The irreducible core content of modern trust law

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Abstract

In recent years, the emergence of the trust Protector and Enforcer, and the widespread use of devices like letter of wishes and settlor’s reserved powers have enabled settlers to check the ever-widening powers and discretions of the trustee. However, these innovative instruments have also affected the fundamental understanding of the trust concept. This article argues for the presence of minimum requirements—in accordance with the obligational theory of trusts—in each of these instruments to ensure that their use will not jeopardize the very existence of the trust arrangement in which they function.

Key points

- Increasing fragmentation of the traditional trust—power devolved to innovative instruments of Protector, Enforcer, letter of wishes and settlor’s reserved powers.
- But an ‘irreducible core content’ must exist if there is to be a trust at all
- Concept of the trust as obligation sets appropriate limits to the use of these innovative instruments.
- It ensures that they will not jeopardize the fundamental existence of a trust—its ‘irreducible core content’.

Introduction

It is perfectly well-known that [the rules of Courts of Equity] have been established from time to time—altered, improved, and refined from time to time. Sir George Jessel MR

The law of trusts today is an area of law which is characterized by its fluidity and dynamism—witnessing its fair share of changes and innovations over the past few decades. This is in part due to the modern tendency in equity to place less emphasis on the detailed rules formulated in cases, and attach much more weight to the principles underlying these rules, treating these rules more like guidelines which a court can refer to in applying the principles.2 One of the most important and intriguing trends has been the increasing fragmentation of the traditional trust by the devolution of the powers historically held by the trustee, with the recently created offices of Enforcer and Protector, and the devices of settlor’s

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1. Re Hallett’s Estate (1880) 13 Ch. D. 696 at 710.
2. Re Montagu’s Settlements [1987] Ch. 264 at 278 (Ch. D., per Megarry V-C.)
reserved powers and the letter of wishes playing prominent roles in this process. The consequence is that the trustee, the traditional ‘owner–manager’ of the trust, finds his role increasingly under threat by these innovative instruments which are designed to act as a form of check and balance on the extensive powers and discretions that a trustee possesses, especially when the trust involved is a discretionary trust.

The recent creations of the offices of Protector and Enforcer, and the widespread use of letter of wishes and settlor’s reserved powers highlight one of the most important qualities inherent in a trust—flexibility. This has contributed substantively to the attractiveness of the trust as a commercial device today, capable of being used in a variety of contexts, ranging as far as the imagination and creativity of lawyers can go in accommodating the commercial interests of clients. In addition, the absence of rigid formalities for the creation and operation of trusts, unlike companies, further emphasizes the usefulness of the trust in achieving commercial purposes, provided that there are no tax disadvantages in its use and no practical disadvantages flowing from its lack of legal personality. As Maitland observed, the development of the trust concept represents the ‘greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence’. However, it is argued that when we go to the heart of the trust relationship, there must be certain elements—an ‘irreducible core content’—which must exist if there is to be a trust at all. This article addresses the fundamental issue of the extent to which these innovative instruments have affected our traditional understanding of the trust concept, and identifies the crucial elements which must be present in each instrument to ensure that the trust concept is not jeopardized.

When we go to the heart of the trust relationship, there must be certain elements—an ‘irreducible core content’—which must exist if there is to be a trust at all

The conception of the trust as obligation

The obligational theory of trusts defines a trust as an equitable obligation, whereby the trustee is bound to deal with trust property owned by him as a separate fund, distinct from his private patrimony, for the benefit of the beneficiaries or for the furtherance of a purpose. This conception of the trust as an equitable obligation originated from Prof. David Hayton, who argued that at the core of the trust concept lies a duty of confidence which is imposed upon a trustee with regard to particular property, and is positively enforceable in a Court of Equity by a person. This entails that the right of the beneficiaries to enforce the trust and to make the trustees account for their actions in the context of the trust, and the resultant duties owed by the trustees to the beneficiaries are at the heart of the trust concept.

3. A trustee is not concerned with management as agent or bailee of assets owned by another. See Chief Commissioner of Stamp Duties v ISPT Pty Ltd., (1999) 2 I.T.E.L.R., 1 at p. 15, (New South Wales Court of Appeal, per Mason P.).
5. See Austin W. Scott, ‘The Trust as an Instrument of Law Reform’, 31 Yale L. J., 457 at 457. Scott notes that while ‘Maitland’s dictum at first blush may seem to be an exaggeration, but when it is considered how much of the progress of the English law is due to the doctrines of the law of uses and trusts, its truth would seem to be clear’.

In a trust, a person called the trustee owns assets segregated from his private patrimony and must deal with those assets (the ‘trust fund’) for the benefit of another person called ‘the beneficiary’ or for the furtherance of a purpose.
This theory received judicial acceptance in the English Court of Appeal case of Armitage v. Nurse, where Millet, L. J. held that:

There is an irreducible core of obligations owed by the trustee to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

Millet, L. J. did not accept that these core obligations included the duties of skill and care, prudence and diligence, and hence upheld a clause which exempted a trustee from liability for loss or damage unless those were caused by the trustee’s own actual fraud. However, he held that there is a minimum level of obligations which are necessary to give substance to the trust—the duty of the trustees to perform the trust honestly and in good faith for the benefit of the beneficiaries.11

All of the duties which must be present in the irreducible core flow from the central duty of the trustee having to account to his management of the trust fund. In English law, this necessitates that the trust should have a human beneficiary who has standing to enforce the trustee’s duties.12 To ensure that this central duty is enforceable against the trustee, it is necessary that the beneficiaries, together with objects of a fiduciary power of appointment who have a realistic chance of benefiting under an appointment,13 have a right to obtain the trust accounts from the trustee so as to enable them to falsify or surcharge those accounts. Moreover, the trustee is also under a concomitant duty to take reasonable steps to notify the beneficiaries that they are in fact beneficiaries of the trust. This gives meaningful substance to the duty of trustees to account to the beneficiaries, since beneficiaries can only enforce the trustee’s right to account if they are aware of their positions as beneficiaries and to identify the trustee.14

The application of this duty was illustrated in Re Murphy’s Settlement, where the court held that the settlor had to provide the names and addresses of the trustees of a foreign trust to his son, a beneficiary under the discretionary trust who had fallen out with the settlor, so that the latter can apply to the trustees for a discretionary distribution.

This article expressly adopts the obligatory theory of trusts as the basis of its analysis of the offices of Protector and Enforcer, and the devices of letter of wishes and settlor’s reserved powers. The increasing fear of potentially litigious beneficiaries has led settlers to consider the extent to which they can restrict and nullify key elements of the trust, such as the beneficiaries’ rights to information and the duty of the trustees to account to the beneficiaries for the exercise of their powers and discretions.15 In response, the concept of the trust as obligation sets

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12. See Morice v Bishop of Durham [1804] 9 V. & S. 399 at 404–405 per Sir William Grant M. R.
13. See Re Murphy’s Settlement [1998] 1 W.L.R. 282 at 291 (Ch. D., per Neuberger J.), where the court treated the claimant like an object of a power of appointment as in Re Manistry’s Settlement, [1974] Ch. 17 (Ch. D.). As Millet, L.J. noted in Armitage v Nurse, [1998] Ch. 241 at 261 (C. A.), ‘every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not’. This means that beneficiaries with a life interest or an interest in remainder, whether in income or in capital, or vested or contingent, have accounting rights. See Re Tillott, [1892] 1 Ch. 86 at 89 (Ch. D., per Chitty J.). This also includes beneficiaries under discretionary trusts. See Re Murphy’s Settlement, [1998] 1 W.L.R. 282 at 290 (Ch. D.), where Neuberger J. held that:

Mr. McDonnell said that, as a discretionary object of the defendant’s 1965 settlement, the plaintiff is entitled to ask the trustees for information as to the nature and value of the trust property, the trust income, and as to how the trustees have been investing and distributing it… On behalf of the defendant, Mr. Blackett-Ord, quite rightly in my view, accepts that the plaintiff does, as a matter of principle, have these rights in relation to the defendant’s 1965 settlement.

