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(2) Nature of Trusts
(3) Irreducible core of trusteeship
(4) Information Rights
(5) Exculpatory clauses
(6) Court Supervision
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generally are mandatory - can’t normally change property law simply because it suits you.

Affirmative and defensive asset partitioning are a proprietary form of analysis - concerned with property rights. Proprietary analysis are:

- **Defensive asset partitioning (owner shielding).**
  - ...protection of the owners personal assets, from claims that might be made by the firm’s creditors
  - ...e.g. limited liability of shareholders in company law.

- **Affirmative asset partitioning.**
  - ...concerned with protecting the firm’s assets from claims by the owners’ creditors.
  - ...e.g. one of the functions served by separate legal personality in company law.

- **Bonding (sometimes elided into affirmative asset partitioning).**
  - ...concerned with the extent to which the firm’s assets are available to creditors of the firm.

- **Manager shielding...**
  - ...protecting managers by claims from the firm’s creditors.

- **Contractarianism...**
  - ...concerned with to what the degree does contract as a concept have anything to tell us about the way firms operate.
  - ...predominantly about default rules - which rules are there as default that the parties can change if they want to.
  - ...ie. which rules are mandatory and should they be - would it be better for that rule to be a default rule.

**1) Asset partitioning**

Hansmann & Kraakman, “The Essential Role of Organizational Law” (2000) 110 Yale LJ 387 (see 393-395)

- The truly essential aspect of asset partitioning is, in effect, the reverse of limited liability - namely, the shielding of the assets of the entity from claims of the creditors of the entity's owners or managers (390).
- There are a variety of ways to coordinate the economic activity of two or more persons...
  - ...one common approach is to have each of those persons enter into a contract with a third party who undertakes the coordination through design of the separate contracts and, most importantly, through exercise of the discretion given the third party by those contract...a third party that serves this coordination function is commonly called a ‘firm’.
  - ...the firm therefore serves...as the requisite ‘nexus of contracts’...it is the common party with whom each of those persons has an individual contract.

- To serve effectively as a nexus of contracts, a firm must generally have two attributes...
  - ...well-defined decision making authority...one or more persons who have ultimate authority to commit the firm to contracts.
  - ...the ability to bond its contracts credibly - that is, to provide assurance that the firm will perform its contractual obligations.
  - ...bonding generally requires that there exist a pool of assets that the firm’s managers can offer as satisfaction for the firm’s obligations.

- Asset partitioning has two components...
  1. The designation of a separate pool of assets that are associated with the firm (i.e. an entity that undertakes business), and that are distinct from the personal assets of the firm’s owners and managers. The first part of asset partitioning is making sure that the firm has a separate pool of assets associated with it. By separate, is meant separate from the owners of the firm and also separate from the managers assets.
    - ...that pool of assets is ring-fenced - protected for the benefit of the firm. Ultimately, that is for the benefit to the owners and managers as well, but that pool of assets is protected and belongs to the firm (i.e. distinct pools of assets: owners, managers, and assets).
  2. The assignment to creditors of priorities in the distinct pools of assets that result from the formation of a legal entity...the assignment takes two forms (i.e. assigning priority to different creditors in respect of the different pools of assets)...
    - affirmative asset partitioning...the first form assigns to the firm’s creditors a claim on the assets associated with the firm’s operations that is prior to the claims of the personal creditors of the firm’s owners...i.e. the firm’s creditors have a prior (prior over the creditors of the owners) claim to the firm’s pool of assets.
      1. ...entity shielding... ‘entity shielding’ means that the firm’s assets are shielded from the owners’ (e.g. shareholders) creditors (e.g. if a shareholder owes money to someone else - personal debt - the shareholder has no right to sell the company’s assets to pay that debt - the shareholders can only get at the company’s assets once all of the company’s creditors have been paid out, and then you wind up, and if there is any surplus, that goes to the shareholders, and then to the shareholders creditors).
      2. ...bonding...the question of the degree to which the firm’s creditors can get at the firm’s assets. If the company enters into a contract with a third party, if the company doesn’t perform the contract, the third party gets judgment for damages. In terms of execution of that
judgment, the creditors are entitled to execute the judgment against the company’s assets. i.e. the company when it enters into a contract, bonds its assets to that contract - its not a proprietary right, it just means that if the contract is not performed the firm’s creditor can get at the company’s assets to execute a judgment that it gets against the company on that contract. (Nb bonding is a separate concept from entity shielding).

- Defensive asset partitioning...the second form...is the opposite...granting to the owners’ personal creditors a claim on the owners’ separate personal assets that is prior to the claims of the firm’s creditors (i.e. the personal creditors of the owners have a claim on the personal assets of the owners which is prior to any claim that the firms creditors may have over the owners personal assets - defensive asset partitioning - ‘owner shielding’ - shields the owners assets from the firms creditors);
  - e.g. limited liability in company law - once the shareholders have paid the full value of their shares, they are not exposed to any more liability to the company’s creditors.
  - ...with defensive asset partitioning, we are talking bout the firms creditors not being able to go after the managers’ (e.g. directors’) personal assets in order to satisfy the firm’s debts.
  - ...the managers pool of assets is protected from the firm’s creditors (nb the firm may be able to sue the directors).

- [NB: Different business have different strengths or weaknesses in terms of defensive and affirmative asset partitioning. Eg in the company context, the entity shielding is pretty strong, it is less strong in a partnership, because in a partnership, there is no separate legal entity - the partners own the partnership assets, and that makes it easier for the partners’ creditors to get at the partnership assets. A partnership has weaker affirmative asset partitioning than a company.]

(2) Trust relationships

- Trusts have owners (beneficiaries), managers (trustees)...
  - ...the beneficiaries can have creditors, and the trustees can have creditors.
- What’s different with trusts, is that there is no legal entity (i.e. a firm) that is a trust...in the way that a company is a separate legal entity...
  - ...however, trusts operate like business operates. They are not strictly legal entities, but they operate like businesses and so an asset partitioning analysis can be applied.
- Defensive asset partitioning in trusts (owner shielding)...  
  - ...the trust creditors can get at the trust owners’ (the beneficiaries) personal assets but only via subrogation to the trustee’s right of indemnity against the beneficiary (i.e. there are ways that the trust’s creditors can get at the beneficiaries personal assets - but those rights are weak).
    - ...i.e there is owner shielding in trusts to a reasonably good degree (because subrogation to the trustee’s right against the beneficiaries is a weak ability for trust creditors to get at the beneficiary’s assets)
- Affirmative asset partitioning (entity shielding and bonding)...where the real differences come in between trusts and company law...because...trusts are not separate legal entities...
  - ...nb: certain entities are called trusts when they’re not in fact trusts (be careful of names)
  - ...in the United States, they are more willing to treat trusts as separate legal entities - which has important consequences for the asset partitioning analysis.
  - There is affirmative asset partitioning in Anglo-Australian trusts, but it is not complete...
    - In terms of entity shielding (i.e. to what degree are the trust’s assets able to get at by owner creditors), there is entity shielding, but there are big holes in it in two particular ways...
      (i) ...if the beneficiary is absolutely entitled to the trust assets, or to a portion of them, then they can say that they own those assets in equity, and therefore their creditors can get at those assets.
      (ii) ...if all the beneficiaries get together they can wind up the trust and simply take the assets out of it, and then those assets are available to the creditors of the beneficiaries.
    - In terms of bonding...(i.e. to what degree are trust assets bonded to trust contracts - to what degree can trust creditors get at trust assets to execute a judgment).
      - ...affirmative asset partitioning becomes particularly weak here. The bonding in trust contracts is not good compared with companies...it is not easy for the trust creditors to get at the trust assets. There are ways that you can get at trust assets, but you have to subrogate to the trustee’s right against those assets.
(3) Contractarianism

• Contractarianism focuses on the bargains or the voluntarily assumed obligations that the parties have created in a business organisation ...’contract like’ arrangements.
  ○ although trusts aren’t strictly speaking contracts, they are ‘contract like’ in the sense that they are a voluntarily assumed arrangement between parties, which means that the contractarian perspective can be applied.
  ○ trusts are highly malleable in terms of the ability to change the terms of the trust, to determine what rights the beneficiaries get under the trust, and what obligations the trustees have...

• In the trust context - that bargain in a contract like analysis is between the settlor and the trustee...
  ○ the settlor and trustee necessarily enter into a binding legal contract (they can, but often they don’t)...but, it is still ‘contract like’, because functionally, it is a bargain between those two parties as to what the trustee will do with the trust property.

