Comments on papers by Bill Patterson and Andrew Butler

Introduction

The questions of when is a trust a trust, or a trustee a trustee, are ones of such fundamental importance to the law of trusts that it is somewhat surprising that we are gathered here in 2009 to debate such issues. Speaking very much as the quasi-trust lawyer that I am, I must ask those of you with more invested in the area; what have you all been doing for the last 200 years, that you haven't figured this out yet?

Yet as has been demonstrated by both presenters in their papers, these core issues are very much live in the law of trusts today. The abstract questions of whether a trust is formed by the unilateral action of the settlor, or bilateral agreement between the settlor and the trustee, and the related questions of whether the obligations that bind the trustee flow from their agreement with the settlor to act as trustee, or from the fact they hold property on behalf of a third party, are issues that have yet to be fully explained, but which can have significant practical consequences.

The particular point in the presenters' papers that I wanted to comment on, was their inclination to use an analogy with contract law to help explain the answers to the questions they pose, and to justify the results reached in some of the cases they discuss. As a commentator, I am in the fortunate position of not having to provide my own alternative solution to the problems they address, but I am not convinced that the contract analogy is as helpful as has been suggested. I am especially not convinced that the contractual ideal of consent is a helpful justification for the imposition of the range of duties that lie on a trustee.

Why contract matters to the presenters

There is no doubt that an express trust operates by way of obligations that bind the trustee. As Dr Butler discusses in detail in his paper, without there being some obligations at least to bind the trustee, there can be no trust. The more difficult issue, as I understand it, is in describing the source of these obligation, a question which depends of how you understand the law of trusts, and in particular the express trust. Mr Patterson, in his comprehensive review of the writing in this area, presents two basic alternatives:

(a) A proprietary based model, where the obligations on the trustee are seen as sourced in ownership rights held by the beneficiaries that are enforceable against the trustee; or

(b) An obligations based model, where the obligations on the trustee are sourced in their agreement to act as trustee.

These different conceptions of the source of a trustee's obligations, are reflected in the debate over the meaning of one of the three certainties in trust formation; certainty of intention. The question Mr Patterson discusses, and which has arisen in recent New Zealand case law, is whether it is sufficient for the settlor alone to intend the creation of a trust, (an idea that I take as being consistent with the idea that the obligations of a trustee are ultimately proprietary based), or whether there must also be both an intention of the settlor to create a trust, and an intention by the trustee to accept those trusts. The obligations of the trustee in this instance are ultimately sourced in their agreement to act as trustee.

Mr Patterson makes no secret of the fact that, in his view, express trusts should be understood as essentially "obligations" based, and therefore require the agreement of a trustee before they come into being. Both he, and the various authors he refers to, present this as a "contract-like" notion. Mr Patterson recognises that it is not a truly equal bargaining process, as many of the terms of the trust will be of no significance to the trustee, and we can expect no involvement in their preparation. However, he explains that the trustee does have the right "to be involved in agreeing the terms upon which the trust property will be held and administered by the trustee." Acceptance by the trustee of the obligations the settlor wishes to impose are crucial to the formation of the trust, and provides an explanation as to why the trustee is bound to various obligations.

Applying that reasoning to the context of sham trusts, common intention must be shown because:

(a) Sham is a principle that has come from contract law and requires a common intention;

(b) Trusts are no different from contracts in terms of formation, in that they require a common intention; therefore

(c) Common intention should also be necessary in order to show that a trust is a sham.

I sense that Dr Butler is less keen on the bilateral/contract and analysis of express trusts, and has some sympathies for a proprietary-based explanation for trustee obligations. Nevertheless, the contract ideal of contractual freedom underlies the conclusion that all "default" terms that bind a trustee can be excluded with some limited (and extreme) exceptions. The starting

presumption in the cases he analyses is one of contractual freedom, in that there is nothing to prevent the settler and trustees from excluding all obligations, except those that go to the core of the trust concept.

The question I want to raise for discussion, however, is whether this contract analogy offers us too easy a response to these questions, namely sham and the limits on the rights to except liability. How strong is the contract/trust analogy? More particularly, how much weight should we put on the one clearly consensual aspect of the trustee position; their initial voluntary acceptance of the role, and possibly also their continuing consent to remain in that role?

Why we like contract

There is no doubt that lawyers like the idea of contract. We like the fact that it is the parties themselves, and not the courts, that create obligations that bind. All we ask of the Court is that it ascertains the exact agreement between the parties, if there is any uncertainty in that regard, and then enforces it. In respect of the justificatory question of why you should be bound to any contract term, the first step in most explanations is; "well, because that is what you agreed." This idea of actual consent, determined on an objective basis, is what animates most of the general doctrines of contract law.

This contractual paradigm, however, seems rather different to the situation of trust formation. There will in most situations be voluntary acceptance of the role of trustee by the trustee, but can we really say that this idea of trustee consent and agreement operates (or is even necessary) at anything more than this most basic level? Dr Butler identifies 13 different default duties that lie on a trustee. They are a "towering hydra of obligations" that would make a reasonable trustee "quail". Yet having heard Dr Butler describe these duties in detail, it hardly seems realistic to say that any but the most expert professional trustee would have an effective knowledge of the extent of these obligations, certainly to the extent where we cold say they have actively consented to them. If what we are looking for is actual consent to these obligations by the trustee, it seems artificial to say that this exists in many situations of express trusts.