14. See Scally v Southern Health & Social Services Board [1992] 1 A. C. 294 at 307 (H. L.), where Lord Bridge held that:

[I]t is not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the terms of the contract in question to the employee’s attention, so that he may be in a position to enjoy its benefit.

15. See D. Hayton, ‘The Irreducible Core Content of Trusteeship’ in A. J. Oakley (ed.), Trends in Contemporary Trust Law (Oxford: Oxford University Press, 1996) at 48. This trend is aided by the facilitative laissez-faire approach of English law in this area of the law, allowing settlers to generate their own laws for their trusts as long as they are not inconsistent or repugnant to the very trust arrangements which they are purporting to create. Other limitations are these laws must not be uncertain, administratively unworkable or contrary to public policy.
appropriate limits to the free will of the settlor to achieve these aims which are incompatible with the fundamental existence of a trust. Moreover, it is argued that this theory strikes an appropriate balance between the two extreme conceptions of the trust touched upon below, representing the minimum requirements which must exist to ensure that the trust is a functioning institution.

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Alternate theories of the trust

Apart from the obligational theory of trusts, two other important theories have also been advanced to explain the concept of the trust. The first is the organizational theory, which states that there is a strong contract-like basis for trusts to be regarded as ‘deals’ entered into by the settlor and the trustees for the benefit of the beneficiaries. It postulates that the word ‘trust’ is nothing more than a bare label which settlors can choose to attach to a property-holding arrangement. As such, the existence of the ‘trust’ is inextricably linked to the settlor’s subjective desires, and is devoid of any substantive content. This theory is consistent with the view of trust practitioners that trusts are not simply monolithic impositions by the law, but a flexible concept in which content and purpose are largely dependent on the aims of the settlor who is putting it into use. However, the appeal of the theory is diminished by the fact that it does not answer the all-important question of whether there needs to be a limit to the settlor’s freedom and ability to dictate the terms of the trust. Specifically, can a settlor exclude whatever terms he wishes and still create a property-holding arrangement which can be described as a trust? Or is there an irreducible core content which must be present for there to be a trust?

The second theory views the true conception of the trust as being independent from the variety of property-holding arrangements which settlors have instituted. Instead, its true meaning can be constructed a priori from a closed set of legal axioms which is dependant on the distinction between rights in rem and rights in personam. However, proponents of this theory have failed to fully explore its implications for the law of trusts, and have left many important questions unanswered. For example, the theory does not resolve the question of how a right in property arising under a trust is to be distinguished (if at all) from a mere contractual right to property, if the former right is capable of amounting to an interest in property.

The obligational theory of trusts strikes a balance between these two extreme conceptions of trust, holding that the distinctive feature of the trust is the ‘irreducible core content’ which it must contain to be valid and enforceable. This core content represents the minimum set of duties which must be present if one of the most important features of the trust is to be preserved—the distinction between


In truth, the trust is a deal, a bargain about how the trust assets are to be managed and distributed. . . The distinguishing feature of the trust is not the background event, not the transfer of property to the trustee, but the trust deal that defines the powers and responsibilities of the trustee in managing the property.

17. See J. H. Langbein, ‘The Secret Life of the Trust: The Trust as an Instrument of Commerce’, (1997) 107 Yale L. J., 165 at 166. Langbein notes that ‘one of the great attractions of the trust for the transaction planner who is designing a business deal is the convenience of being able to absorb these standards into the ground rules for the deal, merely by invoking the trust label’.


19. It is important to note that Pretto-Sakmann does not accept that a proprietary interest is created merely because a trust is created. See A. Pretto-Sakmann, Boundaries of Personal Property (Oxford: Hart Publishing Oxford, 2005) at p. 211. However, a beneficiary under a bare trust of a chattel also possesses a proprietary interest as she has a right in a corporeal thing. So the question is whether the position would be different. Would if the trust was a trust for sale, or if the trust assets were an investment portfolio which consisted partly of chattels and partly of shares? These important questions are left unanswered by Pretto-Sakmann.

trusteeship and beneficial ownership of particular assets. Without this core content, the owner of the assets whom the settlor has named as the ‘trustee’ would no longer be compelled to apply trust assets for the settlor’s purposes, but instead can exploit them beneficially for himself.

Assessing the instruments: the requirement of an irreducible core content

The increased use of supernumeraries like the trust Protector and trust Enforcer, outsiders who hold powers even though they are neither the settlor nor the trustee, and the use of devices like settlor’s reserved powers and letter of wishes, can be attributed to changing attitudes to the disposition of wealth, and the resultant use of trusts for that purpose. Settlors today are more likely than before to regard the investment and management of trust property as a matter of creating an ideal structure to hold the family wealth, and achieving the different objectives of the settlor, rather than just a simple matter of giving wealth away.

The trust is also frequently used as an investment tool aimed at enhancing the value of personal property, common financial assets such as stocks or bonds. The present-day trustee, in view of his duty to invest, therefore enjoys greater responsibility, and also discretion, in the administration of the trusts. These discretionary powers of investment are further expanded under legislative regimes which confer upon trustees a default general power of investment. At the same time, the nature of modern forms of trust assets (financial securities) also allow for settlor to devolve more options on the trustee in the dispositive provisions of trusts, viz. the allocation and distribution of beneficial interests. Extensive discretionary powers vested in trustees have encouraged settlors to seek to retain control over their trust assets and ensure that the trustees are exercising their powers and discretions in accordance with the settlor’s purposes by making use of instruments such as the Protector, Enforcer, letters of wishes and settlor’s reserved powers.

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The use of these instruments provides the settlor and the beneficiaries with a level of protection and control over the trust assets which were previously absent. In the case of the Protector and Enforcer, their appointments will help control the distribution of funds from the trust, and secure the settlor in cases where the trustee fails or is unable to carry out his administration of the trust properly. Moreover, they also allow the settlor to retain much desired control over the trust assets and ensure that the trustees are exercising their powers and discretions in accordance with the purposes that the settlor had in mind while setting up the trust.

However, the use of these instruments must be consistent with certain minimum requirements, in particular the ‘irreducible core content’ which makes up every valid trust. This section will suggest

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21. This can be contrasted to Langbein’s view that some mandatory trust rules are required to implement the settlor’s intention that a trust, and not another form of legal institution, was created by the particular transaction. See J. H. Langbein, ‘Mandatory Rules in the Law of Trusts’, (2004) 98 Nw. U. L. Rev., 1105 at 1119–1126.