• Trusts are not strictly contracts...
  ○ settlor can’t sue the trustee for breach of the trust...you might be able to reserve to the settlor a power to do that, but if you don’t, once the trust is created, the settlor falls away, they can’t enforce the bargain so it’s not like a contract...
  ○ the settlor can be the trustee himself or herself (you can’t contract with yourself, but you can self declare a trust, and it can create a binding trust).
  ○ the rights that trust beneficiaries get are greater than the rights that third parties get under contract analysis.
  ○ where a contracting party dies, the contract terminates. Trusts don’t die with the trustee (new trustee is appointed).
  ○ a major breach of a contract can terminate the contract, a major breach of trust does not terminate the trust.
  ○ the court has a special inherent jurisdiction to control trusts...the court does not have an inherent jurisdiction to deal with contracts (court has a more interventionist role in dealing with trusts).

• Connection between contractarianism and asset partitioning.
  ○ Contractarianism is primarily concerned with default rules (the law has rules but they can be got rid of if the parties don’t like them)...there can be some default rules that we want to place limits on - we want to limit your ability to change certain things, such as where there is third party impact from the changes .
    * E.g. in a trust, the arrangement between the trustee and the beneficiaries is predominately contractarian (the settlor and the trustee can put anything in place there, assuming it’s not illegal - i.e. a mandatory limit). There are also potentially limits on how you can contract around some of the rights that the trustees and beneficiaries have.
      • the trustee’s right to an indemnity from the beneficiaries, the trust creditors primary way of getting to the trust assets is by subrogating to that right...to what degree should we let the trust deed take away the trustee’s right to an indemnity...has third party effects - if you take away the indemnity, nothing to subrogate to, therefore it takes away the creditors interests as well.
  ○ Contractarianism emphasises that not all law is about litigation...
    ○ ...contractarianism focuses on the other end of the transaction - putting the documentation together in the first place which will give the parties what they want within the boundaries of the law (i.e transactional).

  ○ In truth, the trust is a deal, a bargain about how the trust assets are to be managed and distributed
  ○ You can look at trusts as contractarian (contract like), and that can lead you to make arguments about how trusts ought to operate...
  ○ At the time Langbein wrote his piece, the American law institute was putting a re-statement on the law of trusts.
    * ...the restatements tries to synthesise all of trust law for America, so that there is a statement of how trust law works in America.
    * Langbein was concerned that the restatement that was put together was treating trusts as a matter of property - treating them like estates in property. Langbein saw that it would be detrimental to the law of trusts, because it would take away the flexibility that you have with trusts to change the rights and obligations that a trust creates.
      • ...Langbein was saying that trusts are about property, but there is another side to them - the contractarian side, the flexible like nature.
      • ...Langbein was concerned with the social utility of trusts...

✦ Maitland, Equity (rev ed by Brunyate, 1936), 54
  ○ “But though this be so (i.e. though you can have self-declared trusts) the commonest origin of a trust is a transaction between two persons. ... S conveys land, or moveable goods, or Consols, or a debt, to T upon a trust, and T consents to execute that trust.
We have here an agreement between S and T, and since that agreement is a binding one (binding in equity) – since it can be enforced by that part of our law which is called equity, we well might say that there is a contract between S and T. Indeed I think it impossible so to define a contract that the definition shall not cover at least three quarters of all the trusts that are created.”

- Maitland is making a functional point - trusts operate like contracts, because they involve a form of agreement between the settlor and the trustee to transfer the property to be held on trust, and in return to undertake to hold that property on the trusts that are agreed.

(4) Organisational Law

- The law of organisations...the law which controls the way business organisations work (corporate law, trust law, partnership law, etc)...all the law which controls and gives legal form to business organisations.

- ...organisational law is a blend of asset partitioning and contractarianism - a blend of the proprietary analysis as well as the contractarian analysis.

  - “While it is sometimes said that the common-law trust lacks legal personality, in our view it is, on the contrary, quite clearly a legal entity, and trust law is consequently a form of organizational law.”
    - ...nb trusts are not legal entities in anglo Australian law.

  - Sitkoff is trying to explain is that Hansmaan & Kraakman are not arguing that trusts are legal entities in the way a company is a legal entity, they are arguing about the function that trusts serve...
    - “Reifying the trust in expression is an embrace of substantive function over technical form.”
    - i.e. we acknowledge that as a matter of technical form the trust does is not a separate legal entity, but in terms of the functions that trusts perform, they operate like other business entities - corporations, partnerships etc. - and therefore, we call them legal entities. (nb American law).
(2) Nature of Trusts

(A) RIGHTS IN REM & RIGHTS IN PERSONAM

(i) The Classic Debate

- The classic debate...is a beneficiary’s right under a trust a right in rem (proprietary - good against the whole world) or in personam (good against one or two other parties individually but not the whole world)...
  - ...even on its own terms, this classic debate is suspect...because the phrases ‘in rem’ and ‘in personam’ come out of the Civilian/Roman law tradition and it doesn’t follow that the common law when it creates a right or interest is adopting those ideas in any way.
  - In Roman law, a right was a right in rem when it was enforceable against the whole world, or at least an indefinite class of people (e.g. legal property rights). In contrast to a right in rem, a right in personam was a right enforceable against one other person (e.g. right under contractual arrangement). In these terms - the beneficiary’s rights under a trust are directly enforceable against the trustee (i.e. an in personam right).
  - ...But, the beneficiary’s rights under a trust are also enforceable against third parties, giving them the appearance of rights in rem. However, a beneficiary’s right under a trust is not enforceable against a particular kind of third party (e.g. bona fide purchaser of the legal title to the trust property who has no notice of the trust takes free of the trust)

- A trust is an equitable chose in action; i.e. a personal right that the beneficiary has against the trustee (e.g. for breach of trust). But a trust can also, at times, display proprietary characteristics.
- Trust beneficiaries have rights that are enforceable over the trust assets - i.e. they have rights in respect of the trust property (unlike a mere debt relationship). Two types of rights in respect of trust property:
  1. Entitlement of beneficiary to get property returned to the trust if wrongfully disposed of (right of recoupment): If the trustee wrongfully disposes of the trust assets to a third party, the beneficiaries of the trust can get those trust assets returned to the trustee. That right, to get the property back from someone who shouldn’t have it, is a proprietary right (i.e. a right ‘in rem’) in the sense that it is enforceable against third parties (nb not all third parties — e.g. bona fide purchaser without notice is protected from that right) and not merely against the trustee (an in personam right)
  2. Claim to equitable ownership of trust property: Trust beneficiaries may have a right to assert that part or possibly all of the trust property is theirs in equity - they are the equitable owner of that property - don’t need this right to exercise the first type of right above. This type of claim claim depends on the terms of the trust (e.g. Baker v Archer-Shee)

✦ Maitland, *Equity* (rev ed by Brunyate, 1936)
  - “Cestui que trust has rights enforceable against any person who has undertaken the trust, against all who claim through or under him as volunteers (heirs, devisees, personal representatives, donees) against his creditors, and against those who acquire the thing with notice actual or constructive of the trust. [i.e. a list of parties who are bound by the beneficiary’s interest, which suggests that the rights are in personam and not in rem, because they are not good against the whole world - they’re good against that list of people.]
  - [NB: Maitland argued in this book that trusts are in personam, that is, that trusts involve an obligation owed to the beneficiary, and it is not really proprietary...his view was that the beneficiary’s interest was fundamentally in personam.]

  - Maitland’s later view was that the trust does basically involve a form of property right, in the hands of the beneficiary and his reasoning was that the number of people against who the beneficiary could enforce their rights is so large, that you might as well call it a property right (in rem).

✦ Scott, Austin “The Nature of the Rights of the Cestui Que Trust” (1917) 17 Columbia LR 269
  - Austin Scott argued against Maitland’s (first/earlier view), arguing that the beneficiary’s interest was a form of proprietary right...

