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INTRODUCTION: DEFINITIONS AND CLASSIFICATION

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1.01 The word 'power' has many different meanings and usages, both technical and colloquial.[1] In English law, however, 'power' is said to be a term of art. 'A "power" is an individual personal capacity of the donee of the power to do something'.[2] In these broad terms, a power signifies an ability to do or effect something or to act upon a person or thing. Powers may be public (that is, conferred on authorities of State, officials of central and local government, or on agents acting on their behalf) or they may be private (that is, conferred by one person on another or reserved by one party to a transaction). Statutes confer powers on many public officials and on private individuals, often persons occupying a particular office. A power may therefore affect property and interests in property, or it may determine the legal relations between persons without reference to property of any kind. However, in this book, the term 'power' refers primarily to those powers which have

[1] In the *Oxford English Dictionary* (2nd edn, 1989), Vol XII, six pages (259–64) are taken up with the different meanings and usages of the word 'power'. These include 'ability to do or effect something or anything, or to act upon a person or thing'; 'legal ability, capacity or authority to act; esp. delegated authority; authorization, commission, faculty; spec. legal authority vested in a person or persons in a particular capacity'; and 'a document, or clause in a document, giving legal authority'. Other meanings, of less relevance in the present context, include 'a particular faculty of body or mind'; 'ability to act or affect something strongly; physical or mental strength; might; vigour; energy; force of character; telling force, effect'; 'authority given or committed'; 'the limits within which administrative power is exercised'; 'political or national strength'; 'of inanimate things: active property; capacity of producing some effect'; 'a State or nation regarded from the point of view of its international authority or influence'; and also various technical meanings associated with medieval angelology, mathematics and engineering.

[2] *Re Armstrong* (1886) 17 QBD 521, 531, *per* Fry LJ.

some proprietary effect in private law,[3] and it is used, in the main, to signify an authority or mandate conferred on, or reserved by, a person to deal with, as well as dispose of, property which he himself does not own. Thus, a power is distinct from the dominion that a man has over his own property.[4]

1.02 Sometimes, the word 'power' is used in the cases simply to refer to a 'power of appointment',[5] which, as Lord Jessel MR said, in *Freme v Clement*,[6] 'is a power of disposition given to a person over property not his own by some one who directs the mode in which that power shall be exercised by a particular instrument'. Although this work is concerned with general principles relating to powers of appointment, even in private law the word 'power' is, nonetheless, not always used synonymously with either dispositive powers generally or powers of appointment in particular: it is also used, as appropriate, in its more general sense indicated above, so as to include, where appropriate, administrative or managerial powers as well. Where the word 'power' bears a more restricted meaning or is confined to a particular kind of power, this should be clear from the particular context.

1.03 The person who creates or confers a power is generally referred to as the *donor*; the person upon whom the power is conferred is the *donee*; and those in whose favour the power may be exercised are *objects* of the power. In the case of a power of appointment, when the power is exercised, the donee is called the *appointor* and those objects who are benefited thereby are called the *appointees*.

A. Power and property

1.04 The distinction between power and property is fundamental. As Fry LJ stated, in *Re Armstrong*:[7]

> No two ideas can well be more distinct the one from the other than those of 'property' and 'power'. A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they 'property'. In one sense no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law. Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar, and I am almost ashamed to deal with such an elementary proposition. We all know that, when the Statute of Uses enabled persons to declare uses, conveyancers availed themselves of it, and were in the habit of reserving powers to alter the uses declared by conveyances or settlements of land. But powers remained just as they were before the Act—they were not property, they were merely an individual capacity to do something.

[3] It may also, of course, simultaneously affect relations between persons; but relations between persons, without any proprietary effect, are not covered.

[4] *ibid.*; *Commissioner of Stamp Duties v Stephen* [1904] AC 137, 140 *per* Lord Lindley; *Drake v A-G* (1843) 10 Cl & F 257; *Platt v Routh* (1840) 6 M & W 756; *Goatley v Jones* [1909] 1 Ch 557; *Van Grutten v Foxwell* (*Third Appeal*) (1901) 84 LT 545; *Re Reeve* [1935] Ch 110.

[5] *Sykes v Carroll* [1903] 1 IR 17.

[6] (1881) 18 Ch D 499, 504.

[7] *Ex p Gilchrist*, *Re Armstrong* (1886) 17 QBD 521, 531–2. See also *Commissioner of Stamp Duties v Stephen* [1904] AC 137, 140, *per* Lord Lindley; *Drake v A-G* (1843) 10 Cl & F 257; *Platt v Routh* (1840) 6 M&W 756; *Goatley v Jones* [1909] 1 Ch 557; *Van Grutten v Foxwell* (*Third Appeal*) (1901) 84 LT 545; *Re Reeve* [1935] Ch 110; *TMSF v Merrill Lynch Bank and Trust Company (Cayman) Ltd* [2011] UKPC 17, [31]–[46]. *cf. Melville v IRC* [2001] EWCA Civ 1247; [2002] 1 WLR 407.

> Again, when the equitable doctrine of trusts was reconstituted after the passing of the Statute of Uses, the Courts of Equity recognised the capacity of certain persons to declare trusts by deed or will, and thus to mould or modify the existing trusts of property. This capacity, however, was only a power to do something; it might result in property, but it was not property at all. These are powers of the same kind as that with which we are now dealing—powers to modify either existing legal uses or existing equitable trusts. I repeat that such powers are no more property than a power to do any act which an individual may do.
>
> That being so, have the courts ever said that such powers are 'property'? If they have, it would be our duty to follow their decision. But no such imputation can with propriety be cast on the Courts of Law or Equity; they have always recognised the distinction between 'power' and 'property'.

