Trustee Unanimity and Third Parties: Have the Courts got it Wrong?

Campbell Lang

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Introduction

In all transactions affecting trust property in a private express trust, trustees must act personally and be active.[1] Following from this is the trustees' duty to act unanimously: where there are multiple trustees then all must act personally in exercising trust powers, and agree as to how a trust power is to be exercised in order for the trust to be bound.[2] Because trustees must act personally, they cannot delegate their trust functions.[3] We can call this duty the "non-delegation rule". Likewise, a trust is not bound to transactions that trustees do not enter into unanimously, so we can call the consequences of the duty to act unanimously "the unanimity rule".

The harshness of these rules can be alleviated through the trust instrument; because these are only default rules, a prudent settlor may contract out of them.[4] The unanimity rule is not usually excluded in private trust deeds, and there are only limited exceptions to the duty to act personally.[5] In New Zealand there are many express family trusts, where the trustees are often family members with an independent trustee.[6] While all should be involved in decision-making, it is common for one or more of the trustees to leave decisions to another of the trustees.[7] There are also practical difficulties for independent trustees in family trusts who may be unaware of decisions made by family trustees until well after the event. Questions

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[1] Justice Hammond for the High Court in *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192 (HC) at 195 reasoned that "[the unanimity rule] is a corollary to the non-delegation principle. For, if trustees cannot delegate, it must follow that they must all perform the duties attendant upon the execution of the trust. There is no such thing in trust law- at least absent a provision in the trust instrument- for some such concept as a 'managing trustee', or suchlike. Both in theory and in practice, the settlor requires several persons to execute the office and to watch over each other."; Justice Paterson, on behalf of Fisher and Keith JJ for the Court of Appeal in *Niak v Macdonald* [2001] 3 NZLR 334 (CA) at [16] stated "It is an established rule of trust law that a trustee must not delegate his or her duties or powers, not even to co-trustees… A trustee has a duty to act personally and this requires trustees to be unanimous in any decision they make.".

[2] Master of the Rolls Jessel in *Luke v South Kensington Hotel Co.* [1879] 11 Ch 121 (CA) at 125-126 stated "Two out of the three trustees have no power to bind the cestui que trust. There is no law I am acquainted with which enables the majority of trustees to bind the minority. The only power to bind is the act of the three, and consequently the act of the two. . could not bind the trust estate…".

[3] See above n 1.

[4] *Niak v Macdonald* above n 1, at [16].

[5] Although the Law Commission *Review of the Law of Trust: Fourth Issues Paper* (NZLC IP26, 2011) at [1.66] states "it is common for trust instruments to empower trustees to act by majority"; Trustee Act 1956, s 29 empowers trustees to employ agents on behalf of the trust and s 31 outlines exceptions to the rule in limited circumstances such as where a trustee becomes incapable of performing the trust or is going overseas. A trustee must disclaim the trust by deed under s 31.

[6] Sue Tappenden "The Family Trust in New Zealand and the Claims of 'Unwelcome Beneficiaries' " (2009) 2 Journal of Politics and Law 17 at 17 states "….Family Trusts have become big business in New Zealand…"; see generally Law Commission *Review of the Law of Trust: Second Issues Paper* (NZLC IP22, 2010) at ch 2.

[7] In this context, Williams J in *Blumenthal v Stewart* [2014] NZHC 1924, [2014] NZFLR 1002 at [50] noted that "…trustees will have different roles…".

then arise about whether the decisions made by one or some trustees are binding on the others. Recent cases have apparently different answers. The purpose of this dissertation is to analyse these cases and determine how the courts apply the non-delegation and unanimity rules.

The dissertation will be broken up into four chapters.

Chapter one will outline four apparently inconsistent decisions involving the duties to act personally and unanimously. These decisions have been chosen because they illustrate how the seemingly clear rules appear to be inconsistently applied. This chapter will provide some commentary on the similarities and differences between the decisions, and set the background for the issue that this dissertation is attempting to tackle; are the unanimity and non-delegation rules being applied consistently?

Chapter two will look at the history of the duties in the context of the early trust. It provides a background on why we have these duties and the corresponding rules. It will look at the early common law on the duties, and begin to clarify the various different aspects of the duties.

Chapter three then considers the modern application of the duties. It will look at academic commentary to identify the rationale for the modern duties. From this, it will outline the exceptions to the duties. The last part of the chapter considers what is required to act unanimously and personally. This analysis sets the background to a reassessment of the chapter one cases.

Chapter four considers the apparently inconsistent cases against the common law and conceptual background developed in the earlier chapters. It will offer two ideas as to how these decisions can be viewed consistently, and will consider whether either of these are a proper approach to the trustee duties.

Chapter 1: An Outline of Two Different Approaches

The normal rule for trustee decision-making is that every trustee is expected to be active.[8] Where there are multiple trustees, this duty requires the trustees to act together and not delegate responsibilities to another.[9] Following from these duties is the duty to act unanimously.[10] Unless the settlor has expressed a contrary intention, no one trustee may trump another.[11] All trustees have been appointed by the settlor and are expected to perform their duties. Where trustees do not act unanimously then generally the trust estate is not bound to these decisions. The case is clear where one trustee dissents to the actions of another trustee- the default position remains, and the lone trustee cannot exercise the trust power.[12] However, an issue appears to arise where trustees delegate among themselves. Should the active trustee's actions bind their co-trustees?

The following cases have been chosen because they reveal a discrepancy between the courts' application of the rules in this context. For the most part, these are recent decisions which suggest there is an inconsistency in how the rules apply. They will set the background for this dissertation. The dissertation will then seek to clarify the nature of the duties to act personally and unanimously and the current exceptions to those duties. It will then try to reconcile these decisions based on this analysis.

I Murrell v Hamilton

Ms Murrell and Mr Hamilton began a relationship in early 2002. [13] In 2004 they moved into a property under construction in Arrowtown. Between 2004 and 2007 the section was landscaped, and construction of the house was finished. Ms Murrell made contributions to the property over this time, while Mr Hamilton used his family trust as a vehicle to fund the

[8] G Kelly and C Kelly *Garrow and Kelly: Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at [20.96] states that trustees "must conscientiously take part in decision making"; *Turner v Turner* [1983] 3 WLR 896 (Ch).

[9] Ibid at [19.37] states that trustees "must act unanimously and cannot delegate their power (or duties) to co-trustees…"; *Niak v Macdonald* above n 1*; Hansen v Young* [2004] 1 NZLR 37 (CA); *ASB Bank Ltd v Davidson & Ors* (2005) 8 NZBLC 101, 597 (CA); *Commissioner of Inland Revenue v Newmarket Trustees Ltd* [2012] NZCA 351, [2012] 3 NZLR 207 at [50].

[10] , Kelly, above n 8, at [19.15] states "All trustees must agree in the exercise of powers given to them concerning the trust fund". See *Luke v South Kensington Hotel Co.* , above n 2; see generally above n 1.

[11] *Luke v South Kensington Hotel Co.* , above n 2; Kelly, above n 8, at [19.15] states "Unless the trust document says otherwise, the act of the majority of the trustees cannot bind a dissenting minority or the trust fund.".

[12] *Luke v South Kensington Hotel Co.,* above n 2.

[13] *Murrell v Hamilton* [2014] NZCA 377.

project and hold the property.[14] Mr Hamilton subsequently rented the property out, and sold it in March 2009.

Upon the couple's separation in 2010, Ms Murrell brought a claim that some of the sale proceeds from the developed property were held on constructive trust for her. Justice Panckhurst set out the well-established elements of a constructive trust claim:[15]

(a) contributions, direct or indirect to the property in question;
(b) the claimant has an expectation of an interest in the property;
(c) that such expectation is reasonable; and
(d) that the defendant should reasonably expect to yield the claimant an interest.

The central issue was that this house was held by Mr Hamilton's Family Trust (the Trust), and only Mr Hamilton, one of two trustees, had made representations to Ms Murrell that she should expect an interest and only Mr Hamilton had knowledge of her contributions. The other trustee was an independent trustee and solicitor, Geoffery Mirkin. Put shortly, the requirement that trustees act personally and unanimously was not met. Ms Murrell accepted she knew that the house was held on trust, but the High Court held that she reasonably expected an interest in the house based on Mr Hamilton's representations.[16]

The essence of Ms Murrell's argument in the High Court was that her interest should be recognised because the trust was controlled by Mr Hamilton to such an extent that it was reasonable both trustees yield her an interest.[17] It was found as a matter of fact that the trust's bank account was solely in Mr Hamilton's name, and that Mr Mirkin had no designated trust file, no trust notes, and limited financial records.[18] Mr Mirkin had only kept financial statements to file tax returns for the tenancy of the property, and did not record the trust's assets or liabilities.[19] There was also limited contact between the two co-trustees and as a result Mr Mirkin knew little about the activities of the trust.[20]

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[14] Justice Panckhurst for the High Court in *Murrell v Hamilton* [2013] NZHC 3241at [28] observed "it is apparent that the property was finished and presented in an attractive manner". Ms Murrell was found to have helped erect ceilings, put cladding in the hallway, lay insulation and timber flooring, paint the exterior of the house and generally plan the landscaping (at [18] – [20] and [28]).

[15] At [15] per Panckhurst J. These were taken from *Lankow v Rose* [1995] 1 NZLR 277 (CA) particularly at 294 per Tipping J.

[16] At [38] and [32] per Panckhurst J it was accepted that Ms Murrell had been told she would share in the benefits of the property; note that claim fell outside of the Property (relationships) Act 1976 (the PRA) because the property was never beneficially owned by Mr Hamilton and the circumstances did not meet any of the PRA trust related provisions.

[17] At [52] per Panckhurst J. Note that this argument was specifically based on alter ego trust reasoning.

[18] At [58] per Panckhurst J.

[19] At [58] per Panckhurst J.

[20] At [59] per Panckhurst J.

Although the elements of Ms Murrell's claim were largely made out in the High Court, it was held that because only one of the two trustees had cultivated Ms Murrell's expectation, her claim against the trust could not succeed.[21] The High Court acknowledged that the result would have been different where her "…contributions to the trust property were made with the knowledge and approval of all the trustees, such that their collective conscience [was] bound to recognise the validity of the claim".[22] Mr Hamilton alone had cultivated Ms Murrell's expectations of an interest, and therefore the requirement that all trustees must act unanimously in order to bind the trust was not fulfilled.[23] Thus it could not be said that Mr Mirkin should reasonably expect to yield an interest.

Controversially, the Court of Appeal allowed the appeal on the basis that Mr Mirkin had "…essentially abjured his trustee responsibilities in favour of Mr Hamilton".[24] Justice Wild for the Court considered that Mr Mirkin had allowed Mr Hamilton to bind the trust to contracts in respect of the building process, and had "…implicitly accepted…" that the trust was liable to pay the amounts owing.[25] Thus, "…in that unusual fact situation…" the Court considered it would be unconscionable to deny Ms Murrell's claim "based on the expectation stimulated by Mr Hamilton on behalf of the trust".[26] This reasoning appears to be grounded in a kind of agency between Mr Hamilton and Mr Mirkin.

This trustees sought leave to the Supreme Court on the basis that the Court of Appeal had overlooked the principles of unanimity and non-delegation in relation to trustees.[27] The Supreme Court considered it was "not necessary in the interests of justice" to hear the appeal, as it was a "case which turns on its particular facts".[28]

Murrell is one of a string of cases involving constructive trust claims being brought against a partner's trust, where trustees cannot be said to have acted unanimously in respect of the

[21] At [40] per Panckhurst J. For example it was found Ms Murrell had made significant contributions outweighing the benefits she received and it was found that Ms Murrell did have a reasonable expectation of an interest, however it was held that Mr Mirkin should not reasonably expect to yield her an interest; Note that this reasoning appeared to be based on the decision of *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45 cited at [77] per Panckhurst J. His Honour noted that "while evidence of far reaching control may support the finding that a trust is a sham, it does nothing more.".

[22] At [79] per Panckhurst J.

