Identifying Identifiability

Re-Assessing Certainty of Subject-matter of Trust in Light of *Proprietors of Wakatū v Attorney-General*

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Introduction

Since 1994, there has been fundamental and unresolved uncertainty in the requirement of certainty of subject-matter in trusts. Suppose I have ten bottles of wine, each of the same vintage. Suppose, then, that I declare a trust over three of these ten bottles for the benefit of my friend. I express this declaration with the utmost clarity of intention. Yet, I fail to ever say which three of my ten bottles are to be the subject of the trust. Given all this, have I created a valid trust? Would the answer be different if, instead of wine, I declared a trust over a quantity of shares?

This ostensibly simple, yet uncommon, problem has perplexed the courts in common law countries since the decision in *Hunter v Moss*.[1] The English Court of Appeal concluded that, if the above scenario involved shares, then yes, there would be a valid trust. Yet this case, *prima facie,* appears to be at odds with two other cases – *Re Goldcorp Exchange,*[2] and *Re London Wine*.[3] These "conflicting cases"[4] are the origin of this uncertainty in certainty of subject-matter.

This issue recently arose in New Zealand as a small part of *Proprietors of Wakatū v Attorney-General*.[5] Further, the facts of this case introduced unprecedented problems into the issue. Previously, this problem had only ever been considered in commercial cases involving indistinguishable mixtures of goods such as wine or gold, or intangibles like securities or shares. *Wakatū*, on the other hand, concerned a trust claimed over 10% of a large quantity of land (referred to as the 'tenths"). While one area land is of course distinguishable from another area of land in all cases, in *Wakatū* there was a system of lots to objectively determine which sections of the land would become the subject of the claimed trust.[6] Consider the scenario above once more. If there can be a trust over my three bottles of wine, then why not over the land in *Wakatū*?

Because the issue of certainty of subject-matter was a relatively minor issue in *Wakatū*, it was only addressed by Elias CJ and Glazebrook J in the Supreme Court, and their judgments unfortunately do not alleviate the uncertainty in certainty of subject-matter.[7] The Court of

[1] *Hunter v Moss* [1994] 1 WLR 452 (EWCA).
[2] *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385 (PC).
[3] *Re London Wine Company (Shippers) Ltd* [1986] PCC 121 (Ch D).
[4] *Proprietors of Wakatū v Attorney General* [2017] NZSC 17 at [579] per Glazebrook J.
[5] *Proprietors of Wakatū v Attorney General* [2017] NZSC 17.
[6] At [14]-[36] per Elias CJ.
[7] This is perfectly understandable given the significance of the other issues in *Wakatū*.

Appeal unanimously addressed the issue, but reached the opposite conclusion to the Supreme Court.[8] Because of this, *Wakatū* shows that the requirements of certainty of subject-matter in New Zealand are currently entirely unclear.

The knot in trust law created by *Hunter*, *London Wine* and *Goldcorp* has yet to be conclusively untied in any jurisdiction, but three main responses have emerged:

1) *Hunter v Moss* is erroneous.

   A trust cannot arise over an unidentified portion of a bulk, because trust property must be specifically identified to have a valid trust.

2) The "Whole-Fund Approach"

   Hunter v Moss was decided correctly. Though a trust cannot arise over an unidentified portion of a bulk, it can nevertheless be inferred that the settlor intended to create a trust over the *entire bulk*, which is a valid trust.

3) The "Portion Approach"

   Hunter v Moss was decided correctly. A trust can arise over the unidentified portion of the bulk.

This dissertation will focus on these three different responses to the uncertainty in certainty of subject-matter. Its central conclusion is that, while the whole-fund approach appears to have been accepted in Australia and England, this approach is problematic and the portion approach is preferable.

This dissertation additionally seeks to scrutinise one particular novel aspect of *Wakatū* – the system of lots, and ask whether it means there would be sufficient certainty of subject-matter for a trust over the "tenths". This analysis leads to the conclusion that the portion and whole-fund approaches have very different consequences, yet might still be able to function in tandem, as illustrated by their application to the facts of *Wakatū*.

Chapter One will introduce *Hunter v Moss*, *London Wine* and *Goldcorp*, explain the issue at the heart of these cases, and describe the different responses to it which have emerged since the 1990s. It will also introduce *Wakatū* and the issues this case raises. Chapter Two will define the "*Hunter v Moss*-type trust", a particular kind of trust which encapsulates the uncertainty in

[8] *Proprietors of Wakatū v Attorney General* [2014] NZCA 628.

certainty of subject-matter outlined above. It is then concluded that trusts, by nature, do not require specific identification of trust property to form. Chapter Three will evaluate the portion approach and conclude that this approach is perfectly viable when applied to property that is "fungible". However, it will also conclude that a trust in *Wakatū* would not be possible on the portion approach. Chapter Four will evaluate the whole-fund approach and conclude that it is both unnecessary, and conceptually problematic in the cases in which it has been applied. It will then be concluded that, despite the issues with whole-fund approach, the basic principle at its heart is valid, and may justify there being certainty of subject-matter on the facts of *Wakatū*.

Wakatū also raises two further novel issues, in addition to the objective system of selection – whether the principles set down in cases like *Hunter*, *London Wine* and *Goldcorp* are relevant to (a) land, and (b) fiduciary duties arising from the surrender of native title. These issues are, unfortunately, outside the scope of this dissertation, as in my view before these can be adequately addressed the issues in cases concerning private parties and personal property must be put to bed.

Certainty of subject-matter is a fundamental requirement of trust law, but the law on it remains very unclear. Given that *Wakatū* has raised the issue once again, it is an appropriate time for New Zealand to consider how it might cure the uncertainty in certainty of subject-matter.

Chapter I: The Uncertainty in Certainty of Subject-matter

A. Certainty of Subject-Matter in Trusts

To create an express trust the "three certainties" must be present: certainty of intention, certainty of objects, and certainty of subject-matter. Certainty of subject-matter, put simply, refers to the property within the trust - there can be no trust if this is not sufficiently defined. The classic case uncertain subject-matter is *Palmer v Simmonds*, in which a trust was declared over the "bulk" of the settlor's residue without further specification.[9]

Certainty of subject-matter is often split into two parts – (a) certainty as to what property is the subject of the trust, and (b) certainty as to the interests of each beneficiary.[10] Different considerations apply for each, because (a) focuses on what property is in the trust as a whole, while (b) focuses on what property is held for each beneficiary. This dissertation will focus on (a), and, unless indicated otherwise, when referring to "certainty of subject-matter" I am referring to this. Conversely, (b) will be referred to as "certainty of beneficial interests".

Certainty of subject-matter has been considered infrequently by the courts. However, significant controversy has emerged in cases where a trust is claimed over a portion of a collection of property,[11] but the exact property within this which is to be the trust property has not been specifically identified. This issue arose in the 1990s and remains unsettled in New Zealand due to the apparent inconsistencies between three cases – *Re London Wine, Hunter v Moss* and *Re Goldcorp Exchange*.

This chapter will outline *Hunter*, *London Wine* and *Re Goldcorp,* and how these cases have been developed by the courts in England and Australia. It will then outline the recent case *Proprietors of Wakatū v Attorney-General*, which raises unique questions, yet failed to resolve the uncertainty in certainty of subject-matter.

[9] *Palmer v Simmonds* (1854) 2 Drew 221 at 706.
[10] Andrew S. Butler and Tim Clarke *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 77; Phillip H. Pettit *Equity and the Law of Trusts* (12th ed, Oxford University Press, Oxford, 2012) at 53.
[11] Referred to in this dissertation as a "bulk", "fund", or "mass".

B. The Three Conflicting Cases

I. *Re London Wine*

Re London Wine[12] concerned a vendor of wine, which in its normal practice would store wine for its customers after payment. London Wine held each vintage of wine in one mass and provided paid customers with certificates deeming them the "sole and beneficial owner" of their wine. Despite this, particular cases of wine were never segregated from the bulk of wine for particular purchasers.[13] London Wine went insolvent, so the purchasers claimed their wine was held on trust for them, to claim ahead of unsecured creditors.[14]

Oliver J, as he then was, held the trust failed due to lack of certain subject-matter.[15] Even though the wine was "homogenous", there was no trusts because the wine was never specifically identified as held for particular purchasers.[16] Oliver J noted, however, that a trust could have been created over the entire fund of wine, forming an equitable tenancy in common with the purchasers entitled to a proportion of every bottle equivalent to the amount of wine they purchased.[17] But London Wine did not intend to create a trust.[18]

Re London Wine was not reported until over a decade after the decision, and was not the subject of any major contemporary commentary.[19] This may imply that, prior to the 1990s, it was generally accepted that trusts require specific identification of the trust property.[20]

II. *Hunter v Moss*

This was brought into question by the English Court of Appeal in *Hunter v Moss*[21] in 1994. Moss owned 950 shares in Moss Electrical Co. Ltd. (MEL) and declared a trust over 50 of these

[12] *Re London Wine Company (Shippers) Ltd* [1986] PCC 121.
[13] At 128-129. It was never represented to the customers that their wine was or would be segregated.
[14] At 135.
[15] At 137.
[16] At 137.
[17] At 136-137.
[18] At 137.
[19] *Re London Wine Company (Shippers) Ltd* [1986] PCC 121.
[20] This is supported by Ewan McKendrick "Unascertained Goods: Ownership and Obligation Distinguished" (1994) 110 LQR 509; David Hayton "Ascertainability in Transfer or Tracing of Title – *Re Goldcorp Exchange*" [1996] LMCLQ 449 at 454; Mark Ockelton "Share and Share Alike" (1994) 53 CLJ 27 at 27-28. However, see also *In Re Clowes* [1994] 2 All ER 316 (CA) at 325, Watkins LJ in the English Court of Appeal noted that the effect of the authorities seemed to be that segregation was merely an indicator of intent to create a trust, and lack of segregation was not fatal to the existence of trust.
[21] *Hunter v Moss* [1994] 1 WLR 452 (EWCA), hereafter referred to as *Hunter v Moss* (CA). Leave to appeal to the House of Lords was denied, see *Hunter v Moss* [1994] 1 WLR 614.

for the benefit of Mr Hunter.[22] Moss continued to pay dividends on the 50 shares to Hunter until the two fell out and Hunter sued Moss for the shares.[23]

While accepting a trust was declared, Moss argued that because the 50 shares were never specifically identified from the 950, the trust lacked certain of subject-matter, relying in large part on *London Wine*.[24] Colin Rimer QC in the Chancery Division nevertheless held there was valid trust. He distinguished *London Wine*, because it dealt with tangible property (wine) while shares are intangible.[25] He concluded that, because the shares were identical, "each of them could satisfy the trust just as well as any other of them".[26] Because of this, a court could have easily ordered a transfer of the shares immediately after the trust was declared, and this is sufficient for a valid trust.[27]

This was upheld in the English Court of Appeal. Dillon L.J, who gave the judgment of the court, reasoned that if the shares had been gifted in Moss' will (without specification), there transfer would have been valid, as would a transfer by share certificate of the 50 shares without specifically identifying them.[28] Therefore, why should a trust declared in the same way be invalid? His Lordship also distinguished *London Wine*, as that case concerned "the appropriation of chattels and when the property in chattels passes", while the *Hunter* involved a declaration of trust.[29]

Hunter was controversial,[30] and many contended it was an affront to the requirement clearly express in *London* Wine that trust property be identified.[31] Much of the reasoning in the case has been questioned,[32] and it was unclear how the trust would work in practice. If the trustee

[22] *Hunter v Moss* [1993] 1 WLR 934 at 936, hereafter referred to as *Hunter v Moss* (Ch), at 936. The Court of Appeal referred to the shares as "5%" of the total 1000 shares in MEC and "50" shares interchangeably, however the court analysed the issue as if the trust was intended to be over 50 specific shares. This failure of the court to distinguish between a trust over 5% and 50 has been criticised - see Roy Goode "Are Intangible Assets Fungibles?" (2003) 309 LMCLQ 379 at 380; Michael Bridge "Certainty, Identification and Intention in Personal Property Law" in Paul S Davies and James Penner (ed) *Equity Trusts and Commerce* (Hart Publishing, Oxford, 2017) 87 at 99-101.
[23] *Hunter v Moss* (CA), above n 21, at 455.
[24] *Hunter v Moss* (Ch), above n 22, at 936.
[25] At 940.
[26] At 946.
[27] At 945-6
[28] *Hunter v Moss* (CA), above n 21, at 457-458. Dillon LJ relied on *Re Rose* [1952] Ch 499 for this point.
[29] At 458.
[30] Mark Ockelton "Share and Share Alike" (1995) 53 CLJ at 28. Mark Ockelton called the decision in the Chancery Division "remarkably unorthodox".
[31] Hayton "Ascertainability", above n 20, at 449; Ockelton, above n 30, at 450; David Hayton "Un-certainty of Subject-matter in Trusts" (1994) 11 LQR 335 at 337.
[32] Ockelton, above n 30, at 28; Hayton "Ascertainability", above n 20, at 450; Hayton "Un-certainty", above n 31, at 337-338; Alastair Hudson *Equity and Trusts* (9th Ed, Routledge, New York, 2017) at 103-104.

sold some of the fund of shares, how could it be determined which shares were the trust property, and which were not? [33]

III. *Re Goldcorp Exchange*

While *Hunter v Moss* was being considered in England, *Re Goldcorp Exchange*[34] was passing through the courts in New Zealand.[35] Goldcorp had entered into many contracts for the sale of the gold for future delivery, and held a large amount of gold on stock.[36] Yet Goldcorp never had enough gold to satisfy all of its contracts, and Goldcorp never segregated gold for particular customers after payment, despite promising to.[37] Upon Goldcorp's insolvency, the customers brought several different claims that they had a proprietary interest in the gold for which they had paid, so as to take priority ahead of other creditors – among these, they argued Goldcorp was holding their gold on trust.

The Board rejected the purchasers' claims.[38] Lord Mustill, delivering the judgment, focused first on sales, and distinguished sales of "generic goods" (where the seller can obtain goods answering the description in the contract from anywhere) from "goods sold ex-bulk" (where the seller must supply the goods from a within a pre-determined source or "bulk").[39] Here, the sale was of "generic goods",[40] so specific identification of the property was necessary for title to pass under the sale of goods contract, and the gold was not identified.[41]

Further, a trust could not have arisen from the "collateral promises" to the sales contract,[42] because the subject-matter of such a trust could only have been Goldcorp's *entire* stock of gold, with the purchaser a beneficiary for a proportion of the stock.[43] Such a trust could not have been intended in the circumstances.[44] Further, Lord Mustill stated the issue before him was

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[33] Ockelton, above n 30, at 29; Hayton "Un-certainty", above n 31, at 336; Graham Virgo *The Principles of Equity and Trusts* (1st Ed, Oxford University Press, Oxford, 2012) at 91.
[34] *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385 (PC).
[35] The decision of the English Court of Appeal in *Hunter v Moss* was given after argument in *Re Goldcorp* was heard, but before the decision in *Re Goldcorp* was given: *Re Harvard Securities Ltd (in liq.*) [1997] 2 BCLC 369 (Ch) at 575.
[36] *Re Goldcorp Exchange,* above n 2, at 385.
[37] At 385. The customers were aware that the gold was being stored in bulk and was not allocated, but seemed to have believed nevertheless they were purchasing actual gold, not just a contractual right to gold.
[38] In the New Zealand Court of Appeal, the majority found that the original monies paid by the customers to Goldcorp were held by Goldcorp on trust, but unanimously rejected that there was a trust over the gold itself: see *Liggett v Kensington* [1993] 1 NZLR 257. The claim over the monies is not relevant to the focus of this dissertation.
[39] *Re Goldcorp Exchange,* above n 2, at 392-393.
[40] At 393.
[41] At 392-393.
[42] At 393-394.
[43] At 394.
[44] At 394. The Board reasoned that Goldcorp could have intended to have "inhibited any dealings" with its stock of gold, and the customers could not have thought that their rights to the gold were dependent on (a) how much gold the company had in

"not...novel", because it had been considered in *London Wine*,[45] and that the Board "would have been content to do little more than summarise [*London Wine*] and express their entire agreement" with it.[46]

Goldcorp is frequently cited in support of the proposition in *London Wine* that trust property must be clearly identified for a trust to form.[47] Because the decision in *Goldcorp* was made shortly after *Hunter*, some contended that *Goldcorp* overruled the previous case.[48] Professor Hayton even concluded following *Goldcorp* that "the status quo prevails".[49] Yet, as the next sections demonstrate, this assessment proved somewhat hasty. *Hunter* is well-accepted in England, appeared to be generally accepted in New Zealand prior to *Wakatū*, and has been followed in practice in Australia.