1.05 This distinction is clear where the power in question is a special power (as to which see below)[8] and where the donee himself is not an object of that power. However, it also applies where the power is a special power of which the donee is an object, such as where a life tenant has a power to raise and pay the capital of the trust fund to himself: such a power does not make the fund the property of the life tenant unless and until the power is properly exercised.[9] In a different context, the transfer of funds by settlement trustees to a son pursuant to an appointment in his favour by his father in exercise of a special power of appointment was held not to be an 'advancement' of property from the father's estate for the purposes of section 47(1) of the Administration of Estates Act 1925.[10] As a general rule, the distinction is equally applicable to a general power. The donee of a general power has no title to the property which is the subject-matter of the power until he exercises the power in his own favour. In *Re Armstrong* itself, for example, the question was whether the expression 'separate property' in section 1(5) of the Married Women's Property Act 1882 included only that which would be the property of a woman if she were unmarried or whether it also included a general power of appointment by deed or will of which she was the donee, but which she had not exercised. The woman in question, who had been declared bankrupt, was also the life tenant under the relevant settlement and she could, therefore, have given a purchaser of the settled property a good title to the whole estate. Nevertheless, the Court of Appeal held that the subject-matter of the power was not her property and she could not be compelled to execute a deed exercising the power in favour of her trustee in bankruptcy. Similarly, and for the same reason, it was eventually concluded by the courts (but not without vacillation) that a covenant to settle after-acquired property does not affect any property over which the covenantor has a general power of appointment, unless and until the covenantor exercises that power in favour of himself.[11] The distinction is also crucial in the context of insolvency because, in the absence of specific statutory provision to the contrary, a 'power' over assets does not in itself constitute 'property' and those assets can not, therefore, be said to be part of the insolvent's estate,[12] although, in certain circumstances, this principle is departed from.[13]

[8] See para 1.17 below.

[9] *Pennock v Pennock* (1871) LR 13 Eq 144.

[10] *Re Reeve* [1935] Ch 110.

[11] *Townshend v Harrowby* (1858) 27 LJ Ch 553; *Bower v Smith* (1871) LR 11 Eq 279; *Re Lord Gerard* (1888) 58 LT 800; *Tremayne v Rashleigh* [1908] 1 Ch 681. But *cf. Steward v Poppleton* (1877) WN 29 (in which *Townshend v Harrowby*, above, was not cited); and *Re O'Connell* [1903] 2 Ch 574 (which followed *Steward v Poppleton*, above).

[12] eg, a power of appointment *is* included in a bankrupt's 'estate' if it can be exercised in favour of the donee of the power himself: Insolvency Act 1986, s 283(4): *Clarkson v Clarkson* [1994] BCC 921; and a general power of appointment has been held to be 'property' for the purposes of ss 3 and 272 of the Inheritance Tax Act 1984: *Melville v IRC* [2002] 1 WLR 407; and see also Lightman J's judgment at first instance, [2000] STC 628; and *Commr of Stamp Duties v Stephen* [1904] AC 137, 140.

[13] See paras 1.28–1.34 below.

1.06 However, this fundamental distinction between the concepts of power and property has not been preserved in all contexts and for all purposes.[14] A donee of a truly general power can appoint the subject-matter of the power to himself. He therefore has 'an absolute disposing power' over the property.[15] Consequently, for many purposes, the law regards the donee as the effective owner of that property. He can, for instance, contract not to exercise the power,[16] and he can appoint interests in trust, or create new powers, free from the restraints of any rule against delegation.[17] The rule against perpetuities applies to any appointment made in exercise of the power as if he were the absolute owner of the appointed property.[18] Moreover, various statutory provisions have been enacted to ensure that such property can be regarded as part of the donee's estate for tax purposes, for satisfying the claims of creditors, or for discharging his debts on death.[19] Indeed, even in the cases of a special power or a hybrid power (as to which see below),[20] if the donee is himself an object of the power, the distinction between power and property may again be ignored for certain purposes. We shall return to this aspect when more has been said about different kinds of powers and different methods of classifying them.

B. Classification of powers

1.07 The major distinction of relevance to private lawyers today is that between fiduciary and non-fiduciary powers.[21] This thorny issue is dealt with below.[22] However, this is a comparatively modern phenomenon. Historically, powers have been classified in a number of different ways, some of which are more useful than others—and, indeed, some of which are of antiquarian interest only. Thus, powers have been classified according to the donee's interest, according to the interest conveyed or created, according to the purpose for which they were created, according to the kinds of restrictions placed on them, and so forth. No classification is exhaustive.

(1) Classification according to the donee's interest

1.08 Powers were traditionally classified according to the donee's interest and were called powers collateral, powers in gross, and powers appendant (or appurtenant).[23]

1. A power simply collateral is a bare power or authority given to a person who has no interest whatever in the property over which the power is given.[24]
2. A power in gross is a power given to a person who has an interest in the property over which the power extends, but such an interest as precedes and cannot be affected by the exercise of

[14] *TMSF v Merrill Lynch Bank and Trust Company (Cayman) Ltd* [2011] UKPC 17, [43], citing the statement in the text above.
[15] *Sugden*, 394.
[16] See paras 17.26–17.29 below.
[17] See paras 1.38, 6.06–6.08 below.
[18] See paras 1.35, 5.15–5.20 below.
[19] See paras 1.26–1.34, 1.36–1.37 below.
[20] See paras 1.18, 1.24, 1.28, 1.32, 1.35,1.36, 1.38 below.
[21] But see *Scully v Coley* [2009] UKPC 29, [49].
[22] See paras 1.46–1.60 below.
[23] Farwell, 9–10; *Re D'Angibau* (1879) 15 Ch D 228, 232–3 *per* Jessel MR
[24] *Dickenson v Teasdale* (1862) 1 De GJ & Sm 52, 59, 60, *per* Lord Westbury, approving Sugden's classification. (See Sugden, 45–9.)

the power,[25] for example a power given to a tenant for life to appoint the estate in remainder amongst his own children.