22. See Anthony Duckworth, “Protectors and Other Supernumeraries: Part I” (2006) 20(3) Tru. L. L., 180 at 180—supernumeraries are ‘non-trustees’ and that ‘supernumerary powers’ are ‘powers [given] to outsiders (i.e. supernumeraries who are neither the settlor nor a beneficiary)’. See also Anthony Duckworth, ‘The International Trust Part II: The Trust Offshore’, 32 V.N.J.T.L., 879 at 919—‘supernumerary powers’ as a generic label for ‘powers of one sort or another [that] are given to persons who are neither the settlor nor the trustee’.


24. For example, both the Trustee Act 2000 (U.K.), 2000, c. 29, s. 3(1), and the Trustee Act (Cap. 337, 2005 Rev. Ed. Sing.), s. 4(1) provide that ‘a trustee may make any kind of investment that he could make if he were absolutely entitled to the trust’.


the necessary minimum requirements which must be present in the use of these instruments, so as to ensure that the validity of the trust instrument is not jeopardized.

**Trust protector**

The office of trust Protector, originated within the context of asset protection—where it was used to enable settlors of offshore asset protection trusts to maximize their control over assets transferred to trusts, while still immunizing them from the reach of creditors. Although the trust Protector is not statutorily defined in English law, it has been defined by Waters as:

An individual, natural or incorporated, or group [who] is granted in the trust instrument, invariably inter vivos in offshore trusts, a power or several powers that enable the grantee to direct the trustees, or refuse consent to the trustees, in the latter’s exercise of one or more of their administrative powers (or discretions), or to appoint and delete, or to consent to the appointment and deletion of, trust beneficiaries. The grantee may have powers of both kinds.

Providing the dual advantages of adding critical flexibility to long-term trusts, and increasing the settlor’s ability to control the trustees’ behaviour long after the former’s death or incapacity, it is no surprise that the Protector has enjoyed great success, especially in offshore jurisdictions, and is considered by many to be an essential component of the operation of offshore trusts. This led to its widespread adoption and codification in many offshore jurisdictions, of which the Cook Islands International Trust Amendment Act of 1989 was the first.

**Duties of protector: minimum requirements**

The nature and scope of the duties owed by a Protector has always been an uncertain and problematic area of the law, and this has led to doubts as to whether this recently created office can fit into the framework of the traditional trust. However, in order to ensure that the Protector performs its function of supervising trustees’ activities so as to provide settlors with the desired control or influence over trustee activity, it is argued that certain duties should be imposed on it. A useful analogy can be drawn from the context of the trustee, especially since both Protector and trustee are power-holders within the trust. Hence, it is suggested that the Protector, like the trustee, owes an irreducible core of fiduciary duties to the beneficiaries to exercise their powers and functions bona fide in the way they consider to be in the interests of the beneficiaries—consistent with the obligational theory of trusts.

Since a Protector can be given an extensive list of powers by a trust deed, it is imperative that the extent of the duties it owes is clear so as to prevent

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27. ‘Protector’ as a term in property law could be traced to its use in s36 of the United Kingdom Fines and Recoveries Act 1833, in relation to entails. Although that area of law has since become obsolete, this terminology has survived into the modern law of trusts.


29. Offshore trusts, which provide a method of tax planning that is both effective and legitimate, and for holding assets when capital growth is anticipated, are extremely useful for settlors who are not domiciled in the jurisdiction for tax purposes. As such, the settlor is given both control and tax breaks—the best of both worlds. See Donovan Waters, The Protector: New Wine in Old Bottles!, Trends in Contemporary Trust Law (1996) at 71.


[A trust Protector] is a person other than the trustee who, as the holder of an office created by the terms of the trust, is authorised or required to play a part in the administration of the trust.


it from becoming ‘a law unto itself’. Moreover, a Protector will also want to know whether he is answerable in the exercise of these powers, and if so, to whom.\textsuperscript{34} The nature, creation or exclusion of the duties owed by a Protector is dependant on the intention of the creator of the power, either expressed or inferred. There seems to be no clear basis for a court to decline to give effect to the intentions of the creator in this respect.\textsuperscript{35} A Protector’s position may also be regulated by statute\textsuperscript{36} or public policy,\textsuperscript{37} and different jurisdictions with different legal systems may provide different answers to this question.

The crucial question of whether the powers granted to a Protector are exercisable by him in a fiduciary capacity will also have to be answered before we can come up with a list of duties owed by a Protector. Based on both arguments from principle and from case law, it is argued that a Protector, like a trustee, is a fiduciary who owes fiduciary duties to the beneficiaries. A fiduciary duty,\textsuperscript{38} the most onerous duty imposed by the common law, is imposed by the courts whenever they find that a fiduciary relationship exists. First developed in the law of trusts, fiduciary duties would be imposed on the trustees, who had undertaken responsibility for the property or affairs of another, to ensure that they do not exploit their position for their own benefit at the expense of the beneficiaries. Today, it is trite that a fiduciary duty can either be imposed under the general law,\textsuperscript{39} whereby relationships such as the paradigm example of trustee and beneficiary, and principal and agent are labelled as fiduciary relationships, or imposed outside of the traditional fiduciary relationships mentioned above—arising whenever there is a relationship of trust or confidence between the parties. Hence, it is clear that the categories of what constitutes a fiduciary are not closed.\textsuperscript{40}

In the case of a Protector, one view is that it is the holder of a fiduciary office \textit{per se} and thus has an irreducible core of duties imposed upon it. An analogy can be drawn from \textit{Armitage v Nurse,\textsuperscript{41}} where Millet, L. J. held that trustees owe an irreducible core of obligations to the beneficiaries which are enforceable by the latter—a fundamental concept of the trust.\textsuperscript{42} It is argued that since a Protector, like a trustee, is a holder of power within a trust arrangement, he also owes an irreducible core of obligations to the beneficiaries, which is fundamental to the concept of a trust. Since a Protector is in a position of trust and its powers as Protector are granted to it by virtue of its office, it is suggested that the duties it owes are in general, fiduciary ones, instead of being bare powers.\textsuperscript{43} Moreover, even if it is considered that a Protector is not in a fiduciary position, the actions of the Protector can still be

\textsuperscript{34} Walkers, ‘Cayman Islands: Role of the Trust Protector’, \texttt{<http://www.mondaq.com/article/articleid=59896>} (accessed 22 October 2008).
\textsuperscript{35} Anthony Duckworth, ‘Protectors and Other Supernumeraries: Part 2’ (2006) 20(4) Tru. L. I., 235 at 235. However, there are exceptions to this view. The first situation is when public policy is involved. For example, if it were provided that the trustees required the Protector’s consent before applying to court for directions on any matter, this would be considered against public policy since it purports to oust the jurisdiction of the court. Second, there may be situations in which there is a lack of authority. Such a situation could arise where the creator of the power was not settling his own property, but was himself executing a trust or exercising a relationship of trust or confidence between the parties. Hence, it is clear that the categories of what constitutes a fiduciary are not closed.\textsuperscript{40}