[23] Again note that it appears this reasoning was strongly based on *Wilson* and the alter ego argument being rejected in New Zealand, see [81] per Panckhurst J.

[24] At [27] per Wild J.

[25] At [28] per Wild J.

[26] Ibid.

[27] *Hamilton v Murrell* [2014] NZSC 162, [2015] NZFLR 45 at [5] per William Young, Glazebrook and Arnold JJ.

[28] At [6] per William Young, Glazebrook, and Arnold JJ.

constructive trust representations.[29] These cases play out against the background of the Property (relationships) Act 1976 and although it may be more difficult for a constructive trust claim to succeed where the express trustee and constructive trust claimant do not have an intimate relationship, the relevant trust principles of unanimity and non-delegation are of general application.

II Lang v Southen

Lang v Southen involved a trust that was set up to facilitate a building development project. [30] There were two trustees: Mr Lang, an independent solicitor trustee, and Mr Wilson, the trustee running the project. Mr Wilson was the sole beneficiary of the trust. In October 1997, a Christchurch section was purchased by the trustees for development.

The plaintiff was a plumber who sought repayment from Mr Lang for work he had undertaken for the trust. Mr Wilson had secured the plaintiff's services without specific authorisation from Mr Lang, but had then fled the country following the project's failure. It was found that Mr Lang had "…no knowledge of the contract at the relevant time.".[31] Likewise, although the plumber knew that he was working for a trust, as his fees were being paid from a trust bank account, the plumber "…did not know of Mr Lang's identity or existence since Mr Wilson had declined to provide such information".[32]

It was clear that Mr Lang had left the day-to-day running of the trust to Mr Wilson.[33] It was also clear that this contract with the plumber was entered in furtherance of the purpose of the trust.[34] On this basis, the Court considered that Mr Lang had prospectively authorised Mr Wilson to enter into a "class of transactions" on behalf of the trust, namely those transactions in furtherance of the trust purpose.[35] Mr Lang was held personally liable for the debt.

A Comments

In both of these cases the courts appear to have accepted that one trustee may act on behalf of other trustees in respect of trust dealings. Importantly, in both cases the court gave a similar

[29] *Prime v Hardie* [2003] BCL 118, [2003] NZFLR 481; *Glass v Hughey* [2003] NZFLR 865 (HC); *Boys v Calderwood* HC Auckland CIV-2004-404-290, 15 Dec 2005; *Blumenthal v Stewart*, above n 7; *Vervoort v Spears* [2015] NZHC 808, [2015] NZFLR 525.

[30] *Lang v Southen* HC Christchurch AP15/01, 24 July 2001.

[31] At [6] per Panckhurst J.

[32] At [4] and [6] per Panckhurst J.

[33] *Southen v Lang* DC Christchurch NP 3800-98, 16 May 2001at [44] per Judge Willy.

[34] Above n 30, at [18] per Panckhurst J.

[35] Ibid.

reason for the decision. In *Lang* the Court considered that Mr Lang had allowed Mr Wilson to bind Mr Lang to a class of future transactions in furtherance of the trust purpose.[36] Likewise, in *Murrell* Mr Mirkin had allowed Mr Hamilton bind Mr Mirkin to contracts with third parties in relation to work carried out on the house. This factor allowed Mr Hamitlon to bind Mr Mirkin to a constructive trust claim from a third party because it was also in relation to work carried out on the trust property.[37]

At this point, neither of the decisions sits well with the duties to be active and act personally on behalf of the trust, or any of the associated duties stated earlier.

III Niak v Macdonald

Mr Macdonald and Ms Somerville were husband and wife between 1971 and 1 October 1994.[38] In 1988 Ms Somerville received a substantial inheritance, and in 1991 she settled a trust with both her and Mr Macdonald named as beneficiaries. The trustees were Ms Somerville, Mr Macdonald and a Dunedin solicitor, Mrs Weatherall. Mrs Weatherall was later replaced by Ms Niak, another Dunedin solicitor. Mr Macdonald and Ms Somerville were also beneficiaries of the trust and, together with Mrs Weatherall, could distribute capital and income to themselves.[39]

In March 1994, Mr Macdonald used $83,500 of trust funds to purchase a yacht.[40] Well after the couple's separation, Mr Macdonald executed a chattel security over the yacht in favour of BNZ. Following this, Mr Macdonald was removed as trustee and the yacht was sold by the remaining trustees. The issue was whether BNZ or the trust was entitled to these sale proceeds. If Mr Macdonald had been authorised to purchase the yacht, the bank held a valid chattel security and the trust could not assert any claim against the yacht. In order for Mr

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[36] At [19] per Panckhurst J the District Court reasoning was accepted that "…Mr Lang had, in all the circumstances, approved the actions of his co-trustee in entering into a contract of this kind.". This was stated in line with his Honour's earlier outline of Mr Southen's counsel's case that one trustee could delegate transactions by class on behalf of the trust, rather than on an individual basis.

[37] At [28] per Wild J it was stated "…Mr Mirkin allowed Mr Hamilton to bind the trustees to contracts relating to the construction of the house and implicitly accepted the trust was liable to pay the amounts owing under the contracts".

[38] *Niak v Macdonld*, above n 1.

[39] *Niak v Macdonald* HC Dunedin CP 32/97, 19 April 2000 at [38] per Hansen J. A clause in the trust deed allowed them to distribute funds to themselves.

[40] Note that the evidence conflicted as to the state of the relationship at this time. Mr Macdonald argued it was clear in the course of relationship that he was going to purchase the yacht, and that Ms Somerville had even inspected the yacht with him, while Ms Somerville argued that she was only aware of his intention to purchase the yacht and thought this was going to be done using other funds. Justice Hansen preferred Mr Macdonald's evidence at [44] and [46].

Macdonald to have been authorised in the advance of funds, all trustees must have unanimously made the decision to advance the relevant funds.

In the High Court Justice John Hansen found as a matter of fact that Mrs Weatherall essentially delegated all trust functions to Mr Macdonald and Ms Somerville.[41] Ms Somerville was also found to have generally delegated money matters to Mr Macdonald, although she had knowledge of this particular transaction, as she took part in the inspection of yachts.[42]

Justice Hansen held that the use of trust funds was authorised for three reasons. First, his Honour accepted that the statutory exception to the non-delegation rule for ministerial tasks under s 29 was broad enough to include the making of a loan.[43] Second, his Honour considered Mrs Weatherall had generally authorised Mr Macdonald and Ms Somerville to enter into transactions on behalf of the trust.[44] Third, his Honour considered that the other trustees were estopped from denying the authority of the transfer of proceeds to Mr Macdonald, as the general authority given to Mr Macdonald was the way the trust had operated until the point of the transfer.[45]

On appeal, Paterson J for the Court of Appeal held that s 29 did not empower trustees to make a general delegation of their personal duties to the trust.[46] Justice Paterson reasoned that the duty to act personally required the trustees to act unanimously, and none of the exceptions to the rule applied here.[47] His Honour held that neither Ms Somerville nor Mrs Wetherall authorised the transaction, because neither gave specific authority to the transaction.[48] Finally, his Honour held that the estoppel argument failed because no representation by one trustee could relieve a trustee of their obligations under the trust deed.[49]

A Comments

The Court of Appeal's decision in *Niak* appears to be plainly inconsistent with a general interpretation of the *Murrell* and *Lang* decisions. As in *Murrell,* the trustees in *Niak* appeared to generally delegate or abjure to Mr Macdonald, however Mr Macdonald's decision to purchase the yacht was still not authorised.

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[41] At [31] per Hansen J.

[42] At [44] per Hansen J.

[43] At [41] per Hansen J.

[44] At [58] per Hansen J.

[45] At [64] per Hansen J.

[46] *Murrell v Hamilton*, above n 13, at [16] per Paterson J.

[47] Ibid.

[48] At [19] per Hansen J.

[49] At [21] per Hansen J.

The contexts of the decisions are different. Although all of the cases involved professional trustees abjuring to another trustee, *Lang* involved a trust that was set up for a commercial purpose, while both *Murrell* and *Niak* involved family trusts. Even so, the unanimity and non-delegation rules are of general application.

The decisions are different in another respect. In *Lang* and *Murrell* the trust gained from the third parties' actions. Mr Southen's work on behalf of the trust and Ms Murrell's contributions to trust property both led the trust to gain at the third party's expense. By contrast, in *Niak* there would have been a loss to the trust and no gain. These factors appear to affect the courts' application of the rules.

Finally, in *Niak* the parties to the transaction were all within the trust, whereas in *Murrell* and *Lang* there was a third party involved. As stated however, the trust rules are of general application.

IV Stokes v Insight Legal Trustee Company

The Court of Appeal appears to have rejected the proposition that one trustee is able to bind the trust based on undisclosed agency principles in *Stokes v Insight Legal Trustee Co Ltd.*[50]

Elaine Colebrook and Shona Carr were the two trustees of the RM Colebrook Family Trust. In 2007 Elaine entered into a purchase agreement with the plaintiffs. Settlement never occurred, and in 2008 property prices plummeted. The difference between the 2007 purchase price and the amount eventually realised on resale was $943,033.36. The purchasers argued that Elaine had acted as trustee in entering into the purchase agreement, and therefore sought this price difference from the trust assets through Elaine's right of indemnity.[51] The purchase agreement never mentioned that the property was being purchased on behalf of the trust, and the plaintiffs were not aware of this at the time of sale.[52]

Elaine was found to be the active trustee who made all trust decisions, with the co-trustee's consent being a mere formality of administration.[53] The trust was described as Elaine's "creature", as Shona left her a "free reign" over the trust's decision-making.[54] On this basis, Ellis J in the High Court accepted that Elaine was acting as the trust's undisclosed agent,

[50] *Stokes v Insight Legal Trustee Co Ltd* [2013] NZCA 148.
[51] *Stokes v Insight Legal Trustee Co Ltd* [2012] NZHC 1822 at [7] per Ellis J.
[52] At [9] per Ellis J.
[53] At [62] per Ellis J.
[54] At [62] per Ellis J.

capable of binding the trust to the sale and purchase agreement.[55] The trustees were each personally liable for the difference in price, and through their indemnification under the trust they were able to utilise trust assets to meet this liability.[56]

The Court of Appeal allowed the appeal on the grounds that this holding was not correct in law.[57] Justice Harrison for the Court stated:[58]

> …one trustee cannot act on another trustee's behalf when performing duties which are personal to the trustee in that capacity…. Trustees must exercise their trust powers personally and unanimously, precluding delegation even to co-trustees.

The Court of Appeal rejected the application of agency principles among trustees to allow a third party to enforce an obligation against trust assets.

A Comments

This case lends support for the strict approach in *Niak*, and again appears to be inconsistent with *Murrell* and *Lang*. In both *Lang* and *Murrell* the trustees were not actively involved in the decisions and yet the court considered the trust to be bound. Although not stated expressly, the reasoning underlying the *Lang* and *Murrell* decisions appears to be generally based on agency principles. Justice Wild in *Murrell* stated:[59]

> …Mr Mirkin allowed Mr Hamilton to bind the trustees to contracts relating to the construction of the house and implicitly accepted the Trust was liable to pay the amount owing under the contracts.

Similarly, Panckhurst J in *Lang* observed "… there may be a general approval of a number of contracts, as a class, such as to lead to the remaining trustee being bound by the act of his co-trustee.".[60] These comments both suggest that the courts used a kind of agency reasoning to circumvent the duties to act personally and unanimously. This is the proposition that *Stokes* rejects.

V Chapter 1 Conclusion

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[55] At [68] per Ellis J.

[56] At [74] per Ellis J.

[57] Ibid.

[58] *Stokes v Insight Legal Trustee Co.* , above n 50, at [20] per Harrison J. Note that this was point that was conceded by the Stokes' counsel in the course of argument and which the court subsequently stated as a reason for remitting the case back to the High Court. See [64] per Harrison J.

[59] *Murrell v Hamilton*, above n 13, at [28] per Wild J.