3. A power appendant or appurtenant is a power exercisable by a person who has an interest in the property to which the power relates, which interest is capable of being affected, diminished or disposed of to some extent by the exercise of the power,[26] for example a power given to a tenant for life of leasing in possession.[27]

1.09 This particular classification seems to have originated as early as 1500 and was based on the need, perceived by both common law courts and courts of equity, to distinguish between powers which were merely authorities or mandates and powers which gave the donee something in the nature of an interest in the property over which they had been created. Initially, a distinction was made between powers simply collateral and other powers (that is, those which were not powers collateral). A power simply collateral (such as a power given to executors or feoffees to uses to sell) was a personal authority to a particular person to act and was not lost in consequence of any dealing by that person (the executor or feoffee) with the property. A power not simply collateral (such as a power to revoke uses and appoint new ones) was annexed to the estate in the property and was therefore similar to a future estate in the land; and, as such, it could be barred or released or destroyed (by fine or feoffment) like other future estates.[28] A further distinction between powers appendant and powers in gross emerged in the latter half of the seventeenth century:[29] a power in gross was similar to a power simply collateral in that its existence could not be affected by any dealings with the particular estate, because it was not annexed to that estate, but similar to a power appendant in that it might be destroyed or released or extinguished. Thus, the underlying basis of the classification was a need to distinguish between powers which were so much like future estates in the land that they could be destroyed by the acts of those to whom they were given and powers which were mere mandates and therefore not destructible.[30] The need to make such a distinction no longer exists[31] and, therefore, a classification of powers on this basis now has little, if any, value. However, the traditional classification may have a residual, albeit minor, impact in relation to other questions. For example, infants have always been capable of exercising powers simply collateral, whether over realty or personalty,[32] but it was eventually settled that infants could execute a power in gross (and probably also a power appendant) over personal property only and not over real property.[33] It is difficult to justify these distinctions.[34] Nevertheless, they have never been overruled. Thus, in the rare case where the question of an infant's capacity to exercise a power may arise, the traditional classification may still have some relevance.

[25] *Nottidge v Dering* [1909] 2 Ch 647 (on appeal [1910] 1 Ch 297).

[26] *Re Mills* [1930] 1 Ch 654; *Re D'Angibau* (1880) 15 Ch D 228, 243; *Penne v Peacock* (1734) Cas Temp Talb 41.

[27] See, eg, the Settled Land Act 1925, ss 41–48.

[28] See Holdsworth, *History of English Law*, Vol VII, 149–93 (especially 154, 165–8); *Albany's Case* (1586) 1 Co Rep 107a, 112a; *Digges's Case* (1598–1600) 1 Co Rep 173a.

[29] Holdsworth, *ibid*., Vol VII, 167; *Edwards v Slater* (1665) Hardres 410.

[30] Holdsworth, *ibid*., Vol VII, 168.

[31] Section 155 of the Law of Property Act 1925. Before 1882, a power simply collateral could not be extinguished or suspended. Nor, if it was to be exercised for the benefit of another, could it be released. A power appendant or in gross could be released: *West v Berney* (1819) 1 Russ & M 431; *Willis v Shorral* (1739) 1 Atk 474; Sugden, 893. Section 155 does not apply, however, to fiduciary powers, which may be released only by express authorisation. See also paras 17.02–17.13 below.

[32] Sugden, 153, 177; *Grange v Tiving* (1665) O Bridg 107; *Hearle v Greenbank* (1749) 3 Atk 695.

[33] Ibid; *Re D'Angibau* (1880) 15 Ch D 228; *Re Cardross's Settlement* (1878) 7 Ch D 728. See also paras 7.04–7.09 below.

[34] *Re D'Angibau* (1880) 15 Ch D 228, 233; and see also paras 7.04–7.06 below.

(2) Classification according to the interest conveyed or created

1.10 Powers have also been classified under three heads on the basis of the interest conveyed or created, namely as common law powers, statutory powers, and equitable powers.

1. A common law power enables the donee to convey or create a legal estate. A common law power may be created or conferred by power of attorney.[35]
2. A statutory power is a power conferred by statute and is usually said to authorize the creation or conveyance of a legal estate. Since 1 January 1926, such powers are relatively rare,[36] for example, the powers conferred on a legal mortgagee,[37] or on the tenant for life under a strict settlement.[38] Some of the more important statutory powers do not create or directly affect the legal estate, however, such as the powers of maintenance and advancement conferred on trustees by sections 31 and 32 of the Trustee Act 1925.
3. An equitable power is a power which affects the equitable and not the legal estate or interest. Although the owner of the legal estate must give effect to the equitable estate or interest of the appointee (indeed, equity will compel him to do so), the legal estate does not pass simply by virtue of the execution of the equitable power.[39] Since 1 January 1926, all powers of appointment (with which this work is primarily concerned) can operate only in equity,[40] and so, too, do most dispositive powers conferred on trustees, such as powers of selection and powers of maintenance and advancement.

1.11 This classification is straightforward, well established, and easily understood. This work deals primarily with equitable powers (and particularly equitable dispositive powers) but it also refers to many statutory powers (especially those conferred on trustees, personal representatives, and company directors). In many instances the two kinds of powers merely complement each other and can be dealt with together; and it ought to be clear (from what is expressly stated or from the surrounding context) which kind of power is being considered and whether there is any material difference between that kind and any other. Common law powers are not dealt with in any detail in this work.

(3) Classification according to the purpose of the power

1.12 Another commonly-used method of classifying powers is in relation to the purpose for which they were created or conferred, which, in broad terms, distinguishes between administrative or managerial powers on the one hand, and dispositive powers (often simply called powers of appointment)[41] on the other. The *purpose* of a power is, of course, of crucial significance,

[35] Powers of attorney are beyond the scope of this work. See, generally, *Halsbury's Laws*, Vol 1(2) ('Agency') section l(6)(ii) and (7).

[36] Section 1(7) of the Law of Property Act 1925 provides (*inter alia*) that every power to convey or charge land or any interest therein, whether created by statute or other instrument or implied by law, operates only in equity, but this does not apply to 'a power vested in a legal mortgagee or an estate owner in right of his estate and exercisable by him or by another person in his name and on his behalf'.

[37] See, eg, ss 100 and 101 of the Law of Property Act 1925. A mortgagee's power of sale is a fiduciary power (of a weak sort) although this is often denied. The authorities say that a mortgagee is not 'a trustee' of the power of sale, which is a different thing altogether.

[38] See, eg, s 38 of the Settled Land Act 1925.

[39] *Cloutte v Storey* [1911] 1 Ch 18; *Re Brown* (1886) 32 Ch D 597, 601. See also the Law of Property Act 1925, s 3 and the Settled Land Act 1925, s 16.