\textsuperscript{36} E.g. the Belize Trusts Act 1992 and the Cook Islands International Trusts Amendment Act 1989.
\textsuperscript{37} See for e.g Re Wynn, [1952] Ch. 271. If a Protector clause is drafted so as to oust the court’s jurisdiction, the offending part of the clause may be struck down on the basis that it is contrary to public policy.
\textsuperscript{39} The concept originally developed in Roman law and was borrowed by the Courts of Equity who developed the branch of the common law known as equity. These principles of equity are now part of our common law and are used by our modern day courts generally to avoid injustices being perpetrated.
\textsuperscript{40} See P. D. Finn, ‘The Fiduciary Principle’ in T. G. Youdan (ed.) \textit{Equity, Fiduciaries and Trusts} (Toronto: Carswell 1989) at 54.
\textsuperscript{41} \textit{Armitage v Nurse} [1998] Ch. 241 (C. A.).
\textsuperscript{42} \textit{Armitage v Nurse} [1998] Ch. 241 at 233 (C. A., per Millet, L. J.).
\textsuperscript{43} Bare powers are powers given to a person who has no interest in the property over which the power can be exercised. A Protector holding only bare powers does not hold its powers for the benefit of any particular person or group of persons, and cannot be compelled to exercise it at all. See Walkers, ‘Cayman Islands: Role of the Trust Protector’, \texttt{<http://www.mondaq.com/article/articleid=59896>} (accessed 22 October 2008).
The argument that a Protector owes fiduciary duties to the beneficiaries and must exercise their powers and functions *bona fide* in the way they consider to be in the interests of the beneficiaries is also supported by the case law. The Bermudan case of *Von Knierem* is authority for the proposition that a Protector’s power to appoint and remove trustees is a fiduciary power because it could not exercise the power for its own benefit, but only for the benefit of others. The Isle of Man decision of *Steele v. Paz Limited* also held that the Protector’s powers were fiduciary powers and so the court had inherent jurisdiction to appoint a person to exercise these powers. Moreover, the Bahamas Supreme Court decision of *Rawson Trust v. Pearlman* held that a Protector’s power to consent to a proposed resettlement was not a fiduciary power if the settlement gave the Protector the power to further his own interests. These cases reinforce the view that, in general, Protectors will owe fiduciary duties to beneficiaries—a view increasingly seen as correct.

However, it should be noted that a ‘routine transplantation to trust Protectors of the same fiduciary standards applied to trustees would be a mistake’. This is because settlors generally expect Protectors to play different roles from trustees, so that in most circumstances, Protectors should defer to the trustees’ judgements. The settlor gives powers to the Protector which has the effect of constraining the trustee’s management decisions, not because the Protector is expected to exercise those powers, but because their existence will make the trustee more responsive to the interests of the trust beneficiaries, and ultimately to the settlor’s wishes. Therefore, the Protector is expected to monitor trustee behaviour without affecting the level of discretion that the trustee possesses, and to intervene only in situations where the trustee has abused the discretion reposed in him.

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44. Even if the unlikely position that a Protector is not in a fiduciary position is taken, for example, when the trust instrument lays down that a Protector owes no fiduciary duties, it is argued that ‘the court’s general jurisdiction to secure the good administration of trusts should, in principle, enable the court to intervene’. As Lord Walker noted in *Schmidt v Rosewood Trust Limited* [2003] 2 W.L.R. 1442 (P.C), at para 51, ‘the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts’.

45. In recent years, courts have made a distinction between duties which are owed by fiduciaries alone, and duties which are owed by both fiduciaries and non-fiduciaries. Fiduciary duties can be owed concurrently with non-fiduciary duties, but only fiduciary duties are peculiar to fiduciary relationships. See Matthew Conalgen, *The Nature and Function of Fiduciary Loyalty* [2005] 121 Q. R. 452 at 455. See also, *Hilton v Barker Booth and Eastwood (a firm)*, [2005] 1 W.L.R. 567 (H.L.) at [29], where the House of Lords observed, ‘not every breach of a duty by a fiduciary is a breach of fiduciary duty’.

46. *Von Knierem v Bermuda Trust Co. Ltd.*, (13 July 1994) Butterworths Offshore Cases and Materials, Vol 1, pp. 116 at 124, Supreme Court of Bahamas. (Meerabux J.), [Von Knierem]. Here the Court identified the key issues as being whether the Protector was a fiduciary, and whether the power to remove and appoint new trustees must be exercised in a fiduciary capacity.

47. This means that the Protector is ‘bound to select to the best of his ability the best people he can find for that purpose’. See *In re Skeats’ Settlement* (1889) L. R. 42 Ch. D. 522 at 526. (Kay, J.)

48. *Steele v Paz Limited* (10 October 1995) Butterworths Offshore Cases and Materials, vol. 1, pp. 338–418, CA of Isle of Man. (P. W. Smith Q. C. & T. B. Hegarty Q. C.). The case concerned the failure of a declaration of trust to nominate a Protector, where certain powers of the trustees could only be exercised with the Protector’s consent. As a result, the key issue was whether these circumstances resulted in the failure of the trust. At first instance, the trial judge held that the trust was invalid due to the uncertainty of trust objects. On appeal, it was held that the trust did not fail. The court held that as the Protector’s powers were fiduciary powers, it had—by analogy with the case of trustees—inherent jurisdiction to appoint a person to exercise these powers. Thus the trust was held valid.

49. *Rawson Trust v Pearlman*, (25 April 1990) Butterworths Offshore Cases and Materials, Vol 1, p. 31 at 31, Supreme Court of the Bahamas. (Smith, J.). This case concerned a trust which provided that the trustee had to obtain the consent of the three Protectors in order to exercise its powers. It proved impossible for the trustee to do so as the three Protectors were in perpetual disagreement. One of the Protectors was later disqualified from his position by the court’s inherent jurisdiction to decide the assets of the trust to a new trustee. This new trustee provided that the trustee need not consult more than one Protector when exercising his powers. The main issue before the Court was whether the Protector’s consent to the distribution from the old trust to the new trust was an exercise of a fiduciary power and thus subject to the control of the Court. Smith, J. held that a Protector’s power to consent to the proposed resettlement was not a fiduciary power if the settlement gave the Protector the power to further his own interests. In this case, because the trust instrument gave the Protectors powers to protect their own interests, the Court held that the Protectors were not exercising any fiduciary power. Only when a Protector is not protecting his own interests will he be acting as a fiduciary, and therefore be subjected to the control of the Court.


Accordingly, it is argued that Sterk’s proposed deferential standard of behaviour\(^5\) and the concomitant standard of review\(^4\) should be adopted in most situations when determining the content of the duties which should be applied to trust Protectors. This flexible approach of maintaining the office of the Protector as secondary to that of the trustee has the advantages of ensuring that the trustee remains subject to fiduciary duties, and retaining the traditional position of the trustee as the core fiduciary within a complex web of trust relationships.\(^5\) More importantly, this approach will help to induce trust Protectors to function as settlors intend them to function—as monitors of trustee behaviour. Although the deferential standard of review will constitute the general rule, there remains room for flexible standards within this general rule, which will depend on the powers that the settlor has conferred on the Protector.\(^6\)

Another important issue with regard to the duties owed by a Protector is whether these duties can be excluded. It is important that we first distinguish between duties that are common to both fiduciaries and non-fiduciaries, and duties which belong to fiduciaries alone. This is crucial because duties which are uniquely fiduciary, unlike duties which apply to both fiduciaries and non-fiduciaries, cannot be excluded by fiduciaries as they are foundational basis of the concept of fiduciary duties.\(^7\) For example, the ‘conflict rules’ are considered an undisputed part of fiduciary duties, while the duties of care and skill are not peculiarly fiduciary in nature. Generally, a fiduciary like the Protector will be subjected to both the conflict rules and the duties of care and skill in the exercise of his powers. However, since the latter duties are not peculiarly fiduciary, they can only have a contingent, but not necessary connection to duties which are considered uniquely fiduciary. Hence, this explains why these duties can be excluded with regard to a fiduciary’s exercise of his powers.\(^8\)

Once again, an analogy can be drawn with a trustee, since both trustee and Protector are power-holders within a trust arrangement. As Millet, L. J. held in *Armitage v. Nurse*, there is an ‘irreducible core of obligations’ owed by the trustees to the beneficiaries, without which there would be no trust. Similarly, it is argued that a Protector also owes an irreducible core of obligations to the beneficiaries in a trust, not least to perform his duties honestly and for the benefit of the beneficiaries, so as to give substance to the trust. This means that these core obligations cannot be excluded in any way, as doing so would destroy the very existence of the trust, since the beneficiaries would no longer have any rights enforceable against a Protector.