[60] *Lang v Southen*, above n 30, at [16] per Panckhurst J when referring to the successful counsel's submissions.

The common issue in all of these cases is the trustees not acting together. One trustee is active, while the co-trustees are not. However, in some cases the failure to be active and act together invalidates the transaction, in others it does not. This dissertation will look at whether these cases are consistent with the duty to act personally and unanimously, or whether they can be reconciled with the exceptions to the rules.

The next chapter will explore the history and rationale for the duties to act personally and the duty to act unanimously, and attempt to outline the principles underlying the duties in answering these questions. [61]

[61] See generally above n 1; *Thorpe v Hannam* (2010) 11 NZCPR 471 (HC) at [24] per Gendall AJ.

Chapter 2: The History of the Duties

The general rule is that a trustee must not delegate his or her duties or powers, not even to co-trustees.[62] This is known as the non-delegation rule or the duty to act personally. Deriving from this duty is the duty to act unanimously, together and jointly.[63] If all trustees must act personally, and none may delegate to another person or co-trustee, then the trustees must act unanimously.[64]

To begin to clarify the apparent inconsistency exposed in chapter one, it is important to assess the rationale for each duty as it developed. This chapter will look at the early development of the trust in order to uncover the rationale for the duties to act personally and unanimously.

I The Early Development of the Duties

In order to understand why trustees have a duty to act personally, it is important that we first look at the history of the trust. The earliest form of trust developed in the seventh century in relation to chattels, however modern trust law grew primarily out of the early practice of the "Use".[65] In the early Christian era, the Roman Peace that had secured law and order in Western Europe came to an end.[66] Barbarians overran Europe, and groups of lawless men were a threat to the common landowner.[67] Defenceless landowners placed themselves under a Lord, who would offer a degree of protection in exchange for military service and loyalty.[68] This became known as feudalism.

Following the Norman Conquest, William I was the supreme overlord of all the land in England.[69] Over time the social structure changed, however the strict processes of feudalism remained. The landowner was required to pass land by descent, rather than will, and strict shares of primogeniture and dower were required.[70] Freehold owners suffered from taxes known as wardship and marriage on their death.[71] Additionally, because medieval land law considered tenure a personal relationship, it did not allow transfer through a will.[72]

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[62] *Niak v Macdonald,* above n 1; *Stokes v Insight Legal Trustee,* above n 50.

[63] See above n 1.

[64] Ibid.

[65] Gary Watt *Trusts* (2nd ed, Oxford University Press, 2006) at 6; GW Keeton and LA Sheridan *The Law of Trusts* (12th ed, The Law Publishers Limited, England, 1993) at 23.

[66] GW Hinde and others *Principles of Real Property Law* (2nd ed, LexisNexis, Wellington, 2014) at [2.001].

[67] Ibid.

[68] Ibid.

[69] At [2.002].

[70] JH Langbein "The Contractarian Basis of the Law of Trust"(1995) 105 Yale Human J.L. 625 at 632-633.

[71] Ibid.

[72] Ibid.

In order to circumvent these burdensome requirements, freehold owners would convey their freehold to third parties, on the promise that those third parties would transfer the property subject to the original holder's wishes.[73] Because the original freehold owners were no longer the freehold owners on their death, none of these restrictions would apply to their estate. These transferors became known as the feoffers, and the third party transferees became known as feoffees.[74]

Once feoffees held this property, there was a real temptation to act dishonestly. As Hinde states, "…trusted friends were not always trustworthy, and complaints of faithless feoffees began to be heard.".[75] Hinde means that sometimes these third parties would fraudulently convey the property to themselves, or even not transfer the property at all, in breach of their promises.[76] The common law did not acknowledge that the cestui que use, those persons whom the feoffer wished to be ultimate transferees, had any rights in the land and therefore did not allow them a remedy where the feoffees acted dishonestly.[77]

There were several hurdles for the cestui que use to enforcing this agreement.[78] First, the writ of covenant required a common law plaintiff to have any agreement in a sealed document.[79] If this had been lost or destroyed, no action could lie against the feoffee.[80] Secondly, the common law courts could not grant specific performance, only damages in money.[81] This was unhelpful where real estate was the primary form of wealth. Thirdly, the common law restricted assignability of choses in action.[82] Only the original freehold owner could therefore enforce the agreement. This person was no longer alive when these disputes arose.[83] In addition to this, procedural restrictions on common law actions would have largely prevented the feoffees from testifying against the dishonest feoffee.[84]

In the late 14th or early 15th century, the Chancellor started to interfere in these dishonest practices.[85] The Chancellor considered that a solemnly undertaken obligation ought to be

[73] Ibid at 633.
[74] Ibid.
[75] Hinde, above n 66, at [4.009].
[76] Langbein, above n 70, describes the issue of the 'faithless feoffee' where a feoffee fraudulently conveyed the land to themselves in breach of their obligations to the feoffer.
[77] Ibid.
[78] Langbein, above n 70, at 634.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Keeton and Sheridan, above n 65, at 24.

fulfilled on the equitable ground that "the conscience of a dishonest feoffee ought to be purged".[86] Underlying this intervention is the maxim of equity that "equity acts in personam" or "on the person".[87] It did not matter that the enforcer was a third party to the agreement, because the Chancellor looked at the feoffee's conscience rather than the formalities of the cestui que use's right. The principal remedies given by equity were an injunction or specific performance; these clearly reflect the action being "on the person", and were a satisfactory remedy for the defrauded cestui que use.[88]

We see here the seed of the modern duty to act personally. It was the conscience of the given individual who had accepted an obligation that the Chancellor considered to be affected. The feoffee was compelled to establish those interests in land that the feoffer had declared. As Maitland puts it "Men ought to fulfill their promises, their agreements; and they ought to be compelled to do so".[89] Because the Use constituted an agreement between the feoffer and feoffee, the feoffee was required to fulfill it in their personal capacity.

We now come to the duty to act unanimously. Maitland has explained that enfeoffment to multiple persons was an essential requirement to evade feudal rules.[90] This also ensured that where one feoffee died, the remaining group or individual would receive the property by survivorship. One consequence of joint tenancy is that the power to transfer property only existed in the tenants together.[91] Joint tenancy is a form of co-ownership in which each tenant is wholly entitled to the whole of the estate, or interest, which is the subject of the co-ownership.[92] No joint tenant holds any distinct share in the co-owned estate but is – together with the other tenants- holder of the total interest in the land.[93] In the eyes of the law the joint tenants together comprise a collective entity –one composite person- holding the same interest in the land.[94] A transfer of land to two or more persons as joint tenants "operates so as to make them, vis a vis the outside world, one single owner".[95] A consequence of this is

[86] Ibid.

[87] C Harpum and others *The Law of Real Property* (18th ed, Sweet & Maxwell, London, 2012) at [5-008].

[88] Ibid at [5-015]. Note that the nature of remedies in equity is discretionary and not granted as a right; see [5-014].

[89] FW Maitland *Equity* (Cambridge University Press, London, 1947).

[90] Ibid at 26 states "By keeping up a wall of joint tenants, by feoffment and refeoffment, [the feoffer] can keep out the lord and can reduce the chances of reliefs and so forth to nothing.".

[91] Harpum, above n 87, at [13-066].

[92] Kevin Gray and Susan Gray *Land Law* (7th ed, Oxford Publishers, Great Britain, 2011) at [7-088] citing *Burton v Camden* [2000] 2 AC 399, 2 WLR 427 (HL).

[93] Ibid at 366 citing *Wright v Gibbons* (1949) 78 CLR 313. In *Wright* the High Court of Australia held that two joint tenants could not transfer their tenancy in common so as to effect a severance of the property. Although Australian authority, the decision was based on Torrens System principles that came from England.

[94] Ibid.

[95] *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 (HL) at 492 per Lord Browne-Wilkinson.

that each feoffee had a veto power.[96] This meant that if one feoffee were dishonest, they could not by themselves give effect to a legal transfer of the estate.

II Joint Tenancy and the Modern Trust

These rules translate to the modern trust. Over time the cestui que use's remedy existed against all but a small class of persons. The bona fide purchaser for value without notice of the trust could take free from trust.[97] Today's express trust has been aptly described as a "sophisticated form of management device".[98] The trust evolved into a vehicle where these duties could be owed in respect of chattels and funds, as well as real estate. Even so, the trustees remain as joint tenants of the trust property.[99] *Lewin* states:[100]

> The office of co-trustees of a private trust is a joint one. Where the administration of the trust is vested in co-trustees, they all form as it were but one collective trustee and therefore must execute the duties of the office in their joint capacity.

As such, the law requires trustees to jointly exercise control of these assets like joint tenants.[101] To this effect, Kay J stated:[102]

> The theory of every trust is that the trustees shall not allow the trust moneys to get into the hands of any one of them, but that all shall exercise control over them… The reason why more than one trustee is appointed is that they shall take care that the moneys shall not get into the hands of one of them alone…

Virgo still places joint tenancy as one feature making up the "essence of trusteeship".[103] Chapter one demonstrates that difficulties arise where the court is required to translate these joint tenancy principles to other functions of the modern trustee.

III The Development of the Duties at Common Law

Although the duty to act personally and unanimously are directly related, they appear to have developed separately at common law. This part of the chapter will first look at the common

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[96] Langbein, above n 70, at 640.

[97] Keeton and Sheridan, above n 65, at 35 states "By successive decisions there was evolved the proposition that only the bona fide purchaser for value without notice of the trust was able to take free of it.".

[98] Gray, above, at [1-075].

[99] Hinde, above n 66, at [12.008].

[100] T Lewin and others *Lewin on Trusts* (19th ed, Sweet and Maxwell, London, 2015) at [29-068].

[101] *Lewis v Nobbs* [1878] 8 Ch 591 (Ch).

[102] *Re Flower and Metropolitan Board of Works* [1884] 27 Ch 592 (Ch) at 596 per Kay J.

[103] Graham Virgo *The Principles of Equity & Trusts* (Oxford University Press, Hampshire, 2012) at [12.2.2].

law duty to act personally and then at the duty to act unanimously. The duty to act personally can be divided into the duty not to delegate to third parties, and the duty not to delegate among the trustees. This part of the chapter will look first to the rationale for the duty in relation to third parties, then cover the relevant case of delegation among trustees, before briefly looking at the duty to act unanimously.

A The Duty Not to Delegate to Third Parties

The early House of Lords decision in *William Foley v AG* is the first clear illustration of the duty not to delegate.[104] In *Foley* a charitable trust was established with a sum of money to pay for a person to act as preacher and curate. The issue was whether the trustees or the parishioners had the right to appoint this person. The parishioners thought that they did and had done so until they were challenged. Against this, the House of Lords stated there was "an absolute power vested in the trustees named in the deed" that was "not assignable".[105]

This chapter's discussion has so far shown that the duty to act personally is based on the trust that a settlor places in the trustees' personal discretion; the Chancellor enforced the feoffees' conscience and required them to act on the settlor's intention.[106] In *Robson v Flight* we see the early duty applying expressly to those powers requiring the exercise of judgment and discretion.[107] In 1818 John Hall by will vested a freehold in two trustees. The trust vested in his son and daughter in equal shares for life, with the remainder of the separate interests to be held for their children. The will contained a direction that the power to lease the trust property vested only in the two trustees. When John Hall died in 1826, neither of the trustees would act on the trusts. One trustee died a year and a half after John's death, and the other formally disclaimed the trust. No new trustees were appointed. In 1836 John's son, John E. Hall, and daughter, Eliza, themselves leased out the trust property to a third party for 21 years. Eliza died in 1840, and in 1848 John purported to lease the property for a further 21 years. In 1857 John died, and the trust vested in Eliza and John's children. When the freehold was compulsorily acquired by a railroad company, Eliza and John's children brought a claim against the lessees on the basis that the lease was invalid.[108] The land was worth more if it were not subject to the lease, and the purchase price would correspond with this.

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[104] *William Foley v AG* (1721) 7 Bro PC 249, 3 ER 162 (HL).

[105] At [253].