[40] Section 1(7) of the Law of Property Act 1925: this provision actually applies to powers to convey or charge land or any interest therein (subject to the exceptions referred to in n 36 above) as well as powers of appointment.

[41] These two expressions are often used synonymously and interchangeably. Although powers of appointment are dispositive powers, not all dispositive powers are powers of appointment: powers of advancement and of selection, eg, are also dispositive in nature and are treated as such in this work, even though they may not be so regarded for all

irrespective of the classification of the power itself. For many, perhaps most, issues raised in connection with the exercise of a power—for example, its interpretation (including the implication of any terms), the scope of the power, whether it has been exercised improperly, whether authorities decided in one context are binding in another, and so on—the purpose for which that power was created or conferred is one of the key determining factors (the other usually being the context in which it appears). Indeed, in *Scully v Coley*,[42] the Privy Council noted that the real question was not whether a power was a fiduciary power or an administrative power (after all, a power could be both),[43] but what was the purpose for which the power was conferred. In any event, there is usually no need to classify the power before resolving such questions.

(i) Administrative or managerial powers

1.13 Administrative or managerial powers, as their name suggests, are conferred on a person for the purpose of managing either his own or another person's property. Such powers may be created expressly or by necessary implication or conferred by statute (hence a clear overlap between this mode of classification and the last one).[44] Well-known and commonly-used examples of statutory administrative powers include the wide range of powers conferred on trustees by the Trustee Act 1925 and the Trustee Act 2000, on trustees of land by the Trusts of Land and Appointment of Trustees Act 1996, on personal representatives by the Administration of Estates Act 1925, and on company directors by the Companies Act 2006. Administrative powers are often, indeed usually, expressly conferred on trustees by the trust instrument and, similarly, on executors by the Will under which they are appointed, and usually serve to modify or supplement those conferred by statute. A detailed treatment of individual administrative powers will not be provided in this work and must be found elsewhere.[45] However, since many of the general principles dealt with in this work apply to administrative and managerial powers, as well as dispositive powers, many of them will be referred to at several points below as examples of ways in which such general principles apply and operate.

(ii) Dispositive powers

1.14 Dispositive powers are powers which authorize one person to create or dispose of beneficial interests or proprietary rights in property which that person does not himself own. In this sense, a common law power of attorney is capable of being a dispositive power. However, this book is primarily concerned with powers of appointment (which are often regarded as if they were the only dispositive powers) which can subsist only in equity.[46] It also regards and deals with as 'dispositive powers' all other powers which may have a similar dispositive effect, such as powers of advancement, powers of maintenance, powers to select, and discretions relating to capital or income, all of which also operate and take effect in equity.

(iii) Powers of appointment

1.15 Powers of appointment are the most important and most common dispositive powers. They are usually sub-classified as general powers, special powers, or hybrid (or intermediate) powers.

purposes: see, eg, *Lord Inglewood v IRC* [1983] 1 WLR 866, 373, *per* Fox LJ (where a power of advancement was said to be analogous, in some respects, to an administrative power).

[42] [2009] UKPC 29, [49]. This may have been the case in the matter before them but, as a general proposition, it would be an oversimplification.

[43] *Weinberger v Inglis* [1919] AC 606, 640.

[44] For the construction of instruments and the implication of terms, see Ch 2 below.

[45] See, eg, Thomas and Hudson, Chs 13 and 14; Underhill and Hayton, Ch 14; Williams, Mortimer & Sunnucks, part 6; Theobald, Ch 38; Sherrin and Bonehill, 128–34.

[46] Law of Property Act 1925, s 1(7).

In *Freme v Clement*,[47] Lord Jessel MR provided a reasonable working definition of a power of appointment when he described it as 'a power of disposition given to a person over property not his own by someone who directs the mode in which that power shall be exercised by a particular instrument'.[48] This statement does not say anything, however, about the possible constitution of the class of objects of such a power, the width of the class, the identity of its members, whether or not the power is fiduciary in nature, and particularly the effect of including or excluding the donee of the power himself from the class of objects. It was clear from the early sixteenth century that it was often difficult to distinguish between the case where a power had been conferred on a donee to appoint the fee to anyone he pleased, on the one hand, and the case of a gift of a proprietary right on the other. Although the fundamental distinction between power and property became entrenched, the proprietary characteristics of an unlimited power to appoint to anyone at all, including the donee himself (which, in substance, was more akin to a right of property), were emphasized for certain practical purposes, such as the protection of the interests of creditors, and for the purpose of determining the application or non-application of the rule against perpetuities and the rule against delegation.[49] It also gradually became clear that there was a material difference between such a power and one to appoint property to a specific narrow class of objects (which was more akin to a mandate by the donor of the power). It seems to have taken the courts some considerable time to evolve a clear distinction between the rights and duties of those invested with powers which were essentially mandatory and the rights and duties of those invested with powers which were essentially proprietary, but the distinction between limited or special powers and general powers was nonetheless well established by the eighteenth century. It is a classification upon which the law relating to powers has been built and which is, therefore, still fundamental to an understanding of that law.

(iv) Simple, general powers

1.16 A simple[50] general power is usually defined as a power which the donee can exercise in favour of such person or persons as he pleases, including himself[51] and his executors and administrators.[52] The donee has 'an absolute disposing power' over the property.[53] A truly general power would also permit the donee to appoint in favour of any purpose or purposes, as he pleases.[54] It might also be thought that, in order for a power to be a general power, the donee must be free from any restriction or limitation, not only in respect of the objects of the power but also as to the mode or manner of its exercise, that is, it must be capable of being exercised by deed or by will (or indeed by any other means). However, as we shall see below, although this is generally the case, the law does not

[47] (1881) 18 Ch D 499, 504.

[48] Although it is almost invariably the case that the instrument by which a power of appointment may (or even must) be exercised is laid down by the donor (eg by deed, by will, by either or both, or in writing) this is not essential: a failure to make any such stipulation will not defeat the power.

[49] See paras 1.28–1.35; 5.12–5.15; 5.18–5.20 below.

[50] ie one which has not been given a special meaning for some statutory purpose.