**Trust enforcer**

The office of the trust Enforcer was created for the sole purpose of monitoring the trustee’s activities so as to ensure that the purpose of the trust is carried out. A recent development which is exclusively found in offshore jurisdictions such as the British Virgin Islands, Jersey and the Isle of Man, the Enforcer is similar to the office of the trust Protector in that both have been widely used in offshore jurisdictions for the purposes of tax planning. The Enforcer’s existence is inextricably linked to the non-charitable purpose trust (NCPT), which has been recognized by several offshore and commonwealth jurisdictions. Traditionally, NCPTs have been rejected as being

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56. See Stewart E. Sterk, ‘Trust Protectors, Agency Costs, and Fiduciary Duty’ (2006) 27 Cardozo L. Rev., 2761 at 2785. Sterk notes that ‘... to the extent settlors expect Protectors to play a role distinct from trustees, the standard of review applied to the Protector’s actions must reflect that distinction’. The room for flexible standards within this general rule can be illustrated by the following example: When a Protector is given both veto powers over any decisions made by the trustee, and also more extensive powers, such as directive powers over both investments and distributions, and a power to replace the trustee a more activist standard of behaviour and a concomitant higher standard of review might be appropriate. This is because the Protector’s role is similar to that of a co-trustee and this justifies a higher standard of behaviour and standard of review.
invalid trusts because the absence of beneficiaries in such trusts, the traditional enforcers of the trust, contravenes the ‘beneficiary principle’. This principle can be traced back to Morice v. Bishop of Durham,59 where Sir William Grant M. R. held that:

There can be no trust over the exercise of which this court will not assume control; for an uncontrollable power of disposition would be ownership and not trust. If there is a clear trust but for uncertain objects the property, that is the subject of the trust, is undisposed of . . . But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favour the court can decree performance.60

Moreover, the appointment of an Enforcer also provides an additional layer of security to the settlor, assuring him that the trust assets will be applied in accordance to his intended purposes. Moreover, the appointment of an Enforcer also provides an additional layer of security to the settlor, assuring him that the trust assets will be applied in accordance to his intended purposes.

For an Enforcer to perform its function of monitoring the trustee to ensure that the latter is carrying out the purposes of the trust effectively, the trust instrument must expressly provide it with an absolute right of access to any information or documents pertaining to the trust, its assets and the administration of the trust.63 Most importantly, an Enforcer can apply to the court if necessary to ensure that the objective of the trust is honoured.64 An Enforcer may be a single person, a committee of persons or a corporation chosen by the settlor and the powers granted to him may be similar to that granted to a Protector, such as the power to remove a trustee and appoint a new trustee.65 There is generally no restriction on who can be appointed as an Enforcer—any person, whether legal or natural, is eligible.66 A settlor can even appoint himself as the first Enforcer under the terms of his trust deed as the most eligible person for the enforcement duties, while at the same time including provisions for subsequent Enforcers to be appointed.67

Duties of enforcer—minimum requirements
The relatively recent creations of the Enforcer and Protector highlights one of the most valuable benefits of the trust—flexibility. However, it is argued that

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59. Morice v Bishop of Durham (1804) 9 V.e.s. 399.
60. Morice v Bishop of Durham (1804) 9 V.e.s. 399, at pp. 404–405. Sir Grant, M. R.’s holding has since been subjected to criticism by Hirsch:

[Sir William Grant M.R.’s holding is] philosophically hollowed for the same lawmakers who require a trust to be enforceable by somebody in order to subsist also decide just which somebodies are (and are not) invested with that authority. If a trust is to be void for an Enforcer, that is true because lawmakers have declined to pick one out, not because of the inexorable logic of the beneficiary principle.

64. David Harris, ‘Special Trust Arrangements in Bermuda’ (2002) 5 P. C. R., 286 at 289.
67. Even if the machinery for the appointment of a successor Enforcer breaks down, a court ought to hold that it has inherent jurisdiction to appoint an Enforcer as a vital officer of the trust. For example, the Isle of Man Court of Appeal appointed a Protector in Steele v Paz Ltd. (10 October 1995) Butterworths Offshore Cases and Materials, vol. 1, pp. 338–418, CA of Isle of Man. (P. W. Smith Q. C. & T. B. Hegarty Q. C.).
when we go to the heart of the trust relationship, there must be certain elements which must exist if there is to be a trust at all. In order to ensure that the Enforcer carries out its role of monitoring the trustee’s activities to ensure that the purpose of the trust is carried out expediently, it is argued that certain duties should be imposed on it.

In defining the duties owed by an Enforcer, one of the key issues that has to be decided is whether an Enforcer is a fiduciary. In the case of an Enforcer appointed in an NCPT, it is clear that the objective of the trust is a purpose, for example, to hold shares in a company, and the role of the Enforcer is to act on behalf of (as it were) and for the furtherance of that purpose, by monitoring the trustee so as to ensure that the trustee is fulfilling his duties of carrying out the purpose of the trust. In view of the role of the Enforcer, it is argued that it is a holder of power within the trust arrangement and that its position is that of a fiduciary. It has also been suggested that if mainland courts were asked to rule with regard to an NCPT, they would inevitably hold that the role of the Enforcer of trustee’s duties is a fiduciary role. The argument that an Enforcer is a fiduciary is also supported by the STAR trust regime of the Caymans—the Special Trusts (Alternative Regime) Law 1997. The Law makes it mandatory that there must be an Enforcer and the office is expressly stipulated to be a fiduciary one. Criminal sanctions are also imposed if the requirement for the appointment of an Enforcer is not adhered to. However, as in the case of a trust Protector, it is argued that a routine transplantation to an Enforcer of the same fiduciary standards applied to trustees would be a mistake. This is because settlors generally expect an Enforcer to monitor the activities of the trustee so as to ensure that the latter is fulfilling its duties of carrying out the purposes of the trust. This is akin to the role of a ‘watchdog’—a very different role from that of a trustee.