[106] The same applied to third party recipients: Maitland, above n 89 at 32 states "… against whom is a trust enforceable? This is the line of development- as regards purchasers all is to depend on conscience.".

[107] *Robson v Flight* (1864) 34 Beav 110, 55 ER 575 (Ch).

[108] At 611 this was brought among other claims that new trustees be ordered, that a declaration be granted that they be entitled to the purchase money from the company, and the proceeds of the lease, and that they be entitled to the property itself.

The children claimed there was no power in John E Hall to grant a lease, as this was a power that only trustees could exercise. Lord Chancellor Westbury on this basis held that the lease was invalid. The principle was laid out:[109]

> Such trusts and powers are supposed to have been committed by the testator to the trustee he appoints by reason of his personal confidence in their discretion, and it would be wrong to permit them to be exercised by [another]… in whom he has no confidence at all.

The Lord Chancellor considered that there was a great deal of discretion in exercising the power to grant a lease, as it required a determination of how much rent to charge, how adequate certain tenants were, the length of term to grant the leases, and the conditions of any such lease.[110] These were "matters requiring knowledge and skill" that the settlor entrusted to the particular trustee.[111] Put shortly, the appointed trustee was expected to act personally and not to delegate. John Hall was "…a stranger to the power".[112]

However, it was impractical for trustees to personally carry out all the tasks of their office, and an exception developed in relation to those tasks involving professional expertise. In *Ex P. Belchier* an assignee of a bankrupt had employed a broker to sell a quantity of tobacco on her behalf.[113] The broker then sold the tobacco, but before he could hand the proceeds back to the assignee the broker died insolvent. The issue was whether the assignee was answerable for this loss. Lord Chancellor Hardwicke considered that if the assignee were liable, then "…no man in his senses would act as assignee….".[114] His Lordship stated as obiter that "…where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses.".[115] Put simply, some tasks are necessary and ordinary to delegate, and therefore trustees should not be held liable where their prudent delegation results in loss.

The leading case following *Belchier* on this exception is *Speight v Gaunt.*[116] In *Speight* a trustee employed a broker to purchase stocks for a trust. The broker was the testator's broker, who had a sound reputation. The beneficiaries themselves had specifically requested the funds to be invested through this broker. When the broker was subsequently declared bankrupt, it was found that he had appropriated the trust funds to himself. The issue was

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[109] At 613 per Lord Chancellor Westbury.

[110] At 614 per Lord Chancellor Westbury.

[111] Ibid.

[112] Ibid.

[113] *Ex P Belchier* (1754) Amb 218, 27 ER 144 (Ch) at 145 per Lord Hardwicke.

[114] Ibid.

[115] Ibid.

[116] *Speight v Gaunt* [1883] 22 Ch 727 (CA); (1883) 9 App. Cas. 1. Note the Court of Appeal decision was affirmed in the House of Lords.

whether the trustee was liable to make good the loss to the trust. It was held that because reasonable persons of business would employ an agent to act as a broker, he was not liable for the loss. Lord Justice Bowen in the Court of Appeal stated thus:[117]

> A trustee cannot, as everybody admits, delegate his trust… On the other hand, in the administration of a trust a trustee cannot do everything himself – he must to a certain extent make use of the arms, legs, eyes, and hands of other persons…

This exception is grounded in necessity and practicality.[118] It does not allow a trustee to fully delegate their trust, but only applies to implementation of trustee decisions where a trustee *must* make use of another's skills, or "arms, legs, eyes and hands…".[119]

B The Duty Not to Delegate to Other Trustees

Trustees are not permitted to delegate to each other or leave the administration of the trust to one or a selection of the appointed trustees. This was an early feature of the rule. In *AG v Scott* a charitable trust had been set up for the election of a clergyman.[120] The subject matter of the trust consisted of the right of a collation for a living.[121] While the trust started out as a group of 25 trustees, when one trustee died the remaining 24 trustees were split evenly between two candidates. Upon the death of another trustee, the majority group in favour of one clergyman set up a meeting among themselves to pass the election of their choice. Many objections were raised to this meeting and thus the validity of the election. One objection was that certain of those voting trustees were not even present at this meeting, and had voted by proxy.

The Court of Chancery considered that "…the trustees were themselves to judge of the qualifications of the candidates, and could not delegate that judgment to others, but ought to exercise it themselves".[122] The trustees who did not attend and voted by proxy were "…the worse for it…", as such trustees made their election "…without hearing his brother trustees".[123] The election was held to be invalid on this basis, among others. This case recognises that the duty not to delegate also precludes delegation among trustees. It also

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[117] At 763 per Bowen LJ in the Court of Appeal.

[118] In the House of Lords Earl Selborne at 4 stated that a trustee is not authorised to delegate "at his mere will and pleasure" however he referred to the "moral necessity of mankind" as requiring this kind of agency. Lord Blackburn likewise stated at 20 "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are".

[119] Ibid.

[120] *AG v Scott* (1750) 1 Ves Sen 413, 27 ER 1113 (Ch) at 1116.

[121] At 1114.

[122] At 1116.

[123] At 1116.

suggests there is a corresponding duty to be active and involved in the decision-making process. This is evident as the Court suggests that the trustees must all hear each other out, and then make an informed decision, rather than making a predetermined decision and delegating to another trustee the formality of registering their decision. It suggests that personal trustee decision-making is not a formality, but rather involves active participation by all trustees in the decision process.[124]

C The Duty to Act Unanimously

The duty to act unanimously as a rule in its own right developed later at common law. In the seminal case of *Luke v South Kensington Hotel Co* the unanimity rule was given as a bold and general statement, with language reflecting the concept of joint tenancy.[125] The plaintiff, Luke, and the defendants, Browne and Sandys, were trustees of the will of Dr Luke. Dr Luke died in 1829. Following his death, a significant amount of money and stocks were standing in the trustees' names jointly. In 1864 the plaintiff and the defendants sold the stock, and invested it on the security of the mortgage of a leasehold property owned by the South Kensington Hotel Company (the "SKH company"). The interest was payable under it at 6.5%, or 5.5% on punctual payment. In 1869 this company ran into financial difficulties, and could not meet its mortgage payments. The defendants formed a company to take over the SKH company's assets, and forgive rent that was formerly owed to the trust. The plaintiff objected to this proposal. Even so, the defendants continued as though his assent had been given and executed a deed as such. Because the plaintiff had not agreed to release the SKH Company from the mortgage, he argued that he could maintain an action for foreclosure against the new company which had subsequently taken on the SKH company's assets. His claim succeeded. Master of the Rolls Jessel observed:[126]

> Two out of the three trustees have no power to bind the *cestui que trust.* There is no law I am acquainted with which enables the majority of trustees to bind the minority. The only power to bind is the act of the three, and consequently the act of the two. . could not bind the trust estate…

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[124] Note that a string of cases are generally cited for this duty that have some relevance. For example in *Crewe v Dicken* (1798) 4 Ves Jun 97, 31 ER 50 (Ch) it was held that where a third party purchaser of trust property knows of the trust, and of a condition in the trust deed requiring trustees to see to purchase money jointly, that purchaser can require the trustees to see to the trust money jointly. In that case one trustee had transferred his trust property to the contracting trustee. Even so, the third party's contract with one trustee in respect of trust property was deemed invalid when the other trustee refused to join in the receipt. Also see *Langford v Gascoyne* (1805) 11 Ves 333, 32 ER 116 (Ch), which deals with liability for losses among executors, where the law is different.

[125] *Luke v South Kensington Hotel Co.* above n 2.

[126] At 125-126 per Jessel MR.

This statement reflects the concept of joint tenancy, and indeed the concept permeates the courts' decisions in respect of the duty to act unanimously.[127]

The joint tenancy concept is clear in *Astbury v Astbury*.[128] In *Astbury* it was held that an acknowledgement of rent owed by a trust property's tenant was not sufficient for the purposes of a limitations statute where only one of two trustees had made this acknowledgement. In the Chancery Division Stirling J reasoned that the person to whom money was owed was "…a composite person consisting of both trustees together".[129] His Honour thus stated that "…all trustees must concur in the exercise of powers conferred on them in reference to the trust estate".[130]

IV Chapter 2 Conclusion

This chapter has shown that the duty to act personally is linked to trust decisions involving the discretion of trustees. It is clear that this involves a duty to be active in administering the trust and exercising trust powers. From these cases we see that the unanimity rule applies in the same way; trustees must all participate in decision-making and come to a unanimous decision through this process. These duties are therefore directly linked to each other.

Chapter three will now look at the modern application of the duties to act personally and unanimously in more detail. It will look at the current exceptions to the duties, and what is required in order to act unanimously in specific transactions.

[127] See *Tempest v Lord Camoys* [1882] 21 Ch 571 (CA) where the Court of Appeal considered that it could not force a trustee to exercise their disretion in a certain way, even where the beneficiaries and the co-trustee were in favour of the particular manner of exercise of the power. The only power to act was the power of trustees jointly.

[128] *Astbury v Astbury* [1898] 2 Ch 111 (Ch).

[129] At 113 per Stirling J.

[130] At 116 per Stirling J; see also *Leyton v Sneyd* (1818) 8 taunt 532, 129 ER 489 (Comm Pleas) for this aspect of the rule.

Chapter 3: The Modern Application of the Duties

This chapter will first look at the modern academic commentary around the duties to act personally and unanimously, and then consider the exceptions to the duties. The purpose of this chapter is to set the background for an analysis of the kinds of cases where the unanimity and non-delegation rules apply. It will consider whether delegation or prospective authorisation of trustee decision-making should amount to an exception to either or both duties. From this chapter, we can then categorise and analyse those cases where the rules have and have not applied.

I The Duty to Act Personally

Trustees must generally act personally in trust decision-making. The traditional view is that because a settlor has chosen particular trustees for their skills, they must personally perform the trust.[131] For this reason, Garrow and Kelly states that "…as a general rule all trustees must conscientiously take part in decision-making.".[132]

We have seen in *Robson v Flight,* the case involving a third party trying to lease trust property, that the duty to act personally applied at common law to trustee *discretions*. The general direction of the commentary on non-delegation also appears to be that *discretionary* powers cannot be delegated. Finn points out that because exercises of discretion involve personal judgment, discretionary powers cannot be delegated:[133]

> [a] donee of a discretion, who has trust and confidence reposed in his personal judgment in exercising that discretion, cannot delegate it to another in the absence of an express authority so to do.

Rotman describes this as a "vital component of the maxim that obliges a trustee to administer a trust personally", however Rotman acknowledges that there is dearth of direct commentary on the topic of delegation.[134] To this effect, *Thomas on Powers* states:[135]

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[131] AS Butler and others *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [5.3.1].

[132] Kelly, above n 8, at [20.96].

[133] PD Finn *Fiduciary Obligations* (The Law Book Company Limited, Sydney, 1977) at 20.

[134] LI Rotman *Fiduciary Law* (Thomson Carswell, Canada, 2005) at p 367 citing C Harpum "Fiduciary Obligations and Fiduciary Powers – Where are We Going?" in P.Birks (ed) *Privacy and Loyalty* (Oxford: Clarendon, 1997) at 99.

[135] GW Thomas *Thomas on Powers* (2nd ed, Oxford University Press, UK, 2012) at [6.44].

> The extent to which trustees are authorised to delegate their functions, though now considerable, is nonetheless not unlimited. In the main, delegation of their trusts and any powers involving a personal *discretion* is not permitted. (emphasis added)

Lewin explains the rationale for this duty similarly:[136]

> …a trustee is not entitled to delegate his trust, for trusteeship is an office of personal confidence. Thus the underlying rule is that a trustee may not commit to another person the exercise of any *discretion* vested in him as trustee, except as authorised by statute or the trust instrument. (emphasis added)

These authors all suggest that the modern duty to act personally exists for largely the same reason as the rule developed: a settlor has reposed trust and confidence in the trustees, and therefore the trustees must personally exercise discretions.

