed or unequivocally accepted the gift. If he disclaims, then he avoids the gift, and with it the concomitant right, but that does not alter the fact that down to the moment of disclaimer he did have the right and would still have had it if he had not disclaimed.’

¹²⁷ *Crago* (n 118) 74.

¹²⁸ *Jervis v Wolferstan* (1874) LR 18 Eq 18.

¹²⁹ *Jervis* (n 129) 24. See too *Painter v Hutchison* [2007] EWHC 758 (Ch), [2008] BPIR 170 [104].

¹³⁰ Similarly, in *Federal Commissioner of Taxation v Cornell* (1946) 73 CLR 394, 401-2, Latham CJ held that disclaimer of a trust declared by a husband for his wife had the effect of voiding the trust and that the husband was then taxable on the relevant property.

gift'.¹³¹ Disclaimer is only possible where it is made by all joint tenants acting together. Where a life tenant disclaims, the remainderman's interest will be accelerated unless the settlor intended that the remainderman should take no interest in the property until the actual death of the life tenant, in which case the life interest will result to the settlor or his estate.¹³² Where an object of a discretionary trust or power wishes to disclaim, *Re Gulbenkian's Trusts (No 2)*¹³³ holds that he may release the trustees from their obligation to consider him for benefit, and will then cease irrevocably to be an object. However, the power in that case was a fiduciary power conferred on the trustee and we doubt that an object of a mere power can disclaim before the donee of the power makes an appointment in his favour. This is particularly so in the light of *Re Smith (Deceased)*,¹³⁴ which holds that disclaimer of a mere expectancy – on the facts, an interest under a will in advance of the testatrix's death – is ineffective because at the time of disclaimer there is no real interest to be accepted or disclaimed.

Is the foregoing analysis consistent with the protection afforded by the law to unborn beneficiaries? The law will protect them by holding the trustees to account for actions which damage their contingent interests before they are born,¹³⁵ when they obviously cannot have consented to the creation of rights under the trust in their favour. However, it does not follow that their consent is irrelevant, because they still have the right to disclaim with retrospective effect once they are in a position to do so, and they are not deprived of this right by the fact that a remedy has been awarded against defaulting trustees in the interim. Indeed, one can say that the law ensures the continued relevance of their consent by presuming their acceptance, and ensuring that the property remains available to be vested in them according to the terms of the trust pending their eventual choice whether or not to take it.

5. CONCLUSION

It is often said that an express trust is created whenever a settlor manifests an intention to create a trust of certain property for certain beneficiaries. We have argued here that such statements are true but they are not the whole truth: there is more to say about the creation of express trusts. Beneficiaries must consent to the creation of proprietary and personal rights under such trusts because settlors cannot force rights onto them against their will. People must be free to choose whether to become property-owners, not least because the ownership of property can be burdensome as well as beneficial (and property rights cannot easily be abandoned once they have been acquired¹³⁶). Furthermore, because 'the normal private trust is essentially a gift, projected on the plane of time and so subjected to a management regime',¹³⁷ settlors need the co-operation of trustees. The consent of the trustees is not needed to bring all the beneficiaries' rights under an express trust into being, since the law imposes some duties on them regardless of their consent, to stop them from misapplying property which the settlor intends for the beneficiaries. But many of the duties commonly associated with trusteeship cannot be forced onto trustees and must be voluntarily assumed.

¹³¹ *Re Schar* [1951] Ch 280, 285.

¹³² *Re Hodge* [1943] Ch 300, 301-2; *Re Flower's ST* [1957] 1 WLR 401, 405; *Re Scott* [1975] 1 WLR 1260; *Brannan v British Columbia (Public Trustee)* (1991) 56 BCLR (2d) 113; *Underhill & Hayton* (n 54) para 23.9.

¹³³ [1970] Ch 408.

¹³⁴ [2001] 1 WLR 1937.

¹³⁵ As in e.g. *Mansell v Mansell* (1732) 2 P Wms 678, 24 ER 913; *Savage v Taylor* (1736) Cas Temp Talbot 234, 239; 25 ER 753, 755. We thank Rob Chambers for drawing these cases to our attention.

¹³⁶ A Hudson, 'Abandonment' in N Palmer and McKendrick (eds), *Interest in Goods* 2nd edn (London, LLP, 1998).

¹³⁷ B Rudden, Book Review (1981) 44 MLR 610, 610.

This article has concerned the creation of rights under trusts at the time when they are first established, and it has not discussed the creation of rights under existing trusts, a topic which we examine in a second article.¹³⁸ Our findings there are consistent with our findings here, inasmuch as this article shows that a settlor's unilateral intention is insufficient to create rights under a new trust, and our second article shows that the beneficiaries of an existing trust cannot unilaterally act as a body to create new rights under the trust and so impose new duties on the trustees: they must obtain the trustees' consent to this or else replace them with new trustees who are willing to perform the new duties. These rules reflect the liberal vision of trusts law: rights and duties cannot be forced onto people unless they consent to them.

Our discussion in this article has proceeded on the basis that beneficiaries have various rights, some of which are 'personal' and some 'proprietary'. We have noted that there is an ongoing theoretical debate about the juridical nature of beneficiaries' proprietary rights,¹³⁹ and while we do not purport to engage in this debate, we observe that any theory of rights under express trusts which claims to align with the caselaw must take into account the fact that beneficiaries have different rights which arise at different times for different reasons. Trusts theorists tend to ignore this phenomenon, but it suggests that trusts are more complex devices than any exclusively property-focused or duty-focused theory can account for.

Finally, we note that our article has some implications for the 'contractarian' analysis of trusts propounded by John Langbein.¹⁴⁰ He claims that the trust is a deal between the settlor and the trustees that is 'functionally indistinguishable' from the modern contract entered for the benefit of third parties.¹⁴¹ However, while we agree that the settlor's and trustees' consent are both needed for trustee duties to be created, we consider that trusts are less like contracts than Langbein claims because there is no need for a *consensus ad idem* between the parties. It is enough for a settlor to manifest an intention to impose duties on the trustees and for the trustees independently to consent to these, it may be that no bargaining is involved, and it may be that the trustees' options are of the 'take it or leave it' variety. We would also add that the settlor and the trustees are not the only parties whose consent matters, since the beneficiaries' consent is also required. Langbein considers that self-declared trusts are created by the unilateral act of the settlor,¹⁴² and he has been criticised for marginalising these in his account of the law because they do not fit with his theory. It is interesting that that he does not consider whether such trusts – or indeed trusts where the trustees are people other than the settlor – might be borne of a consensual relationship between the settlor and the beneficiaries. So far as that goes, however, we would say that the beneficiaries – like the trustees – need not have formed an agreement with the settlor; it is enough for them to give their independent consent.

¹³⁸ YK Liew and C Mitchell, 'Beneficiaries' Consent to Trustees' Unauthorised Acts' in P Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Oxford, Hart, 2018).

¹³⁹ See references cited in n 9.

¹⁴⁰ JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale LJ 625.

¹⁴¹ Langbein (n 140) 627.

¹⁴² Langbein (n 140) 627 and 672-5.