[51] Farwell, 8; Sugden, 394. Section 27 of the Wills Act 1837 (as to which see paras 7.155–7.159 below) refers to a 'power to appoint in any manner [the donee] may think proper' and not to a 'general power' as such.

[52] *Irwin v Farrer* (1812) 19 Ves 86; *Mackenzie v Mackenzie* (1851) 3 Mac & G 559; *Cofield v Pollard* (1857) 3 Jur NS 1203. See also *Re Park* [1932] 1 Ch 580, 583–4; *Re Penrose* [1933] Ch 793.

[53] Sugden, 394. The donee may, therefore, 'bring it into the market whenever his necessities or wishes may lead him to do so': *loc. cit*. In *Re Churston Settled Estate* [1954] Ch 334, 346, Roxburgh J said that the test of a general power is: 'is there somebody who for all practical purposes can be treated as the owner?'

[54] See *Re Dilke* [1921] 1 Ch 34, 40, 43, where the omission of the words 'and purposes' after 'such person or persons' was considered unimportant. *cf. Re Jones* [1945] Ch 105.

always insist upon such a requirement for a general power, and a general power which is exercisable by will only, for example, is still a general power.[55]

(v) Special powers

1.17 A special power (sometimes referred to as a limited power), on the other hand, is generally defined as a power which can be exercised only in favour of certain specified persons or classes,[56] such as children, issue, or relations.[57] The donee 'is restricted to some objects designated in the deed [or will] creating the power'.[58] There is no objection to the donee himself being a member of the class of objects of the power, for example, a power given by a wife to her husband to appoint to 'any issue of my husband's late father'.[59] Nor is there any objection to a special power being conferred on two or more persons jointly (a joint power).[60]

1.18 It is immediately clear that not all powers fit into one or other of these two categories. A power to appoint to all persons except a named or specified person, persons or class of persons, or persons answering to a particular description (for example, a power to appoint 'to any person except AB or CD, or any relatives of the said AB or CD') is clearly not exercisable in favour of any person in the world and is not, therefore, a general power.[61] Similarly, neither a power to appoint by deed to any person except the donee of the power,[62] nor a power to appoint to all persons living at the death of the donee,[63] is unlimited as to its objects and neither, therefore, can be a general power. In addition, a power to appoint to an unlimited class of objects, and which is subject to no restriction on the mode or manner of its exercise, may still not be a general power if it is exercisable only with the consent of another person (such a power often being referred to as a consent power).[64] On the other hand, none of these powers is a special power in the ordinary sense in that the persons in whose favour the power may be exercised are not limited to specified persons or classes of persons answering a particular description. There is an obvious difference between a class of objects comprising (say) children and grandchildren of the donor and a class comprising (say) everyone in the world barring X and Y. In one sense, it is only a difference of degree. In each case, there is a 'class' and, indeed, in each case it is a restricted or limited class. Thus, a hybrid power may be said to be no more than a special power with a very large class of objects. The law does not (and, it is suggested, clearly cannot) stipulate at what point the size of the class becomes too large for the power to be a special power and must therefore be a hybrid power. However, another way of looking at the difference (and, it is suggested, the better way) is to say that the objects of a special power are defined by positive act of inclusion (they are specifically identified either by name or by reference

[55] *Hawthorn v Shedden* (1856) 3 Sm & G 293; *Re Powell's Trusts* (1869) 39 LJ Ch 188.

[56] Farwell, 8. There may even be just one object of the power or (in the event) none.

[57] See, eg, *Re Dilke* [1921] 1 Ch 34, 41, 42; *Re Johnston's Estate* (1922) 56 ILT 153; *Eland v Baker* (1861) 29 Beav 137; *Re Gestetner Settlement* [1953] Ch 692; *Re Sayer* [1957] Ch 423.

[58] Sugden, 394 (as amended). See also *Re Bradshaw* [1902] 1 Ch 436, 447.

[59] *Re Penrose* [1933] Ch 793, 804–05; *Taylor v Allhusen* [1905] 1 Ch 529 (power to appoint to grandchildren, of whom the donee herself was one), *cf. Re Sinclaire's Estate* (1867) LR 2 Eq 45. See also *Tharp v Tharp* [1916] 1 Ch 142, 152 (question left undecided); and Farwell, 555–6.

[60] *Re Churston Settled Estates* [1954] Ch 334; *Re Earl of Coventry's Indentures* [1974] Ch 77.

[61] Sugden, 394; *Re Byron's Settlement* [1891] 3 Ch 474; *Re Park* [1932] 1 Ch 580, 584–5; *Re Jones* [1945] Ch 105; *Blausten v IRC* [1972] Ch 256; *Re Manisty's Settlement* [1974] Ch 17; *Re Hay's Settlement Trusts* [1982] 1 WLR 202. See also (1949) 13 Conv (NS) 20 (Fleming); (1954) 18 Conv (NS) 565 (FR Crane); (1962) 26 Conv 25 (AD Hughes).

[62] *Re Park* [1932] 1 Ch 580.

[63] *Re Jones* [1945] Ch 105.

[64] *Re Churston Settled Estates* [1954] Ch 334; *Re Earl of Coventry's Indentures* [1974] Ch 77. It may be otherwise if consent is required only as to the actual exercise of the power and not as to the selection or approval of the appointee: *Re Dilke* [1921] 1 Ch 34; *Re Phillips* [1931] 1 Ch 347; *Re Watts* [1931] 2 Ch 302; *Re Joicey* (1932) 76 Sol Jo 459; *Re Triffitt's Settlement* [1958] Ch 852.

to some specific definition or description) whereas the objects of a hybrid power are essentially defined by process of exclusion (everyone except X). It may well be that, in theory, a class comprised of (say) specified categories A to Y would be identical with a class comprised of everyone in the world barring Z. Nevertheless, the fact remains that, in practice, even the largest classes of objects specified by positive inclusion are nowhere near as large as the classes of objects formed by exclusion from humanity generally. In any event, a third category of powers, that of hybrid (or intermediate) powers, has been recognized to cater for those cases where the simple distinction between general and special powers is not entirely appropriate. The boundaries of this new category are somewhat uncertain,[65] but, for practical purposes, a hybrid (or intermediate) power may be said to be a power to appoint to anyone in the world with the exception of certain specified persons or groups of persons,[66] and it is in this sense that the expression is used in this work (unless the context requires otherwise).