C. The Development of *Hunter v Moss* in England

The status of *Hunter v Moss* in England was first considered in *Re Harvard Securities*[50], in which trusts were claimed over shares which Harvard Securities had sold but never registered in the names of the purchasers.[51] Neuberger J, as he then was, in the Chancery Division concluded *Hunter v Moss* was not *per incuriam* to *London Wine* or overruled by *Re Goldcorp*, and distinguished *Hunter* from those two judgments as it related to shares while the other two cases related to chattels.[52] Applying *Hunter*, his Honour found a trust over the securities.[53]

Hunter v Moss was applied again in *Pearson v Lehman Brothers*[54] by the England and Wales High Court. Briggs J held *Hunter* stood for the principle that:[55]

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stock at the particular time and (b) how many other purchasers had contracts for gold of the same description. Seeing the transaction like this would make it a sale "ex-bulk", which it "plainly was not".

[45] At 401.

[46] At 401.

[47] Hudson, above n 12, at 101; David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (19th ed, Wellington, LexisNexis, 2016) at 8.7.

[48] Peter Birks "Establishing a Proprietary Base (*Re Goldcorp*) (1995) RLR 83 at 87; Hayton "Ascertainability", above n 20, at 450; Ruth Wilson "Lord Browne-Wilkinson's 'Identifiable Trust Property' Principle" (1998) 6 Waikato L. Rev. 86 at 96.

[49] Hayton, above n 12, at 454..

[50] *Re Harvard Securities*, above n 35.

[51] At 568.

[52] At 577. Neuberger J found that shares were to be treated in the same way as portions of debts or funds, for which segregation was not needed, citing Meagher, Gummow and Lehane *Equity Doctrines & Remedies* (3rd edn, 1993, Butterworth Law NZ); Neuberger J also did not consider that *Hunter* could be validly distinguished from *London Wine*, *Goldcorp* and the facts in front of him on the grounds that *Hunter* was an express declaration of trust, and the other cases were not.

[53] At 578. Neuberger J's following of *Hunter* in *Re Harvard Securities* has been described as "reluctant": Goode, above n 22, at 380.

[54] *Pearson (Steven Anthony) v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch), hereafter referred to as *Pearson v Lehman Brothers* (HC).

[55] At [225].

> A trust of part of a fungible mass without the appropriation of any specific part of it for the beneficiary does not fail for uncertainty of subject-matter, provided that the mass itself is sufficiently identified and provided also that the beneficiary's proportionate share of it is not itself uncertain.

Significantly, Briggs J considered how the trust in *Hunter* works in practice, which *Re Harvard* did not. His honour concluded that the trust creates a "beneficial co-ownership share" in the fund, citing the Australian case of *White v Shortall* in support.[56] It is unusual that Briggs J relied on *Hunter* for this point given that both Dillon LJ and Colin Rimer QC explicitly stated the trust in *Hunter* was *not* a tenancy in common.[57] Briggs J's analysis was not challenged on appeal, and the English Court of Appeal reached the same conclusion as his honour.[58]

Hunter was also applied by the English Court of Appeal in *Wilkinson v North*[59] in 2018, but no conclusion was reached on the conflict between *Hunter*, and *London Wine* and *Goldcorp*.[60] So while *Hunter v Moss* is now established in England, what it stands for remains somewhat unclear.[61]

D. Australia – The Origin of the Whole-Fund Approach

Hunter v Moss was analysed in detail by Campbell J in the New South Wales Supreme Court in *White v Shortall*.[62] The facts were similar to *Hunter* – Mr White declared a trust over 222,000 of his 1.5 million share for the benefit of his then-wife, but later claimed this trust lacked certainty of subject-matter because he did not identify the particular 222,000 shares.[63] *Hunter* was not binding on the court, and Campbell J did not find its reasoning sufficiently persuasive.[64] However, his Honour ultimately concluded there was a valid trust.[65] Campbell J concluded the only possible trust was one over the entire 1.5 million shares, with 222,000 held for Mrs White and the rest for Mr White.[66] Although Mr White only declared a trust over a portion of his

[56] At [232] See below for more on *White v Shortall*.
[57] *Hunter v Moss* (CA), above n 21, at 457-458; *Hunter v Moss* (Ch), above n 22, at 945.
[58] *Pearson v Lehman Brothers*, above n 54.
[59] *Wilkinson v North* [2018] 4 WLR 41 (CA).
[60] At [21]-[23].
[61] *Hunter* was also applied in Hong Kong in *Re CA Pacific Finance Limited* [2000] 1 BCLC 494.
[62] *White v Shortall* [2006] NSWSC 1379.
[63] At [61].
[64] At [192].
[65] At [268].
[66] At [210].

shares,[67] his Honour concluded that the "nature of the trust property" meant the obligations of the trustee were the same whether the trust was over all 1.5 million shares or just the 222,000.[68] It could therefore be inferred that the trust Mr White actually intended was over the whole fund, because he must have intended to create a trust with sufficient certainty of subject-matter.[69] This is the first instance of the "whole-fund" approach, which will be defined in Chapter Two.

White was reconsidered in 2018 by the Australian Full Federal Court in *Ellison v Sandini*[70]. *Ellison* concerned another declaration of trust over portion of shares (2,115,000) in a larger fund (of over 35 million shares), however here the declaration was made by the Family Court.[71] The Court concluded no trust arose because the Family Court order could not be interpreted as creating one.[72] Jagot J for the majority discussed and approved of the approach in *White v Shortall*.[73] Her Honour concluded there can be a valid trust over a "fungible pool of assets" if the assets and relevant proportions for the beneficiaries are identified, but only if the trust is over the entire pool.[74] Further, there "may be a sound basis in principle" for upholding a trust over the whole fund even when the settlor only intended a trust over part of the fund, because their intention must have been to create an effective trust.[75] Therefore, it appears that both the Australia and English courts have adopted the "whole-fund" analysis in *White v Shortall*.

E. The Position in New Zealand Prior to *Wakatū*

Re Goldcorp is binding on New Zealand Courts, while *Hunter v Moss* is not. However, it appears that *Hunter* had general acceptance in New Zealand prior to *Wakatū*. *Equity and Trusts in New Zealand* cites *Hunter* to suggest that there is sufficient certainty of subject-matter if a court could make an order for the execution of the trust immediately after it is declared.[76] Garrow and Kelly also cite *Hunter* as an example of an "objective determinant" by which the court can determine certainty of subject-matter.[77] The High Court briefly considered the issue

[67] At [211]
[68] At [211]-[212].
[69] At [211].
[70] *Ellison v Sandini Pty Ltd* [2018] FCAFC 44.
[71] At [34].
[72] At [164].
[73] At [148]. Her Honour did not decide the point, but cited Campbell J's reasoning with consistent approval. See [151], [149], [148] and [121]-[143].
[74] At [148].
[75] At [148].
[76] Butler, above n 10 at 77.
[77] The "objective determinant" in *Hunter* was the fact that the shares were identical (of the same company and class). Another example of an "objective determinant" was "reasonable income" in *Re Golay's Will Trusts* [1965] 2 All ER 660 - Greg and Chris Kelly *Law of Trusts and Trustees* (7th Ed, LexisNexis, Wellington, 2013) at 67.

in *Priest v Ross Asset Management*,[78] and concluded that because shares are fungible a trust could form over a portion of a bulk of shares.[79]

F. *Proprietors of Wakatū v Attorney General*

Proprietors of Wakatū v Attorney General[80] concerned a sale of a large quantity of land in 1839 from Ngāti Toa chiefs to the New Zealand company.[81] As part of the consideration for the purchase, the New Zealand company agreed to reserve 10% of the lands purchased and maintain them for the benefit of the Māori vendors.[82] Shortly after the signing of the Treaty of Waitangi, the Crown took responsibility for administering these "tenths" reserves.[83] The sections which would make up the 10% were to be identified by a system of lots, in which representatives of the Māori vendors would have an equal chance of obtaining any particular piece of land as European settlers.[84] However, most of the tenths were never identified.[85] 170 years later, the descendants of the purchasers brought a number of claims against the Crown, one being that the tenths were held on trust for them by the Crown, and the Crown had breached this trust by failing to set the reserves aside.[86] For the tenths sections which were identified, there was no question of certainty of subject-matter.[87] This was not the case for the rest of the tenths. The area of land from which they were to come was known, but the individual plots were not specifically identified.[88] Certainty of subject-matter is a minor part of *Wakatū*,[89] as the main issue was whether the Crown owed fiduciary duties to the Māori vendors[90]

[78] *Priest v Ross Asset Management (In liq*) [2016] NZHC 1803.
[79] At [178]-[180].
[80] *Proprietors of Wakatū v Attorney General* [2017] NZSC 17, hereafter referred to as *Wakatū v AG* (SC).
[81] At [10].
[82] At [12].
[83] At [12].
[84] At [16] and [522]. Glazebrook J notes that details on the nature of the ballot are "scant", but does say that "it appears from the 4 September 1841 edition of the New Zealand Journal that 'four little boys' were stationed behind the four wheels of the ballot. Each wheel had an opening 'large enough to admit a child's arm.' The ballot lasted for nearly eight hours, with 'only the intermission of half an hour to rest the children'.
[85] At [31].
[86] At [77]-[78].
[87] At [420].
[88] At [420].
[89] Of the 954 paragraphs of the Supreme Court's judgment, only 22 are concerned with certainty of subject-matter in trusts.
[90] A majority of the Supreme Court concluded that the Crown owed fiduciary duties to the Māori vendors, and breached them. *Wakatū v AG* (SC), above n 80, at [1].

I. The Court of Appeal – Indistinguishability vs. Identifiability

In the Court of Appeal counsel for the appellants submitted that if the subject-matter of a trust is "identifiable" then it is sufficiently certain, relying on *Hunter v Moss*.[91] However, Ellen France J concluded the subject-matter of the trust claimed was uncertain because the tenths were unidentified.[92] Her Honour distinguished *Hunter* and instead applied *Re Goldcorp* and *London Wine*, on the basis that shares are "identical" while one piece of land is "distinguishable" from another.[93] Harrison and French JJ agreed without further comment.[94]

II. The Supreme Court – Sidestepping *Hunter*

Unlike the Court of Appeal, Elias CJ concluded there was sufficient certainty of subject-matter for trust, [95] yet did not rely extensively on *Hunter*.[96] Her Honour rather considered that *London Wine* and *Goldcorp*:[97]

> …do not…stand for any rigid rule that a trust can never exist in non-segregated property. They seem to me, rather, to turn on whether the trust was in fact intended in the particular cases.

Elias CJ appears to have concluded[98] the trust was over a 10% of the entire quantity of land sold.[99] Firstly, her Honour relied on statements of Oliver J in *London Wine* that a trust can exist over unspecified chattels in a larger mass if it is an equitable tenancy in common between the settlor and the beneficiary.[100] Secondly, her Honour concluded that *Goldcorp* is merely authority that "equitable title to 'generic goods' cannot pass until those goods are positively identified",[101] and is therefore not relevant to the facts in *Wakatū*, where the source of the claimed trust property was known.[102] However, Elias CJ paraphrases parts of *Goldcorp* to

[91] At [155].
[92] *Proprietors of Wakatū v Attorney General* [2014] NZCA 628 at [161], hereafter referred to as *Wakatū v AG* (CA).
[93] At [157]-[159].
[94] At [202].
[95] *Wakatū v AG* (SC), above n 80, at [420].
[96] At [433]. The case is only cited to support the proposition that certainty of subject-matter does not necessarily require segregation of the property.
[97] At [423].
[98] Tim Bain has interpreted the judgment of Elias CJ slightly differently, arguing that it stands for the proposition that there is certainty of subject-matter if the trust property is identifiable by any means, and the intention of the settlor is sufficiently clear – see Tim Bain "Some of mine is yours" (2018) NZLJ 7.
[99] *Wakatū v AG* (SC), above n 80, at [432].
[100] At [426]-[427].
[101] At [431].
[102] At [432]. "The Board in *Goldcorp* did not doubt that in such circumstances there would be sufficient certainty of subject-matter for trust."

conclude that the trust "was intended to inhibit dealings in the whole quantity" of land.[103] Her Honour thus appears to have taken the point suggested in *Goldcorp*[104] and *London Wine*[105] that an equitable tenancy in common would have been valid if intended, and applied it to the land in *Wakatū*.

Yet her Honour doubted *London Wine* and *Goldcorp*, being "commercial cases…concerned with fungible assets" were even relevant to a case concerning land and fiduciary obligations stemming from the surrender of native title.[106] So, despite Elias CJ's prior analysis of these conflicting cases, her Honour reached her final conclusion on the basis of different reasoning.[107]

First, her Honour concluded that Equity could not "countenance" the trust failing for lack of certainty of Subject-matter given the facts of the case: the proportion of land was known; the area it was to come from was known; the land could be ascertained out of this; and the trust obligations owed by the Crown to Māori arose from the surrender of native title.[108] Secondly, Elias CJ cited two cases addressing certainty of objects,[109] in which the courts chose not to discard the trusts because any uncertainties were only "evidential" uncertainties, meaning the court could understand what was intended and only needed to ascertain the correct facts to execute the trust.[110] In the case of the tenths, there was only "evidential uncertainty", and therefore no bar to trust.[111]

Glazebrook J also did not consider *London Wine*, *Hunter* or *Goldcorp* to be applicable to the facts in *Wakatū*, but her Honour supported Elias CJ's analysis of these cases if the point needed to be decided.[112] The remaining judges did not address the issue.

[103] At [432]. Elias CJ states the beneficial interest in the land "was intended to 'inhibit dealings in the whole quantity' of land". This appears to paraphrase a section of the judgment in *Re Goldcorp* which Elias CJ cites earlier at [430], in which the board said that Goldcorp could not have intended to create a trust over its "general stock" of gold because this would have "inhibited any dealings" with the gold other than for delivery. See *Re Goldcorp Exchange*, above n…, at 394.
[104] *Re Goldcorp Exchange*, above n 2, at 394.
[105] *Re London Wine*, above n 3, at 136-137.
[106] *Wakatū v AG* (SC), above n 80, at [432].
[107] At [435]. After discussing *London Wine, Goldcorp* and *Hunter v Moss*, she moves on to her final conclusion saying "more importantly".
[108] At [435].
[109] At [421]-[422]. Her Honour cited *Re Tuck's Settlement Trusts* [1978] Ch 49 (CA) and *Re Beckbessinger* [1993] 2 NZLR 362 (HC).
[110] *Wakatū v* AG (SC), above n 80, at [421]-[422].
[111] At [435].
[112] At [579].

G. The Significance of *Wakatū* to Certainty of Subject-matter

Neither the judgment of the Court of Appeal, nor Elias CJ's comments in the Supreme Court, provide a clear basis for reconciling *Hunter v Moss* with *London Wine* and *Goldcorp*.[113] The two courts took different approaches to the issue, and neither court addressed how the trust might work in practice.

The Court of Appeal focused on *Hunter*, and, assuming it applies in New Zealand, found it provides a trust can form over an unidentified portion of a bulk of "indistinguishable" property. Elias CJ's judgment sidestepped the issue of "distinguishability", leaving the status of *Hunter* in New Zealand unclear. Further, her Honour's judgment includes several potentially controversial points. Elias CJ limited the application of *Goldcorp* to cases of "generic goods",[114] applied principles used in certainty of objects cases to certainty of subject-matter,[115] and appeared to find there could be a trust as an equitable tenancy in common over the land based on *Goldcorp* and *London Wine*.[116] Many of these points are not unprecedented in discourse on certainty of subject-matter in trusts, but the limited significance of this issue in *Wakatū* meant that neither Court was able to develop a cohesive approach to the issue. *Wakatū* shows that the current position on certainty of Subject-matter in trusts in New Zealand is entirely unclear.

The facts of *Wakatū* also raise some significant questions about certainty of subject-matter.[117] One such question emerges from the system of lots. The development of *Hunter* in England and Australia suggests a trust is possible where the trust property is an unspecified portion within a "fungible" mass. Land is not (objectively) fungible, but the lots provided an objective system for identifying the tenths. This raises the following question: *Is there a valid trust when the beneficiary's interest would be in an unsegregated portion of an identified bulk which*

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[113] The analysis of Elias CJ seems to be particular to the facts in *Wakatū*. See especially *Wakatū v* AG (SC), above n 80, at [435]

[114] At [431]. This would mean that no New Zealand authority has directly considered a trust like that in *Hunter* until *Wakatū* (with the small exception of *Priest v Ross Asset Management*, above n 78)

[115] At [422] and [435].

[116] At [432]. As will be discussed later, this is slightly at odds with the facts in *Wakatū*.