• [CRITICAL COMMENT: The classic debate is largely meaningless for two reasons... (1) the civilian/Romanist ideas of in rem and in personam simply don’t track very well onto common law concepts. And so debating whether our common law notions map on to civilian notions is largely irrelevant; (2) The debate has been conducted the wrong way... the question that is traditionally asked is whether the beneficiary’s right under a trust in rem or in personam - that is a misguided question, because even in the civilian system, they don’t ask that question about rights. The question whether something is in rem or in personam is a question about individual rights and against who it is enforceable. Rights and interests are not the same thing - an interest is a bundle of rights - some of those rights may be in rem, but not all of them are necessarily in rem. In the trust context, some of the beneficiary’s rights may be personal against the trustee, whereas others of the rights may be proprietary in the sense of being enforceable against third parties outside the trust arrangement. e.g. if you’re a trust beneficiary, you’re entitled to expect that the trustee will perform the trust - a right to compel due administration of the trust, but you can only compel the trustee to do that [i.e. no one else owes you that obligation]. But, if the trustee misapplies the trust property and gives it to somebody who is not entitled to, the beneficiary has a proprietary right to get it back - a right enforceable against third parties.]

• [CRITICAL COMMENT: Therefore - beneficiary’s right is close to a right in rem but is not as 'in rem' as legal property rights are...it is a collection of in rem and in personam rights]
Livingstone v Commissioner of Stamp Duties (Queensland) (1960) 107 CLR 411, 448
  - “for the purpose of solving a concrete legal problem with respect to such a set of rights, more hinderance than help is likely to come from an attempt to classify them according to Austinian terminology as rights in personam or rights in rem.” (Kitto J)
  - [CRITICAL COMMENT: Unfair to Austin - Austin himself emphasised that you need to look at individual rights when you are looking at whether something is in rem or in personam. Austin’s focus was on aspects of interests on the discrete rights that form the interest, rather than the interest as a whole. But, the basic point is that the debate is unproductive.]

  - The beneficiary’s rights under a trust are a complex set of rights - a combination of various sets of rights.
    * ...rather than focusing on whether the rights are in rem or in personam, Nolan focuses on whether the rights are positive or negative...he points out that in a trust, the beneficiaries will have a combination of positive and negative rights.
    * ...the key argument Nolan makes...the fundamental right of a beneficiary is negative, not positive...the beneficiary’s fundamental right is to ensure that no one else can have access to the trust property (no one who is not entitled under the trust can have access to it).
      - e.g. if the trustee wrongfully gives the trust property to someone who is not entitled, the beneficiary can go and get it brought back to the trustee, i.e. a negative right to exclude all of the people who are not entitled to the trust assets from benefiting from the trust assets (a negative shield - ring-fencing).
    * However...trusts also have positive rights for beneficiaries - they have a positive right to enjoy the trust property themselves in some way. However, the reason Nolan doesn’t treat that as fundamental is because the rights that the beneficiaries have under the trust are inherently malleable - they depend on what the trust deed says - it depends on what the trustee gives the beneficiaries the right to enjoy...you can’t speak generically about that...
      - ...You can speak generically about the negative right, because the beneficiaries always have the right to prevent third parties who are not entitled from benefitting from the property. But, if you go beyond that and ask what rights do the beneficiaries have to the trust property, you can’t answer that question in the abstract, you’ve got to look at the trust deed.

Examples of beneficiary’s positive & negative rights.
  - The beneficiaries might be given a positive right to benefit from a specific asset in the trust (can claim that they own the property in equity): Baker v Archer-Shee;

Baker v Archer-Shee [1927] AC 844
  - Trusts can give the beneficiaries property rights in the trust assets.
    - The interest of a beneficiary in trust income was proprietary and not limited to a personal right against the trustee...
      * The beneficiary has a property right to all of the income, albeit that the trustee has a personal right to reclaim expenses (i.e. trustees have first charge upon the trust funds for their costs, charges and expenses... but this does not reduce the beneficiary’s right to a balance sum).
      * ‘If a landowner employs an agent to collect his rents and authorizes him to deduct a commission he does not cease to be owner of the rents...[Lady Archer-Shee’s] right is not to a balance sum, but to the dividends subject to deductions as above mentioned. Her right under the will is ‘property’ from which income is derived.’
    - In the present case...
      * The HoL held that Archer-Shee is liable to pay income tax on that income because she was entitled to it under the trust (i.e. under the trust the income belonged to Lady Archer-Shee - she owned the income, and therefore it was income that she had, and therefore had to pay tax on it in the UK)...an example of a positive right.
    - [Trust for income in a bank account - concerned a trust that had been created under a will and the beneficiary of the trust was Lady Archer-Shee. The testator (person who had written the will) was in the US. Lady Archer-Shee was based in the UK. The trustees of the trust and the trust assets were all in the US. The trust deed/provision stated that Lady Archer-Shee was entitled to the income from the trust assets. The trustees received that income, and put it into a bank account in the US. The UK revenue authority tried to tax Lady Archer-Shee on that income. Issue: did the beneficiary have a proprietary right to the income or merely a personal right to be repaid the income? A property right.]
      - [CRITICAL COMMENT: of discretionary trust - trust for A, B and C as the trustee thinks fit. A doesn’t own any of the trust fund in equity, until a decision is made. A’s positive right is to be considered for a distribution from the trust fund - but they can’t until an appointment has been made to them, say that any particular part of the fund is there...all depends on what the trust deed gives them.]
Modern debate

- More modern version of the classic debate - instead of asking whether in rem or in personam - look at the trust institution as a whole (the trust structure) and ask whether it is a form of property or a form of contract.
  - Langbein is the main proponent of the view that trusts are contractarian...
  - Hansmann with Kraakman (and Mattei specifically in respect of trusts) is on the property side.
- Different from the classic debate...
  - ...part of the reason for that difference is that Langbein and Hansmann etc. know that trusts have different aspects to them.
    * ...e.g. Langbein is arguing that the trust is contractarian (that contract malleability is more important), but he acknowledges that property is important to the way trusts operate as well (i.e. acknowledges a combination of in rem and in personam aspects).
  - ...the different camps are focusing on what they think is important about trusts (i.e. is it more important that trusts are recognised to be malleable/flexible/contractarian? Or, is it more important to recognise that trusts have a property aspect to them with third party effects.
    * ...these two views (The Langbein contractarian view and the Hansmann property view) are talking past each other, because they have different criteria applied to that category of importance. They’re asking what’s important about trusts, but importance is a relative concept - things are not important in their own right.
      * ...For Langbein what is important is what achieves social utility out of a trust (the malleability - the commercial application of trusts)
      * ...Haansman & Kraakman are focused on importance in the sense of things that can’t be replicated by contract.

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- Nolan, “Understanding the Limits of Equitable Property” (2006) 1 Journal of Equity 18
(B) MANDATORY & DEFAULT RULES

(1) To what degree is the trust doctrine mandatory...and if so...why...
  - Mandatory rules tend to be property like - because they tend to be there for third party effects.
  - Part of the answer as to why rules are mandatory, may be because of their third party effects.

(2) Alternatively - to what degree are trust rules default rules...and therefore more inherently contractarian in nature...and if they are contractarian in nature, to what degree are there limits on how you contract around those default rules.
  - Mandatory rules of trust...(to what degree are they actually mandatory...)
    - Three certainties (intention, subject matter, object)...
    - Beneficiary principle...
    - Administrative workability...
    - Perpetuities and accumulation rules...

(i) Certainty of intention
  - Paul v Constance [1977] 1 WLR 527
    - This money is as much yours as mine’ was sufficiently certain to create a trust...
      - The was sufficient certainty of intention that he was putting the bingo winnings into a trust for him and his partner.
    - A couple shared their financial affairs. Mr Constance put bingo winnings into the account. The specific question was whether Mr Constance’s bank account was held legally for him unencumbered, or whether he held the legal title on trust for himself and Mrs Paul (i.e. Constance had a bank account - a chose in action against the bank). He therefore had legal title to that chose in action against the bank. Was that legal title his, or was that legal title held on trust for him and Mrs Paul). Mr Constance said ‘this money is as much yours as mine’. Held: there was enough evidence to suggest that there had been a declaration of trust - an indirect/informal declaration of trust.
    - Critical comment: If you don’t have certainty of intention...then you don’t have a trust.