Chapter two outlined how this early duty to act personally also appears to encompass a duty to be active.[137] Recent decisions reveal this is still the case. In *Turner v Turner* a settlor had set up a trust for the benefit of his wife, children, remoter issue and spouses of each.[138] He appointed trustees who knew nothing about trusts. The trustees had broad powers to appoint capital or income to the benefit of any or all of the beneficiaries. Instead of considering the exercise of these powers, the trustees simply signed documents that the settlor put before them in purporting to exercise their trust powers of appointment. It was held that when exercising a discretionary power of appointment the trustees were under a duty to consider whether the appointment was appropriate. The trustees had not appreciated their powers and duties in relation to the discretionary trust, which was disregarded for the purpose of decision-making. Therefore the powers to appoint had not been validly exercised.

Likewise, in recent New Zealand judgments the duty to act personally has been shown to include a duty to be active. In *CIR v Newmarket Trustees Ltd* the Court of Appeal was required to consider the liability of a company trustee for tax responsibilities in relation to trust property.[139] A firm of solicitors had set up this company to act as a trustee for over 100 client trusts. Southern Lights Trust (SLT) was one of these trusts. SLT had incurred substantial taxes on transfers of property. The other trustee of SLT, Mr Goh, was a client of the law firm. He was declared bankrupt. The Commissioner of Inland Revenue sued the

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[136] Lewin, above n 100, at [36-009].

[137] See also *Re Lucking's Will Trusts* [1968] 1 WLR 866 (Ch) where it was held that a trustee who was a director of a company, over which the trust held a controlling interest in shares, had a duty to actively supervise the other director to ensure no losses to the company. The trustee was held liable to the trust beneficiaries to the extent of the other director's overdrawings.

[138] *Turner v Turner*, above n 8.

[139] *Commissioner of Inland Revenue v Newmarket Trustees Ltd*, above n 9.

trustee company for these tax liabilities. On summary judgment the High Court rejected the company's argument that it was a 'bare trustee', a trustee with no duties, because the trust deed did not state this. However, the High Court considered that professional trustee companies were not expected to assume tax liabilities, and in this case the costs of ordering liquidation would outweigh the benefits.

Inland Revenue appealed to the Court of Appeal, which held that by only concurring to these transactions, and not having any system in place to monitor its co-trustees, the company's delegation to a co-trustee amounted to "…fundamental breaches…" of its trustee responsibilities.[140] The Court considered that the trustee company could not delegate the payment of tax liabilities to its co-trustees and was jointly and severally liable for those tax liabilities.[141] This shows there is a duty to be active and not merely acquiesce in other trustees' decisions and judgment. This is a part of the non-delegation rule discussed earlier, because it shows that trustees must take active steps to act personally in administering the trust.

A The Employment of Agents Exception

A statutory exception now exists in relation to the employment of skilled agents to implement trustee decisions.[142] *Lewin* explains:[143]

> Another branch of the principle prohibiting delegation formerly denied trustees any general right to appoint agents to act on their behalf… even though there was no delegation of any discretion to the agent. But that branch of the principle was always subject to exceptions and there was [eventually] extensive statutory intervention.

The purpose of the exception is not expressly outlined in the case law. Writing in 1977, Finn stated "The relationship of the prohibition on delegation to the power to appoint agents has never been analysed satisfactorily in private law".[144] Virgo discusses this exception as grounded in practicality:[145]

> Originally, a trustee was expected to perform all of his or her duties personally. In reality, this has proved to be impracticable, especially as the size of the trust funds have increased, and over the years it has become possible for trustees collectively to delegate certain functions to other people…

[140] At [56] per White J on behalf of O'Regan P and Ellen France J.

[141] At [48] per White J on behalf of O'Regan P and Ellen France J.

[142] Trustee Act 1956, s 29.

[143] Lewin, above n 100, at [36-009].

[144] Finn, above n 133, at 20.

[145] Virgo, above n 103, at [13.7].

This was seen in the *Belchier* decision discussed in chapter two, where the trustee was not liable for loss caused by the employment of a broker in good faith. The law recognises the necessity in certain circumstances to delegate to persons with special skills and not be accountable for their actions. As Martin states, the exception developed because "there are certain things which a business person would always delegate to a skilled agent.".[146]

Virgo points out that trustees may "collectively" delegate functions to other people. Trustees could not delegate the decision to select an agent, or the action of selecting an agent, to one trustee.[147] The practical consequence of allowing this collective delegation was that where a trustee's properly appointed agent committed an act in his or her ordinary employment causing loss to the trust, the trustees were entitled to an indemnity from the trust fund.[148] It does not, however, allow trustees to delegate their duties and discretion.

Our Trustee Act preserves this common law exception for the employment of agents. Section 29 allows the trustees to employ and pay an agent for certain purposes. The agent may be a solicitor, accountant, bank, trustee corporation, stockbroker "or other person".[149] The agent may be employed to transact any business or do any act required to be done in the execution of trust or administration of trust property, this includes the receipt and payment of money and keeping and audit of trust accounts.[150] This exception is limited as the agent cannot be delegated trustee discretions, and so in all exercises of the trustee's discretion the trustee is responsible.[151]

We see here the distinction articulated in *Robson* between powers that must be exercised personally and powers that may be delegated. Those powers that require a trustee to make a decision in respect of the trust fund or property cannot be delegated. The distinction reflects the nature of trusteeship as "an office of confidence".[152] A settlor entrusts that trust discretions will be carried out by the particular skilled persons selected, and delegating that discretion is therefore breaching this trust.[153]

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[146] JE Martin *Modern Equity* (18th ed, Sweet & Maxwell, London, 2009) at [20-012].

[147] *Robinson v Harkin* [1896] 2 Ch 415 (Ch). Note that unlike *Lang* this dealt with a claim by beneficiaries against the trustees for the loss caused by one trustee allowing his co-trustee to entrust trust funds with a third party broker. It was held the active trustee was entitled to contribution from the co-trustee.

[148] *Bennett v Wyndham* (1862) 4 De G F & J 259, 45 ER 1183 (Ch).

[149] Trustee Act 1956, s 29.

[150] Ibid.

[151] See *Speight v Gaunt*, above n 116, at 756.

[152] Lewin, above n 100, at [36-009].

[153] Butler, above n 131, at [5.3.1].

This distinction is also clear from the recent case of *Ponniah v Palmer*.[154] This case was an appeal from a High Court decision refusing an application that a caveat not lapse. The Court held that the trustees had not and could not delegate to the settlor the power to mortgage trust property and caveat the relevant trust property.

The trustees and trust settlor had employed a law firm to act for them in certain proceedings, and the trustees generally authorised the settlor to make binding decisions on matters involving the trust's administrative decisions. As a substantial amount was owed to the law firm, the firm requested, and the settlor signed on behalf of the trust, a mortgage over trust property and a caveat as security for the fees. Clause 7 of the trust deed empowered trustees to do all things in management of the trust fund whether or not "such thing be one which Trustees would normally have no power to do in the absence of an express power or order of the Court". Clause 7(v) empowered the trustees to employ any person "to do any act of whatsoever nature" rather than act personally.

Even so, the Court of Appeal held that clauses 7 and 7(v) only permitted delegation of the *implementation* of decisions made by trustees unanimously.[155] It was reasoned that executing a security is "… akin to the ability to alienate or dispose of that property. The trustees alone have the ability to make decisions on such matters…".[156] To allow the settlor as a third party to exercise such broad administrative powers it was said "… would conflict with the general obligations on trustees to come to decisions concerning the trust property themselves.".[157] The appeal was therefore dismissed.

However, s 29(2) does permit delegation of the trustee's discretions in limited circumstances. It provides that a trustee may appoint any person to act as agent or attorney for the purpose of selling, converting, collecting or dealing in certain other ways with property subject to the trust in any place *outside New Zealand*.[158] In this case, a trustee may authorise the agent to exercise any discretion or trust or power vested in the trustee in relation to that asset. This exception is clearly grounded in convenience and ensuring efficiency of trust administration. A trustee cannot properly exercise trust discretions where he is far away from trust property.

B The Absence or Incapacity Exception

Section 31(1) of our Trustee Act also outlines a complete exception to the duty to act personally. This requires a power of attorney to be executed as a deed. It is available where a

[154] *Ponniah v Palmer* [2012] NZCA 490.

[155] At [23] per Stevens J on behalf of himself, French and Venning JJ.

[156] At [25] per Stevens J on behalf of himself, French and Venning JJ.

[157] At [27] per Stevens J on behalf of himself, French and Venning JJ.

[158] Trustee Act 1956, s 29(2).

trustee is for the time being outside of New Zealand or expects to be absent from time to time during the trust's administration, or where a trustee expects to become incapable of performing their trust duties. Under s 31 trustees may fully delegate their office, as the section states the trustee may "…delegate to any person the execution or exercise…" of the trust "…powers, duties, authorities and discretions…". This section allows the original trustee a defence to any action brought by beneficiaries.[159]

This exception could suggest that a lenient approach to general delegation among trustees should be taken. Instead, the exception exists for the practical reason that an absent or incapable trustee cannot sufficiently discharge their duties to the beneficiaries, and therefore in these circumstances it is necessary that they be able to fully delegate trusteeship. This rationale also underlies the foreign asset exception above. Delegation is permitted because the replacement trustee is better able to perform their trust duties and safeguard the interests of beneficiaries than an absent or incapable trustee.

II The Duty to Act Unanimously

The duty to act unanimously appears to be based on the conceptual understanding that trustees hold trust powers jointly, as joint tenants. It comes from the duty to act personally: each trustee has a settlor's trust and confidence placed in them to exercise their discretion in respect of the trust property.[160] In this context, *Parker and Mellows* states:[161]

> The settlor or testator has reposed his trust in all the trustees, not just some of them; the liabilities and responsibilities are consequently those of all the trustees. Actions taken and decisions made in the administration of trust must be those of all the trustees.

Likewise, the learned authors of *Snell's Equity* state:[162]

> In general, any power or trust must be exercised by all the trustees. A majority has no power to bind the minority, unless settlement expressly so provides.

Trustees are still joint tenants over the trust property and so any power that they exercise in respect of the trust must be exercised jointly. On this point *Lewin* states:[163]

[159] Section 31, ss (2)-(5).

[160] See above n 1.

[161] DB Parker and others *Parker and Melllows: The Modern Law of Trusts* (9th ed, Sweet & Maxwell, London, 2008) at [14-013].

[162] EHT Snell and others *Snell's Equity* (33rd ed, Sweet & Maxwell, London, 2015) at [10-015].

[163] At [29-069].

> [the trust is a joint office] Accordingly, trustees are generally[164] required to act unanimously in the exercise of their powers; a majority is not entitled to bind the trust against the opposition of a minority.

We see the terminology of powers being used in respect of trustee unanimity. There appears to be a consensus that it is powers of a trustee that must be exercised jointly. *Snell's Equity* states:[165]

> In general, any power or trust must be exercise by all the trustees. A majority has no power to bind the minority, unless the settlement expressly so provides.

Similarly, *Garrow and Kelly* states that "All trustees must agree in the exercise of powers given to them concerning the trust fund".[166]

It appears that in general trustees must act unanimously in relation to trust *powers*. In this author's view we can draw the conclusion from the common law and the academic commentary that trustees must act personally and unanimously in respect of *discretionary powers.* This is the first important feature of the apparently inconsistent cases in chapter one, and the question becomes whether or not *Lang* involved a discretionary power of trustees, and whether the constructive trust involves an exercise of a discretionary power. The next chapter will look more closely at this point. For now, the next part of this chapter will look at the exceptions to the duty to act unanimously.

A The Charitable Trusts Exception

A statutory exception to the duty to act unanimously exists for charitable trusts.[167] This exception originated in *Re Whiteley*, where Eve J stated:[168]

> In private trusts the rule is inflexible that all trustees must concur in administering the trusts, but it is otherwise in the case of public and charitable trusts… the act of the majority is held to be the act of the whole number.