[117] There are two other significant questions also raised by the facts, which are unfortunately beyond the scope of this dissertation. First, the trust was over land, which is different in nature to shares, securities and chattels, raising the following question: *Are the principles certainty of subject-matter that are applicable to personal property (tangible or intangible), also applicable to land?* To this question the Court of Appeal answered yes, while Elias CJ and Glazebrook J answered no. Second, the trust arose in the context of "obligations of a fiduciary arising out of the surrender of native title" (*Wakatū v AG* (SC), above n 80, at [432]). This raises the following question: *Are the principles of certainty of Subject-matter different for commercial cases such as London Wine and Hunter v Moss than those of indigenous-crown relations?* Again, the Courts were split on this question.

consists of (objectively) indistinguishable property, but there is an objective system of identifying the property within this bulk? The answer of Elias CJ was yes, while the Court of Appeal answered no.

Chapter II: The "Hunter v Moss-Type Trust"

Having introduced the uncertainty in certainty of subject-matter, and how this issue manifested in the facts of *Wakatū*, the following three chapters seek to achieve two things. First, the viability of the two main responses to the uncertainty in certainty of subject which have emerged since *Hunter v Moss* will be assessed. These approaches are the "portion approach" and the "whole-fund" approach, both of which are defined below.

Second, it will be asked how these two approaches would answer the question just proposed, which arose from the facts of *Wakatū*: *Is there a valid trust when the beneficiary's interest would be in an unsegregated portion of an identified fund which consists of (objectively) indistinguishable property, but there is an objective system of identifying the property within this bulk?*

However, firstly some conceptual clarity is needed. The question can be split into two, by adding qualifiers:[118]

a) … *when the settlor intended the trust property be the whole fund, with themselves as a beneficiary of the balance?*
b) … *when the settlor intended the trust property be the unsegregated portion only?*

Question (a) is straightforward – the trust's subject-matter would be certain. The Māori beneficiaries would be entitled to ten percent of the total land, while the Crown would hold the remaining ninety percent for itself, and the lots system would be used to select.[119] This seems valid given that powers of selection of beneficial interests can be held by people.[120] This is because certainty of beneficial interests is treated more flexibly that certainty of subject-matter.[121] In *Re Knapton*,[122] a will bequeathed one of several houses to each of several named beneficiaries, without specifying which house for which beneficiary. Simmonds J found the deed implied that the beneficiaries held a power of selection in the order in which they were

[118] This distinction is the reason for the use of "beneficiary's interest" instead of "trust property" in the initial question.
[119] Geraint W. Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at 22; Pettit, above n 20, at 77.
[120] *Boyce v Boyce* (1849) 16 Sim 476; *Re Knapton* [1941] Ch 428; *Re Tuck's Settlement Trusts* [1978] Ch 49 (CA) at 417. See also Thomas and Hudson, above n 119, at 86; Butler, above n 10, at 79; Pettit, above n 10, at 53. The power of selection could be surely given to the trustee, a beneficiary or a neutral third party. For example, in *Re Tuck's Settlement Trusts*, there was a valid trust, despite the vague requirement that the beneficiary could only receive if they had an "approved wife…of Jewish blood", because the deed provided that the Chief Rabbi could resolve any ambiguities
[121] Butler, above n 10, at 79. Pettit, above n 10, at 53-54. This is presumably because, once there is a clear distinction between the property of the trustee and the trust property, then there is less likely to be confusion for third parties as to who is entitled to what property (for example in insolvency). Further, trustees are commonly given a large amount of discretion as to how they deal with trust property.
[122] *Re Knapton*, above n 120.

named.[123]

A. Defining the "*Hunter v Moss*-type trust"

Question (b) is more challenging. *Hunter v Moss* directly addressed it. There, Hunter could point to Moss' shares and say "fifty of those shares are on trust for me", though he could not identify which.[124] But, one share could satisfy the trust "just as well as any other of them".[125] *White* and *Ellison* concerned the same issue, while Oliver J in *London Wine* pointed towards it.[126]

The essential issue is whether there can be a valid trust when there is:

1. An identifiable bulk;[127] and
2. A calculable[128] portion of this bulk which has not been specifically identified;[129] and
3. The settlor declares the trust *over the portion*, not the entire subject-matter; and
4. There is an objective means of identifying the portion in specie.

In this dissertation, trusts with these features are referred to as "*Hunter v Moss*-type trusts".[130]

If *Hunter v Moss*-type trusts are valid, two questions arise. First, what kind of trust is created? The Courts in *White v Shortall* and *Lehman Brothers* inferred the settlor intended a trust over the whole bulk with themselves as a beneficiary, because a trust over the portion would lack certain subject-matter.[131] This will be referred to as the "whole-fund approach". Conversely, many contend there is no bar to a trust of the portion alone. This position will be referred to as

[123] At 433. The first named beneficiaries were the "nieces and nephews" of the testatrix. Because they were not ordered, the court found that they could divide the houses between them as they agreed, and in default of agreement the houses would be divided between them by lot. See also *Re Golay's Will Trusts* [1965] 1 WLR 969, where a beneficiary was entitled to "reasonable income" from properties on trust - "reasonable" was enough of "yardstick" for the court to calculate the beneficiary's entitlement; Thomas and Hudson, above n 119, at 86, and Pettit, above n 10, at 53.
[124] *Hunter v Moss* (CA), above n 21, at 457. The Court of Appeal referred to the shares as "5%" of the total 1000 shares in MEC and "50" shares interchangeably, however the court analysed the issue as if the trust was intended to be over 50 specific shares. This failure of the court to distinguish between a trust over 5% and 50 has been criticised - see Goode, above n 22, at 380; Bridge, above n 22, at 99-101.
[125] *Hunter v Moss* (Ch), above n 22, at 946.
[126] *Re London Wine*, above n 3, at 137. Oliver J suggested that if a farmer who has ten sheep declared a trust over two of them, without specifying which particular sheep, this could not create a trust, and it would be "immaterial that at the time he has a flock of sheep out of which he could satisfy the interest". Further, he rejected that on the facts before him it might make a difference that the wine was "homogenous". Applied to the facts in *Hunter*, this would surely mean there could not be a trust.
[127] References in this dissertation to "fund" and "mass" are used with the same meaning as bulk.
[128] Patrick Parkinson "Reconceptualising the Express Trust" (2002) 61 CLJ 657 at 668-669.
[129] For example, by segregating that portion from the bulk.
[130] This term impliedly assumes that such trusts are ever capable of being valid. Whether this is in fact the case is discussed later in this chapter.
[131] *Pearson v Lehman Brothers*, above n 54, at [232]; *White v Shortall*, above n 62 at [210]. This was supported in *Ellison v Sandini*, above n 70.

the "portion approach". Colin Rimer QC and Dillon LJ both found a trust over fifty shares only in *Hunter*.[132] Similarly, the Courts in *Wakatū* focused on whether there could be a trust over the tenths alone.[133]

Second, on what basis can these trusts arise? The tentative consensus in Australia and England is *Hunter v Moss*-type trusts can arise in bulks of "fungibles".[134] Yet what "fungible" means is unclear, and it may acquire different meaning on the portion approach than the whole-fund approach. Furthermore, the contention of counsel in *Wakatū* that it is enough that the portion is identifiable *by any means* has support.[135]

Chapter Three will consider the "portion approach", and Chapter Four the "whole-fund approach" This Chapter lays a foundation for Chapters Three and Four by first considering the three "conflicting cases" at the core of the uncertainty in certainty of subject-matter. The nature of trusts is then considered, and it is concluded that there is nothing in the nature of trusts which requires specific identification of property for a trust to form – it is only necessary that the trust property be *identifiable*.

B. Assessing the Three Conflicting Cases

Analysis of certainty of subject-matter in *Wakatū* focused on the "conflicting cases"[136] of *London Wine*, *Goldcorp* and *Hunter v Moss*. It is, therefore, worth considering whether the uncertainty in certainty of subject-matter can be clarified from these cases alone. It is concluded that *Goldcorp* provides no authority on *Hunter v Moss*-type trusts, statements in *London Wine* are only obiter on this issue, and the reasoning in *Hunter v Moss* is itself problematic. Thus, the validity of *Hunter v Moss*-type trusts is best addressed on general principle.

I. *Re Goldcorp Exchange* – Authority for Generic Goods Only

Goldcorp is the only case of the three that is binding in New Zealand.[137] It has been argued *Goldcorp* overrules *Hunter*,[138] but it is difficult to see how this is the case. Lord Mustill held

[132] *Hunter v Moss* (CA), above n 21, at 457-458; *Hunter v Moss* (Ch), above n 22, at 945.
[133] *Wakatū v AG* (CA), above n 92, at [155]; *Wakatū v AG* (SC), above n 80, at [432].
[134] *Pearson v Lehman Brothers*, above n 54, at [225]; *Ellison v Sandini*, above n 70, at [148]
[135] *Wakatū v AG* (CA), above n 92, at [155]
[136] *Wakatū v AG* (SC), above n 80 at [579] per Glazebrook J.
[137] In *Priest v Ross Asset Management*, above n 78, the High Court also considered the validity of a *Hunter v Moss*-type trust at [178]-[180], but not in detail.
[138] Birks, above n 50, at 87; Hayton, above n 12, at 450; Hudson, above n 12, at 102; Wilson, above n 48, at 96.

the "only possible" trust that could arise was over Goldcorp's current stock of bullion, with the purchasers as beneficiaries in common, but this could not have been intended by Goldcorp.[139] This might be read to mean *Hunter v Moss*-type trusts are valid only if over the whole fund.[140] However, the better view is that his Lordship was merely saying this was the only trust possible in the circumstances. Goldcorp never had enough gold to satisfy all the purchasers' claims,[141] and the sales were of "generic goods", meaning the gold could be sourced from anywhere.[142] This means the claimants[143] could not point to any particular fund and say with certainty that it contained gold held on trust for them.[144] The Board recognised this. Lord Mustill compared *Goldcorp* with *In re Wait*,[145] in which there *was* a sale of goods "ex-bulk".[146] Wait sold 500 of his1000 tons of wheat to several sub-purchasers, but never allocated any particular wheat to the buyers.[147] No proprietary interest passed to the purchasers.[148] Lord Mustill found it "unnecessary" to discuss *Wait* in detail because its facts were "crucially different", as there (emphasis added):[149]

> The buyer could point to the bulk and say that his goods were definitely there, although he could not tell which part they were…*No such feature exists here*.

Given his Lordship explicitly avoided discussing sales "ex-bulk", it would be strange to say *Goldcorp* is authority for the validity of trusts "ex-bulk".

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[139] *Re Goldcorp Exchange*, above n 2, at 393-394 and 398. See also Paul Eden "*Re Goldcorp Exchange* Revisited" in Elizabeth Cooke (ed) *Modern Studies in Property Law Volume 3* (Hart Publishing, Oxford, 2004) at 181. That Lord Mustill was referring to this kind of trust is made clear by his statement that a purchaser "cannot have contemplated that his rights would be fixed by reference to a combination of the quantity of bullion of the relevant description which the company happened to have in stock at the relevant time and the number of purchasers who happened to have open contracts at that time for goods of that description".

[140] David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (19th ed, Wellington, LexisNexis, 2016), at 8.7.

[141] *Re Goldcorp Exchange*, above n 2, at 390 and 398.

[142] At 7.

[143] Except for the "Walker and Hall" claimants, whose gold had been taken by Goldcorp after Goldcorp purchased Walker and Hall, another gold-selling firm. Their gold had been initially kept separate by Goldcorp, so title had passed under the sale of goods contracts, but because a large amount of gold was taken out of it they were only able to claim the lowest intermediate balance of the fund – At 26-27.

[144] At 18. Lord Mustill made clear that "the Company's stock of bullion had no connection with the claimant's purchases". For this reason, a *Hunter v Moss*-type trust was not possible. See also Kelly and Kelly, above n 77, at 66, and Alison Clarke "Property Law" (1997) 50 CLP 119 at 135.

[145] *In re Wait* [1927] 1 Ch 606 (CA).

[146] *Re Goldcorp Exchange*, above n 2, at 393-394.

[147] *In re Wait*, above n 145, at 607-608. Wait had purchased 1000 tons of wheat, which was then shipped to him from Oregon to England. En route, having received a bill of lading, Wait sold 500 tons of the 1000 to several sub-purchasers who paid for the wheat, but went bankrupt before the wheat was delivered. No particular 500 tons of wheat were ever allocated to the sub-purchasers. The Court held the sub-purchasers did not have a proprietary interest in the wheat because specific performance was not yet possible on the sale of goods agreement, and no trust arose outside of this.

[148] At 606.

[149] *Re Goldcorp Exchange*, above n 2, at 393-394.

Nothing in *Goldcorp* rejects a *Hunter v* Moss-type trust, because that was not the factual scenario before the Board. On this point Elias CJ is correct. *Goldcorp* is only authority that legal and equitable title to "generic goods" cannot pass on sale until specifically identified.[150]

II. *London Wine* – Obiter Dictum

Conversely, Oliver J in *London Wine* did consider the validity of a *Hunter v Moss*-type trust.[151] Counsel for the purchasers submitted that if a bulk could be identified which contained a known amount of the claimant's wine, a trust could form.[152] Oliver J held such a trust is possible only if expressly over the entire mass, even if the property is fungible.[153] *London Wine* is therefore inconsistent with the portion approach. The Privy Council in *Goldcorp* expressed "their entire agreement" with Oliver J's reasoning.[154] However, like *Goldcorp*, the sale in *London Wine* was of "generic goods".[155] His Honour's comments on *Hunter v Moss*-type trusts are therefore *obiter dictum.*

III. *Hunter v Moss* – Insufficient Reasoning

Though neither the Court of Appeal nor Supreme Court in *Wakatū* concluded that *Hunter v Moss* applies in New Zealand, both were willing to treat it as such,[156] and *Hunter* has been consistently applied in England.[157] However, the reasoning in *Hunter* has been widely criticised. Dillon LJ relied on two key points. Firstly, his Lordship reasoned that a trust over the 50 shares would have been valid if a testamentary bequest, and must by analogy be valid *inter vivos*.[158] Yet in a testamentary bequest, because the executor has legal and equitable title to the testator's whole estate, they could simply select any fifty shares. In an inter vivos

[150] *Wakatū v AG* (SC), above n 80, at [431]; See also Theresa Villiers "Certainty of Subject-matter in Trusts: The Controversy Continues" 9 KCLJ 112 at 112, and Sarah Worthington "Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts" (1999) JBL 1 at 4.
[151] Eden, above n 139, at 182.
[152] *Re London Wine*, above n 3, at 136. This would be a *Hunter v Moss*-type trust.
[153] At 136-137. Oliver J held that "to create a trust, it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property it is to attach". The "mere" declaration of a trust over a number of things within the larger fund would not be sufficient.
[154] *Re Goldcorp Exchange*, above n 2, at 401.
[155] *Re London Wine*, above n 3, at 138; Villiers, above n 150, at 114.
[156] *Wakatū v AG* (CA), above n 92, at [157]; *Wakatū v AG* (SC), above n 80, at [433].
[157] *Re Harvard Securities*, above n 35; *Pearson v Lehman Brothers*, above n 54; *Wilkinson v North*, above n 62.
[158] *Hunter v Moss* (CA), above n 21, at 457 and 459 - For example, if a testator promised a beneficiary 50 of his 200 identical shares in his, without specifying, there is no doubt the executors of the will would be bound to identifying and distribute those 50 shares. Dillon LJ relied on *In re Clifford* [1912] 1 Ch. 29 and *In re Cheadle* [1900] 2 Ch. 620 for this point. See also *Hunter v Moss* (Ch), above n 22, at 942 – Colin Rimer QC discussed this point and noted it would be "odd" if there could be a trust in *In re Clifford* but not the on facts in front of him, but did not rely on this in his decision.

declaration, it may be unclear which shares are those of the trustee, and which are the trust property.[159] Secondly, his Lordship cited *In Re Rose*[160] for the proposition that an ordinary transfer of fifty shares out of 200 is valid even if the shares are not identified.[161] But in *Rose,* Mr Rose identified the shares to be transferred by number.[162] Neither analogy explains why there canbe a trust over the fifty shares, nor what kind of trust this might be. Dillon LJ also distinguished *Hunter* from *London Wine*, contending that an "appropriation of chattels" in sale is different to a "declaration of trust".[163] Yet his Lordship failed to explain *why* these scenarios are different in law.[164] Nor is it explained, in response to the submission that the only equitable interest possible over a portion of a mixed fund is a floating charge over the whole, *why* "no question of a blended fund…arises and we are not in the field of equitable charge".[165]

The limitations of Dillon LJ's reasoning led Campbell J in *White v Shortall* to conclude that it was not "sufficiently persuasive…to adopt it as the solution to the present problem", and to address the issue in front of him on general principle.[166] Given the issues with *Hunter* and *London Wine,* and the persisting uncertainty over this issue, it is recommended that the New Zealand courts take the same approach.