1.19 It is a question of construction whether a general, special, or hybrid power has been created[67] (as, indeed, is the question whether that power is fiduciary or non-fiduciary in nature).[68] Thus, a gift on the trusts which another may declare as to his own residuary estate gives that other a general power.[69] A power which is exercisable only with the consent of trustees is a special and not a general power, unless the consent is required only to the actual exercise of the power and not to the selection or approval of the appointee.[70] A power is not prevented from being a general power merely because the period of distribution of the property is postponed.[71] Moreover, a power may also partake of several of the characteristics mentioned above.[72] For example, a power may be given to A and B to appoint, with the consent of C, to anyone except a defined class of persons which includes A and B. Such a power would be described as a joint, hybrid consent power. However, it is neither necessary, nor perhaps possible, to work out all the possible variants. The material question is usually whether a particular power possesses a particular characteristic which is regarded as crucial for the purposes of a particular rule of law, and it is then generally immaterial what other characteristics that power may have or may share with other powers.

1.20 This underlines the elementary, though crucial, point that the division of powers of appointment into general, special, and hybrid powers is not precise or exhaustive. Some powers simply do not sit comfortably in the particular category in which they have been placed. For example, a power to appoint to a specified class, or to persons answering a particular description, where the donee is

[65] eg, is there no difference between a wide hybrid power which excludes the donee himself from the class of objects and one which excludes others, but not the donee himself (as was the case in *Re Byron's Settlement* [1891] 3 Ch 474)? Should not the latter be regarded as a general power, and to have been held to be a special power only for the purposes of s 27 of the Wills Act 1837? Hybrid powers are treated as general powers for some purposes and as special powers for others: see paras 1.24, 1.27, 1.30, 1.32, 1.35, 1.36 below.

[66] *Re Byron's Settlement* [1891] 3 Ch 474; *Re Park* [1932] 1 Ch 580; *Re Jones* [1945] Ch 105; *Re Abrahams' Will Trusts* [1969] 1 Ch 463, 474; *Re Lawrence's Will Trusts* [1972] Ch 418; *Re Manisty's Settlement* [1974] Ch 17; *Re Hay's Settlement Trusts* [1982] 1 WLR 202; *Re Beatty's Will Trusts* [1990] 1 WLR 1503.

[67] See, eg, *Re Johnston's Estate* (1922) 56 ILT 153; *Eland v Baker* (1861) 29 Beav 137; *Bannerman's Trustees v Bannerman* [1915] SC 398.

[68] *Re Beatty's Will Trusts* [1990] 1 WLR 1503, from which it is clear (1506) that a power may be fiduciary in nature despite the fact that the donee is himself an object of the power, the rule against conflict of interest being excluded. See also *Rafferty v Philp* [2011] EWHC 709 (Ch), where the rule applied and the donees/objects were impliedly excluded; but if it also implies that this is necessarily the case, it is inconsistent with *Re Beatty* and not correct.

[69] *Bristow v Skirrow* (*No 1*) (1859) 27 Beav 585. But see *Bristow v Skirrow* (1870) LR 10 Eq 1.

[70] *Re Dilke* [1921] 1 Ch 34; *Re Phillips* [1931] 1 Ch 347; *Re Watts* [1931] 2 Ch 302; *Re Joicey* (1932) 76 Sol Jo 459; *Re Triffitt's Settlement* [1958] Ch 852. Whether it is actually possible to separate consent to actual exercise from consent to the choice of appointee must be doubtful, however.

[71] *Re Keown's Estate* (1867) 1 IR Eq 372.

[72] (1962) 26 Conv (NS) 25, 27 (AD Hughes).

himself an object of the power, is regarded, as we have seen,[73] as a special power, but, in view of the historic emphasis on the proprietary characteristics of a general power (particularly the fact that the donee could appoint the subject-matter of the power to himself), such a power might appear to be more akin to a general power; and, indeed, for some purposes, but not all, it is so treated.[74] In other instances, a power may change its status (and its category) as circumstances change: for example, a power to appoint to anyone except a specified person (that is, a hybrid power) may become a general power if and when that excluded person dies or can no longer come into existence;[75] and a power conferred on a spinster to appoint to anyone except any husband she may marry is regarded as a general power while she remains unmarried, but will become a hybrid power if she marries.[76] However, such a change of status is not possible for all purposes.[77]

1.21 Moreover, the classification does not take full account of the difference between a limitation of the range of eligible objects of a power, on the one hand, and a restriction on the mode by which that power may be exercised on the other. Thus, it has been suggested[78] that it would be more appropriate to adopt an alternative classification based on a division into unlimited and limited powers, with the latter being subdivided into (i) those powers which are limited as to the mode of exercise and (ii) those which are limited by the exclusion or inclusion of certain persons as objects of the power. This alternative classification, despite having much to recommend it, has not caught on, however. In any event, it cannot ignore the fact that a particular power may be classified in different ways for different purposes. Nor can it overcome the fact that the traditional division of powers of appointment into general, special, and hybrid powers has been sanctioned by general and consistent use and has formed the basis from which much of the law relating to powers has evolved: it cannot therefore be easily displaced. Indeed, in many circumstances and for many purposes (including certain statutory provisions), this division (indeed, usually just that between general and special powers) has been regarded as including all possible cases, with the result that the courts 'must allocate every power to the more suitable or less unsuitable of the two heads' and fit powers 'into a statutory strait-jacket'.[79]

C. Modified meanings and effects for specific purposes

1.22 The classification of powers of appointment into general, special, and hybrid powers is both simple and convenient, but it is not precise or exhaustive. In some common and important instances, powers which could be, and have been, placed in one category for one purpose are treated as powers of a different kind and re-classified for other purposes. Similarly, although the distinction between power and property is generally regarded as a fundamental conceptual difference, it is ignored or overridden in many circumstances. This is particularly evident in relation to general powers (but is not confined to that context). In effect, for many purposes (but by no means all) the law looks to the substance rather than the form and has greater regard to the fact that, although a donee of a power may not actually have property vested in him, if he is an object of the power he is nonetheless in a position to make that property his own. Some of the more common instances

[73] See para 1.17 above.
[74] See paras 1.26–1.39 below.
[75] *Re Byron's Settlement* [1891] 3 Ch 474, 480; *Re Harvey* [1950] 1 All ER 491.
[76] *ibid*.
[77] See para 1.35 below.
[78] (1949) 13 Conv (NS) 20 (JG Fleming). FR Crane seems to have accepted this classification in his note on *Re Churston Settled Estates* [1954] Ch 334: (1954) 18 Conv (NS) 565.
[79] *Re Lawrence's Will Trusts* [1972] Ch 418, 428, *per* Megarry J. See also *Platt v Routh* (1840) 6 M & W 756, 788.

where the basic classifications and distinctions have been abandoned (wholly or in part) are dealt with briefly below.