Commercial application of the need for certainty of intention in trusts
  - Korda v Australian Executor Trustees (SA) Ltd [2014] VSCA 65 [overturned in HCA]
    - Majority in CA held that the funds were held by the milling company and forestry company on trust...because...objectively, were the funds intended to be held on trust when they were received by the milling company and then by the forestry company even before they got put into the trust?
      - Investors knew that the investment returns would depend on the commercial success of the forestry operations. They also knew that, in the event of such commercial success, the benefits would be held for them on trust. No investor would have imagined – and the prospectus certainly did not suggest – that the investment returns could be put at risk by reason of any activity of the operating companies, less still of their holding company (Guns) outside the scope of the timber production enterprise (i.e. the charges are securing other debts that Guns owed - nothing to do with the Forestry investment). The whole tenor of the documentation was to precisely the opposite effect.
    - The investors can’t have imagined that the investment monies would be exposed to other debt obligations and so the proceeds of trust were held on trust for the investors.
    - HC held that there was not trust...the right question was asked (was a trust intended), but the CA got the wrong answer...
      - The Forestry company and Milling company owed all sorts of obligations not all of which were consistent with saying that they held the money on trust...for example, neither the milling nor the forestry company were obliged to keep those funds separate from their own operating funds...traditionally, where there is a trust, you’re expected to keep the funds separate - an indicator of the parties’ intention.
      - Because the Forestry company was entitled to take a percentage of the proceeds based on its capitalisation (i.e. not fees for the work they did as trustees but rather some percentage based on capitalisation that has no bearing with operating a trust), tends also to suggest that there wasn’t a trust.
      - The fact that the trust documentation indicated that there would be at trust, but that the trust arose once Forestry put the money into the trust, tends to suggest that the parties did not intend a trust earlier on (i.e. why did they create a trust at the end if they intended a trust at the beginning when the proceeds of sale would come in).
      - Flaw in the CA’s reasoning ‘...no investor would have imagined...’: the fact that investors don’t imagine losing their money doesn’t mean that all of the parties to the transaction are creating a trust which will ring-fence their assets and protect them against loss.
...the objective intention here was not to create a trust beforehand...

- [Concerned an investment in forestry plantations. There was a forestry company which would take investments and use those investments to plant forests. There was a separate company called the milling company, which operates the forests that the forestry company has planted. The milling company cuts the timber down and sells it (i.e. gets proceeds of sale), it takes a commission from those proceeds and pays the rest up to the forestry company. The forestry company deducts its costs and expenses from that sum, and whatever is left gets put into a trust for the investors. Both of the forestry and milling companies were bought out in 2008 by Guns Ltd. Part of that transaction involved the granting of charges by the forestry and milling companies, in order to secure debts that Guns owed. Guns then goes into receivership (in 2012). *Where do the investors stand?* As to the proceeds of the sale of the timber which had been put into the trust, there is no question that that money was held on trust for the investors. But, the proceeds of sale of the timber, when it's in the hands of the milling and forestry company (i.e. before it's been put into the trust) - is it held in trust for the investors, because if it is, it is ring-fenced and protected from the charge-holders.]

- [CRITICAL COMMENT: The actual conclusion on whether there was a trust or not doesn't matter so much as the need to find that certainty of intention to be a trust. *Korda*, alongside *Paul v Constance* shows us that that question remains constant; even outside of a domestic/family type situation. *Korda* was a commercial investment transaction. You need certainty of intention to create a trust, no matter what the context is.]

- **Byrnes v Kendle [2011] HCA 26, (2011) 243 CLR 253**
  - The intention is objective. It is to be extracted from the words used...not a subjective intention of the parties...

- [CRITICAL COMMENT: Certainty of intention is a mandatory requirement. Across the board, for there to be a trust, there needs to be certainty of intention to create that trust.]

**Different jurisdictional attitudes to approaching certainty of intention & retention of title clauses**

- **Clough Mill Ltd v Martin [1985] 1 WLR 111 (CA)**
  - The English courts have tended not to wanted to find that the parties intended to make a trust. There approach to the certainty of intention question is that it has to be extremely clear.

  - Although this looked like an equitable charge, AA had instead established a trust with M...there was a manifest intention to create a trust...
  - ...if you intended to create a trust, it doesn’t have to be a charge, the way it works is the proceeds come in, which discharges the debt. So, the proceeds are now held on trust for the supplier, they are not held to secure a debt because the debt is discharged by the creation of the trust. So the property is now held on trust for the supplier.
  - The trust did not have to be registered in order for AA to have priority over other creditors. The trust discharged the debt (i.e. the trust did not secure payment of the debt, rather, in place of the debt there is a trust interest).
  - [The vendor, Alloys, supplied steel on a retention of title basis (i.e. reserving title in the goods until they’d been paid) to the purchaser, Metropolitan, on 90-day terms, subject to a contractual clause which provided that if Metropolitan used the steel to manufacture goods and sold those goods to third parties, the proceeds of such sales, up to the value of the amount which it owed Alloys, would be held on trust for the benefit of Alloys. Metropolitan then sold various manufactured steel products to third parties and became insolvent. Alloys claimed the amount still owing to it for the supply of steel to Metropolitan on the basis that the retention of title clause in the contract had created a ‘trust’ in its favour. If the clause did not create a trust, but rather, a charge, then the failure to register the charge under s 266 of the Corporations Law would render the charge void and ineffective. Issue: Did AA have a charge over the proceeds, or did M hold the proceeds on trust for AA? - HC held there was a trust.]

- [CRITICAL COMMENT: The Aus court was more prepared to treat these sorts of clauses as trusts if that intention was manifested in some way...greater willingness to find a trust if the circumstances objectively indicate that.]

- [CRITICAL COMMENT: What these cases (*Clough Mill Ltd v Martin* and *Associated Alloys*) show is that the judges within different countries can take different attitudes to these certainty of intention requirements. *Clough Mill Ltd v Martin* & *Associated Alloys* are about retention of clauses where the question arises as to whether the clause is a retention of title clause or is it a charge, because if it’s a charge, then normally it won’t be registered and it will not be effective against a liquidator in liquidation. One possibility in the retention of title clause context is to say that what you are dealing with is a trust, rather than a charge - did you have the intention to create a trust. The English courts have made it clear that they don’t like retention of title clauses, and so they tend not to want to find that the parties intended a trust: see *Clough Mill Ltd v Martin*. As a matter of judicial attitude, their approach to that certainty of intention question is that it has to be extremely clear that what you intended to create was a trust. The attitude point comes out when you look at *Associated Alloys* (an Australian decision), because the Australian court was much more prepared to treat retention of title clauses as trusts, if that intention was manifested in some way.
(B) MANDATORY & DEFAULT RULES

Why do we insist of certainty of intention to create the trust...

- ...because there are third party effects (i.e. they may be directly affected by the transaction).
  - ...trustee (need to understand that they owe obligations in respect of the trust property)...
  - ...Court (needs to know so it can supervise the administration of the trust)
  - ...beneficiary...(needs to know so that they know they’ve got rights under the trust)
  - ...third parties (creditors)...(need to know in what capacity they’re dealing with people’s property holdings).

- Need to know that the parties really did intend that transaction and what that transaction was...in the same way as we do in other contexts...

<table>
<thead>
<tr>
<th>Proprietary and contractarian analysis...</th>
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<tr>
<td>- ...the certainty of intention requirement exhibits proprietary characteristics because of the proprietary consequences of the trust arrangement (i.e. if you set up a trust arrangement, it creates its proprietary consequences that can affect third parties, and so we put in place a property like rule, a mandatory rule - a certainty of intention rule - that says we will only let you have those consequences if we know that you actually intended that).</td>
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<tr>
<td>- ...the construction of the trust arrangement is objectively ascertained (Byrnes v Kendle), because it can affect third parties as well.</td>
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(ii) Certainty of subject matter

- In respect of what property does the trust subsist...
  - ...the certainty for that has been tested in recent years.

- Who needs to know...
  - ...trustee...because they need to know what property they are administering subject to the trust.
  - ...beneficiaries...affects what right they can assert against the trustee in respect of the trustee...
  - ...third parties...
  - ...court...court needs to supervise the trustee’s administration of the trust - it needs to be able to tell the trustee when they’ve done something wrong or what they should/shouldn’t do. The Court can’t do that if they don’t know what the property is in respect of which the trustees need to be acting in that way. Similarly, the court needs to be able to tell the trustee that property is held in trust so it’s not available to the trustee’s general creditors, it’s only available to the beneficiaries in an insolvency.

- Why we require a trust to be clear in its subject matter...because we want to be clear in respect of what property the trust subsists because that has third party impacts. The certainty of subject matter rule is concerned with certainty of subject matter as to what the trust property is - a question about property. The point of property is that it affects third parties - that’s why something is ‘property’...part of the reason why we have this as a mandatory requirement.