Settlors generally expect an Enforcer to monitor the activities of the trustee so as to ensure that the latter is fulfilling its duties of carrying out the purposes of the trust

In addition, the content of the duties owed by an Enforcer should not be dependant on the labelling of that office as Enforcer or trustee. Since there is a distinction between duties which are solely fiduciary, and duties which may be fiduciary or non-fiduciary, it is argued that the question of whether the duties owed by an Enforcer are fiduciary ones should depend on the substance of the obligations. It has been suggested above that an Enforcer is generally in a fiduciary position with regard to the powers it holds, but it does not follow that every duty owed by it will be a fiduciary duty. Accordingly, it will be

70. See the Cayman Islands Special Trusts (Alternative Regime) Law, 1997.
71. Cayman Islands Special Trusts (Alternative Regime) Law, 1997, s. 7(2) states:
   
   The only persons who have standing to enforce a special trust are such persons, whether or not beneficiaries, as are appointed to be Enforcers—
   
   (a) by or pursuant to the terms of the trust; or
   
   (b) by order of the court.
72. Special Trusts (Alternative Regime) Law, 1997, s. 8(2) states: ‘Subject to evidence of a contrary intention, an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust.’
73. Special Trusts (Alternative Regime) Law, 1997, s. 7(5) states:

   In the circumstances described in subsection (4)(c), the trustee shall within 30 days apply to the court for the appointment of an enforcer, or for the administration of the special trust under the direction of the court, or for such other order as the court shall think fit and, if a trustee knowingly fails to do so, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding $10,000.

See also s. 7(4)(c):

If there is no enforcer who is of full capacity and who—

(i) is a beneficiary; or

(ii) has a duty to enforce and is fit and willing to do so.

74. This is because settlors generally expect Protectors to play different roles from trustees, so that in most circumstances, Protectors should defer to the trustees’ judgments.
difficult for courts to come up with a precise formulation of the fiduciary rules which should be applied to an Enforcer. As such, it is argued that a settlor should ideally specify the exact standards which an Enforcer must meet in the exercise of its powers.

The identity of the person to whom an Enforcer owes its fiduciary duties to has remained an uncertain part of the law, with the statutes of the offshore jurisdictions which provide for the role of an Enforcer being silent. Since an NCPT has no beneficiaries, the easy answer would be that an Enforcer owes fiduciary duties to the settlor, especially if the settlor can force the Enforcer to act. However, this remains a novel idea which has not been accepted by any court, primarily because this would be contrary to the basic intention of an irrevocable trust, where the settlor drops out of the picture after making the declaration and loses control directly or indirectly over the assets concerned.76 Questions will also be raised as to whether the ‘trust’ is really a sham,77 since it begins to take on the appearance of an agency rather than a genuine trust, so as to perpetuate the settlor’s control over the trust.78

Traditionally, in a trust for beneficiaries, the trustee will owe fiduciary duties to a beneficiary, because the latter is the beneficial owner of the trust assets. However, in the context of an Enforcer appointed in an NCPT, there is only a purpose and so no party to whom an Enforcer can owe its fiduciary duties. In this situation, it is argued that when an Enforcer breaches its fiduciary duties, the trust instrument must expressly provide for a person who has the standing to bring an action for the enforcement of the duties of an Enforcer. Such a person can be a trustee, another Enforcer or any person expressly authorized by the trust instrument.79 This provision preserves the fiduciary nature of the Enforcer office, while ensuring that the Enforcer does not ‘become a law unto itself’ since there is always an interested party who can step in to bring an action against an Enforcer in the event of it breaching its fiduciary duties. More importantly, this is consistent with the position in Equity to place more emphasis on the principles underlying detailed rules as compared to the particular rules themselves. It is argued that the principle laid down by the obligational theory of trusts—that the trust is an equitable obligation—is satisfied when an Enforcer is appointed by the settlor so as to have locus standi to enforce the trustee’s duties.80

Another important issue concerning the duties of an Enforcer is whether these duties can be excluded. Once again, a parallel can also be drawn with exemption clauses for trustees, since both trustee and Enforcer are power-holders within a

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> A trust is not a contract like a contract for the benefit of a third party or parties or a contract of agency... once the settlor has made his unilateral transfer of his assets to the trustee to own as a segregated patrimony, he drops out of the picture and cannot tell the trustee what to do; the trustee’s obligations are independent obligations owed exclusively to the beneficiaries who alone have correlative rights against the trustee.' [emphasis added].

However, counterarguments have also been raised by a number of commentators, who are in favour of at least limited settlor standing, which would allow settlors to enforce trust terms and the trustee’s adherence to his fiduciary duties. Langbein advances a contractarian view of trusts whereby the trust is analogised to a third-party beneficiary contract. He argues that since the promise in a third-party beneficiary contract can bring suit to enforce such contracts, the analogous actor in trust law, the settlor, should likewise be able to bring suit to enforce the trust terms agreed upon with the trustee. See J. H. Langbein, ‘The Contractarian Basis of the Law of Trusts’, (1995) 105 Yale L.J. 625. Sitkoff also makes a similar argument based on the agency costs theory of trusts. See Robert H. Sitkoff, ‘An Agency Costs Theory of Trust Law’ (2004) 89 Cornell L. Rev., 621 at 668–69.

77. A classic exposition of the sham doctrine is found in Lord Diplock’s holding in Snook v London [1967] 2 Q.B. 786 at 802, where he held that:

> [The sham doctrine] means acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

78. A court is likely to hold that a trust is a sham in a situation where an Enforcer owes a fiduciary duty to the settlor, and where they intended to create a false or misleading appearance to third parties that certain legal rights and obligations have been created. This would be the case when a settlor seeks to retain control of a trust it has created by naming itself as the beneficiary, and appointing an Enforcer to ensure that the trust is enforced accordingly to achieve the settlor’s purposes. See Paul U. Ali, ‘Publication Review: Trusts and Related Tax Issues in Offshore Financial Law by Rose Marie-Antoine’, (2006) 21(1) J.I.B.L.R., 58 at 58.

79. Adopted from the Cayman Islands Special Trusts (Alternative Regime) Law, 1997, s. 8(3).

80. David Hayton, ‘Developing the Obligation Characteristic of the Trust’, (2001) 117 L.Q.R., 94 at 98. The concept of trust as obligation is satisfied as long as there [is] somebody in whose favour the court can decree performance’. See Morice v Bishop of Durham (1804) 9 V.R. s. 399 at 405 per Sir William Grant, M. R.
trust arrangement. Generally, if a trustee can prove that the settlor knew of and approved of the clause in trust instrument which exempts the trustee from liability for a breach of trust upon a fair and non-restrictive construction of the clause, then the trustee will be able to escape liability for such a breach unless it was a dishonest or reckless breach of trust. As Millet, L. J. held in Armitage v. Nurse:

...there is an irreducible core of obligations owed by trustees to the beneficiaries & enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

Since an Enforcer is also a power-holder within a trust, it is argued that it owes an irreducible core of obligations—to act responsibly so as to enforce the proper execution of the trust, and to consider at intervals which it reasonably considers appropriate whether and how to exercise its powers and then to act accordingly—which can be enforced by a trustee, another Enforcer or any person expressly authorized by the trust instrument. The existence of these core obligations, as required by the obligational theory of trusts, cannot be excluded in any way because doing so would erode the crucial role played an Enforcer in an NCPT, and destroy the very existence of the trust.

**Letter of wishes**

Increasingly found in the case of very flexible discretionary trusts, a letter of wishes represents a less direct means by which settlors can control the devolution of trust property. As a separate document from a trust instrument, it is commonly given by a settlor to the trustees of his will so as to provide them with nonbinding guidance as to how he would like them to exercise their powers. Not only does a letter of wishes allow a settlor to indicate in a confidential manner matters which he would like a trustee to take into account in the management of the trust, but also does not undermine the essential independence of a trustee. Generally, there are three categories of letter of wishes. The first is a legally binding letter which is a mandatory document to be read alongside the trust instrument. The second is a letter which is designed to have only legal significance. The third is a letter which is only morally binding, and so an action cannot be brought against the trustees alleging that they had failed to act in accordance with the letter.