(1) Section 27 of the Wills Act 1837

1.23 Section 27 provides that a general devise of the real estate, and a general bequest of the personal estate, of the testator shall be construed to include any real estate or personal estate (as the case may be) 'which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will'. Although section 27 does not refer expressly to a general power as such, the rationale behind the provision is that the interest of a donee of a general power of appointment over property is 'so analogous to ownership of property that a will of that person making a general disposition of property should, prima facie, be held to extend to and include property embraced in a general power'.[80] Thus, for the purposes of section 27, where the donee possesses a general power in the widest sense, under which he can appoint to anyone and by any means, as he pleases, the distinction between power and property is effectively ignored: regard is had to the substance rather than the form and such a power is clearly within the scope of the statute. However, a general power (in the sense that it is unlimited as to its objects) which is exercisable by will only (and not, for example, by deed) has also been held to be within the section.[81] On the other hand, a general power (unlimited as to its objects) which is exercisable by deed only (or by any means other than a will) is clearly not within the scope of section 27; nor is it a special power. Moreover, a general devise or bequest will not operate as an exercise of a power of revocation, unless the gift would otherwise be rendered inoperative.[82]

1.24 A hybrid power is not within the section.[83] This is so even where the donee himself is not one of the excluded objects,[84] despite the fact that his position is then clearly 'analogous to ownership of property'.[85] Such a hybrid power might be regarded as a general power for other purposes, but not for the purposes of section 27 because it is not exercisable by the donee 'in any manner he may think proper'.[86] The subject-matter of such a power would clearly be caught by section 27 if the power had already been exercised in favour of the donee himself (that is, he had already reduced it into possession). In other contexts (e.g. for the purposes of the estate duty and subsequently the inheritance tax legislation) the fact that it has not actually been exercised in this way is ignored, and greater regard is had to the substance than the form,[87] but this is not so in relation to section 27. Similarly, a power to appoint to such persons as the donee should think fit by writing (not being a will or codicil) or by will or codicil expressly referring to the power, has been held not to have been well exercised by a general bequest, which did not refer to the power.[88] The words 'which he may have power to appoint in any manner he may think proper' in section 27 were held to be equivalent

[80] *Re Wilkinson's Settlement* [1917] 1 Ch 620, 627, *per* Sargant J. See also *Re Priestley's Will Trusts* [1971] Ch 858; *Re Pryce* [1911] 2 Ch 286; *Chandler v Pocock* (1880) 15 Ch D 491 (aff'd (1881) 16 Ch D 648); *Freme v Clement* (1881) 18 Ch D 499; *Re Wilkinson* (1869) 4 Ch App 587; *Re Spooner's Trust* (1851) 2 Sim NS 129; *Francombe v Hayward* (1845) 9 Jur 344.

[81] *Hawthorn v Shedden* (1856) 3 Sm & G 293; *Re Powell's Trusts* (1869) 39 LJ Ch 188.

[82] *Pomfret v Perring* (1854) 5 De GM & G 775; *Palmer v Newell* (1855) 20 Beav 32, 38; *Re Brace* [1891] 2 Ch 671; *Tassaruf Mevduati Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd* [2009] CILR 324, 337.

[83] *Re Byron's Settlement* [1891] 3 Ch 474, 480; *Re Harvey* [1950] 1 All ER 491; *Re Lawrence's Will Trust* [1972] Ch 418, 428; *Perpetual Executors and Trustee Association of Australia v Adams* [1975] VR 462.

[84] *Re Byron's Settlement* [1891] 3 Ch 474.

[85] *Re Wilkinson's Settlement*, above, 627.

[86] *Phillips v Cayley* (1889) 43 Ch D 222; *Re Davies* [1892] 3 Ch 63; *Re Tarrant's Trusts* (1889) 58 LJ Ch 780; *Re Waterhouse* (1907) 77 LJ Ch 30.

[87] *Re Penrose* [1933] Ch 793, 807, *per* Luxmoore J. See also *Melville v IRC* [2001] EWCA Civ 1247; [2002] 1 WLR 407; and see paras 1.36–1.37 below.

[88] *Phillips v Cayley* (1889) 43 Ch D 222; and see para 7.129 below.

to 'which he may have power to appoint by the will in question in any manner he may think proper'; and such a power could not be exercised by a will not referring to the power any more than it could be exercised by deed.[89] The power itself was undoubtedly general in the ordinary sense.

1.25 A power which can be exercised only with the consent of some person is not a general power,[90] unless such consent is required only in order to give validity and effect to the exercise of the power and not by way of approval of the persons who are to be benefited.[91] The cases establishing this proposition did not actually involve section 27 of the Wills Act: indeed, in *Re Phillips* Maugham J pointed out that, in relation to section 27, the courts were dealing with the true construction of the words of a statute, where different considerations might arise. Nevertheless, it seems clear that a power which can be exercised only with the consent of another, but which is otherwise general, is not a power which the donee can exercise 'in any manner he may think proper'. Similarly, a power which is exercisable by two or more persons jointly may also not fall within section 27 for the same reason, although a joint power may probably be exercised effectively under section 27 where a joint will is made.[92]

(2) Administration of assets

1.26 Section 32(1) of the Administration of Estates Act 1925 provides that the real and personal estate of a deceased person, and 'the real and personal estate of which a deceased person in pursuance of a general power . . . disposes by his will', are 'assets' for payment of his debts and liabilities. Indeed, any disposition by will inconsistent with this provision is void as against the creditors. This is a statutory formulation of an equitable principle to the effect that if an appointment is made under a general power (including a general testamentary power)[93] in favour of a volunteer, the creditors of the appointor can have the appointed fund intercepted to satisfy their claims in so far as the other assets of the appointor are insufficient for that purpose.[94] The appointor could have exercised the power in favour of his creditors and, in equity, the claims of creditors were regarded as paramount to the claims of volunteers.[95] This rule applied to appointments by will and to those made by deed, but taking effect from the death of the appointor.