- Hunter v Moss [1994] 1 WLR 452
  - Trustee declared 50 of his 950 shares would be held on trust...
    - ...the shares were fungible in the sense that they were indistinguishable in character and quality...(the shares all came from the same company)
    - ...the trustee was not required to specify which particular shares were part of the subject matter of the trust...
  - [The settlor declared a trust over 50 of his 950 shares. Was their sufficient certainty of subject matter? Yes].
  - [CRITICAL COMMENT: The decision was criticised by David Hayton, on the basis that the cases the CA relied on were cases that were concerned with testamentary trusts. Hunter v Moss concerned an inter vivos trust. The difference is that with a testamentary trust, the settlor can’t do anything else to make it clear which shares are held in trust (they’re dead) - their executor steps into their shoes and the executor is duty bound to separate assets out. However, in an inter vivos trust, until Hunter v Moss, it was dealt with differently, because the settlor is still alive and can separate the assets out - and until he/she does that, the assets were treated as the settler’s assets (i.e. they’re not held in trust until they are separated out as to which assets are to be held in trust) because the trust hasn’t been properly constituted. Hunter v Moss goes against that, and says that you declared the trust, there are ways of working out what the trust assets are (e.g. tracing rules).]
  - [CRITICAL COMMENT: The problem in Hunter v Moss is that if you have 950 shares and you declare a trust over 50 of them, what happens if you give away 100 shares? Whose shares are given away - the trustee’s or the trust shares? Re Hallet and Re Oatway can be applied (i.e. treat the trustee as having given away their own property and not the trust property. The problem is that it begs the question - you can only apply Re Hallet and Re Oatway if there is a trust. Those rules work because the trustee is obliged to hold the trust assets for the beneficiaries and not for their benefit. But, if we don’t know if there is a trust, we can’t use those rules to create the trust.]
Re Harvard Securities Ltd (in liq); Holland v Nebury [1997] 2 BCLC 369 [English Decision but concerned Aus law] [HC decision - lower than the CA which decided Hunter v Moss]

○ The Court did not follow Hunter v Moss because although it was an English decision it concerned Australian law.
   * ...expert evidence on Australian law was provided, and stated that Hunter v Moss was not the law in Australia...therefore Hunter v Moss didn’t need to be followed.

White v Shortall [2006] NSWSC 1379; (2006) 60 ACSR 654

○ Campbell J came to the conclusion that it is possible to declare a trust over part of a whole shareholding (i.e. over a specific number of a larger number of shares)...only if the whole shareholding goes into the trust...or there is segregation...
   * ...in reaching that conclusion, Campbell J didn’t follow Hunter v Moss, which he considered wrong as a matter of authority - you can’t declare a trust over a part of your shareholding without identifying that part ... but what you can do is declare a trust over the entire shareholding, whereby you hold part of it on trust for the beneficiary, and the rest of it on trust for yourself (because you can be the beneficiary of the trust that you’re trustee of).
      • ...[e.g if you declare a trust over 50 of your shares for X and you’ve got 950 shares, in White v Shortall terms, you hold 950 shares on trust, you are the trustee, and there are two beneficiaries. X is entitled to 50 of the shares, and you are entitled to the other 900 shares. If the whole lot doesn’t go into the trust, you’re left with the question ‘which shares are held on trust’.]
      • [e.g. If the trustee declares a trust over 10,000 of 30,000 shares, and the trustee sells 20,000 of the shares and dissipates the proceeds, are the remaining 10,000 held on trust for the person who claims there’s a trust, or are they going to be sold in the insolvency and used to pay off other creditors. If there’s no trust - the beneficiaries lose.]

○ In the present case...
   * The declaration of trust that the defendant made is, in substance, that, of those shares in Unitract that he held, 222,000 of them were held in trust for the plaintiff....and the rest were on trust for himself.
   * ...one can identify the property that is subject to the trust (the entire shareholding) one can identify the trustee (the defendant), and one can identify the beneficiaries (the plaintiff as to 220,000 shares, the defendant as to the rest). That is all that is needed for a valid trust.

   ○ [CRITICAL COMMENT: Again, the question links back to certainty of intention - did the person who created the trust intend to create that sort of arrangement over the whole shareholding, or did they merely intend that there would only be a trust of the 220,000 shares. If they only intended a trust of the 220,000 shares it would not be a trust, because you haven’t identified with sufficient certainty what the subject matter of the trust is.]

(iii) Certainty of object

<table>
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<th>Fixed Trust</th>
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<td><strong>If the trust is a fixed trust...you need to be able to list the beneficiaries...</strong></td>
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<td>○ ...listed/identified in trust deed, or people who are entitled equally in the trust fund...</td>
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   ○ McPhail v Doulton [1971] AC 424, CB 25.11C

      ○ In a fixed private trust, the test for certainty of objects is the list certainty rule, that is, all beneficiaries must be ascertained or ascertainable at the time of distribution, such that they could be listed at the time the trust takes effect.

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<tr>
<th>Discretionary Trust</th>
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<tr>
<td><strong>In the case of a discretionary trust, you may not end up with any property. Anybody who is in the class of discretionary trust beneficiaries is a beneficiary but only some of them will become actual recipients. (Must make the distinction between someone in the group who may not receive property with someone who will.)</strong></td>
</tr>
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   ○ Until a discretion is exercised, no beneficiary has a proprietary interest in any of the assets of the trust fund; the nature of the interest is a mere expectancy: Pearson v Inland Revenue Commissioners. The rights of potential beneficiaries under a discretionary trust are restricted to a right to be considered and to compel the trustee to properly administer the trust fund - he/she can apply to the court to enforce this right: Gartside v Inland Revenue Commissioners.

   ○ Certainty of objects seems to be a mandatory rule...in the sense that if the class is insufficiently certain, then the trust will be invalid...

   ○ McPhail v Doulton [1971] AC 424

      ○ Any given postulant ... the question is whether it can be said with certainty that any given individual is or is not a member of the class...
...for a class of discretionary beneficiaries, the trust is sufficiently certain provided that it is clear of any given postulant whether he/she is or is not a member of that class.

- **Re Baden’s Deed Trusts (No 2) [1973] Ch 9**
  - **How is the any given postulant test implemented? Three different views...**
    1. **Stamp LJ**: the question is whether it can be said with certainty that any given individual is or is not a member of the class. *The words must be susceptible of a definite yes/no answer* (nb: qualitatively the same as a complete list test).
    2. **Sachs LJ**: what is important is whether the power of appointment is conceptually certain...as long as the words are conceptually certain, they won’t fail for evidential certainty.
    3. **Megaw LJ**: the question is whether it can be said with certainty that a substantial number of objects fall within the trust (i.e. a substantial number of yeses)

**Is the certainty of objects rule really a mandatory rule? Or are there ways that you can get around it?**

- **As a matter of strict doctrine, the rule is a mandatory rule** - you can’t choose not to apply it...but, in functional terms, you can easily get around this rule: see Re Manisty’s Settlement Trusts and Re Hay’s Settlement Trusts.

- **Why do we insist on certainty of objects?**
  - ...part of the answer
  - **[CRITICAL COMMENT]**: If certainty of objects remained a matter of mandatory law that you couldn’t get around, you would expect to be seeing more of these cases on a regular basis, because you’d expect people to be messing it up and for the courts to be finding that trusts are invalid for lack of certainty as to objects - however, there are not cases these days about certainty of objects. *Re Manisty’s Settlement Trust and Re Hay’s Settlement trust render the rule in McPhail v Doulton largely obsolete.*

- **Re Manisty’s Settlement Trusts [1974] 1 Ch 17**
  - **One way to get around the certainty of objects rule is to have a power of appointment in favour of a wide open class (i.e. a class that cannot possibly be uncertain)...**
    - *e.g. A trust for your friends (a classically uncertain category). Have a trust for a given individual/body. That way, there is certainty as to who the beneficiary is. Classically, you choose someone who you do not intend to benefit (e.g. the Red Cross). Then, you give your trustees a power of appointment to choose other beneficiaries as beneficiaries of the fund (i.e. anyone in the world or ‘anyone in the world except for me, my wife and my children), thus no uncertainty at all as to who can be picked - anyone can be picked (nb a power of appointment to apply the trust property to your friends is not a discretionary trust for your friends, but it would fail under Re Gulbenkian’s Settlement Trusts because the class in favour of whom the trustees can choose is insufficiently certain). Then, you have a quiet word with your trustee (or send them a letter of wishes) to tell them that the people you want them to pick are my friends - it’s a non binding obligation (if it’s a binding obligation it needs to be enforceable by the Court, the Court then needs to know what the class is).*

- **Re Hay’s Settlement Trusts [1982] 1 WLR 202 (ChD)**
  - **There is nothing legally wrong with a power of appointment in favour of a wide open class or, a 'hybrid class'.**
  - **[CRITICAL COMMENT]**: Although the rule is mandatory, in strict doctrinal terms, in functional terms it can be got around - and the rule begins to look more contractarian.