**Increasingly found in the case of very flexible discretionary trusts, a letter of wishes represents a less direct means by which settlors can control the devolution of trust property**

**Impact on beneficiaries’ right to inspect trust documents**

The duty of trustees to inform a beneficiary of a trust of its entitlement is a duty at the heart of the trust relationship. It has been observed that the core element of a trust is the right of a beneficiary to enforce the trusteeship, without which the beneficial ownership remains with the settlor. Because no trusts will exist if the beneficiaries have no rights enforceable against the trustees, this entails that

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81. Hayton and Marshall: Commentary and Cases on the Law of Trusts and Equitable Remedies, 12th edn. (London: Sweet & Maxwell Ltd, 2005) at p. 659. Hayton also points out that this is subject to the principle that ‘the jurisdictions of the court as to pure matters of law cannot be ousted by provisions in the trust instrument giving the trustees power to determine all questions arising in the execution of the trusts under the instrument.’

82. Armitage v Nurse [1998] Ch. 241


84. See Bank of Nova Scotia Trust Co. (Bahamas) v Ricart de Barletta (1985) Buttersworth Offshore Service 5 at 8–9.


every beneficiary is entitled to see the trust accounts.90 However, with regard to letters of wishes, there remains much uncertainty as to whether beneficiaries have an absolute right to see these documents, so as to ascertain the settlor’s purposes in setting up the trust and to determine whether the trustees have exercised their powers and discretions in accordance with those purposes.91

It is also important to note that the traditional idea that beneficiaries have certain rights within a trust, such as the right to be informed of their entitlement under the trust by the trustees, has been replaced by a discretion based upon the court’s inherent duty to supervise the trust. This change occurred in the landmark case of Schimidt v. Rosewood, signifying a shift of emphasis in this area of the law from confidentiality to accountability. Consistent with the obligational theory of trusts, this explains why trustees must disclose the content of documents concerning the administration of the trust to the beneficiaries, because only then can the beneficiaries effectively monitor the trustees’ performance of their duties, and be in a position to enforce the performance of these duties—essential to the existence of a trust.92

It is argued that a settlor cannot provide that all trust documents, such as a letter of wishes, are to be kept confidential by the trustees from the beneficiaries. As Millet, L. J. held in Armitage v. Nurse, there is an ‘irreducible core of obligations owed by the trustee to the beneficiaries and enforceable by them which is fundamental to the concept of a trust’. As such, the removal of the trustees’ accountability to the beneficiaries, a duty which is at the very core of the trust concept, would oust the existence of any trust for the so-called beneficiaries.93

When a settlor’s intention is for the trustee to accept a letter of wishes as a legally binding document which overrides any contrary terms contained in the trust instrument,94 the beneficiary will have a right to see this letter, since the legally binding terms of the trust arise via the incorporation of both documents.95 To ensure the confidentiality of the letter of wishes, a settlor can also make the letter of wishes morally binding and of no legal significance, so that it need not be disclosed even if the beneficiary brings a legal action against the trustee. This is because there are no legal obligations imposed on a trustee to consider a morally binding letter of wishes, and a trustee will not be accountable before the courts with regard to his taking into account such wishes.

To ensure the confidentiality of the letter of wishes, a settlor can also make the letter of wishes morally binding and of no legal significance.

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90. This is construed by Lindley L. J. in Low v Bouverie [1891] 3 Ch. 82 at 99 as an obligation ‘to give all his cestui que trust’ on demand information with respect to the mode in which the trust fund has been dealt with and where it is. However, it should be noted that this duty is only limited to providing information duly requested by a qualified applicant for it—a trustee has generally no duty to volunteer information. See Megarry V. C. in Tito v Waddell (2) [1977] Ch.106 at 242–3, (Ch. D., per Megarry V. C.), and Hartrigan Nominees Pty Ltd v Rydge (1992) 29 N.S.W.L.R. 405 at 431, (C.A., per Mahoney J.). A beneficiary’s right is confined to information which concerns him. As such, if the beneficiary’s interest is in capital alone, he has no right to seek information with regard to the distribution of income. Moreover, the term ‘beneficiary’ may not include the objects of a fiduciary discretionary power.


92. However, it is also clear that this does not represent a complete shift to accountability. Instead, the courts must undertake a balancing exercise so as to decide whether trustees have disclosure obligations towards the beneficiaries. The trustee’s duty to hold trust property for the benefit of the beneficiaries and the resulting duty to account entitle the beneficiaries to inspect trust documents and records on request. At the same time, the court must balance this duty against the trustee’s duty to act in the best interests of the beneficiaries, and so may reject a request for disclosure in the appropriate circumstances.

93. See Raak v Raak, 428 NW 2d 778 at p. 780 (1988). The Michigan Court of Appeal held that if the trustee cannot be called to account by a beneficiary, then the beneficiary is remedyless and the trustee may do as he likes.


A settlor may contemporaneously provide with a discretionary trust instrument a letter in which he directs the trustees to pay the income to him for the rest of his life, and which the trustees must sign to acknowledge that they must implement its terms; then during the settlor’s life, the real trust is in the letter, not in the discretionary trust instrument (except for administrative powers and any powers of appointment, etc.).

Some factors which will persuade the court that the settlor intended the letter of wishes to be a legally binding document include the use of mandatory language, the degree of precision with which the letter of wishes is couched and the length and complexity of the trust instrument as contrasted to the shortness and simplicity of the letter of wishes.

However, there is a third category of letter of wishes—legally significant letters.96 This category is problematic since it is unclear whether the settlor can provide that the trustees keep such letters confidential from the beneficiaries, and whether the wishes contained in such letters will be considered to be legally binding. Generally, legally significant letters provide some guidance for a trustee and any successor or replacement trustee with regard to the exercise of its powers and discretions,97 but do not legally bind the trustee to follow exactly the wishes set out in them. Once guidance contained within the letter has been considered, a trustee is free to exercise his independent judgement so as to accord with changing circumstances and will not be held accountable for exercising his powers and discretions in a particular manner.

In light of the fact that the disclosure of information to beneficiaries is now contingent on the core accountability of the trustees to them,98 it is argued that a legally significant letter is a crucial document which the beneficiaries must be able to inspect so that they can ascertain the purposes of the settlor. Only then can they demand that the trustees account for the exercise of their powers and discretions.99 This view is consistent with the obligational theory of trusts, which holds that settlors cannot keep such letters confidential to the trustees and exclude the beneficiaries’ ability to inspect these letters. Since such a confidentiality clause ousts the core element of the trust—accountability of the trustees to the beneficiaries—it would be ignored as being inconsistent with the obligational theory of trusts, and repugnant to the very existence of the trust.