C. Does Property have to be Specifically Identified to Form a Trust?

Having determined that the validity of *Hunter v Moss*-type trusts should be addressed as a matter of general principle, a preliminary question arises: do trusts, by nature, require specific identification of property to be valid? If the answer is yes, then the portion approach cannot ever be valid, though the whole-fund approach may be.

There is a strong argument in principle that a trust can only form over specifically identified property.[167] Oliver J's assertion that "to create a trust it must be possible to ascertain with

[159] Hayton "Un-Certainty", above n 31; Hayton "Ascertainability", above n 20, at 450; Hudson, above n 12, at 103; Hayton, Matthews and Mitchell, above n 47, at 8.18; Ockelton, above n 12.
[160] *In re Rose* [1952] Ch. 449.
[161] *Hunter v Moss* (CA), above n 21, at 458.
[162] *Re Harvard Securities*, above n 35, at 576; *White v Shortall*, above n 62, at [178]; *Ellison v Sandini*, above n 70, at [124]-[125] and [129].
[163] *Hunter v Moss* (CA), above n 21, at 458.
[164] Bridge, above n 22, at 100; *White v Shortall*, above n 62, at [185]; *Ellison v Sandini*, above n 70, at [126] and [129].
[165] *Hunter v Moss* (CA), above n 21, at 459; Bridge, above n 22, at 100; *White v Shortall*, above n 62, at [190]; *Ellison v Sandini*, above n 70, at [127] and [129]. This was in response to a submission by counsel for Moss that the best Hunter could claim was a floating charge over the whole mixed fund of shared, based on *Re Diplock*. This will be assessed in more detail in Chapter 3.
[166] *White v Shortall*, above n 62, at [154] and [191].
[167] Wilson, above n 48, at 89; Hayton, Matthews and Mitchell, above n 47, at 1.1; David Hayton "The Irreducible Core Content of Trusteeship" in AJ Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996) at 47; Roy Goode "Ownership and Obligation in Commercial Transactions" (1987) 103 LQR 433 at 449. See also Goode "Are

certainty not only what the interest of the beneficiary is to be but to what property it is to attach" reflects this view.[168] The draft Trusts Bill[169] also proposes to require that an express trust may only arise if the settlor "clearly and with reasonable certainty…identifies the trust property".[170]

On the other hand, there is Colin Rimer QC's view that in *Hunter*:[171]

> The shares were…of such a nature that each of them could satisfy the trust just as well as any other of them. Why therefore should equity be concerned that 50 particular shares were not identified?

If Mr Moss had transferred all 950 shares to a trustee without instructions as to the remaining 900,[172] or declared a trust over all 950 of his shares with 50 for Hunter and 900 for himself, a valid trust would have arisen. Why, then, can there not be a trust over 50 shares alone, without identification?[173]

"Much ink has been spilt" over whether the trust is "obligational" or "proprietary",[174] and this debate may be relevant here.[175] However, I do not propose to determine which view is more favourable because, as it seems to me, *neither* approach strictly requires that trust property be identified – only *identifiable* at any given time.

I. The Nature of Trusts

Professors Parkinson and Scott both contend certainty of subject-matter requires two things: (a) calculable trust property (the actual subject of the trust); within (b) identifiable subject-matter (the thing in which the trust property exists).[176] In *Hunter* the subject-matter (950 shares) was clear, and the trust property (50 shares) was identifiable within it.[177] This view is consistent with both the proprietary and obligational theories of trust, and aligns with existing case law.

Intangible Assets Fungible", above n 22 at 382 – "A person cannot have an interest in an asset unless he can identify the asset in question".
[168] *Re London Wine*, above n 3, at 137. See also Hudson, above n 12, at 99.
[169] Trusts Bill 2017 (290-1). As at the time of writing, this Bill has passed its first reading and is before the select committee.
[170] Trusts Bill 2017 (290-1), cl 15(1)(b)(iii).
[171] *Hunter v Moss* (Ch), above n 22, at 946.
[172] Worthington, above n 150, at 18. The 900 would return to Moss as a resulting trust.
[173] At 18.
[174] RC Nolan "Equitable Property" (2006) 122 LQR 232 at 232.
[175] Jessica Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" (2010) 2 NZLJ 541 at 544. Professor Palmer contends that "much of one's views of particular issues within trust law may be guided, for better or worse, by their conception of the basis of the express trust as being predominantly proprietary or obligation-based".
[176] Patrick Parkinson "Reconceptualising the Express Trust" (2002) 61 CLJ 657 at 664; AW Scott, ML Ascher and WF Fratcher *Scott on Trusts* (4th ed, Aspen Publishers, New York, 1987) at 3.1.
[177] Parkinson, above n 176, at 676.

According to the proprietary theory, a trust is a means of passing property, so when a trust arises the trustee's legal title to the trust property is encumbered, and the beneficiaries gain an interest in the trust property.[178] This does not mean, however, that the exact trust property must be known, as has been argued.[179] The nature of the trust means property does not pass in a way which necessitates specific identification of property. This point can be understood by comparing how property passes under a sale of goods contract with the process of property made subject to a trust.

For legal or equitable title to pass in a sale of goods, the goods must be specifically identified.[180] It has also been argued that sale of goods law provides a "guide" for how goods can pass on trust.[181] Further, Neuberger J concluded in *Re Harvard Securities* that *Hunter* differs from *London Wine* because the requirements for passing equitable interests in chattels are different to those for shares, relying on Atkin LJ's judgment in *Re Wait*.[182] Oliver J in *London Wine* also cited *Wait* to conclude a trust over chattels requires specific identification, as a sale does,[183] and *Goldcorp* too has been cited in support of this proposition.[184] This would mean that, at least in relation to goods, the portion approach would not be possible.

However, *Wait* and *Goldcorp* contradict this. Lord Mustill cited *Wait*, not only to conclude that under a "contract for the sale of unascertained goods no equitable title can pass merely by virtue of sale,"[185] but also for the proposition that an interest could nevertheless have passed by trust outside of this.[186] Atkin LJ's judgment cannot be read as a general statement on equitable interests in chattels. His discussion only ever relates to sales,[187] and he states that sale of goods law has:[188]

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[178] Peter Jaffey "Explaining the Trust" (2015) 131 LQR 377 at 387; Palmer, above n 175, at 542-3 and 553.
[179] Ockelton, above n 30, at 450.
[180] Contracts and Commercial Law Act 2017, s 143. Section 143 even specifically provides that, if A purchases 1000 gold coins from B, and those coins are stored in bulk, ownership does not pass until those coins are segregated. This enshrines the decision in *Re Goldcorp Exchange*, above n 2, at 393. While the decision in *Re Goldcorp* related to the now repealed Sale of Goods Act 1908, s 18, this section and s 143 are essentially identical. See also *Gault on Commercial Law* (online loose-leaf ed, Thomson Reuters) at SI4.03(2)(c).
[181] Wilson, above n 48, at 104; Goode "Ownership and Obligation", above n 167, at 449; John McGhee *Snell's Equity* (33rd Ed, Thomson Reuters, London, 2015) at 22-018. See also L Sealey and R Hooley *Text and Materials in Commercial Law* (Butterworths, London, 1994) at 264 – "Just as property cannot be transferred in unascertained goods, so also we may note that there cannot be a valid trust of unidentified property."
[182] *Re Harvard Securities*, above n 35, at 577. *Wait* relates to the English Sale of Goods Act 1893, s 52, which is essentially identical to the New Zealand Contract and Commercial Law Act 2017, s 143.
[183] *Re London Wine*, above n 3, at 149.
[184] Birks, above n 50, at 87; Hayton, above n 12, at 449-450; Hayton, Matthews and Mitchell, above n 47, at 8.7; Wilson, above n 48, at 96.
[185] *Re Goldcorp Exchange*, above n 2, at 393-394.
[186] *Re Goldcorp Exchange*, above n 2 at 394 - "…no equitable title can pass merely by virtue of the sale. This is not, of course, the end of the matter; *In Re Wait*, above n 145, at 636 per Atkin LJ.
[187] *Re Wait*, above n 145, at 634-640.
[188] At 636.

> …no relevance when one is considering rights, legal or equitable, which may come into existence *dehors* the contract for sale.~~.~~

Both Atkin LJ in *Wait* and Lord Mustill were clear that a trust could arise outside of the contract of sale, [189] implying that equitable interests do not pass the same way in trusts as they do via sale of goods contracts.

This conclusion makes sense given the different nature of the two areas. Sale of goods law consists of policy choices,[190] and while these choices limit equity within the sale of goods sphere,[191] it is hard to see why they should restrict the ability of a settlor to declare a trust outside of a sale of goods contract.[192] An equitable interest passes to the buyer when specific performance becomes available because a court would enforce the transfer of property – so equity deems that property has passed.[193] Allowing an interest to pass before this point would undermine the legislation and contradict the intentions of the parties, thus forcing equity to work within the limits of the contract and the law. Reflecting this, Atkin LJ concluded that finding an equitable interest had passed in *Wait* would "throw the business world into confusion".[194] The interest which passes is therefore entwined with sale of goods law.

Conversely, a trust involves holding property for another, subject to obligations.[195] Campbell J noted the difference in *White*:[196]

> …there is no transfer of any property involved in a declaration of trust, but rather the declarer of the trust sates the terms on which, henceforth, he will hold certain property that he already holds.

This is different to rights transferred by sale, which involve a definite right of legal ownership of property passed to a particular person. Even if the beneficiaries have equitable ownership of the trust property,[197] this "ownership" is, in many trusts, very limited. In some discretionary

[189] *Re Goldcorp* Exchange, above n 2 at 393-394; *In Re Wait*, above n 145, at 635-637 per Atkin LJ.
[190] This can be seen in the changes in Sales of Goods law in the UK on the adoption of the Sale of Goods (Amendment) Act 1995. This specifies that, in a contract for the sale of a portion of a fungible bulk, once the bulk is ascertained the buyer will obtain a tenancy in common over that bulk. The previous Sale of Goods Act 1976 provided, as the current New Zealand law, that goods must be specifically ascertained for property to pass on sale – See Ewan McKendrick "The Passing of Property in Part of a Bulk" in Norman Palmer and Ewan McKendrick (ed) *Interests in Goods* (2nd ed, LLP Reference Publishing, London, 1998) at 385-386.
[191] Worthington, above n 150, at 9. *Re Wait*, above n 145, at 636.
[192] Clarke, above n 144, at 122; Worthington, above n 150, at 17.
[193] Worthington, above n 150, at 8. This is because equity deems done what ought to be done, and the buyer ought to have an ownership interest at this point.
[194] *In Re Wait*, above n 145, at 640.
[195] Parkinson, above n 176, at 670.
[196] *White v Shortall*, above n 62, at [211]. In saying there is "no transfer of any property", Campbell J is presumably meaning there is no transfer of legal property (as there may well be transfer of equitable ownership).
[197] Palmer, above n 175, at 542 – However, Professor Palmer questions whether this is always the case at 553; Parkinson, above n 176, at 658.

trusts or *Re Denley*[198] purpose trusts, no beneficiary can claim an equitable interest in the trust property.[199] Proponents of the proprietary view have taken this into account. Professor Penner sees beneficiaries' rights in trust property as encumbrances on the trustee's "power of title", even if they are only discretionary beneficiaries.[200] In this sense, with the exception of trusts which require immediate transfer of title, all beneficial interests are future or contingent interests to receive property when the trustee exercises their power to do so.[201] Such a right could not be created by sale. Even in a simple trust, which might be thought analogous to an equitable interest acquired on specific performance, which might be thought analogous to a beneficial interest obtained on specific performance, the beneficiary and trustee can simply choose to let the trust continue.[202] This seems different to how, in sales of goods, property passes when intended by the parties jointly to pass. [203] Creation of trust thus involves a very different process to a sale of goods, and the types of interests passed are not the same. This reflects how the nature of trusts is not the kind that might require specific identification of property. Further, that trusts involve holding property seems to imply that the property need not be identified until the property is to be transferred to the beneficiary and so only needs to be identifiable.

Alternatively, on an obligational theory of trusts, the beneficiary does not have property rights in the trust. Instead, the trustee owes the beneficiaries personal obligations, which attach to the trust property.[204] This seems to naturally imply that, if property is not the heart of the trust, trust property need not be specifically identified so long as it is sufficiently defined. Professor Parkinson has argued, on this view, that certainty of subject-matter is better defined as "certainty of obligation".[205] If the source of the trust property is known, and the obligation in relation to this source is known, there is sufficient certainty of subject-matter.[206] This would mean that a *Hunter v Moss*-type trust would be valid even if the quantity of the portion of the bulk is not known, so long as that quantity is "calculable".[207] Nevertheless, Professor Hayton,

[198] *Re Denley's Trust Deed* [1969] 1 Ch 373.
[199] Parkinson, above n 176, at 660-662; Palmer, above n 175, at 553;
[200] JE Penner "The (True) Nature of a Beneficiary's Equitable Interest under a Trust" (2014) 27 CLJ 473 at 481. Professor Palmer also supports this view – see Palmer, above n 175, at 553.
[201] At 495.
[202] Thomas and Hudson, above n 119, at 166-167.
[203] Contract and Commercial Law Act 2017, s 144.
[204] Jaffey, above n 178, at 378-479; Palmer, above n 175, at 543.
[205] Parkinson, above n 176, at 675. See also at 663 – "…the core idea of the private express trust lies in the notion of equitable obligations in relation to property, which in most cases will also give to the beneficiaries commensurate property rights in equity."
[206] At 664.
[207] At 668-669. For this point, Professor Parkinson relied on the case of *Stephens Travel Service International Pty. Ltd v Qantas Airways* (1988) 13 NSWLR 331 (NSWCA). In this case, a travel agency specified in its contract with an airline that all moneys collected from tickets sold for that airline, less the agency's commission, would be held on trust for the airline. It

an advocate of the obligational theory, contends trust property must be "segregated from [the trustee's] private patrimony".[208] However, requiring segregation seems unnecessary if it is possible to ascertain at any point what property the trustee's obligations relate to. This analysis reflects how, at a minimum, certainty of subject matter requires that: (a) the trust property must be *capable* of being identified from within the property of the settlor whenever necessary, and (b) the obligations of the trustee in relation to that trust property must be clear.[209]

Moreover, there does not appear to have ever been a hard rule requiring specific identification of property for trust. In *re Kayford*[210] several customers claimed trusts over money they had paid to a mail order company. The money had been placed in a bank account which also contained some of the company's money.[211] Megarry J found there was a valid trust, concluding that (emphasis added):[212]

> Payment into a separate bank account is a useful (*though by no means conclusive*) indication of an intention to create a trust…

Oliver J in *London Wine* even cited *Kayford* as an example of trust property that was "specifically set aside and identified".[213] However, as Colin Rimer QC noted in *Hunter*, it is unclear whether the trust in *Kayford* was over the entire account with the company and the customers as beneficiaries (which would be consistent with *London Wine*),[214] or only over the customers' money (which would be *Hunter v Moss*-type trust).[215] Colin Rimer QC indicated the latter was more likely but did not decide the point. [216] In my view, it seems unlikely that

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was impractical, due to the nature of the transactions, for the agency to hold the monies in a separate account. But, the exact amount of the moneys held could be calculated at any point following the terms of the contract. The New South Wales Court of Appeal held there was a valid trust.

[208] David Hayton "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 96 at 107.

[209] Worthington, above n 150, at 17; Hudson, above n 12, at 76; Thomas and Hudson, above n 119, at 11 – "The essence of a trust is the imposition of an equitable obligation on a person who is the legal owner of property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has a beneficial interest recognized by equity in the property".

[210] *In re Kayford* [1975] 1 WLR 279 (Ch D). The case concerned a mail order company which, due to the possibility of insolvency, had been advised to open a separate deposit account for money they had received from their customers. Instead of doing this, the company paid the monies into an existing account which contained £47.80 of its own money. When Kayford went insolvent, the customers whose money had been paid in claimed their money was held on trust for them and was not part of the general assets of the company. By the time the action was brought the account contained £37,872.45 of customer payments in addition to the £47.80.

[211] At 280-281.

[212] At 282. Megarry J relied on *In Re Nanwa Gold Mines Ltd.* [1955] 1 WLR 1080, saying that there "the money was sent on faith of a promise to keep it in a separate account, but there is nothing in that case or in any other authority that I know of to suggest that this is essential."

[213] *Re London Wine*, above n 3, at 136.

[214] See *Re London Wine*, above n 3, at 136-7 – "If trust there be, it must be a trust of the homogenous *whole* and the terms of the trust must be that the trustee I to hold that whole upon trust to give effect thereout to the proportionate interest of the beneficiary".