**Why do we insist on certainty of objects?**

- **Fuller, “Consideration and Form” (1941) 41 Colum L Rev 79**
  - Fuller is looking at why do we require there to be consideration and also why do we have formal requirements...
    - *one possible reason (which may track in to the certainty of objects area) is that it might be about the cautionary effect of these requirements...Fuller’s point with the cautionary effect is that one of the reasons we have formal requirements in transactions is to make people careful about whether they really mean to do this with their property [e.g. when people deal with more valuable property like land, we have greater formal requirements than we do with less valuable property like textbooks etc.]*
    - *if your’e going to create a trust over your property, we want certainty of intention and subject matter, but we also want you to be careful about whether you really want certain people to benefit from it.*
Certainty of objects in other jurisdictions

<table>
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<tr>
<th>Section 103 - Uncertainty</th>
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<tbody>
<tr>
<td>(1) Subject to subsection (4), a special trust is not rendered void by uncertainty as to its objects or mode of execution [not just certainty of objects, but also the way in which the trust is to be executed].</td>
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</table>
| (2) The terms of a special trust may give the trustee or any other person power to resolve an uncertainty as to its objects or mode of execution [you can in your ‘Star Trust’ deed give your trustee power to resolve any uncertainty. But it is discretionary - ‘may’...]
| (3) If a special trust has multiple objects and there is no allocation of the trust property between them, the trustee, subject to evidence of contrary intention, has discretion to allocate the trust property [i.e. if you don’t say it’s a discretionary trust, but you give multiple objects, then the trustee under the statute has a power to allocate between them - and it effectively makes it a discretionary trust. But, it is ‘subject to evidence of contrary intention’.] |
| (4) If an uncertainty as to the objects or mode of execution of a special trust cannot be resolved, or has not been resolved pursuant to the terms of the trust [e.g. if the trust deed says the trustee can resolve uncertainty, then when the trustee resolves that uncertainty, this will be met and the power in subs-4 does not arise] the court-
  (a) may resolve the uncertainty-
    (i) by reforming the trust [by changing it];
    (ii) by settling a plan for its administration; or
    (iii) in any other way which the court deems appropriate; or
  (b) insofar as the objects of the trust are uncertain and the general intent of the trust cannot be found from the admissible evidence as a matter of probability, may declare the trust void [the trust deed]. |
| (5) This section applies to powers as to trusts. |
  - Cayman islands created a special regime for trust (‘Special Trusts - Alternative Regime’). |
  - The trust doesn’t fail for uncertainty in the way it would in an Anglo-Australian context, you an resolve uncertainty by giving the trustee power to resolve that. Even if you don’t do that, the court can resolve the uncertainty if it wants to. And, these ‘Star Trusts’, a bit like Re Manisty’s and Re Hoy - these are used by people to achieve things that they couldn’t otherwise achieve with normal Anglo-Australian type trusts. They are used particularly to hide assets where you don’t want to identify who the beneficiary is, but where everyone knows who they really are. |
  - The Court may declare the trust void...the Court is not going to declare the trust void if it can work out as a matter of reality, who was supposed to get the property out of the trust at whatever stage that was supposed to happen. The Court will resolve any uncertainty and make sure that the trust is given effect to in the way the parties intended, even if that intention is not at the level of certainty that we would require in an Anglo-Australian trust. Only if it all fails - only then does the Court have a choice to declare the trust void. |

(iv) Beneficiary principle

- Considered an essential requirement in Anglo-Australian trust law...and most common law on-shore jurisdictions have this requirement...
  - ...need a beneficiary before there can be a valid trust...because you need somebody who can enforce the trust.
  - “A trust may be created for the benefit of persons as cestuis que trust but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue’.
    - ...the Attorney-General enforces the trust on behalf of the public benefit exercising the King or Queen’s jurisdiction as parens patriae.
  - [Concerned a gift of an endowment to a group of cloistered nuns. Because they were cloistered, no one went in, no one went out and there was no benefit to the public. Therefore it was not charitable. It also couldn’t survive as a private trust because there were no beneficiaries - no body to sue to enforce the trustee’s obligations. NB: on the actual facts there was a statutory provision which saved it.]
- [CRITICAL COMMENT: The beneficiary principle has dual proprietary and contractarian aspects to it. It’s contractarian in the sense that the beneficiary is the person who enforces the bargain that was entered into between the trustee and the settlor (on Langbein contractarian terms). But, it also has a proprietary characteristic to it, because we insist that the person who will do the enforcing has a proprietary interest in the trust - they are going to benefit from the trust. Because it has a proprietary aspect...the beneficiary principle is mandatory...you can’t decide that you don’t want a beneficiary in your trust if it’s a private trust in Anglo-Australians law...if there is no beneficiary...there is no trust.]
Offshore jurisdictions and the beneficiary principle

Cayman islands ‘Star trust’

Trusts Law (2011 Revision) (Cayman Islands), Part VIII (“Special Trusts – Alternative Regime”)

Section 99 - Objects
(1) The objects of a special trust or power may be persons or purposes or both [don’t have to be persons]
(2) The persons may be of any number.
(3) The purposes may be of any number or kind, charitable or non-charitable, provided that they are lawful and not contrary to public policy [i.e. very minimal control on the purposes that you can create private trusts for in the Cayman islands. They don’t have to be charitable and the fact that they’re not charitable does not destroy the trust...]

Section 100 - Enforcers
(1) A beneficiary of a special trust does not, as such, have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property [beneficiaries can’t enforce the trust - very different from Anglo-Australian position.]
(2) The only persons who have standing to enforce a special trust [i.e. any trust set up within the regime] are such persons, whether or not beneficiaries, as are appointed to be enforcers-
   (a) by or pursuant to the terms of the trust; or
   (b) by order of the court.

- [There can be beneficiaries, but even if there are, they are not enforcers - the people who enforce the trust are the enforcers, and the enforcers are put in place by the terms of the trust or by order of the court...because...if you’re going to have trusts for purposes without beneficiaries, then they know that the problem that creates is who is going to enforce the trust. In Anglo-Australian law the beneficiary enforces the trust, but s99 does away with the beneficiary principle. But someone still needs to enforce the trust, because even they recognise that the trustee doesn’t really have any duties if no one can enforce their obligations against them. The enforcer is appointed by the trust or by order of the court.]

Section 101 - Duties that the enforcers have
(1) Standing to enforce a special trust may be granted or reserved as a right or as a duty.
(2) Subject to evidence of a contrary intention, an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust [i.e. creates a duty on the enforcer - a fiduciary duty to act responsibly with a view to the proper execution of the trust. But, it is subject to evidence of a contrary intention - it seems that the trustee can take away that duty - so you can end up with an enforcer (a person with a power to enforce the trust), but where they owe no enforceable duties. Beneficiaries can’t enforce so there is an enforcer...the enforcer can enforce, but it doesn’t mean they have to necessarily - that duty can be taken away by the terms of the trust. If you leave the enforcer owing a duty to act responsibly with a view to the proper execution of the trust, who enforces the enforcer’s duties? see subs(3).

(3) A trustee or another enforcer, or any person expressly authorised by the terms of the special trust has standing to bring an action for the enforcement of the duty, if any, of an enforcer [if the enforcer is not forcing the trustee to do things properly, the trustee can force the enforcer to force the trustee to act properly (nb onus on trustee - how many trustees would do that? - hardly any). Therefore, you’ve also got another enforcer. i.e. if you’ve got two enforcers and one of them is not doing anything, the other one can force their co-enforcer to enforce. But equally, if the co-enforcer wants to do that, they can just enforce themselves. In terms of practical realities, the system that has been set up in s101 seems to put in place a regime where you don’t need beneficiaries, so there are enforcers, but the enforcers don’t really have to enforce, and it’s unlikely that they will be forced to enforce. The one thing that is left that creates an incentive for the enforcers to enforce is professional reputation - if their business that they are a trust enforcer in the Cayman islands - it may be in the interests of their professional reputation to enforce competently.]