Another aspect of this problem of actual consent is the lack of certainty as to the obligations that are apparently being accepted by the trustee. Dr Butler freely admits in his paper that, while he has been able to distil the trustee's duties down to 13 particular duties, others may describe these duties in different ways. Many of the duties he described have changed over time, and

will change again in the future. Is it therefore helpful to say that these obligations are ones accepted by a trustee, when it is likely that neither the settlor nor the trustee could describe them accurately if asked to do so at the time of formation?

Reading the papers of the two presenters, there is a suggestion of three partial responses to this problem of a potential lack of consent:

(a) Trustees will know about these duties because most trustees in the modern environment are professional and skilled;

(b) regardless of whether the trustee knew what they were getting into, they will be "taken" to have consented to these obligations because they have consented more generally to act as trustee; or

(c) these are "default" obligations that the parties are free to exclude if they choose to, and the failure to do so implies some form of active consent.

In respect of the first of these obligations, it is clear that regardless of the extent to which professional trustees have become a feature of modern trust law, their level of knowledge can hardly be used to form the standard for all trustees. If it were, then those who do know of the full extent of their actual obligations, will likely take steps to avoid them through various exclusions of liability, whereas those who probably didn't know about them will be the only ones bound.

In respect of the two other alternatives, it seems to me that we are talking about something very different to any inquiry into what the parties actually agreed. We are talking here more of a "deemed" agreement rather than actual agreement. Once we move from ideas of actual acceptance, even if it is objectively determined, to "deemed" acceptance, it seems to me the contractual model loses much of its explanatory force. The primary question it leaves open is why you are deeming these duties to be accepted?

These issues become particularly apparent, in my view, when we return to the question of whether there must be common intention between the settlor and the trustee for the formation of a trust. If we are looking for a common intention between the settlor and the trustee, exactly what do we say the trustee must have intended? We can say that they intend to be a trustee, and where there is a written trust deed, we can probably assume a familiarity with those basic terms. But many of the default rules described by Dr Butler are unlikely to be dealt with in any

written form – except to exclude them. To say that a trustee would have any detailed understanding of those obligations is to assume a level of legal knowledge that perhaps only the most experienced of professional trustees may hold. Yet common intention seems to suggest such actual intention.

I do not intend to argue that the contract analogy is completely unhelpful in the trust context. As many of the writings referred to by Mr Patterson demonstrate, many of the features of trust law are usefully developed by reference to contract principles (sham itself being a good example). I also have no problem with Courts simply saying that there are certain standards of conduct we expect from a person who accepts the role of a trustee of property on behalf of another, and while you are free to exclude those duties, if you do not we will impose them on you. However, it seems to me that when we are talking about why we have a range of duties that bind a trustee, the failure to exclude those duties is not the same as a positive acceptance of those duties. If what we are looking for is an explanation or justification for those duties, it is not clear to me that it can be found in contractual notions of consent.

The assumption of responsibility in tort law

A similar issue has arisen in the law of torts. Even the most committed trust lawyer among you will remember the decision of the House of Lords in *Hedley Byrne v Heller*. In that case, a bank was asked by a third party to provide a credit reference for one of their customers. They agreed to do this, but did so negligently, and the third party suffered financial loss as a result.

The court in that case found that the bank in providing the credit reference, owed a duty of care. They were under no obligation to the plaintiff to do anything at all, but having decided to provide that reference they had "assumed a responsibility" to the plaintiffs. Lord Diplock liked the claim to one of "near-contract", that only lacked consideration. Of course, as you will also remember, the claim failed on the facts of that case because, in providing the credit reference, the bank had expressly excluded liability for any losses suffered as a consequence of any reliance on the credit report. Again, using a contract based analogy, it could hardly be said that the defendants as a factual matter had assumed responsibility to the plaintiffs, when at the time they provided their reference they expressly disclaimed such responsibility.

Hedley Byrne v Heller, was the start of modern negligence law, in its recognition of a duty of care to prevent pure economic loss. Courts historically and instinctively did not like recovery for pure economic loss, and were always on the search for some animating principle to explain its imposition, and guide its expansion. After the diversion caused by *Anns*, the idea of the voluntary assumption of liability became one of the favoured tools of Courts and tort-law theorists alike, to explain the imposition for of duties of care in respect of pure economic loss.

It is a concept that has now, however, fallen out of favour almost completely. The reason is that, while attractive as a theory, the Courts eventually realised that in the majority of cases, it was very difficult to say that the defendants in any meaningful sense were accepting the obligations the court was now imposing. The reality was that in most situations, the assumption of responsibility was a conclusion the court reached from the existence of a variety of other factors – it was deemed by the Court, rather than accepted by the parties. In that circumstance, it made more sense to focus on the reasons for that conclusion, rather than the conclusion itself.