[215] *Hunter v* Moss (Ch), above n 22, at 944-945. This would be one trust over the £37,872.45, but not the £47.80, of which the customers were beneficiaries in common. This would be a *Hunter v Moss*-type trust, because the trust property is the £37,872.45, within a fungible subject-matter (bulk) of the entire account of £37,920.25.

[216] At 945.

Megarry J could have concluded the trust was over the whole account, and then completely failed to explain that this was the case. Watkins LJ in *R v Clowes*[217] also opined that segregation of property is only an "indicator" that property is to be trust property, and "mingling of funds" does not necessarily invalidate a trust.[218]

MacJordan v Brookmount is often cited for the proposition that money in a bank account *does* require segregation for a trust to form.[219] Indeed, the Board in *Goldcorp* stated that *MacJordan* "conforms entirely" with its own opinion[220]. *MacJordan*, however, like *Goldcorp*, does not relate to *Hunter v Moss*-type trusts.[221] Under contract, Brookmount was to hold on trust retention funds owed to MacJordan construction for building work in a bank, and create a trust specifically for this. The account was never created.[222] It was held that because the only trust intended was one over the specific bank account, no trust could form.[223] The judge did not consider whether a trust could have been formed over a portion of Brookmount's general bank account, which would have been a *Hunter v Moss*-type trust.[224]

II. The Importance of Trust Functionality

It follows from the above that trusts do not by nature require specific identification of trust property. However, this does not end the matter. A key question since *Hunter v Moss* has been: how does the trust like this work in practice?[225] For example, it must be possible to know what happens if the trustee sells some of the fund,[226] or some of the property in the fund is lost or damaged (whether at the fault of the settlor or not).

In fact, the whole-fund approach is based in part on the idea that the portion approach cannot sufficiently define the obligations of the trustee.[227] This dissertation contends that the portion approach *can* sufficiently define the trustee's obligations. But it must be noted that even if trust property need only be identifiable, this is subject to realistic limits.

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[217] *R v Clowes*, above n 20, at 325.
[218] At 352; Pettit, above n 10, at 51. See also Bridge, above n 22, at 104.
[219] Hudson, above n 12, at 101; Hayton "Un-Certainty", above n 27.
[220] *Re Goldcorp Exchange*, above n 2, at 401.
[221] Virgo, above n 33, at 91; Eden, above n 139, at 184. See also *Hunter v Moss* (CA), above n 21, at 458-459, and *White v Shortall*, above n 62, at [187].
[222] *MacJordan Construction v Brookmount* [1992] BCLC 350 at 352-353.
[223] At 356.
[224] At 356. The general bank account contained the retention funds.
[225] Virgo, above n 33, at 91; Hayton, Matthews and Mitchell, above n 47, at 8.11-8.12; Ockelton, above n 12. See also Hayton "uncertainty", above n 27; *White v Shortall*, above n 62, at [248]-[268]
[226] Bridge, above n 22, at 101; Hayton "Un-Certainty", above n 31.
[227] *Pearson v Lehman Brothers*, above n 54, at [232].

One particularly important consideration is the interests of third parties. While the beneficiary and trustee may not mind exactly what property is on trust, if either became bankrupt their creditors would need to know what the trust property is and what obligations attach to it.[228] Insolvency policy draws a clear distinction between creditors with property rights in the bankrupt's estate, and unsecured creditors.[229] If the trustee cannot work out what property the creditors can claim, then how can there be a trust?

III. Summary

Nothing in the nature of the trust requires that the trust property be identified for a trust to form. Following the framework of Professors Scott and Parkinson, if the trust property is calculable within an identifiable subject-matter then it can be identified at any point. This does not mean, as Mark Ockelton suggests, that beneficiaries have "no real interest until a court order.[230] Rather, the beneficiary's interest (whether considered personal or proprietary) attaches to the trust property from the moment the trust is declared, it is simply unnecessary to identify what property it has attached to until the circumstances require it.

Finally, the relationships between certainty of subject-matter and certainty of intention, should be noted.[231] Failure to segregate property which is claimed to be the subject of a trust from a bulk will imply the settlor lacked certainty of intention, even if there is sufficient certainty of subject-matter.[232] The intention of the settlor must also link to the particular fund containing the trust property.[233] Because of this, the less clearly the settlor identifies the trust property, the stronger proof of certainty of intention must be.

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[228] Goode "Ownership and Obligation", above n 167, at 435.
[229] *Pearson v Lehman Brothers*, above n 54, at [225]; Sarah Worthington "The Disappearing Divide Between Property and Obligation" (2007) 42 Tex Int'l LJ 917 at 937. Professor Worthington contends that the only area of the law in which there is a clear distinction between property rights and obligations is insolvency, for these policy reasons – see 936-939. See also *Re Staplyton Fletcher* [1994] 1 WLR 1181 at 1203 per Paul Baker QC: "The court must be very cautious in devising equitable interests and remedies which erode the statutory scheme for distribution on insolvency."
[230] Ockelton, above n 30, at 54.
[231] Pettit, above n 10, at 52; Thomas and Hudson, above n 119, at 70-71; Bridge, above n 22, at 88. See also Bain, above n 98, at 7.
[232] *Re Clowes*, above n 20, at 352; Parkinson, above n 176, at 667; Pettit, above n 10, at 52.
[233] *MacJordan v Brookmount*, above n 222, at 356; Virgo, above n 33, at 91. See also *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh* [1998] 3 NZLR 171 (CA) at 174-175 per Tipping J, where the Court of Appeal held that a constructive trust could not form over moneys because they were paid into an overdrawn account and therefore could not be a "separately identifiable fund". In other words, there was nothing that the trust could attach to in the first place.

Chapter III: The Portion Approach

It has been determined that trusts do not, by nature, require specific identification of trust property for certainty of subject-matter. Therefore, the portion approach is at least tenable. However, it has also been determined that it must at least be possible to ascertain the trust property at any point for a trust to arise.

The Australian and English courts have stated that *Hunter v Moss*-type trusts over "fungible" property are valid.[234] This has some support in New Zealand.[235] This chapter will first consider how the portion approach might apply to fungible property, and what "fungible" means in this context. It will then apply this approach to *Wakatū* and ask if there could be a trust over the tenths alone. It is concluded that, while a trust of an unsegregated portion of a fund of fungible property is perfectly feasible, there could not be a trust on the facts in *Wakatū* applying the portion approach.

A. How Does the Portion Approach Work in Practice?

At least for a bulk of "fungible" property, the portion approach can address the issue of functionality by applying following and tracing principles.[236] Suppose A declares a trust for B over 100 of her 500 shares,[237] clearly intending to create a simple trust over the 100 shares only, but she fails to indicate which shares. A simple trust only requires the trustee to safeguard the trust assets, so selling trust property is a breach of trust even if reinvested in a more valuable asset.[238] Therefore, if A sells 300 of the 500 shares, it can be presumed she sold her own shares because to selling B's would be a breach of trust.[239] If the fund never drops below 100 shares, it can be presumed that B's shares remain.[240] Likewise, A could freely deal with up to 400 of

[234] *Pearson v Lehman Brothers*, above n 54, at [225]; *Ellison v Sandini*, above n 70, at [148]. Both these cases applied the whole-fund approach, however.
[235] *Priest v Ross*, above n 78, at [178]-[179]. The judgment of the Court of Appeal in *Wakatū v AG* (CA), above n 92, at [155]-[159] also generally reflects this view. Unlike the courts in Australia and England, the New Zealand courts appear to have pursued the portion approach.
[236] Worthington, above n 150, at 21; Virgo, above n 33, at 91; Parkinson, above n 176, at 669. See also *Foskett v McKeown* [2001] 1 AC 102 (HLE) at 127 per Lord Millet – "Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old." Therefore, for the purposes of *Hunter v Moss*-type trusts on the portion approach, it is only ever following principles which would be applied, as the portion of the fund is at all times the same asset. If the asset is misappropriated, then tracing principles can be applied exactly as with any other misappropriation of trust property.
[237] I am beginning with the example of shares to illustrate the applicability of tracing principles, as this was the property in *Hunter v Moss* itself. It should be noted that it is arguable that shares are not in fact "fungible", as will be discussed below.
[238] Thomas and Hudson, above n 119, at 31-32; Worthington, above n 150, at 22; Henry Cooper "Uncertainty of Trust Property Within a Pool of Shares" (2018) 45 Aust B at 316-317.
[239] *Re Hallet's Estate* (1880) 13 Ch D 696 (EWCA) at 724-725; Worthington, above n 150, at 21-22.
[240] *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62 (Ch. D) at 69-70.

her shares. So, when A transfers 100 shares to B, or segregates 100 from the fund, it can be said those 100 shares were *always* the trust property.

Alternatively, the trust could involve powers of management. If so, if A sold 50 shares without specifying whether they were her own or B's, then A and B would shares the proceeds *pari passu*.[241] Finally, if there were multiple beneficiaries (or multiple trusts within the fund), if trust property must have been lost or sold, the loss or proceeds can be divided pari passu between the beneficiaries.[242]

Tracing and following principles are not remedies in themselves. They are processes of locating property rights in new assets.[243] If trust property has been misapplied, tracing into its proceeds is only the first step. The beneficiary must then, separately, ask what remedies they are entitled to.[244] Given this, why limit their use to instances of breach, as Professor Hayton contends?[245] However, to assess whether the portion approach can apply to property other than shares, it must be asked what "fungible" really means.

B. The Meaning of "Fungible" in the Portion Approach

When is property "fungible"? The answer initially appears simple; ~~a bulk of~~ fungible property is "mutually interchangeable". Yet there is no consensus as to its meaning in relation to certainty of subject-matter. Consider 100 bottles of a single vintage of wine. Professors Worthington[246] and Bridge[247] would say the wine is fungible. The New Zealand Court of Appeal[248] and Professor Parkinson[249] would say it is not.[250] A *Hunter v Moss*-type trust of fungibles appears possible on the portion approach if following principles can be applied.

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[241] *Foskett v McKeown*, above n 236, at 132 per Lord Millet; *In re Diplock* [1948] Ch 465 (EWCA) at 524; Worthington, above n 150, at 21. Although, the failure to render proper accounts to whose shares were sold might be a breach of trust in itself.
[242] *Foskett v McKeown*, above n 236, at 132 per Lord Millet; This was also the approach suggested by Clifford J in *Priest v Ross Asset Management*, above n 78, at [180].
[243] *Boscawen v Bajwa* [1995] 4 All ER 769 per Millet LJ; *Foskett v McKeown*, above n 236, at 113. See also Peter Birks "The Necessity of a Unitary Law of Tracing" in Ross Cranston (ed) *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Press, Oxford UK, 1997) 239 at 257-258 especially. It should be noted that this is a controversial point – see Ross Grantham and Charles Rickett "Tracing and Property Rights: The Categorical Truth" (2003) 63 MLR 95, and Derek Whayman "Obligation and Property in Tracing Claims" (2018) 2 Conv. 157. Nevertheless, it is well accepted in the judiciary and therefore I adopt it for my analysis.
[244] *Foskett v McKeown*, above n 236, at 128 per Lord Millet.
[245] Hayton "Un-Certainty", above n 31.
[246] Worthington, above n 150, at 6.
[247] Bridge, above n 22, at 99.
[248] *Wakatū v AG* (CA), above n 92, at [158]-[159]. Wine is not directly discussed by Ellen France J but gold and sheep are both considered to be "distinguishable" property, and *London Wine* is cited with approval, so presumably her Honour would also see wine bottles as "distinguishable".
[249] Parkinson, above n 176, at 671.
[250] See also Butler, above n 10, at 77.

Therefore, if tracing principles cannot render the trust property identifiable, this would imply the fund is not "fungible".

I. Subjective vs. Objective Fungibility

There are two ways of assessing the fungibility of a fund of property: objectively (if the property is physically indistinguishable), or subjectively (if the relevant parties treat the property as interchangeable). The issue is summed up in the words of Colin Rimer QC in *Hunter*: (emphasis added):[251]

> All 950 of his shares carried *identical rights*. It *mattered neither to him nor to the plaintiff* which particular 50 shares were to be regarded as held for the plaintiff.

The courts have either made no distinction between the two approaches (like Colin Rimer QC), or preferred the first approach. Ellen France J in *Wakatū* took an objective approach, concluding gold is not fungible because it can "vary from one item to another".[252]

II. Intangible Property Only?

On an objective approach, "fungible" may only include *fungible intangibles*.[253] This might rule out the possibility of a portion trust in *Wakatū.* No court has ever found a *Hunter v Moss*-type trust over property other than shares[254] or securities.[255] Colin Rimer QC in *Hunter v Moss* distinguished *London Wine*, on the basis that tangible assets are "physically…distinguishable" and therefore not fungible, unlike shares.[256] Neuberger J concluded the same in *Harvard Securities*, though as previously discussed this relied on a misinterpretation of *Re Wait*[257] and he was "not particularly convinced" by this distinction.[258] In some ways this makes sense, as tangibles will always be atomically different, and unlike intangibles can be damaged, spoiled, or lost.[259] If a *Hunter v Moss*-type trust is claimed over a portion of a bulk of wine, and one

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[251] *Hunter v Moss* (Ch), above n 22, at 946.
[252] *Wakatū v AG* (CA), above n 92, at [158]. This can be contrasted with Thomas and Hudson, above n 119, at 83, and Villiers, above n 150, at 113, which both describe gold as a quintessential example of a tangible fungible.
[253] This would include debts, shares, securities and other choses in action.,
[254] *Hunter v Moss* (CA), above n 21; *White v Shortall,* above n 62; *Re CA Pacific Finance*, above n 64.
[255] *Re Harvard Securities*, above n 35; *Pearson v Lehman Brothers,* above n 54.
[256] *Hunter v Moss* (Ch), above n 22, at 940. This issue was not addressed by the Court of Appeal.
[257] See above.
[258] *Re Harvard Securities*, above n 35, at 577-578; Villiers, above n 150, at 113. See also *Re CA Pacific Finance*, above n 64.
[259] Virgo, above n 33, at 90; Villiers, above n 150, at 113.

bottle breaks, how can the beneficiary and trustee know whose bottle was broken? Conversely, shares are essentially "indestructible".[260]

However, this distinction has been justifiably criticised as "specious".[261] Some shares in a fund could, for example, be the subject of a forged gratuitous transfer to the settlor.[262] This seems equivalent to if a *Hunter v Moss*-type trust was declared over a fund of wine, some of which, unbeknown to the settlor, had spoiled. In both situations the problem could be addressed by determining whether there was a condition precedent that the fund contained a certain amount of property.[263] If the wine spoiled *after* the declaration of the trust, and the trustee was not at fault, the loss would be shared between the beneficiary and trustee pari passu.[264] Therefore, issues relating to tangibles also exist for intangibles, and for both these problems can be addressed by applying trust principles.

Suppose C declares a trust for D over ten of his 100 identical gold bars.[265] Because no matter who selects the 10 bars, the interests of all parties (settlor, beneficiary, or creditor) will be the same, following principles can apply. If 10 of the gold bars were lost (for example, by falling off a ship mid-transport), the loss would be borne by C if he was at fault,[266] or if not pari-passu between C and D.[267]

Issues might arise, however, if C frequently sells some of his gold then later replenishes the fund. If this were the case, even if balance never dropped below 10, it would become unlikely that there could be 10 bars which have been present since the declaration of trust. This might bring into question whether the trust attached "irrevocably" to the gold bars,[268] and it could be said it would whittle the trust down into a mere equitable floating charge.[269] However, the

[260] Clarke, above n 144, at 120. The value of shares may fluctuate, but their proprietary effect does not.
[261] Hayton, "Un-Certainty", above n 31; Hudson, above n 12, at 106; Hayton, Matthews and Mitchell, above n 47, at 8.21.
[262] Hayton, "Un-Certainty", above n 31; Villiers, above n 150, at 113.
[263] *White v Shortall*, above n 62, at [267].
[264] *Foskett v McKeown*, above n 236, at 124 per Lord Hope, 132 per Lord Millet. See also Thomas and Hudson, above n 119, at 998.
[265] Gold bars have been chosen as they are often seen as a quintessential example of a tangible fungible property - Thomas and Hudson, above n 119, at 83; Villiers, above n 150, at 113.
[266] See Thomas and Hudson, above n 119, at 284-285.
[267] A trustee is not liable for stolen trust property if he took reasonable care of it – Thomas and Hudson, above n 119 at 286. See also *Jones v* Lewis (1751) 2 Ves Sen 240; *Job v Job* (1877) 6 Ch D 562; *Jobson v Palmer* [1893 1 Ch 71. But regardless of innocence and responsibility, *Foskett v McKeown*, above n 236, at 132 per Lord Millet provides that the primary rule for mixed funds is that the contributors shares their losses rateably – see also *Jones v De Marchant* (1916) 28 DLR 561; Thomas and Hudson, above n 119, at 998.
[268] See Thomas and Hudson, above n 119, at 78-79 and 83.
[269] *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979 at 999 per Buckley LJ – "A floating charge is not a specific mortgage of assets, plus a license to the mortgagor to dispose of them in the court of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security"; Counsel in *Hunter* in the English Court of Appeal submitted that this was the only fiduciary relationship which could arise over an unappropriated portion of a mixed fund - *Hunter v Moss* (CA), above n 21, at 459.

trustee is still obliged to render accounts for the trust,[270] and even in cases where the trustee has falsified trust accounts and misapplied trust property the courts have presumed the trustee acted honestly and replaced the trust property with their own.[271]

Thus, if certainty of subject-matter is necessary so the trustee can understand their obligations,[272] it would be nonsense to say a trustee can identify shares within a fungible bulk, but not gold bars. Indeed, courts in the United States have held tangible fungibles like bushels of wheat do not require specific identification to form a *Hunter v Moss*-type trust.[273] If tangible property can be fungible on the portion approach, the next question is: what kinds of tangible property?