Section 109 - Land in the Islands
No land nor any interest in land in the Islands shall be subject, directly or indirectly, to a special trust, but a special trust may hold an interest in a company, partnership or other entity which holds land in the Islands, or an interest in such land for the purposes of its business [you can’t put Cayman’s land put into a Cayman’s star trust. There isn’t alot of land in the Cayman islands - they don’t want what land there is stuck in Cayman’s star trust where no one owns it and no one has a real interest in enforcing it. One reason for may be that the land would end up economically sterile, and that’s not in the interests of the Cayman islands.]

Why does Anglo-Australian law still insist on there being a beneficiary? Naked self-enforcement underpinning the principle.
- ...tax concerns (although nothing to stop you from sending your money the Cayman’s and putting your money in one of these vehicles).
- ...so that there is someone who can enforce the trustee’s obligations. Although there are enforcers in the Cayman ‘Star trust’ system, there are doubts as to whether realistically that is actually going to happen. In an Anglo-Australian trust, we are more confident that there will be enforcement of a trustee’s duties because of ... naked self interest of the beneficiary. Because the beneficiary has a self-interest in the enforcement, he/she is more likely to enforce than an enforcer whose job it is to enforce but whose professional reputation may/may not be in the interests of enforcement. Allied to that, is that not only will it mean that the trust gets enforced, but there’s also economic rationale in terms of ensuring that assets move ultimately to their highest valued user (i.e. efficient allocation of resources). In a trust context, if it’s in your interest to enforce the trust, that will be because
you are a more higher valued user than leaving the assets sitting in a trust effectively doing nothing - there’s a tacit underlying principle the Anglo-Australian beneficiary principle which is that we want trust assets to be used productively - we don’t want them to sit in a hole and become sterile economically.

Bermuda

\textit{Trusts (Special Provisions) Act 1989 (Bermuda), Part II - Purpose Trusts}

\textbf{Section 12A - Purpose Trusts}

(1) A trust may be created for a non-charitable purpose or purposes provided that the conditions set out in subsection (2) are satisfied; and in this Part such a trust is referred to as a "purpose trust". [trusts the beneficiary principle - can have purpose trusts in Bermuda - conditions are in subs(2).]

(2) The conditions are that the purpose or purposes are -
   (a) sufficiently certain to allow the trust to be carried out,
   (b) lawful, and
   (c) not contrary to public policy.

   • [cf Cayman Star Trust certainty rules - the Court could correct any uncertainty - here, one of the conditions is that it must be sufficiently certain for the trust to be carried out...]

(3) A purpose trust may only be created in writing.

(4) The rule of law (known as the rule against excessive duration or the rule against perpetual trusts) which limits the time during which the capital of a trust may remain unexpansible to the perpetuity period under the rule against perpetuities shall not apply to a purpose trust [can create perpetual purpose trusts in Bermuda.]

\textbf{Section 12B - Enforcement and variation of purpose trust by the court}

(1) The Supreme Court may make such order as it considers expedient for the enforcement of a purpose trust on the application of any of the following persons [people who have standing to go to the court and ask the Court to order that the trust be enforced.]
   (a) any person appointed by or under the trust for the purposes of this subsection [i.e. so if the trust identifies an enforcer, they can go];
   (b) the settlor, unless the trust instrument provides otherwise [cf Anglo-Australian trust law where the settlor normally falls out of the picture once they’ve create the trust, although an Anglo-Australia trust could give the settlor enforcement powers - functionally equivalent. Here, the settlor has those powers by default unless the trust instrument provides otherwise.];
   (c) a trustee of the trust;
   (d) any other person whom the court considers has sufficient interest in the enforcement of the trust [looks like the beneficiaries can enforce the trust, which is different from the Cayman islands (beneficiaries excluded from enforcement insofar as they are beneficiaries - you need to be identified as an enforcer). But this can’t be beneficiaries because it’s a purpose trust - looking at other people who have a sufficient interest who can enforce the trust (i.e. a combination of beneficiaries and purposes - maybe).

   and where the Attorney-General satisfies the court that there is no such person who is able and willing to make an application under this subsection, the Attorney-General may make an application for enforcement of the trust [in Bermuda, the enforcer is either one of the people identified in s12B(1)[a]-[d], but if there’s no one in those categories, or no one willing to enforce...the Attorney-General is the long-stop enforcer.]

(2) On an application in relation to a purpose trust by any of the following persons
   (a) any person appointed by or under the trust for the purposes of this subsection [person identified as able to enforce];
   (b) the settlor, unless the trust instrument provides otherwise;
   (c) a trustee of the trust,

the court may if it thinks fit approve a scheme to vary any of the purposes of the trust, or to enlarge or otherwise vary any of the powers of the trustees of the trust [court can basically change the trust on the application of any of these three classes of people - undermines the importance of the certainty rule (the need for it to be sufficiently certain for it to be carried out) - if it’s not sufficiently certain, then under 12B(2), you can make an application to the Supreme Court to vary the trust so as to make it sufficiently certain (back in the realm of the Cayman islands in terms of moving away from the rigour of the Anglo-Australian law).

\textbf{Section 12C - Effect of non-compliance}

Nothing in this Part II affects the creation, termination or validity of any trust created under any other law, but, save as aforesaid, purpose trusts which do not comply with section 12A are invalid [if what you’re dealing with is a wholly purpose trust, then it will be invalid if doesn’t comply with s12A.]

\textbf{Section 12D - Land in Bermuda}

No interest in land in Bermuda shall be held, directly or indirectly, in a purpose trust.
Cook Islands

**International Trusts Act 1984 (Cook Islands)**

**Section 12 - Charitable and Purpose Trusts**

1. Notwithstanding any rule of law to the contrary an international trust shall be deemed to be charitable or for purposes which are charitable where it is a trust substantially for one or more of the following objects or purposes, namely:
   - (a) for the relief of poverty;
   - (b) for the advancement of education;
   - (c) for the advancement of religion;
   - (d) for other purposes beneficial to the community;

Notwithstanding that the object or purposes may not be of a public nature or for the benefit of the public, but may be for the benefit of a section of the public or members of the public, or that it may also benefit privately one or more persons or objects or persons within a class of persons or is liable to be defeated whether by the exercise of a power of appointment or disposition or that the trustee has the power to defer the enjoyment of any charity or other beneficiary of the trust for any period not exceeding the term of the trust, and notwithstanding further that the trust may be discretionary or contingent upon the happening of any event.

- [A statutory definition for the Cook Islands of charitable trusts.]

2. Notwithstanding any rule of law or equity to the contrary a trust settled or established by a non-resident of the Cook Islands shall not be void or voidable by virtue of the fact that the trust fund shall be held for a purpose or purposes, whether charitable or not and any trust so created shall be enforceable .............[on the terms set out in the trust instrument] or by the person or persons named in the instrument establishing the trust as the person or persons appointed to enforce the trust and the trust shall be enforceable at the instance of the person or persons so named notwithstanding that such person or persons are not beneficiaries under the trust.
   - A provision which permits the creation of non-charitable purpose trusts.
   - First half says that if you set up a trust for purposes, even if they’re not charitable, it isn’t void; Second half - the people who enforce the trust are the people who you identify in the trust deed - still leaves the question of what happens if there is no one identified in the trust deed: see subs(4).

3. A person appointed to enforce the trust may resign or be removed or replaced in accordance with the trust instrument.

4. If the person appointed to enforce the trust resigns, or is removed, or is unwilling, refusing, unfit or unable to act, and if no successor can be appointed in accordance with the trust instrument, the trustees shall forthwith apply to the Court for directions or for another person or persons to be appointed by the Court to enforce the trust, and the Court shall be empowered to make an order appointing a person or persons to enforce the trust on such terms it sees fit, and pending appointment by the Court the Attorney-General shall be entitled, on such terms as he may require, to enforce the trust with the same rights and powers as the person appointed under the trust instrument to enforce the trust. [The implication of this regime seems to be that you need an enforcer identified in the trust deed. But if that person leaves (or is unwilling, refusing, unfit or unable), then the Attorney-General can enforce instead - a long-stop enforcer in the form of the Attorney-General (like in Bermuda islands).]