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[164] *Luke v South Kensington Hotel Co.*, above n 2, at 125-126; *Astbury v Astbury*, above n 128, at 115-116; *Rodney Aero Club Inc. v Moore*, above n 1; *Niak v Macdonald*, above n 1, at [16], [19]; *Ponniah v Palmer*, above n 154.

[165] Snell, above n 162, at [10-015].

[166] Kelly, above n 8, at [19.15].

[167] Charitable Trusts Act 1957, ss 7-9, 35, and 45.

[168] *Re Whiteley* [1910] 1 Ch 600 (Ch) at 604 per Eve J. A trust was set up to purchase land to develop into a retirement home for the poor. The trust was clearly charitable. The trustees disagreed over the true construction of the testator's will, with eight trustees against two trustees favouring one construction. It was held that in all kinds of decisions of charitable trusts, including administrative decisions, the majority of trustees bind the minority.

The reason for this exception appears to be that these kinds of trusts generally involve a large number of trustees, and therefore unanimity is inconvenient in all decisions. As it was stated in *Whiteley*, "…unanimity in such a body upon all matters of detail is unattainable, and the Courts have long since recognised this fact.".[169] This does not appear to be an exception to the duty to act personally or be active, as the ratio of *Whiteley* was confined to whether a minority would be bound to a majority's decision. In *Whiteley* the trustees had all acted personally and been active, there was only a disagreement in the final result. This point is also clear from *AG v Scott* in chapter two, where the majority of trustees had technically voted however this was invalid as the trustees had not been active.[170] All trustees of a charitable trust must act together in the decision making *process*. The exception only means that a minority of trustees are then required to defer to the majority's final judgment.

B The Trust Deed Exception

The settlor can contract out of the requirement for unanimity, and give certain powers to specific trustees to get around the non-delegation rule.[171] This is directly related to the rationales for the duties that were outlined earlier – a settlor may choose to repose their trust and confidence in a few trustees or one trustee in particular. This exception therefore preserves settlor autonomy in alienating their property.

III Chapter 3 Part 1 Conclusion

As it has been outlined, the modern exceptions to both duties do not amount to a general rejection of the rules. Instead, the exceptions are grounded in principle. First, certain exceptions exist on the basis of necessity and to ensure the efficient administration of the trust when trustees cannot properly carry out their duties. Second, under s 29, the agent exception, collective trustee decisions can be implemented through agents where the trustees lack the required skills. This exception does not allow trustees to delegate their discretion, only the implementation of a unanimous trustee decision. The settlor may contract out of strict non-delegation or unanimity requirements as this clearly reflects that the duties are grounded in the settlor reposing trust and confidence in the trustees. This is the only exception that allows trustees to delegate their discretion where they are able to perform their duties to the trust's beneficiaries. We see that even in the case of charitable trusts, trustees must be active and act personally.

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[169] At 607 per Eve J. Note his Honour was here stating the submission of the plaintiffs who ultimately were successful on this point.

[170] *AG v Scott*, above n 120.

[171] *Re Butlin's Settlement Trusts* [1976] 2 WLR 547 (Ch).

It is inconsistent with these principles to allow trustees to delegate trust discretions among themselves where the settlor has not provided for this. Although convenient, this breaches the trust and confidence that a settlor has reposed in the individual trustees separately. Where trustees are able to perform their duties and be active, they are required to. The next question is what is required for trustees to act unanimously.

IV What is required for Trustees to Reach a Unanimous Decision?

Unanimity in trustee decision-making can be divided into the process of decision-making and the final trustee decision. Thus, *Garrow and Kelly* states "All trustees must agree in the exercise of powers given to them concerning the trust fund." under the heading "Unanimity", but also state that "…as a general rule all trustees must conscientiously take part in decision-making." under the heading "Duty to act personally".[172] The case law suggests that in both the decision-making process and the final result, trustees must be active and act together. This part of the chapter will look at each of these points separately.

A Unanimity in the Final Decision

Trustees must all concur in the exercise of a discretionary power before it is binding on the trust.[173] The charitable trust exception exempts trustees from this aspect of unanimity. Absent an exception, in private express trusts where one trustee dissents to the decision of the other trustees, the decision will not bind the trust.[174] This aspect of the unanimity rule is clearly linked to the joint tenancy land law concept discussed in chapter two. In the chapter one cases it could be said that this aspect of the duty was fulfilled by the inactive trustees. The inactive trustees were willing to go along with their co-trustee's decisions generally and acted on the basis that unanimous trustee decision-making was a mere formality. However, given that the trustees in those cases did not have knowledge of the decision before it was made, this is a stretch.

B Unanimity in the Process of Trustee Decision-Making

The weight of authority appears to suggest that more is required than acquiescence to a trustee decision. Trustees must actively participate in the decision-making process. This is shown by the courts' approach to retrospective ratification of a non-unanimous trust decision, and is also evident in the courts' general approach to unanimity. This part will go through each to illustrate this strict component of unanimity.

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[172] Kelly, above n 8, at [19.15] and [20.96] respectively.

[173] See above n 1.

[174] Ibid.

1 Retrospective ratification

The New Zealand approach to retrospective ratification suggests that trustees must all participate in the decision-making process. The leading New Zealand authority on retrospective ratification is the recent Court of Appeal decision in *Hansard v Hansard.*[175]

Gerald and Diana Hansard were trustees of the GG Family Trust. Their son, David, and his former partner, Sharon, were trustees of the D & S Hansard Family Trust. Gerald and Diana alleged that David and Sharon were indebted to the GG Trust in their capacity as trustees of the D & S Trust. In 2001 the GG Trust advanced money, consisting of two debts amounting to $1,222,658, to David and Sharon's company, MH Publications Ltd ('MHP'). The plaintiffs, Gerald and Diana, alleged that in 2005 the D & S trust assumed responsibility for MHP's debt. In 2008 MHP was significantly affected by the financial crisis. As such, MHP could never repay the debts owed to the GG Trust. At around the same time David and Sharon separated.

The primary dispute surrounded whether Sharon had sufficient knowledge of David's actions in assuming responsibility for MHP's debt on behalf of the trust in order to bind the trust estate. Sharon argued that they did not act unanimously as trustees, as she did not have sufficient knowledge of the transactions.[176] She had not signed the relevant minutes at the meetings where the transactions were approved.[177] Sharon also argued that she did not subsequently ratify the transactions.[178]

The Court of Appeal held that as a matter of fact Sharon did not do enough to retrospectively ratify the trustee actions in respect of the second debt.[179] Justice Lang in the Court of Appeal held that in order to retrospectively ratify a transaction, a trustee must have knowledge of "…the essential detail of the act or decision in question.".[180] Here Sharon did not have knowledge in advance of the value of the assets the trust was acquiring compared to the debt it was taking on.[181] It was not sufficient that Sharon was aware of the change in financial position, even though this implied the trust had entered into such a transaction.[182] In order for a trustee to ratify a non-unanimous decision, "…mere passive acquiescence…" was not

[175] *Hansard v Hansard* [2013] NZHC 1692; *Hansard v Hansard* [2014] NZCA 433, [2015] 2 NZLR 158.
[176] At [40] per Ellis J.
[177] At [45] per Ellis J.
[178] At [40] per Ellis J.
[179] Above, at [69] per Lang J.
[180] At [51] per Lang J.
[181] At [40] per Lang J.
[182] At [51] per Lang J.

enough.[183] Justice Lang considered the ratifying act "…must show that the trustee considered the exercise of his or her power as a trustee and consented to the action undertaken".[184]

The general approach to ratification in *Hansard* supports a strict approach to unanimity in the decision-making process. If the trustee must have knowledge of all essential matters of the relevant transaction, and must consider the exercise of their power as trustee, then it follows they must actually participate in the decision-making process.

In this context, *Lewin* states:[185]

> A retrospective assent from one trustee, purporting to approve what has already been done by the others without it, will not do. *But all the trustees may ratify what has been previously done by only some of them*, presumably on the footing that they are entitled to avoid the circuity of seeking to set aside the prior purported exercise only to exercise the power again in the same way. (emphasis added)

Put simply, retrospective ratification is really an ex post facto decision by all trustees, with all participating in the decision. *Lewin* therefore suggests that trustees in the first instance are really not exercising a power at all and that only the later unanimous exercise of the power is valid.

2 Unanimity at the time of the decision

The case law suggests there is a corresponding strict approach to unanimity in the decision-making process at the time of the decision. This is evident in the High Court case of *Dever v Knobloch.*[186] The plaintiff, Mr Dever, was the discretionary beneficiary of the relevant trust. In 2008 the trust was wound up, and the trustees were required to make a final capital distribution to the beneficiaries, consisting of Mr Dever, his mother and siblings. Mr Dever brought claims against the trustees, on the ground that their decision was invalid because it was not made unanimously. One of the trustees had recused himself from the decision-making process in order to avoid a conflict of interest, as the particular trustee was married to one beneficiary. The said trustee then signed the formal documentation to execute the other trustees' decision to distribute trust capital. This decision excluded Mr Dever from any capital distribution. Although Dobson J considered there to be "…very little prospect of Mr

[183] At [51] per Lang J.

[184] At [51] per Lang J.

[185] Lewin, above n 100, at [29-233].

[186] *Dever v Knobloch* HC Napier CIV-2008-441-000537, 29 October 2009.

Dever achieving the outcome he desire[d]", the defendants' application for summary judgment was dismissed.[187] Relevantly, Dobson J stated:[188]

> I am inclined to view that the formal endorsement of the documents following the decision being made by the other trustees is not sufficient to meet what is a requirement for substantive participation by all trustees in what was a fundamentally important decision to distribute the trust.

This case suggests that mere agreement will not be sufficient to meet the unanimity requirement, even at the time of the decision. The trustee who had recused himself understood and concurred in the decision when he purported to assent to it, however he had failed to take part in the decision-making process.

Looking at this requirement in light of the duty to act personally, participation in decision-making follows logically from the duty to be active. The unanimity rule itself is a corollary to the duty to act personally which encompasses this duty to be active. If trustees must each be active in exercising trust discretions, then they must actively participate in the decision-making process. Mere formal agreement cannot discharge the duty to be active, and where trustees are not active in exercising discretions, they will not be considered to have unanimously exercised a trust power.

Even in the charitable trusts exception to unanimity, there is still a requirement that trustees be actively involved in decision-making. Thus in *Re Whiteley* as the trustees had all acted personally and been active in the decision-making process, the exception only applied because the trustees disagreed in the final result.[189] Likewise, in the case of *AG v Scott*, the charitable trust case mentioned in chapter two where the trustees had attempted to vote by proxy, the trustees were still all required to hear out their fellow trustees and actively participate in the decision-making process for the decision to be valid.[190]

V Chapter 3 Part 2 Conclusion

In order to act unanimously, the case law and commentary suggest that trustees must all participate and be active in the trust decision-making process. In the chapter one cases of delegation among trustees, the trustees clearly have not done this. The issue now becomes whether these cases can be reconciled with the unanimity and non-delegation rules. The next chapter will consider the cases more fully against these exceptions and this conceptual background.

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[187] At [81] per Dobson J.
[188] At [34] per Dobson J.
[189] *Re Whiteley*, above n 168.
[190] *AG v Scott*, above n 120.

Chapter 4: Reconciling the Case Law

It has been shown that the exercise of a power involving a degree of discretion cannot be delegated. This chapter will consider whether the apparently inconsistent cases in chapter one can be reconciled with the duty to act personally and unanimously. It will begin with the proposition that the trustees in the chapter one cases did not meet the strict requirements of unanimity and active participation in the decision-making process outlined in the last chapter. Having looked at the common law and the exceptions in New Zealand law, this chapter will look more closely at the chapter one cases.