III. When are Tangibles Fungible?

1) Subjective Fungibility

Sir Roy Goode contends that "fungible" is a purely subjective term. The concept of fungibility originates in agreements for the transfer of goods, where any goods of a certain description would meet the terms of the contract.[274] So, if the focus is the legal obligations of the particular parties, there is no reason why property which is physically distinguishable cannot be interchangeable (and therefore "fungible") between two parties.[275] Essentially, "goods are fungible if they are treated as such".[276]

But while a contract of sale expresses the joint intentions of two parties, an express trust reflects the intentions of the settlor only.[277] Prima facie, it seems understandable that equity would allow a *Hunter v Moss*-type trust over shares or gold bars. But the same cannot be said for a trust declared over any two of eight items which are completely physically different even if the

[270] Kelly and Kelly, above n 78, at 532; Colin Rimer QC noted this in *Hunter v Moss* (Ch), above n 22, at 946.
[271] Thomas and Hudson, above n 119, at 327. *Target Holdings v Redferns* [1996] 1 AC 421 (HLE) at 434 per Lord Browne-Wilkinson; *Wallersteiner v Moir (No 2)* [1975] QB 373 at 397. See also RC Nolan "Property in a Fund" (2004) 120 LQR 108 at 114 – Professor Nolan notes that equity often allows beneficiaries to take proprietary rights in assets which are the proceeds of the trustee's dealings with the trust.
[272] Hudson, above n 12, at 76; Worthington, above n 150, at 17.
[273] *Casswell v Putnam* 120 NY 153 (NY 1890); Hudson, above n 12, at 104. Rimer QC, in *Hunter v Moss*, also supported his conclusion by reference to United States authorities. See *Hunter v Moss* (Ch), above n 22, at 948, and *Rollestone v National Bank of Commerce in St. Lous* 252 SW 394 (Mo. 1923).
[274] Goode, above n 22, at 383. This is reflected in the dictionary definition of the term: "(of goods contracted for without an individual specimen being specified) replaceable by another identical item; mutually interchangeable" - Oxford English Dictionary (Online Version October 2018, Oxford University Press).
[275] Goode, above n 22, at 383.
[276] FH Lawson and Bernard Rudden *The Law of Property* (3rd ed, Oxford University Press, Oxford, 2002) at 25.
[277] Bridge, above n 22, at 93. On an obligational view of the trust, the intentions of the trustee may also be relevant – see Palmer, above n 175, at 543-544.

settlor sees them as interchangeable. If the beneficiary or trustee were to become bankrupt, their creditors could not know which of the eight items was on trust and which were not.[278] A purely subjective approach is, therefore, not tenable.

2) An Intermediate Objective Approach

Professor Worthington has suggested an intermediate approach – that property is fungible if the differences between individual units would not be discovered on transfer.[279] For example, someone selecting 100 gold bars out of 1000 will not mind exactly which 100 they pick. The same applies to wine bottles - parties dividing 10,000 identically labelled bottles into equal lots of 1,000 will not check which the bottles are corked.[280] Furthermore, "context is important", because while a group of 10 sheep is not fungible on this definition,[281] a sale of 20,000 sheep out of 100,000 might be. The test is objective, but based on how the property would be perceived by a normal person in the circumstances, instead of its physical nature.

Professor Rudden has distinguished between property as "things" (where property is valued for itself) and property as "wealth" (where property is an investment or representation of wealth).[282] It is likely that property will be fungible in Professor Worthington's sense when, in the particular context, it would be treated as "wealth" rather than a "thing", so this may provide a useful yardstick.[283]

This definition is the most consistent with the portion approach. If the property in the fund is fungible, meaning no one would be concerned what part of the fund is the trust property, then equity can presume the trust property remains in the fund so long as the lowest intermediate balance does not drop below the quantity of the portion.

[278] Although, on a whole-fund approach, the trust could perhaps be interpreted as similar to that in *Re Knapton*, above n 120, so that the trust was over all 8 of the items and the beneficiary is able to select which 2 of the 8 items he wants, the rest reverting to the settlor as the other beneficiary.
[279] Worthington, above n 150, at 6.
[280] Bridge, above n 22, at 99.
[281] Because the sheep will all be in differing states of age and health.
[282] Bernard Rudden "Things as Things and Things as Wealth" (1994) 12 OJLS 81 at 83.
[283] See also Clarke, above n 144, at 120. However, it is perfectly possible for property to be "fungible" in Worthington's sense and not treated as "wealth".

IV. Possible Objections to this Analysis

It has been determined that *Hunter v Moss*-type trusts can form over a portion of a fungible bulk. However, before considering whether the portion approach may apply in *Wakatū*, two possible critiques of the above analysis should be addressed.

The first contention, notably made by Sir Roy Goode, is that *Hunter v Moss*-type trusts are limited to intangibles because intangibles are *not* actually fungible. For a group of assets to be "fungible", Goode contends, they must be dividable into separate legal units.[284] While two identical gold bars are legally unrelated when split, a share is simply a portion of a single legal asset, the issued share capital.[285] Owning 50 shares out of 1000 issued is merely a representation of owning 5% of the entire share capital of a company,[286] and the same is true of debts, securities, and bonds.[287] Because of this, Goode concludes *Hunter v Moss* is decided correctly. This view has been cited by Briggs J in *Lehman Brothers* in support of the whole-fund approach,[288] while Jagot J in *Ellison* indicated support for Goode's approach without deciding the point.[289]

However, I do not see Goode's analysis as inconsistent with the conclusions reached above. Goode's analysis seems to me to *support* the portion approach. Goode does not question the conclusion in *Hunter* that the trust was over fifty shares only. Rather, he argues that placing 50 shares on trust is essentially the same as passing 5% of one car. If I own 10% of a single asset, I can surely create a trust of 5% of that asset alone without that trust being over my entire 10% stake. This seems to be reflected in *Re Kayford*.[290]

Another possible objection stems from the problems associated with ownership of "mixtures". Professor Birks has outlined in detail the difficulties which arise when property one person becomes mixed with like property of another, so that the property of each become unidentifiable.[291] Birks contends that in such situations, following *Spence v Union Marine*[292],

[284] Goode, above n 22, at 381.
[285] At 384.
[286] At 384. See also RM Goode "Ownership and Obligation in Commercial Transactions" (1987) 103 LQR 433 at 448.
[287] At 388.
[288] *Pearson v Lehman Brothers*, above n 54, at [232].
[289] *Ellison v Sandini*, above n 70, at [152].
[290] *Re Kayford*, above n 210, at 282.
[291] Peter Birks "Mixtures" in Norman Palmer and Ewan McKendrick (ed) *Interests in Goods* (2nd ed, LLP Reference Publishing, London, 1998) 228 at 242-244. For example, A and B may each have a bag of corn being transported on a ship. If both bags break and the corn becomes mixed, it will be impossible to tell who's corn is who's, despite the fact that it can be clearly said that some of the kernels continue to be owned by A, and the rest by B. Professor Birks also distinguishes between "fluid" mixtures (e.g. oil mixed with oil) with "granular" mixtures (e.g. a number of identical items of furniture mixed together), but concludes the same principles apply to each – joint ownerships is assumed.
[292] *Spence v Union Marine Insurance Company Ltd* (1868) LR 3 CP 427. See also Birks "Mixtures", above n 291, at 239.

the law presumes the two own the resulting mixture in common, even if the mixture occurred without consent.[293] It could therefore be said that the only ownership interest possible in a mixture of goods is ownership in common of every item, meaning the portion approach should not apply to goods. However, Birk's concern is with pre-existing property interests cannot be identified due to mixture.[294] This differs from creating an interest in an existing mixture, because any part of the mixture could be the subject of the new interest.

V. The Relevance of this Conclusion to the Whole-fund Approach

Campbell J's decision in *White v Shortall* was premised on the assertion that a trust over the 222,000 shares alone would lack certain subject-matter.[295] It follows from the analysis above that this was not the case. It also follows that the conclusion in *Ellison* that a declaration of trust by the family court over the 2,115,000 shares only would not be valid is erroneous.[296]

C. Does the Portion Approach Lead to a Trust in *Wakatū*?

Having determined a *Hunter v Moss*-type trust can form over a portion of a fungible fund, focus can return to *Wakatū*. Elias CJ and Glazebrook J concluded there was a trust over the tenths alone, even if unidentified, in large part because there was an "agreed system" for selecting the land from within an "identified geographical area".[297] Because of the lot system, why should there not be a *Hunter v Moss*-type trust over the tenths alone *before* they were allocated?

I. Was the Land "Fungible"?

Despite the varied nature of the land, it could be said that the lot system rendered it effectively fungible. This contention encounters immediate problems. Fungibility implies that the means the selection of the property is not relevant, because the property is indistinguishable. So, if it the land was fungible, there would have been no need for a system to allocate the land between the settlers and the Māori vendors.

[293] Birks "Mixtures", above n 291, at 248-249.
[294] For example, at 232.
[295] *White v Shortall*, above n 62, at [212]; *Ellison v Sandini*, above n 70, at [148].
[296] *Ellison v Sandini*, above n 70, at [158] and [164]. Her Honour concluded that the order could only be read as giving the claimant a personal right to any 2,115,000 shares.
[297] *Wakatū v AG* (SC), above n 80, at [432] per Elias CJ; at [578] per Glazebrook J.

II. Is the Land Otherwise Identifiable?

There is significant academic support for the idea that *Hunter v Moss*-type trusts are valid if the portion within the bulk is identifiable *by any means*. *Equity and Trusts in New Zealand*, citing Professor Parkinson, suggests that there is a valid trust if the trustees can identify the trust property "by computation or otherwise".[298] This approach reflected in the original judgment in *Hunter v Moss*:[299]

> …the question of whether in any particular case there is such certainty depends…on whether, immediately after the purported declaration of trust, the court could, if asked, make an order for the execution of the purported trust.

Professor Worthington contends there is no way of objectively identifying non-fungible trust property from within a bulk, because the beneficiaries' interests would be dependent on the selection process.[300] However, the lots system means all the parties (the Māori, Settlers and Crown) would have an equal chance at obtaining the best sections,[301] so that a court could make a order for the execution of the trust at any point by simply applying the lot system. Thus, the Crown assumed obligations of trust over whichever sections the system of lots would have allocated to the Tenths, and it was not necessary that these tenths be specifically identified for a trust to form.[302]

Elias CJ in *Wakatū* adopted a similar approach to conclude that the trust did not fail for lack of certainty of subject-matter. Her Honour makes two key points. Firstly, Elias CJ adopts the comments made in *London Wine*[303] and *Goldcorp*[304] that a trust could have formed over a proportion of the whole fund of wine and gold respectively, to conclude that there was a trust over a "specific proportion" (10%) of the whole quantity of land.[305] With respect, this reasoning

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[298] Butler, above n 10, at 77. See also Kelly and Kelly, above n 78, at 67, and Thomas and Hudson, above n 119, at 83 – Kelly and Kelly, and Thomas and Hudson respectively provide that a trust is valid if there is an "objective determinant" of subject-matter, or if the trust is "workable".
[299] *Hunter v Moss* (Ch), above n 22, at 945-946.
[300] Worthington, above n 150, at 6.
[301] *Wakatū v AG* (SC), above n 80, at [582] per Glazebrook J.
[302] At [413]-[415].
[303] *Re London Wine*, above n 3, at 137 – "I cannot see how, for instance, a farmer who declares himself to be a trustee of two sheep (without identifying them) can be said to have created a perfect and complete trust of whatever rights he may confer by such declaration as a matter of contract…Of course, he could by appropriate words, declare himself to be a trustee of a specified proportion *of his whole flock*, and thus create an equitable tenancy in common between himself and the named beneficiary, so that a proprietary interest interest would arise in the beneficiary in an undivided share of all the flock and its produce."
[304] *Re Goldcorp Exchange*, above n 2, at 393-395 – A vendor of goods in bulk can "effectively declare himself trustee of the bulk in favour of the buyer, so as to confer pro tanto an equitable title".
[305] *Wakatū v AG* (SC), above n 80, at [426]-[432].

is somewhat insufficient.[306] The result of this analysis is that the Māori vendors had an interest in 10% of every lot of land until the tenths were allocated, which may be inconsistent with the system of lots because it would make division of the land difficult.[307]

Secondly, her Honour relied on *Re Tuck's Settlement*[308] and *Re Beckbessinger*,[309] two cases concerning certainty of objects, for the proposition that the uncertainty as to subject-matter in *Wakatū* was only "evidential uncertainty".[310] The trust property was a "fixed proportion of an identified area" which could be identified via an "agreed system of selection".[311] There was no "conceptual uncertainty", and the courts will now allow a trust to fail for mere evidential uncertainty.[312] Supporting this, Professor Parkinson has noted that in cases concerning certainty of beneficial interests the Courts are willing to actively resolve uncertainties, even to the extent of quantifying trust interests of a "reasonable" or "satisfactory" amount, or of interests for "support" or "maintenance".[313] This reasoning is summed up well by Tim Bain:[314]

> If identifiability suffices for the objects of a trust, it should also satisfy the requirement for certainty of subject-matter.

It seems to me that the willingness of the courts to cure uncertainty in trusts strongly supports the conclusion reached in Chapter Two that trusts do not, by nature, require specific identification of property to be valid. However, this point alone is not sufficient justification for finding a trust over the tenths. As concluded in Chapter Two, it also must be possible to ascertain in any given situation what property the obligations of the trustee attach to.

The lot system means there would be no need to apply following principles in a *Hunter v Moss*-type trust of the tenths. If any of the plots were damaged (for example due to fire), whether due to fault of the Crown or not, whether the plot was trust property could be determined by applying the lots system. If, in an equivalent trust between two private persons, one party became insolvent, allocation of property could again be determined via the system of lots.

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[306] For a view to the contrary, see Bain, above n 98. Bain's conclusion that *London Wine* and *Goldcorp* are authority that a *Hunter v Moss*-type trust over a portion of a fund if clearly intended by the settlor is, in my view, a mischaracterisation of both *London Wine* and *Goldcorp*.
[307] *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882 (Ch D) at 889-890.
[308] *Re Tuck's Settlement*, above n 100.
[309] *Re Beckbessinger*, above n 109.
[310] *Wakatū v AG* (SC), above n 80, at [421]-[422].
[311] At [423] and [435].
[312] At [421]-[422] and [435].
[313] Parkinson, above n 176, at 675; Thomas and Hudson, above n 119, at 73-74. For example, *Thorp v Owen* (1843) 2 Hare 610, in which Wigram VC held the courts can "measure the extent of interest which an adult…takes under a trust for his support, maintenance, advancement, provision or other like indefinite expression, applicable to a fund larger, confessedly, than the party entitled… can claim, and some interest in which is given to another person."
[314] Bain, above n 98, at 10.

But this analysis can only go so far without becoming untenable. Suppose A owns five paintings. All five paintings are different and range in value from a few hundred dollars to hundreds of thousands.[315] A declares a trust for B over two of her five paintings, but she does not specify which – instead she declares that she is holding for B, on trust, whichever painting a system of lots allocates, but she clearly intends the trust to come into effect *before* going through the system of lots.

What happens if A decides she wants to sell the most expensive painting? Presumably she would have to apply the system of lots to determine whether this painting is her own, or held on trust for B. But there lies the issue – if the trust was only over two of the five, A would be able to deal with at least three paintings exactly as she could have before declaring the trust. The trust cannot be interpreted in this way, because if A alienates one of the paintings then B loses the possibility of obtaining a painting that they otherwise might have received under the trust. If the trustee could alienate up to three of the paintings, this could only be a discretionary trust, but still over all five, or no trust at all.[316] Because of this, the trust can only be read as a trust over the entire fund else is fails for lack of certainty of subject-matter.