**Implications**

- **The trend of having purpose trusts without beneficiaries is moving on-shore...**
  - ....in the United States...29 of the US states now have these sorts of purpose trusts (i.e. can create a trust without a beneficiary).
  - Anglo-Australian law has not gone down this route...

- **Why have these jurisdictions created these purpose trusts without beneficiaries...**
  - ...regulatory competition...competition between states for regulatory regimes that make money for those states. E.g. Cayman Islands ‘Special Trusts - Alternative regime’ s105 - to create a Star trust, at least one of the trustees must be a trust corporation - that corporation needs to be licensed in the Cayman’s - that generates fees for the Cayman Islands, because the licensing application generates a fee for the Cayman’s, and also generates tax income for the Cayman’s in the sense that the trust corporation will charge fees for its work as trustee, and so the trust will pay money to the trust corporation for it’s work as trustee, which generates income for the state.
  - ...the idea behind these different jurisdictions adopting these regimes is that it is one way of them making money.
Delaware Code, Title 12, Ch 35

Section 3556 - Trust for noncharitable purposes

(a) In addition to the provisions of s3555 of this title, a trust for a declared purpose that is not impossible of attainment is valid notwithstanding that the trust might not be deemed to be for charitable purposes i.e. non-charitable purpose trust is valid.

(b) A trust authorized by subsection (a) of this section shall not be invalid because it lacks an identifiable person as beneficiary [beneficiary principle doesn’t apply].

(c) A trust authorized by subsection (a) of this section may be enforced by a person appointed in the terms of the trust or, if there is no such person or if the last such person no longer is willing and able to serve, by a person appointed by the Court of Chancery. A person who has an interest in the declared purpose of the trust other than a general public interest may petition the Court of Chancery for an order that appoints a person to enforce the terms of the trust or to remove that person. [Court appoints someone to enforce if no one’s doing it...who has standing? A person who has an interest...other than a general public interest.]

(d) Property of a trust authorized by this section may be applied only to its intended use. Upon the termination of the trust, any property of the trust remaining shall be distributed in accordance with the terms of the trust or, in the absence of such terms, as provided in s3592 of this title.

(v) Administrative workability

- **R v District Auditor, ex parte West Yorkshire MCC [1986] RVR 24**
  - If a trust is not administratively workable by the trustees, then the trust is void...
  - [The trust in this case was a trust for about 2million beneficiaries, so there was no realistic way for the trustees to work out which of those beneficiaries should get something - the whole trust was found to be invalid.]
  - [CRITICAL COMMENT: This concept of administrative workability isn’t really specific to trusts - e.g. contracts have to be workable as well - if the contract is too uncertain, then it’s not a binding contract. The requirements for administrative workability may be higher in trusts than for contracts, and if they are, that is probably because the court has a greater role in supervising and enforcing trusts. The basic idea that something won’t be a valid trust if you simply can’t make it work, is not really unique to trust law.]

(vi) Perpetuities and accumulations

- **The perpetuities rules are not limited to trusts...they are not trust specific rules. They are mandatory (you can’t choose simply to have perpetuities not apply to you), because they are there for proprietary reasons...**
  - ...the perpetuities rules are primarily concerned with ‘dead hand concerns’... concerns about any settlor creating an arrangement which will be affecting third parties hundreds of years after they’re dead.
  - ...we are prepared to accept some control after you’re dead of what happens to your property (e.g. wills)...but there’s a limit.

- **The old perpetuities doctrine...the rule against remote vesting.**
  - ...was that when you set up your trust (or whatever transaction), at the time the transaction is created, it will fail for perpetuity unless it is clear that all of the interests under the transaction will vest within the perpetuity period (the interest can’t be contingent after the perpetuity period).
  - The relevant perpetuity period was a ‘relevant life and being plus 21 years’.
    - ...all of the interests must vest within the space of a life of somebody who is currently alive plus 21 years...if any of the interest might not vest within that period, those interests fail because it is perpetuous (i.e. if your interest is contingent, and you can’t be sure that it will vest within that period, the interest is valid - void from the outset).
    - ...that rule was mandatory - the interest would be void if it wouldn’t vest within the perpetuity period.
  - ...there was an element of ‘contractibility’ about the perpetuity rules because you could choose who you would nominate as the relevant life and being...
    - ...often, you would use a ‘royal lives clause’ - which stipulates that for perpetuity purposes, the relevant life and being is ‘any of the descendants of the queen who are now alive’ (because there are lots of descendants of the queen, and there is a clear list of who they are). All of those people are relevant lives and being, and so your perpetuity period is now the last one of those people to die, plus 21 years (e.g. *Re Villar*).

- **Re Villar [1928] 1 Ch 243**
  - [The testator died in 1926 and left a bequest of property to trustees upon certain trusts as to income and capital for his issue, but, he tied up the gifts with a clause that said the capital was not to vest until the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of the late Queen Victoria who was living at the time of my death. The disposition was valid.]
In Australia perpetuities law is a matter of state doctrine...

- NSW (Perpetuities Act 1984 (NSW) ss7-17) and ACT (Perpetuities and Accumulations Act 1985 (ACT), ss 8-18) adopted a set perpetuity period of 80 years. . .Royal Lives Clauses make no difference. All of the interest must vest within that period.
- Other states have made it ‘permissive’ - i.e. you can choose a perpetuity period of 80 years, and if you don’t, you go back to the old law.
  - Perpetuities and Accumulations Act 1968 (VIC), ss 5-18
  - Property Law Act 1974 (QLD), ss 209-221
  - Property Law Act 1969 (WA), ss 101-112
  - Perpetuities and Accumulations Act 1992 (TAS), ss 6-21
  - Law of Property Act 2000 (NT), ss 187-201
- SA (Law of Property Act 1936 (SA), ss 61, 62) has abolished the rule against perpetuities, but the Court can order vesting of interests in SA if any remain unvested beyond 80 years.
- [CRITICAL COMMENT: The perpetuity rules are mandatory, because you can’t simply choose not to have perpetuity apply, but they’re contractable in two senses: (1) Even within the traditional english rule, you had some control over how it operated (i.e. could control to some degree how perpetuity applied); (2) These rules are not an immutable or inherent part of the law (this is evident from looking at offshore jurisdictions - several of which have taken away perpetuity rules).

Offshore jurisdictions...a number of offshore jurisdictions have removed perpetuity periods altogether...

- Cayman islands...for normal trusts in the Cayman’s (not Star Trusts) - they continue to use the old english perpetuities law, but for Star Trusts, Perpetuities Law (1999 Revision – Cayman Islands), s 13 removes the perpetuity period.
- Cook islands (International Trusts Act 1984 (Cook Islands), s 6(1))...no perpetuity period...
- Jersey...for all of its trusts, the perpetuity rule doesn’t apply - it’s up to the settlor: Trusts (Jersey) Law 1984, s 15.
- The UK has recently changed its perpetuity law (it now has three perpetuity regimes - a regime up to 1964; a regime between 1964 and 2009, and for anything created after 2009 the regime is 125 years)... 
  - adopted a similar approach to the NSW and ACT but have chosen a longer period (125 years): Perpetuities and Accumulations Act 2009 (UK), s 5.
- The U.S...
  - In Florida, the perpetuity period is now 360 years: Florida Statutes, Title XL, Ch 689, s 225
  - In Wyoming, the perpetuity period is 1000 years: Wyoming Statutes, Title 34, Ch 1, s 139(b).
  - In Delaware...abolished perpetuity entirely for trusts except trusts of real estate: Delaware Code, Title 25, Ch 5, s 503. So they’re concerned about dead hand control of land in Delaware.

Concluding observations...

- alot of trust law is default law - alot of it is not mandatory; alot the parties change or sometimes completely abrogate by their drafting.
- even rules that look mandatory, their effect can sometimes be drafted around (e.g. certainty of objects).
- in respect of trusts, the internal governance controls on the way trusts operate are highly contractable - they’re very much default rules that the parties can change if they want to. Also, even some of the proprietary effects of trusts are contractable (i.e. you can make the third party impact of a trust less burdensome on third parties - you can’t normally make it more burdensome on third parties, and that’s why we have mandatory rules).

✦ Nolan, “Understanding the Limits of Equitable Property” (2006) 1 Jo of Equity 18

- The important role of the drafters of documents in legal practice...the transactional work is all done with the benefit of knowledge of the doctrine.
- The contractibility idea directly affects what you do when you are drafting documents.