I General Delegation of Decisions

This analysis will first consider the nature of the delegation in *Niak* and *Stokes.*[191] In both cases one trustee decided to act without involving the co-trustees. In *Niak* the decision was to distribute trust property to a beneficiary and in *Stokes* the decision was to purchase property for the trust. As the learned authors of *Snell's Equity* note, making an income or capital distribution to beneficiaries, and dealings involving trust assets, are exercises of a trust power.[192] In both of these cases the trustees took their own course of action entirely independent of the other trustees. Unsurprisingly, an argument based on a general delegation empowering the trustees to act non-unanimously was held to be inconsistent with the trust principles of unanimity and non-delegation. In both cases there was no evidence of delegation in respect of the particular transaction, and if there was a general delegation between the trustees this may not have been within the permissible limits of delegation. In both cases a huge degree of discretion was required in the trustee's actions on behalf of the trust. The analysis in chapter two and chapter three suggests that these decisions, which both involved discretionary powers, could not have been properly delegated.

II Delegation of the Implementation of Decisions

While *Niak* and *Stokes* are clear examples of exercises of trust powers that cannot be delegated, the trustee decisions in *Lang* and *Murrell* are slightly different. Recall that in *Lang* a plumber was claiming against Mr Lang, an independent trustee, for a contract the plumber had entered into with Mr Lang's co-trustee, Mr Wilson. The plumber's argument in *Lang* was different from both of the mentioned decisions. The plumber did not argue that Mr Lang had granted Mr Wilson an open ended or general authority to bind the trust. Rather, it was argued

[191] *Niak v Macdonald*, above n 39; *Stokes v Insight Legal Trustee Co.*, above n 50.

[192] Snell, above n 162, at [10-003] and [10-004].

that Mr Lang had sanctioned Mr Wilson to enter into a class of transactions within the purpose of the trust.[193]

Justice Panckhurst in the High Court relied heavily on the fact that the trust in question was a purpose trust. The trust deed in *Lang* outlined in detail the purpose of the trust as being the development of five townhouses.[194] His Honour noted that the major decisions of the trustees in relation to the trust had already been made before Mr Wilson entered into the contract with the plumber.[195] It could be argued that because the original decision to embark on this general project had been made, and was outlined in the purpose of the trust, it was only the *implementation* of this decision that was left to Mr Wilson. His contract with the plumber was necessary to implement the trust's purpose. This point is clear when, in order to distinguish *Niak*, Panckhurst J stated:[196]

> Here, to my mind, the situation is quite different. This was a purpose trust. There is no question that the trustees took certain significant decisions in relation to the acquisition of land, the raising of funds on mortgage, and the decision to embark upon a development project. Against that background one trustee attended to the day to day management of the project.

On this basis, his Honour stated "…it was established to the necessary standard that Mr Lang had, in all the circumstances, approved the actions of his co-trustee in entering into a transaction of this kind.".[197] Put shortly, there was an authorisation here that was not open ended but limited by the *kind* of transaction. Only transactions coming within the purpose of the trust were authorised. The contract between Mr Wilson and the plumber could be seen as an *implementation* of the major trustee decisions.

In *Murrell* the facts are similar in this respect. Although Mr Mirkin was found to know "… little about the Trust's activities beyond the fact that a house was under construction.", he did have some knowledge of the trust activities.[198] Mr Mirkin had knowledge of the sale of the land to the trust, and he had knowledge that a house was under construction.[199] Mr Mirkin

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[193] Justice Panckhurst in *Lang v Southen,* above n 30, at [9] stated that the question in the case was "…can a trustee sanction and approve entry by his co-trustee into a number of contracts general, or must there be specific approval on a contract by contract basis?".

[194] At [2] per Panckhurst J.

[195] At [18] per Panckhurst J.

[196] Ibid.

[197] At [19] per Panckhurst J.

[198] *Murrell v Hamilton*, above n 14, at [59] per Panckhurst J.

[199] At [57] and [59] per Panckhurst J.

had also recorded the trust's indebtedness, and the specific finances in relation to the purchase.[200] Thus, Wild J for the Court of Appeal observed:[201]

> … Mr Mirkin allowed Mr Hamilton to bind the trustees to contracts *relating to the construction of the house* and implicitly accepted that the Trust was liable to pay the amounts owing under the contracts. So Mr Hamilton's actions were treated as the actions of both trustees, or at least as actions binding on both trustees vis-à-vis the contract counterparties. (emphasis added)

The key point is that Mr Hamilton's authority was also not open ended. Justice Wild observed that Mr Hamilton could only bind Mr Mirkin to contracts "…relating to the construction of the house…".[202] Although the facts are not clear around the trustees' formal decision to construct and develop the house, if we accept that there was a unanimous decision to construct the house, it could be said Mr Hamilton merely implemented this decision. Ms Murrell's contributions related directly to the construction of the house. In these circumstances, it is arguable that Mr Hamilton's representations were authorised because he was *implementing* an earlier trustee decision.

A Implementation of Decisions and Section 29

The courts appear to be drawing a distinction between the making of a core trustee decision, and later actions to implement a trustee decision or trust purpose. The courts are more willing to allow delegation among trustees where a trustee's actions can be viewed as the implementation of a previous decision. It appears that strict unanimity at the implementation stage of a core trust decision is not necessary. However, given that trustees must be active and act personally, this does not appear to be consistent with the duties, and indeed there is no common law authority for this implementation distinction.

An argument could be made that in these cases the active co-trustee is acting as the agent of the inactive trustee. We saw in chapter three how the common law agent exception allowed the trustees to collectively delegate a task to another in order to implement an earlier trustee decision, as long as this did not amount to the delegation of a trustee's discretion. If we see the active trustee in *Lang* and *Murrell* as the agent of both trustees, who is putting into effect a unanimous trust decision, then we can try to fit the cases within s 29 of our Trustee Act. This implementation distinction does not neatly fit into s 29. Section 29 states that "A trustee may...employ and pay an agent…whether a solicitor, accountant… or other person… to do any act required to be transacted or done in the execution of the trust…".

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[200] At [57] per Panckhurst J.

[201] *Murrell v Hamilton*, above n 13, at [28] per Wild J.

[202] Ibid.

First, in neither case was the active trustee "employed or paid" by the other trustee. Second, although a trustee is an "other person" in a literal sense, the legislation does not include co-trustees in the listed categories of persons that can be agents, as one would expect. Rather, it appears from the s 29 examples of solicitors and accountants that this exception mainly applies to the employment of third party professionals. This point is supported by the requirement that the act of the agent is "…required to be transacted or done in the execution of the trust", and it is in line with the common law discussed in chapters two. This could suggest that the agent must be employed for their skills – skills that the trustees do not have. In *Lang* and *Murrell* the trustees clearly had the ability to jointly operate the trust, and thus the ability to both make representations, and enter into contracts on behalf of the trust. They simply chose not to. Therefore the results in these cases could be viewed as a common law *extension* of s 29. The courts appear to have accepted that a co-trustee engaged in the implementation of a trust decision can exercise a broader degree of discretion than one acting entirely independent of his co-trustee.

B Consistency with Recent New Zealand Case Law

Although the s 29 common law extension is inconsistent with these duties as they apply generally at common law, the recent New Zealand case law can be viewed consistently with this extended approach. None of the New Zealand cases where the rules apply to invalidate a transaction involve transactions that reflect the implementation of an earlier trustee decision.

The first of these cases is *Rodney Aero Club Inc v Moore*.[203] In 1964 Mr Irvine entered into a licence agreement with Rodney Aero Club Inc., which enabled the Club to set up and operate an aerodrome on his property. The property was subsequently transferred into Mr and Mrs Irvine's names as tenants in common in equal shares. When Mr Irvine died in 1982 his will left a life interest in his share to Mrs Irvine and the remainder to their seven children. One son and one daughter were appointed executors and trustees. In 1989 the Club sought to renew the licence agreement. The daughter and Mrs Irvine signed the agreement, whilst the son as trustee objected. It was held that the trust was not bound by the agreement entered into by the majority of trustees. Justice Hammond stated "There is no such thing in trust law- at least absent a provision in the trust instrument- for some such concept as a 'managing trustee', or suchlike.".[204] His Honour's comments reflect the decisions in *Niak* and *Stokes*, however, these comments were made in the context of a core trustee decision – the decision to alienate trust property.[205] The decision of one trustee to dispose of trust property does not bind the

[203] *Rodney Aero Club Inc v Moore*, above n 1.

[204] Ibid at 195.

[205] See *Ponniah v Palmer*, above n 154.

other trustees, however where one trustee is implementing an earlier trustee decision the result may be different.

The unanimity rule also applies strictly where trustees are unaware of another trustee's actions. This is shown in *Thorpe v Hannam*.[206] A de facto couple, Mr Hannam and Ms Thorpe, had jointly purchased a property. It was subsequently owned one half by Mr Hannam, and one half by Ms Thorpe's Family Trust. Upon this purchase, the couple entered into a property agreement outlining the terms of joint ownership and a mechanism for sale and purchase where one party wished to sell the property. Following the couple's separation, Ms Thorpe wanted to sell the property rather than allow Mr Hannam to buy her out at a lower valuation. The issue was whether Ms Thorpe (one of three trustees) acting alone could bind her Family Trust to the property agreement. On summary judgment, Gendall AJ held that it was at least arguable that no enforceable agreement had been reached due to a lack of trustee unanimity. Again, the trustees had no knowledge of Ms Thorpe's property agreement and so it cannot be said that this case involved the implementation of a trustee decision or trust purpose.

The Court of Appeal's decision in *Duncan v Macdonald* also involved trustees who were entirely unaware of the active trustee's actions.[207] The Court was required to consider the consequences of a rogue trustee entering into an illegal mortgage agreement on behalf of a trust. A group of New Zealanders were tricked into advancing money to a Nigerian bank account. Mr Duncan was a solicitor-trustee and used his position as trustee to advance funds to this group on the basis that security would be granted over a commercial property owned by the group. Acting under a power of attorney granted to Mr Duncan by his co-trustee, Mr Duncan authorised the transfer of funds. Justice Blanchard stated:[208]

> … the power of attorney was legally ineffective in so far as it purported to authorise someone to exercise a co-trustee's powers, for a trustee may not make a general delegation of powers and duties; and, as Mr Simmonds gave no authority for the carrying into effect of the specific transaction, Mr Duncan was not acting in terms of s 29(1) of the Trustee Act.

Once Mr Duncan was removed, the trustees sought security under the mortgage. It was held that the mortgage security granted by the group was an illegal contract and was not enforceable. Thus the court held that although the dishonest intention of Mr Duncan was not to be imputed to the co-trustee, the security granted to the trustee was void under the Illegal Contracts Act 1970.[209] Mr Duncan had transferred the trust funds into another jurisdiction

[206] *Thorpe v Hannam*, above n 61.
[207] *Duncan v Macdonald* [1997] 3 NZLR 669.
[208] At 15 per Blanchard J.
[209] At 15 per Blanchard J.

and unsurprisingly the funds were never recovered. It clearly cannot be said that Mr Duncan was implementing an earlier trustee decision.

The Court of Appeal's decision in *ASB Bank Ltd v Davidson* dealt with a similar set of facts.[210] The Court of Appeal was required to consider whether a trust fund could be used to indemnify a trustee for letters of credit taken out without knowledge of two other trustees. In *Davidson* one trustee had taken out three letters of credit from a bank purportedly on behalf of a trust. The two other trustees had no knowledge of these letters, and clearly had not given their approval to the rogue trustee's actions. It was held that the bank could not assume that the other trustees had assented to the credit advances.[211] Thus the letters of credit were not enforceable against the trust property. This case also clearly did not involve the implementation of an earlier trustee decision.

In the more complicated area of constructive trusts being claimed against trustees of express trust, the rules have also applied strictly where there was no implementation of an earlier trustee decision. This common law extension did not apply in the High Court decision of *Vervoort v Spears.*[212] Between 1999 and 2011 Mr Duffy and Ms Vervoort were involved in a troubled relationship. Before the relationship began, Mr Duffy had settled a Family Trust with himself and Mr Raymond Spears as trustees. Throughout the relationship Ms Vervoort claimed to have made contributions to assets held in this trust. Only Mr Duffy could have been aware of the facts giving rise to her reasonable expectations of an interest. Justice Ellis considered on the evidence that the trust was controlled primarily by Mr Duffy. However, even though there was delegation among trustees, her Honour held that there could not be a successful estoppel or constructive trust claim against trust assets due to the principles of unanimity and non-delegation.[213] Her Honour considered it necessary for there to be an "…obvious nexus or connection…" between the delegation among the trustees "…and any specific property in which Ms Vervoort claims an interest".[214] This reasoning very much reflects this common law extension from *Lang* and *Murrell.* It could imply there must be a kind of decision in relation to the specific asset that is subject of the claim, a delegation of the implementation of this decision, and the trustee's representations coming within the scope of the implementation.