This is consistent with precedent. Valid trusts involving systems of selection, such as *Re Knapton*,[317] *Boyce v Boyce*[318] and *Thorp v Owen*[319], have all concerned systems of selection which operate *within* the trust. This conclusion is also consistent with my analysis of *Hunter v Moss*-type trusts over fungible property. The difference is the system of allocation itself. In a fund of fungibles, it is logical to say that the trustee's obligations attach only to a portion of the fund even if that portion is not yet identified, because the indistinguishable nature of the property means equity can assume any portion maintained is the subject of the trust. This logic does not apply when a settlor declares a trust over a portion of a fund, with the promise that she will later determine the property to be subject to trust by lot, *even if the property in that fund is fungible*. The system of selection presupposes that, if the settlor wishes to use any of

[315] If the paintings were worth the same amount, they could perhaps be treated as "wealth" rather than "things", and therefore be fungible, though this is unlikely to occur in real life. See above.
[316] Note the analysis of subjective fungibility above.
[317] *Re Knapton*, above n 120. Here the power of selection was impliedly given to the beneficiaries in the order in which they were named – first named would get first choice, next named second choice and so on. The first named beneficiaries were simply described as the testator's "nieces and nephews", so were not ordered between themselves. The judge held that if the nephews and nieces disagreed, their choice could be determined by lots.
[318] *Boyce v Boyce*, above n 120, at 476-479. Here the power of selection was given to one of the testators two daughters. The first daughter was entitled to choose one house out of several on trust, and whichever were left would go to the other daughter.
[319] *Thorp v Owen*, above n 313. Here the court determined that, where two beneficiaries are given interests in a fund of property, and one party is entitled to "support, maintenance or advancement" or some other "indefinite expression", the court can quantify this expression.

the fund for herself, she must first go through the system of selection to determine whether the property in the fund is hers or not. This means she is subject to obligations in respect of all of the property in the fund, so that the trust can only be over the entire fund.

Applying this to *Wakatū*, the lot system meant that any plot of land within the whole quantity might become one of the tenths. Because of this, a trust could only come into existence before the tenths were allocated if the Crown was limited in dealing with *all* of the land sold. To say that the trust was over the tenths alone would be inconsistent with the nature of the obligations the Crown would have assumed. A trust could undoubtedly have formed over the tenths *after* allocation,[320] with the system of selection as a condition precedent. This would merely be a contract to create a trust.[321] Alternatively, the trust could be over the entire quantity of land.

[320] *Wakatū v AG* (SC), above n 80, at [420].
[321] Kelly and Kelly, above n 78, at 106-107; Butler, above n 10, at 89; Clifford J in the High Court in *Wakatū* held that, in relation to the unidentified tenths, there was at best a "contractual obligation to create a trust – *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [246].

Chapter IV: The Whole-Fund Approach

It has been established that the approach taken in *White v Shortall* was not necessary on the facts of that case. However, this does not necessarily mean that the whole-fund could not apply in other situations. Because of this, it may have been appropriate to apply the whole-fund approach in *Wakatū*.

A. The Rationale of *White v Shortall*

Before asking how the whole-fund approach may apply to other situations, such as those involving objective systems of selection, it must first be asked how it works in the facts it has been applied to. Campbell J in *White v Shortall* set this approach out in detail. Jagot J in *Ellison* added brief comment and support,[322] but did not conclude on the issue,[323] while Briggs J in *Lehman Brothers* adopted *White* but with little discussion of the particularities of the approach.[324]

Campbell J's reasoning focuses on the particular characteristics of shares, and he concludes that was "nothing in the nature of the trust property that is inconsistent with recognizing the validity of the trust".[325] His honour reasoned that, although shares are personal property, many of the rights which arise from a shareholding do not come from specific shares. Some rights (such as the right to a dividend) can be transferred independently of shares,[326] while other rights are held by all shareholders irrespective of the number of shares they own.[327] Further, identifying shares by number is often unnecessary for transfer at Australian law.[328] Thus it was "perfectly sensible" to say that the trust was over the whole 1.5 million shares, with 222,000 on trust Mrs White and the rest on trust for Mr White.[329]

The underlying rationale of this approach need not be confined to its own facts. In fact, the whole-fund approach makes most sense when the *obligations of the trustee* are focused on, instead of the "nature of the property". If a settlor declares a trust which lacks certainty of

[322] *Ellison v Sandini*, above n 70, at [148].
[323] At [132]-[133].
[324] *Pearson v Lehman Brothers*, above n 54, at [232]. The Court of Appeal did not comment on the validity of the whole-fund approach as it was not questioned by counsel in the case, but appeared to approve of it – See *Pearson v Lehman Brothers* (CA), above n 54, at [71]-[72].
[325] *White v Shortall*, above n 62, at [211].
[326] At [198]
[327] At [197].
[328] At [204]-[209].
[329] At [210] and [212].

subject-matter, but the obligations they sought to enter into can be effected equally well by an alternative construction, then it can be inferred that the trustee intended the other construction. Jagot J in *Ellison* sums this up:[330]

> …there may be a sound basis in principle to uphold the validity of [a trust over the whole fund] on the basis that the trustee's intention must have been to create a valid trust which requires certainty of subject-matter.

A trust over the 222,000 shares alone would have been a simple trust, so Mrs White would have been absolutely entitled to the shares. She therefore could have exercised her power under the rule in *Saunders v Vautier*[331] to claim the shares at any point.[332] The trust declared by Campbell J appears to be a fixed trust of 222,000 shares for one beneficiary (Mrs White), and the balance of the 1.5 million for another (Mr White). The obligations which this trust imposed on Mr White, as described by Campbell J, are effectively identical to those in a simple trust over the shares:[333]

> The declaration of trust left him free to deal with the parcel of 1.5m shares as he pleased, provided that it was not reduced below 220,000, provided that any encumbrances on the shareholding were such that at least 222,000 were left unencumbered, and provided that the plaintiff was entitled to call for the transfer of 222,000 shares at any time after 1 August 2003.

Assuming a trust over the 222,000 shares alone would be invalid, and assuming that the trust found by Campbell J does entail the obligations his Honour described, then it seems valid to infer this must have been what was intended by Mr White. This reflects the principle outlined in *IRC v McMullen*, that if a trust deed is capable of two constructions, "one of which would make it void and the other effectual", then the effectual construction should be applied.[334] The breadth of this approach means that where the portion approach is not possible, the whole-fund approach may still apply. As will be discussed later in the chapter, this is highly relevant to the facts of *Wakatū.*

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[330] *Ellison*, above n 70, at [148].
[331] *Saunders v Vautier* [1841] EWHC J82.
[332] Thomas and Hudson, above n 119, at 161.
[333] *White v Shortall*, above n 62, at [210].
[334] *Inland Revenue Comrs v McMullen* [1981] AC 1 (HLE) at 14 per Lord Hailsham. See also Hayton, Matthews and Mitchell, above n 47, at 8.19; Cooper, above n 238, at 316; Thomas and Hudson, above n 119, at 83.

B. Conceptual Problems in the Whole-Fund Approach

There are several significant conceptual issues with regard to how the whole-fund approach has been applied in the English and Australian Courts. This further reinforces that, for *Hunter v Moss*-type trusts over fungible personal property, the portion approach is preferable. Briggs J concluded in *Lehman Brothers* that the portion approach is "conceptually much more difficult" than seeing the *Hunter v Moss*-type trust as one of "beneficial co-ownership".[335] However, on my analysis the reverse is true. Firstly, Briggs J's judgment is contradictory. His Honour relies on both *White* and Sir Roy Goode's analysis to support his conclusion[336] yet these two views are inconsistent with each other. On Campbell J's approach in *White*, the trust is over the whole fund and involves "powers of management", so the trustee can select which shares are his and which are held for the beneficiaries.[337] Conversely, on Goode's analysis, a share is simply a portion of a single legal entity (the entire share capital of the company), so there is no need for a trust over the whole fund because it does not make sense to require identification of 2% of a single asset.[338] Following the portion approach would be more appropriate. This leaves the position in England unclear.

Secondly, Campbell J's approach is uncertain on its own terms. Jagot J describes the trust in *White* as one where the beneficiary has a "proportional interest" in the "asset pool",[339] while Campbell J describes it as a "trust of a fund".[340] But this is somewhat misleading. As Professor Nolan points out, there is no such thing as ownership of a "fund" in itself. The property only ever is and can be the property *within* that fund.[341] Applied to *White*, this would mean that the only trusts possible over the entire 1.5 million shares would be either a tenancy in common (so that Mrs White was entitled to a fraction of *every* share), or a fixed trust of 222,000 shares for Mrs White and the balance for Mr White (so that Mrs White did not have an absolute interest in any particular share).

This is where the difficulty arises. By treating the trust as over a "fund" rather than the property in it,[342] the nature of the trust declared is obscured. Some commentators have interpreted the

[335] *Pearson v Lehman Brothers* (HC), above n 54, at [232].
[336] At [232].
[337] *White v Shortall*, above n 62, at [212]-[213].
[338] Goode, above n 22, at 384-385.
[339] *Ellison v Sandini*, above n 70, at [148].
[340] *White v Shortall*, above n 62, at [212].
[341] Nolan "Property in a Fund", above n 271, at 108-109.
[342] For example, *Ellison v Sandini*, above n 70, at [151] – "…nothing more than a bare trustee for Ms Ellison as the beneficial owner of that proportion of the pool"; Cooper, above n 238, at 317.

Mrs White's interest as being over a percentage of every share,[343] others as over 222,000 yet to be identified shares.[344] Jagot J in *Ellison* does not seem to distinguish between the two – her Honour refers to the "beneficiary's proportionate interest",[345] but conversely describes the Ms Ellison as a possible "beneficiary of the trust as to 2,115,000 of those shares".[346] Campbell J himself never refers to "co-ownership", and it most likely that the trust his Honour declared did not give Mrs White an interest in a percentage of every share. But the two formulations have slightly different consequences, and on each is it questionable whether the obligations of the trustee would be the same as those in a trust over the 222,000 shares alone.

As above, if the trust was over the 222,000 shares alone then Mr White could use the rest of his shares as he pleased, and Mrs White could call for her shares at any time under the rule in *Saunders v Vautier*. If the trust was over the whole fund as a tenancy in common (so that Mrs White had a partial interest in every share), the result would be generally be the same. Following *Stephenson v Barclays Bank*[347] a beneficiary who is absolutely entitled to an aliquot share of all the assets in a trust can exercise the *Saunders v Vautier* power individually, even multiple beneficiaries are entitled to a proportion, so long as the assets are divisible.[348] While this generally applies to shares, if the interests of the other beneficiaries would be harmed if the trust fund was split, then the Court may prevent the beneficiary exercising this right.[349] This has happened, for example, in cases where division would break up a majority shareholding.[350] Therefore, if the trust in *White* was a tenancy in common, while the trustee's obligations would most likely be the same, in some circumstances they might not be.

If the trust was not co-ownership, but Mrs White was instead entitled to 222,000 unidentified shares, then it is questionable whether she could require transfer of the shares. Following *Stephenson* and *In Re Marshall*[351], beneficiaries can only exercise the power in *Saunders v Vautier* individually if they are entitled to an "aliquot share" of the total trust property.[352] The

[343] Virgo, above n 33, at 92; See also *Pearson v Lehman Brothers*, above n 54, at [232] – It appears from the use of the words "beneficial co-ownership" that Briggs J interprets *White* in this way.
[344] Cooper, above n 238, at 314; Hudson, above n 12, at 104
[345] *Ellison v Sandini*, above n 70, at [148].
[346] At [149].
[347] *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882 (Ch D).
[348] *Stephenson v Barclays Bank*, above n 347, at 889. See also *In Re Marshall* [1914] 1 Ch 192 (CA) at 199; Paul Matthews "The Comparative Importance of the Rule in *Saunders v Vautier*" (2006) 122 LQR 266 at 268; Kelly and Kelly, above n 78, at 25.4.12.
[349] *Re Weiner's Will Trusts* [1956] 1 WLR 579; *Lloyds Bank plc v Duker* [1987] 3 All ER 193; *Stephenson v Barclays Bank*, above n 347, at 889-890; Matthews, above n 348, at 268.
[350] *Re Weiner's Will Trusts* [1956] 1 WLR 579 at 584.
[351] *In Re Marshall; Marshall v Marshall* [1914] 1 Ch 192, CA.
[352] *In Re Marshall*, above n 351, at 199; *Stephenson v Barclays Bank*, above n 347, at 889. This does not apply, of course, to trust which have only one beneficiary.

rule in *Saunders* requires the beneficiary to have an absolute interest in the property.[353] If the trust in *White* was of this nature, Mrs White could not say she had an "absolute" interest as she could not point to any shares and say that she owns them. However, Professor Worthington has contended it does not matter whether the beneficiary is entitled to 20% of 1000 shares or 200 shares – they can claim their portion individually either way.[354] This would seem justified if there is no difference between a percentage of a bulk of shares and quantity of shares.[355] yet as previously concluded this would also provide further support for the portion approach. Regardless of whether Mrs White could exercise the power under the rule in *Saunders v Vautier,* these problems show that the whole-fund approach is not as conceptually certain as Briggs J proposed, even when applied to shares

While this non-co-ownership trust would of course be valid, the key question on the whole-fund approach is whether a court should infer that Mr White actually intended to declare this trust as opposed to a trust over the portion of the shares alone. If the obligations are not the same in the trust inferred as the trust declared, then it will become more difficult for a court to conclude that the settlor would have intended the alternative trust, lest it risk perfecting an imperfect gift.[356]

In fact, the portion approach is not actually inconsistent with the "basal rationale" of *White v Shortall*.[357] When Campbell J discusses the "nature" of shares, he essentially concludes they are fungible, and his Honour applies essentially the same assumptions of trustee honesty, and lowest intermediate balance as the portion approach, but instead *within* the whole-fund trust.[358] It follows from this analysis the portion approach is a substantially sounder means of conceiving of the *Hunter v Moss*-type trust than the whole-fund approach.

C. The Whole-Fund Approach and Tangible Fungibles

It is worth briefly noting that, on the whole-fund approach, there likely could not be a *Hunter v Moss*-type trust over tangible property, even if fungible. If the approach in *White* was applied to ten out of 100 gold bars, the trustee's obligations would almost certainly be different to a

[353] Matthews, above n 348, at 268; Thomas and Hudson, above n 119, at 161.
[354] Worthington, above n 150, at 18. Professor Worthington relies on *Re Marshall*, above n 351, for this point. I do not read *Re Marshall* as providing for this.
[355] *Goode*, above n 22, at 383.
[356] Villiers, above n 150, at 115.
[357] Cooper, above n 238, at 318.
[358] *White v Shortall*, above n 62, at [210].

simple trust over ten bars. This is for similar reasons to above – neither beneficiary could individually require transfer of their trust property because gold bars are not divisible, even if the trust was a tenancy in common over each gold bar.[359] In general, the law views ownership of an undivided share of property as "inescapably different" from ownership of part of a whole, so that for the former there is usually no right to unilateral partition for the interest holder.[360]

D. The Whole-Fund Approach and *Wakatū*

Although it has been determined that the whole-fund approach is problematic in several ways, this does not necessarily mean that the approach cannot validly apply in other situations. As a general principle, it seems correct to say that if a declaration of trust can be construed in two ways, only one of which would create a trust with valid certainty of subject-matter, then the effective interpretation should be followed so long as certainty of intention is also present.[361] However, before considering the relevance of this to the facts in *Wakatū*, it should first be asked how flexibly the courts may infer intent to trust create a valid trust.

I. To What Extent Can Courts Infer Intention to Create a Trust with Certain Subject-Matter?

A inherent risk in the whole-fund approach is that the court might rewrite the intentions of the settlor, who may have only wished to create a trust over a specific portion of the larger fund.[362] Theresa Villiers has suggested that this is inconsistent with the fundamental principles of creation of trust set down in *Milroy v Lord*,[363] by perfecting an imperfect gift.[364]

Milroy v Lord provides that, to create a trust, the settlor must do everything necessary to make the settlement binding upon themselves. This can be by transferring the property to trustees to hold, or declaring that they themselves hold it, or alternatively by transferring the property as a gift as opposed to forming a trust.[365] But "one or other of these modes must…be resorted to,

[359] *Stephenson v Barclays Bank*, above n 437, at 889-890.
[360] Birks "Mixtures", above n 291, 229.
[361] Cooper, above n 238, at 316; Thomas and Hudson, above n 119, at 83.
[362] Villiers, above n 150, at 115.
[363] *Milroy v Lord* (1862) 4 De GF & J 264 (EWCA).
[364] Villiers, above n 150, at 115.
[365] *Milroy v Lord*, above n 363, at 274.

for there is no equity in this court to perfect an imperfect gift".[366] *Jones v Lock*[367] also emphasised that an imperfect gift cannot be saved by inferring a trust.