**Settlor’s reserved powers**

Traditional trust principles dictate that a settlor drops out of the picture once he has transferred property to the trustees—with no rights left in respect of the trust property.100 Unlike the beneficiaries who possess vested equitable interests in the trust property, the settlor does not have any proprietary rights, and hence no standing to sue for enforcement of the trust.101 However, settlors have increasingly chosen to reserve to themselves certain powers within the trust, a development closely linked to the modern trend of the trust being employed predominantly as an investment tool, with the result that trustees have been given extensive discretionary powers and responsibilities to facilitate their duties of investment. The settlor may choose to reserve powers with regard to the administrative functions of the trust (such as a power of veto before the trustees exercise their investment powers) or the distributive functions of the trusts (powers of appointment to different beneficiaries; removal of beneficiaries, etc.). The reservation of such powers enables settlors to ensure the continued assertion of their preferences on the disbursement of assets by the trustees, and enables the trustees to alter the investment directions of the trust in response to changing circumstances.

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97. A legally significant letter will also clarify the purposes and expectations which the settlor had in mind when he granted such broad discretion upon the trustees. See David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees*, 17th edn. (London: Butterworths LexisNexis, 2007) at p. 836.
98. See *Schmidt v Rosewood Trust Ltd.* [2003] 2 A.C. 709 (P. C.).
99. David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees*, 17th edn. (London: Butterworths LexisNexis, 2007) at p. 837. Armed with this information, the beneficiaries can then in the appropriate circumstances allege that the trustees failed to exercise their discretion responsibly for furthering these purposes and expectations, but instead did so arbitrarily, or took into account irrelevant factors, or failed to take into account relevant factors.
100. 'Where a trust is created inter vivos and the settlor is still alive, it would seem that he cannot maintain a suit to enforce the trust’. See *Scott and Ascher on Trusts*, 5th edn., Vol. 4 (2006), ss.24. 4. 1. See also, *Turner v Turner* [1984] Ch. 100.
101. It has been argued that the lack of a proprietary interest in the trust property should not preclude the settlor’s standing to enforce the trust. Instead the issue as to whether the settlor has standing to sue should be determined in analogy with public law standing doctrine. The settlor would have standing to enforce trusts if his economic interest in the subject matter of the alleged breach was sufficiently foreseeable at the creation of the trust such that protection of the interest by the grantor can be said to have been intended, or ‘if the breach violates the grantor’s substantial expectations’. See John T Gaubatz, ‘Grantor Enforcement of Trusts: Standing in one Private Law Setting’ 62 N. C. L. Rev (1983) 905 at 916.
Concerns over the use of settlor's reserved powers

Although the increasing widespread use of settlors’ reserved powers have allowed them to retain control over the trust and ensure that the trustees are exercising their powers and discretions in accordance with the settlors’ purposes, concerns have arisen with respect to the use of this device, which threaten to destroy the very existence of the trust unless they are made to conform with certain necessary requirements. The main concern is that the use of a settlor’s reserved powers within a trust arrangement may be held by a court to be merely a facade (i.e. a ‘sham’) to further his deceitful purposes of evading his personal creditors or matrimonial claims, and may also adversely affect the beneficiaries’ interests. As such, it is argued that the use of a settlor’s reserved powers has to be consistent with certain minimum requirements to ensure that the existence of the trust is not jeopardized.

The main concern is that the use of a settlor’s reserved powers within a trust arrangement may be held by a court to be merely a facade

It is trite that a court would hold a ‘trust’ to be invalid if it is found that the arrangement between the trust parties is actually a ‘sham trust’. A sham trust is created in a situation where the settlor and the trustee execute acts or documents in a manner which is ‘intended by them to give to third parties or to court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create.' For example, a court is likely to hold that a trust is invalid as a sham when a settlor creates a trust for particular beneficiaries, but retains control of the trust by reserving extensive powers to himself so as to ensure that the trustees administer the trust according to his wishes and in his best interests, rather than in the interests of the beneficiaries. The determination of whether a trust is a sham requires a court to inquire into the subjective intentions of the parties involved, and the party alleging that the trust is a sham must show that all the parties to a transaction had the requisite intention to mislead the third party before a court can hold a trust invalid on the basis that it is a sham.

It is suggested that there needs to be a minimum requirement with regard to the use of settlor’s reserved powers in trust arrangements, so as to ensure that the trust is not held to be a sham and hence invalid. This minimum requirement is that the use of settlor’s reserved powers in a trust instrument must not exclude the trustee’s exercise of his discretion to exercise his duties in good faith, and in the best interests of all beneficiaries. In other words, where the trust instrument effectively precludes this ‘irreducible core’ of trustee duties, the law would hesitate from holding that the transferee was acting as a trustee and correspondingly, from holding that there was a trust created in the first place.

This minimum requirement is consistent with the obligational theory of trusts, as it is clear that the duty of the trustee to exercise his duties in good faith and in the best interests of the beneficiaries, is part of the ‘irreducible core’ of duties which all trustees must owe if a trust is to exist at all. Moreover, this minimum requirement also reinforces the central duty of the trustee to account for his management of the trust fund, ensuring he does so in good faith and in the best interests of the beneficiaries. This proposition is also supported by case law. In Rahman v. Chase Bank, the court applied the maxim ‘donner et retenir ne vaut’ because the settlor reserved the powers to directly revoke a substantial proportion of the trust capital by calling within any

103. See Snook v London and West Riding Investments Ltd [1967] 2 Q. B. 786 at 802. (Diplock, L.J)
104. Grupo Torras S.A. v Al-Sabah [2004] W. T. L. R. 1 (Royal Ct (Jer)). In this case, the Jersey Royal Court rejected an argument that a discretionary trust was a sham because there was no common intention between the trustee and the settlor that the position should differ from what was set out in the trust deed.
105. See D. Hayton, ‘The Irreducible Core Content of Trusteeship’ in A. J. Oakley (ed.), Trends in Contemporary Trust Law (Oxford: Oxford University Press, 1996) at 47. Although the content of this irreducible core is still debated among academic scholars, there is judicial authority that it is ‘sufficient’ that this core consists of the duty to perform the trusts ‘honestly and in good faith for the benefit of the beneficiaries’. See Millet, L. J.’s holding in Armitage v Nurse [1998] Ch. 241 at 253–254 (C. A.).
12-month period for the trustee to appoint one-third of the trust capital to the settlor, and to direct the trustee to ignore the interests of other beneficiaries under the trust, but take into account only the settlor’s interests, when exercising its power to appoint the trust capital to the settlor. Since both situations result in the exclusion of the trustee’s duty to exercise his powers and discretions in good faith, and in the best interests of all beneficiaries—part of the irreducible core content of a trust according to the obligational theory—a trust can no longer be said to exist in this case.

**Conclusion**

The rise of the modern trust as a valuable investment and tax-saving tool has meant that the powers and discretions of the trustee have been widened considerably in recent years. In response, the creation of the offices of the Protector and Enforcer, and the widespread use of devices like letter of wishes and settlor’s reserved powers have enabled settlors to retain control over the very trust assets which they have worked throughout their lives to accumulate, and ensure that these assets are applied in accordance to their purposes in setting up the trust in the first place.

Although the usefulness of these innovative instruments cannot be doubted, it is also clear that their use has affected the fundamental understanding of the trust concept. This article has highlighted the need for minimum requirements in each of these instruments to ensure that their use will not jeopardize the very existence of the trust arrangement in which they function. These minimum requirements are in accordance with the obligational theory of trusts, which requires that there exists an ‘irreducible core content’ in order for each trust to be valid. Armed with these minimum requirements, these innovative instruments—testament to the inherent flexibility of the trust—will then represent an increasing list of devices which settlors can make use of to further their purposes in setting up trust arrangements, without fear that their use will render the trusts to be void and unenforceable.