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[210] *ASB Bank Ltd v Davidson,* above n 9.

[211] Justice Glazebrook at [55] and at [40] stated that the clauses relied on by ASB did not enable ASB "to recover amounts from the trust by the back door…".

[212] Above n 29.

[213] Note that it appears the reasoning in the case was based on *Official Assignee v Wilson,* above n 21, having extinguished the alter ego concept even in relation to claims of constructive trust over trust property; see [57] per Ellis J; see [82] and [91] per Ellis J for rejection of the estoppel and constructive trust arguments.

[214] At [80] per Ellis J. Note that Ellis J here takes a very strict approach to these rules, however ironically it was her High Court judgment in *Stokes* that was overturned for accepting that agency could exist despite the non-delegation rule.

Overall, it appears that the *Lang* and *Murrell* decisions could be viewed as a common law extension of the s 29 exception to the unanimity and non-delegation rules. This would fit neatly within the case law on unanimity and non-delegation, and explain the apparent inconsistency among the chapter one cases.

C Is This Extension Appropriate?

It has been shown that the courts could be extending the s 29 agency exception. The question becomes whether this is appropriate. This common law extension is in line with the Law Commission's recent recommendations on delegation to agents.[215] The Law Commission Report has recommended broadening trustees' power to employ an agent, where the agent would be able to exercise or perform a trustee's "administrative functions".[216] These functions would be defined as any power, right or function other than a "trustee function".[217] A "trustee function" is defined as core decisions such as distributions of trust property, utilising trust capital and income, and appointment and removal of trustees and beneficiaries.[218] These recommendations reflect that the process of unanimity in every decision involving the trust is burdensome. Chapter three has outlined that trustees must be actually involved in all trust decisions with detailed knowledge of the effect and details of the exercise of trust power. These recommendations illustrate that the modern trust is often administered by independent trustees with little time and ability to be centrally involved in the implementation of all trustee decisions. On this basis, any s 29 extension could be a welcome change in trust law.

However, the analysis in chapters two and three have shown that discretion is the most important factor in considering whether a decision must be exercised unanimously and not delegated. To allow trustees to non-unanimously implement trustee decisions leaves a degree of discretion to the trustees individually. One issue is how broad or narrow the original trustee decision must be. In both of these cases there was a huge deal of discretion and power left with one trustee in circumstances where a settlor would presumably expect trustees to collaborate. In any event this extension does not sit comfortably with the trustees' duty to be active. In the present author's view it is entirely inappropriate for the courts to extend the agent exception in a way that is inconsistent with both the early common law and the rationale for these duties. A settlor reposes trust in confidence in all trustees to administer the trust, and even where one decision is properly made, it is up to all trustees to be active and act

[215] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 120.
[216] Ibid.
[217] Ibid.
[218] Ibid.

personally in implementing this decision. This is an issue for the legislature and not the courts.

III Cases Involving Disgorgement of Gain

This common law extension does not explain certain cases where a constructive trust has been claimed against trustees of an express trust.[219] In *Marshall v Bourneville* the Court of Appeal accepted that constructive trust claims may succeed against express trust property.[220] In some constructive trust cases it has been clear that one trustee was not implementing any kind of earlier unanimous trustee decision or trust purpose, but even so a general delegation among trustees meant that one trustee was bound by the representations of their co-trustee.[221] Strictly, the trustees had not been active, acted personally or unanimously in respect of the constructive trust representations. The contentious question in these cases was whether the inactive trustee ought to reasonably expect to yield an interest to the claimant in express trust property under the *Lankow v Rose* test.[222] In all of these cases, claims were brought against express trustees in their personal capacity as legal owners of trust property, in personam, in respect of representations that only one of multiple trustees had made to the claimant. All of these cases involved the disgorgement of a gain to the trust. Are these cases consistent with the unanimity and non-delegation rules?

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[219] In *Prime v Hardie* , above n 29, the plaintiff claimed that she was entitled to an interest in her former de facto partner's property. This property was held on trust with the defendant, her former partner, and one other as trustee. The plaintiff claimed that she had contributed to the maintenance of the property, and transferred the whole of her wages into a joint bank account. On the evidence it was accepted that the trust was the defendant's alter ego, and Justice Salmon in the High Court reasoned that the home "was treated as though it was owned by the defendant. On this basis the plaintiff's expectation "was a reasonable one" (at [33]). Unlike *Murrell*, the court did not outline any parameters on the defendant's authorisation here and the defendant trustee did not appear to be implementing a proper trust decision or trust purpose; see also *Glass v Hughey*, above n 29. The plaintiff in *Glass* claimed that her former husband (the defendant) held business assets on constructive trust for her, based on her contributions to the business throughout their relationship. Prior to separation the business in question was sold to the husband's family trust. At separation the business assets were therefore not in the husband's name. Justice Priestley accepted that the express trust holding the business assets was in all respects the defendant's alter ego. On this basis, his Honour considered that a constructive trust existed over the plaintiff's contributions to the trust property.

[220] *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766. Note that here contributions were made by the claimant to the express trust property prior to it being transferred into trust, and therefore the real question in *Marshall* was whether the transfer of the property by one de facto partner into a family trust would prevent the imposition of a constructive trust over that property (see [27] and [39]).

[221] Unless one argues that the co-trustee had knowledge of cohabitation of the partners in *Prime*, or in *Glass* the co-trustee had knowledge of the claimant's contributions to business assets. It could be argued that there was an earlier trustee to allow the claimants to contribute, and therefore both trustees ought to yield an interest. This is not discussed in the cases, and was not apparent on the facts of either case.

[222] *Lankow v Rose*, above n 15.

This apparent inconsistency could be justified on estoppel or unjust enrichment grounds. Both factors are relevant to a constructive trust claim.[223] This would be another way to explain the result in *Murrell.*

An estoppel argument would sidestep the unanimity and non-delegation rules in these constructive trust cases. In these cases, and in *Murrell*, it could be argued that the claimant relied on *both* of the trustees' actions to their detriment; the inactive trustees' acquiescence in the claimants' actions led to the contributions to trust property. As such, both trustees ought reasonably to yield an interest in the trust property.[224]

Alternatively, the courts could be using the constructive trust to remedy unjust enrichment to the trust. Although the Canadian position on constructive trusts clearly encompasses unjust enrichment as a relevant factor, unjust enrichment is not a generally accepted ground for the imposition of a constructive trust in New Zealand law.[225] Despite this, Waikato Law Professor Sue Tappenden has written at length on how the remedial constructive trust is being utilised by courts as a tool to remedy unjust enrichment.[226] This dissertation will not attempt to discuss this point at length, but rather consider it as one option to explain these apparently inconsistent decisions.

Unfortunately, even these principles cannot fully explain the case law. Although in *Vervoort v Spears* there was clearly a gain to the trust, Ellis J considered that the unanimity and non-delegation rules precluded the claimant from a successful constructive trust claim. In the present author's view this is the wrong way to go about these issues. The first question should be whether the claimant made contributions exceeding the benefits they received. If so, then the next question is either whether, based on the delegation among the trustees, both trustees are estopped from denying the claimant's interest in the assets. This is not the place for strict principles of unanimity or non-delegation, because a constructive trust claim recognises that these contributions are not trust property – it does not matter whether the trustees legally hold the property on trust, these contributions are the claimant's property. Chapter two has shown

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[223] In *Gillies v Keogh* [1989] 2 NZLR 327 (CA) at 330 Cooke P stated "Normally it makes no practical difference in the result whether one talks of constructive trust, unjust enrichment, imputed common intention or estoppel. In the same case at 344 Richardson J state that in constructive trust case he "…would be inclined to answer in terms of the well settled principles of estoppel which preclude the legal owner from denying the existence of an equitable interest; the overlap is also empirically clear as in *Stratulatos v Stratulatos* [1988] 2 NZLR 424 (HC) the High Court held that a plaintiff could be entitled to a property interest under both constructive trust and proprietary estoppel principles on the same facts.

[224] *Prime v Hardie*, above n 29; *Glass v Hughey*, above n 29.

[225] *Pettkus v Becker* (1980) 117 DLR (3d) 257; *Carly v Farrelly* [1975] 1 NZLR 356 (SC).

[226] See generally Sue Tappenden "The Emergence of the Concept of Unjust Enrichment in New Zealand, Its Relationship to the Remedial Constructive Trust and the Development of the Status of Joint Ventures in Equity" (2008) 2 Journal of Politics and Law 32.

that these rules only apply in respect of the settlor's alienation of trust property. Contributions are not a part of this alienation. The claimants in all of these cases did not intend to gift their services, and relied on both the trustees' actions and inaction. Put bluntly, a strict application of the unanimity and non-delegation rules to stop a claim being brought against trust property amounts to conversion of the claimant's contributions. This would allow trust beneficiaries to benefit from one trustee being inactive and delegating his or her responsibilities. This does not fit the rationale for the duties to act personally and unanimously, and should not be the law.

IV Chapter 4 Conclusion

It appears that the courts are extending s 29 in certain cases beyond the bounds of the section. It has been shown that this extension is consistent with the Law Commission's view on delegation, and appears to fit with recent New Zealand cases on the rules. However, it is argued that this is not the place for the courts and certainly not in line with settled common law principles on the unanimity and non-delegation rules.

The cases discussed that involve disgorgement of gains to the trust are more contentious. One explanation has been put forward, but it cannot completely explain these cases. It is therefore clear that these rules pose a real issue to the courts in imposing a constructive trust to remedy an unjust gain to express trust property. It has been shown that in the present author's view, these cases are mainly about disgorgement of gain, despite the *Vervoort* decision. This point is moot, however it appears we must accept that this either is, or is not, a place for strict requirements of unanimity and non-delegation.

Dissertation Conclusion

It has been shown that the non-delegation and unanimity rules come from the early practice of the Use, and have developed through the common law to protect a settlor's trust and confidence in the selected trustees. The rules had to develop to accommodate the changing use of the trust and the change in the trust's role in society. While the trust was once a mere stakeholding device, it is now a more complex managerial relationship where trustees take on liabilities and interact with third parties in their capacity as trustees. As such, the common law and academic commentary has focussed on these duties applying to trustees' exercises of discretionary powers. It appears that where trustees are required to exercise personal judgment, they must act personally and they must act unanimously.

It has been shown that both duties have developed to include a duty to be active in administering the trust. The duty to act personally has always required trustees to take positive action to participate in trust decisions instead of concurrence being a mere formality of trust administration. Trustee unanimity no longer merely requires trustees to all agree to a transfer of the feoffer's freehold. It now requires trustees to actively participate in the decision-making process, and take steps to do so. Both duties are directly related, so it is unsurprising that both require a degree of trustee participation.

These duties and their corresponding rules unfortunately pose two problems.

First, they can be inflexible and arduous, creating an issue where certain trustees are more active in trust administration than others. It has been shown that the courts are extending the current statutory exceptions to the duty to act personally and unanimously to get around this issue, however it has been argued that this is not the place for the courts.

Second, these rules pose a real issue where orthodox constructive trust principles are applied against express trustees, in circumstances where a third party has acted on one trustee's representations. Instead of encouraging trustees to be active in trust administration, it appears that the duty to act unanimously and be active is rewarding inactive trustees where the trust property has been enriched by the actions of a third party. This author has outlined two possible ways to explain the current decisions in this area, and posed one argument for future decisions on this topic. Unfortunately the scope of this dissertation is limited to a focus on one side of the coin in this area, and there is significant room for future research on the constructive trust doctrine as it applies against express trustees.

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