There is a difference, however, between making an imperfect gift into a trust, and making an ambiguously declared trust into a fully constituted trust. In *Wakatū*, there is no question of transfer to another trustee – the issue is what kind of trust the Crown adopted. More recently, the English Court of Appeal and Privy Council in *Pennington v Waine*[368] and *Choithram v Pagarani*[369] respectively both construed declarations of trust very liberally, going so far as to say that words which *prima facie* show intention to gift may really be a declaration of trust in the particular circumstances.[370]

This is not necessarily inconsistent with *London Wine*. Oliver J supposed a farmer who declared a trust over two of his ten sheep, without identifying the particular sheep.[371] His honour considered that:[372]

> …the *mere* declaration that a given number of animals would be held upon trust could not… *without very clear words pointing to such an intention*, result in the creation of an interest in common in the proportion which that number bears to the number of the whole at the time of the declaration.

"[V]ery clear words pointing to such an intention" appears to concede that, if the farmer clearly intended to create a trust over two of his sheep, the courts might be justified in finding a valid tenancy in common over the entire flock.[373]

II. Could a Workable Tust be Inferred over the Tenths?

It is not the focus of this dissertation to consider whether there was sufficient certainty of intention for trust in *Wakatū*. Nevertheless, because intent is central to the whole-fund approach, it is worth asking whether an inferred trust over the whole quantity of land is at least

[366] At 275.
[367] *Jones v Lock* (1865) LR 1 Ch App 25 (CA).
[368] *Pennington v Waine* [2002] 1 WLR 2075 (CA).
[369] *T Choithram International SA v Pagarani* [2001] 1 WLR 1 (PC).
[370] Kelly and Kelly, above n 78, at 108-109; Pettit, above n 10, at 104-105, 107; Hudson, above n 12, at 230-232. See also Eden, above n 139, at 6-7. However, the approach appears to have somewhat constrained since these cases following the decisions in *Curtis v Pullbrook* [2011] EWHC 167 (Ch) and *Kaye v Zeital* [2010] EWCA Civ 159 – See also Hudson, above n 12, at 232-234.
[371] *Re London Wine*, above n 3, at 137.
[372] At 137.
[373] It should be noted that such a trust would likely encounter the same issues of difference of trustee obligation previously discussed in relation to the trust in *White v Shortall*. This would provide justification for "very clear words" being required.

tenable on the facts. The essential question, as above, is whether the trustee's obligations would the essentially the same whether the trust was over the tenths alone or over all the land sold.

This situation is broadly similar to that in *White*. A *Hunter v Moss*-type trust appears to have been declared[374] over a portion (the tenths) of a larger quantity, but, as previously concluded such a trust lacks certainty of subject-matter. Yet a trust over the entire fund may be possible. However, there are several key differences between this factual scenario and that in *White* and *Hunter v Moss*.

A declaration of trust over 50 of one's 950 shares does not imply the settlor has put their mind towards the entire quantity. Conversely, in *Wakatū*, all dealings between the Crown and Māori necessarily involved the entire quantity of land.[375] The system of lots reinforces this. Firstly, the lots process was not performed only to exclude the tenths. It was also used to allocate sections to settlers.[376] Secondly, consider once more the paintings example raised in Chapter Three. The fact that A set up a system of selection from her five paintings surely implies, *prima facie*, that she sees her obligations as relating to all five paintings, not just the two which will emerge from selection.

Finally, an agreement between the Crown and the New Zealand Company in 1840, in which the Crown stated it would assume responsibility for reserving the tenths, provided that (emphasis added):[377]

> It being also understood that the Company have entered into engagements for the reservation of certain lands for the benefit of the Natives, it is agreed that, *in respect of all the lands* so to be granted to the Company as aforesaid, reservations of such lands shall be made for the benefit of the Natives by Her Majesty's Government

It would not be an interpretive stretch to say this could be read as a trust over the entire quantity of land.

Of course, if the circumstances indicate that a trust over the whole quantity could *not* have been intended, this would strongly imply that the courts should not infer such a trust. In *Ellison*, because the declaration of trust was made by the Family Court, Jagot J interpreted the declaration strictly – it simply could not be interpreted as creating a trust over the whole fifteen

[374] Or, more accurately in the case of *Wakatū*, *assumed* by the Crown. See *Wakatū v AG* (SC), above n 80, at [413]-[415].
[375] At [1], [12], and [20]. The original sale contract and the Spain award which vested title in the Crown both related to the whole quantity of land.
[376] At [522] per Glazebrook J.
[377] At [111] per Elias CJ.

million shares.[378] Similarly, in *Goldcorp*, Lord Mustill concluded Goldcorp could not have intended to create a trust over all their bullion in stock given the circumstances.[379]

Boyce v Boyce[380] may also be relevant. There, one of the testator's daughters was entitled to choose one of several houses, and whichever she did not choose would pass to her sister. It was held that, because the first daughter passed away before the death of the testator, the trust in favour of her sister failed.[381] In *Wakatū*, the system of lots was not able to be carried out post 1848.[382] It could be said that, because of this, even if there was a trust over the whole area of land it failed due to the failure of the system of selection. On the other hand, there have been cases involving "systems of selection" which have failed, but because the gift was of a defined portion of a larger quantity the beneficiary was allowed to select.[383]

The Crown's obligations to set aside the tenths may have been purely contractual, but there could also have been a trust over all the land sold. If it was determined, in *Wakatū*, that the trust obligations were intended to arise before the ascertainment of the tenths,[384] then given the above it seems to me that there would be a very strong basis for inferring a trust over the entire quantity of land.

[378] *Ellison v Sandini*, above n 70, at [158].
[379] *Re Goldcorp Exchange*, above n 2, at 393-394.
[380] *Boyce v Boyce*, above n 120, at 476-479.
[381] At 478-480.
[382] *Wakatū v AG* (SC), above n 80, at [27].
[383] Thomas and Hudson, above n 119, at 86.
[384] As both Elias CJ and Glazebrook J concluded – *Wakatū v AG* (SC), above n 80, at [416] per Elias CJ and [572]-[576] per Glazebrook J.

Conclusion

If, in future, a New Zealand court is faced with a possible *Hunter v Moss*-type trust, then a choice will have to be made. The validity of such a trust could be rejected entirely, or the trust could be upheld via the portion approach or whole-fund approach.

In light of this, this dissertation has achieved two things. Firstly, it has set out an argument for adoption of the portion approach. Trusts, by nature, are a construct whereby someone holds property to which obligations attach. Whether these obligations are proprietary or personal, there is no strong reason to suppose that trusts require specifically identified property to form. Because of this, a trust may arise so long as the trust property is *identifiable* when the need arises. By applying following principles, a trust over a portion of "fungible" property (meaning any property which is practically indistinguishable) is perfectly viable, as the property will always be identifiable. This approach is relatively straightforward and easy to apply, and generally fits with the approaches of the New Zealand Courts in *Wakatū* and *Priest v Ross Asset Management*. By contrast, the whole-fund approach as applied in Australia and England is problematic. The viability of the portion approach undermines its premise, and it is questionable whether it is conceptually coherent even on its own terms, given that it requires closely analysing the obligations entailed in different types of trusts to be applied properly.

Secondly, this dissertation has illustrated the different consequences that follow from the whole-fund approach compared to the portion approach, through examining the possibility of a *Hunter v Moss*-type trust over non-fungible property chosen by a system of selection. The two approaches may be reconcilable – if a trust is not possible under the portion approach, then the underlying rationale of the whole-fund approach, that where two trusts constructions are possible and only one will be effective, equity should choose the effective construction, may apply. Indeed, the whole-fund approach very arguably justifies there being certain subject-matter on the facts in *Wakatū*.

The uncertainty in certainty of subject-matter need not persist. The portion approach, by applying existing trust principles, provides a clear and fair solution that the Australian whole-fund approach does not.

Bibliography

A. Cases

I. New Zealand

Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh [1998] 3 NZLR 171 (CA)

Liggett v Kensington [1993] 1 NZLR 257 (CA).

Priest v Ross Asset Management (In liq) [2016] NZHC 1803.

Proprietors of Wakatū v Attorney General [2014] NZCA 628.

Proprietors of Wakatū v Attorney-General [2012] NZHC 1461.

Proprietors of Wakatū v Attorney General [2017] NZSC 17.

Re Beckbessinger [1993] 2 NZLR 362 (HC).

Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett [1994] 3 NZLR 385 (PC).

II. Australia

Ellison v Sandini Pty Ltd [2018] FCAFC 44.

Stephens Travel Service International Pty. Ltd v Qantas Airways (1988) 13 NSWLR 331 (NSWCA).

White v Shortall [2006] NSWSC 1379.

III. England

Boscawen v Bajwa [1995] 4 All ER 769

Boyce v Boyce (1849) 16 Sim 476.

Curtis v Pullbrook [2011] EWHC 167 (Ch)

Evans v Rival Granite Quarries Ltd [1910] 2 KB 979

Foskett v McKeown [2000] 3 All ER 97 (HLE)

Hunter v Moss [1994] 1 WLR 452 (EWCA).

Hunter v Moss [1994] 1 WLR 614 (HLE).

Inland Revenue Comrs v McMullen [1981] AC 1 (HLE)

In re Clifford [1912] 1 Ch. 29.

In re Clowes [1994] 2 All ER 316 (CA).

In re Cheadle [1900] 2 Ch. 620.

In re Diplock [1948] Ch 465 (EWCA)

In re Kayford [1975] 1 WLR 279 (Ch D).

In re Marshall; Marshall v Marshall [1914] 1 Ch 192 (EWCA)

In re Nanwa Gold Mines Ltd. [1955] 1 WLR 1080

In re Wait [1927] 1 Ch 606 (CA).

James Roscoe (Bolton) Ltd v Winder [1915] 1 Ch 62 (Ch. D)

Job v Job (1877) 6 Ch D 562

Jobson v Palmer [1893 1 Ch 71

Jones v De Marchant (1916) 28 DLR 561

Jones v Lewis (1751) 2 Ves Sen 240

Jones v Lock (1865) LR 1 Ch App 25 (CA)

Kaye v Zeital [2010] EWCA Civ 159

Lloyds Bank plc v Duker [1987] 3 All ER 193

MacJordan Construction v Brookmount [1992] BCLC 350

Milroy v Lord (1862) 4 De GF & J 264 (EWCA)

Palmer v Simmonds (1854) 2 Drew 221.

Pearson (Steven Anthony) v Lehman Brothers Finance SA [2010] EWHC 2914 (Ch).

Pennington v Waine [2002] 1 WLR 2075 (EWCA).

Re Denley's Trust Deed [1969] 1 Ch 373.

Re Golay's Will Trusts [1965] 2 All ER 660.

Re Hallet's Estate (1880) 13 Ch D 696 (EWCA)

Re Harvard Securities Ltd (in liq.) [1997] 2 BCLC 369 (Ch).

Re Knapton [1941] Ch 428.

Re London Wine Company (Shippers) Ltd [1986] PCC 121.

Re Rose [1952] Ch 499.

Re Staplyton Fletcher [1994] 1 WLR 1181

Re Tuck's Settlement Trusts [1978] Ch 49 (CA).

Re Weiner's Will Trusts [1956] 1 WLR 579

Target Holdings v Redferns [1996] 1 AC 421 (HLE)

T Choithram International SA v Pagarani [2001] 1 WLR 1 (PC).

Thorp v Owen (1843) 2 Hare 610

Wallersteiner v Moir (No 2) [1975] QB 373

Wilkinson v North [2018] 4 WLR 41 (EWCA).

Stephenson v Barclays Bank Trust Co Ltd [1975] 1 WLR 882

IV. Hong Kong

Re CA Pacific Finance Limited [2000] 1 BCLC 494.

V. United States

Casswell v Putnam 120 NY 153 (NY 1890).

Rollestone v National Bank of Commerce in St. Lous 252 SW 394 (Mo. 1923).

B. Legislation

I. New Zealand

Contracts and Commercial Law Act 2017

Trusts Bill 2017 (290-1)

II. England

Sale of Goods (Amendment) Act 1995

Sale of Goods Act 1976

C. Books and Chapters in Books

Peter Birks "The Necessity of a Unitary Law of Tracing" in Ross Cranston (ed) *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Press, Oxford UK, 1997) 239.

Peter Birks "Mixtures" in Norman Palmer and Ewan McKendrick (ed) *Interests in Goods* (2nd ed, LLP Reference Publishing, London, 1998) 228.

Andrew S. Butler and Tim Clarke *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009).

Michael Bridge "Certainty, Identification and Intention in Personal Property Law" in Paul S Davies and James Penner (ed) *Equity Trusts and Commerce* (Hart Publishing, Oxford, 2017) 87.

Paul Eden "*Re Goldcorp Exchange* Revisited" in Elizabeth Cooke (ed) *Modern Studies in Property Law Volume 3* (Hart Publishing, Oxford, 2004).

David Hayton "The Irreducible Core Content of Trusteeship" in AJ Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996).

David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (19th ed, Wellington, LexisNexis, 2016).
Alastair Hudson *Equity and Trusts* (9th Ed, Routledge, New York, 2017).
Greg and Chris Kelly *Law of Trusts and Trustees* (7th Ed, LexisNexis, Wellington, 2013)
FH Lawson and Bernard Rudden *The Law of Property* (3rd ed, Oxford University Press, Oxford, 2002).
John McGhee *Snell's Equity* (33rd Ed, Thomson Reuters, London, 2015)
Ewan McKendrick "The Passing of Property in Part of a Bulk" in Norman Palmer and Ewan McKendrick (ed) *Interests in Goods* (2nd ed, LLP Reference Publishing, London, 1998).
RP Meagher, WMC Gummow and JRF Lehane *Equity Doctrines & Remedies* (3rd edn, 1993, Butterworth Law NZ).
Phillip H. Pettit *Equity and the Law of Trusts* (12th ed, Oxford University Press, Oxford, 2012).
AW Scott, ML Ascher and WF Fratcher *Scott on Trusts* (4th ed, Aspen Publishers, New York, 1987).
L Sealey and R Hooley *Text and Materials in Commercial Law* (Butterworths, London, 1994).
Geraint W. Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010).
Graham Virgo *The Principles of Equity and Trusts* (1st Ed, Oxford University Press, Oxford, 2012).

D. Journal Articles

Tim Bain "Some of mine is yours" (2018) NZLJ 7.
Peter Birks "Establishing a Proprietary Base (*Re Goldcorp*) (1995) RLR 83.
Alison Clarke "Property Law" (1997) 50 CLP 119.
Henry Cooper "Uncertainty of Trust Property Within a Pool of Shares" (2018) 45 Aust B.
Roy Goode "Are Intangible Assets Fungibles?" (2003) 309 LMCLQ 379.
Roy Goode "Ownership and Obligation in Commercial Transactions" (1987) 103 LQR 433.
Ross Grantham and Charles Rickett "Tracing and Property Rights: The Categorical Truth" (2003) 63 MLR 95.
David Hayton "Ascertainability in Transfer or Tracing of Title – *Re Goldcorp Exchange*" [1996] LMCLQ 449.
David Hayton "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 96

Peter Jaffey “Explaining the Trust” (2015) 131 LQR.
Paul Matthews “The Comparative Importance of the Rule in *Saunders v Vautier*” (2006) 122 LQR 266.
Ewan McKendrick “Unascertained Goods: Ownership and Obligation Distinguished” (1994) 110 LQR 509.
RC Nolan “Equitable Property” (2006) 122 LQR 232.
RC Nolan “Property in a Fund” (2004) 120 LQR 108.
Mark Ockelton “Share and Share Alike” (1994) 53 CLJ 27.
Jessica Palmer “Theories of the Trust and What They Might Mean for Beneficiary Rights to Information” (2010) 2 NZLJ 541.
Patrick Parkinson “Reconceptualising the Express Trust” (2002) 61 CLJ 657.
JE Penner “The (True) Nature of a Beneficiary’s Equitable Interest under a Trust” (2014) 27 CLJ 473.
Theresa Villiers “Certainty of Subject-matter in Trusts: The Controversy Continues” 9 KCLJ 112.
Ruth Wilson “Lord Browne-Wilkinson’s ‘Identifiable Trust Property’ Principle” (1998) 6 Waikato L. Rev. 86.
Derek Whayman “Obligation and Property in Tracing Claims” (2018) 2 Conv. 157.
Sarah Worthington “The Disappearing Divide Between Property and Obligation” (2007) 42 Tex Int’l LJ 917.
Sarah Worthington “Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts” (1999) JBL 1.

E. Other

Gault on Commercial Law (online loose-leaf ed, Thomson Reuters).
Oxford English Dictionary (Online Version October 2018, Oxford University Press).