1.27 Thus, although section 32 (unlike section 27) refers expressly to a 'general power', its provisions extend, it seems, to appointments under any hybrid power, such as those under scrutiny in *Re Park* and *Re Jones*,[96] for the donee could have appointed to his creditors, even if he could not have appointed to himself.[97] It also applies, probably, to any power under which the donee could appoint to himself. For the purposes of section 32, therefore, a much wider meaning has been ascribed to a 'general power' than is ordinarily the case. Indeed, only truly special powers (of which the donee is not himself an object), most consent powers and joint powers are outside the scope of the section.[98] A general power, the exercise of which is subject to the consent of another, will

[89] See also *Re Davies* [1892] 3 Ch 63.
[90] *Re Watts* [1931] 2 Ch 302.
[91] *Re Dilke* [1921] 1 Ch 34; *Re Phillips* [1931] 1 Ch 347.
[92] *cf. Re Duddell* [1932] 1 Ch 585: joint power exercised by a joint will, but not by virtue of s 27.
[93] *Beyfus v Lawley* [1903] AC 411.
[94] See, eg, *Re Phillips* [1931] 1 Ch 347. See also (1962) 26 Conv (NS) 25, 32–4 (AD Hughes); and (1949) 13 Conv (NS) 20, 22–3 (JG Fleming). If such property was personal property, it was regarded as equitable assets of the testator which his executor could claim for distribution in the proper order: *Re Hoskin's Trusts* (1877) 6 Ch D 281; *Re Lawley* [1902] 2 Ch 799, 807.
[95] *Re Phillips* [1931] 1 Ch 347, 351.
[96] [1945] Ch 105 (power to appoint to persons living at the death of the donee).
[97] *Edie v Bebington* (1854) 3 Ir Ch R 568; *Drake v Attorney-General* (1843) 10 Cl & Fin 257; *Re Phillips* [1931] 1 Ch 347. See also the Administration of Estates Act 1925, s 34 and the First Sch, Pt II, para 7.
[98] *Townshend v Windham* (1750) 2 Ves Sen 1, 9–10.

generally be outside the scope of section 32, unless the consent is required simply in order to give validity and effect to the exercise of the power and not to the choice of appointees: in the latter case, the fetter imposed on the power ensures that the subject-matter is not 'assets' of the appointor.[99] A general power which is exercisable only by two or more persons jointly would also fall outside the terms of section 32.

(3) Insolvency

1.28 Section 38(b) of the Bankruptcy Act 1914 (now repealed)[100] provided that the property of the bankrupt divisible amongst his creditors included 'the capacity to exercise . . . all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge'. Thus, the distinction between power and property was again ignored. Indeed, section 38(b) did not refer expressly to general powers and was clearly capable of applying to virtually any power, including hybrid and special powers, provided the bankrupt was an object of such a power and could exercise it for his own benefit. Thus, a general power exercisable by deed was held to be within this section. On the other hand, neither a general testamentary power,[101] nor a power which the bankrupt could exercise only partly for his own benefit, would be caught or pass to his trustee in bankruptcy.[102] It was also doubtful whether a consent power or a joint power would have been within section 38(b) for the person whose consent or co-operation was required would not be obliged to give it.[103]

1.29 Section 42 of the Bankruptcy Act 1914 (now repealed),[104] which avoided certain settlements of property as against the settlor's trustee in bankruptcy was limited to a settlement of the settlor's own property, or property in which he had a beneficial interest, and did not apply to a settlement made in exercise of a general power of appointment.[105] In other words, whereas section 38(b) would have applied to the subject-matter of such a power if it remained unexercised at the commencement of the bankruptcy, neither section 38(b) nor section 42 could apply if it had been exercised irrevocably before then: the power had ceased to exist just as much as if the donee were dead.[106] In contrast, for the purposes of section 172 of the Law of Property Act 1925 (now repealed, and the provisions of the statute 13 Eliz. I, c. 5, which preceded it),[107] under which every conveyance of property made with intent to defraud creditors was voidable at the instance of any

[99] *Re Phillips* [1931] 1 Ch 347; *Re Dilke* [1921] 1 Ch 34. *cf. Commissioner of Estate and Succession Duties* (*Barbados*) *v Bowring* [1962] AC 171, 180.

[100] Although its equivalent remains in force in some 'offshore' jurisdictions.

[101] Re *Guedalla* [1905] 2 Ch 331. See also *Re Benzon* [1914] 2 Ch 68. Any power in the hands of the trustee in bankruptcy ended on the death of the bankrupt: *Nichols to Nixey* (1885) 29 Ch D 1005.

[102] *Re Taylor's Settlement Trusts* [1929] 1 Ch 435 (power exercisable only for the joint benefit of donee and his wife).

[103] In *Re Phillips* [1931] 1 Ch 347 (see above), which concerned the equitable assets rule, creditors were allowed to intercept property which had actually been appointed under a consent power; but in that case the fetter on the power had already been removed when the appointment was made, whereas, under s 38(a), the power had yet to be exercised.

[104] Although its equivalent remains in force in some 'offshore' jurisdictions. See, eg, the Bahamian Bankruptcy Act 1870, s 71; the Bermudian Bankruptcy Act 1989, s 45; the Hong Kong Banruptcy Ordinance (c 6), s 47; the Cayman Islands' Bankruptcy Law (Revised), s 107.

[105] *Re Mathieson* [1927] 1 Ch 283. Section 42(1) reproduced s 47(1) of the Bankruptcy Act 1883 which, in turn, re-enacted the first part of s 91 of the Bankruptcy Act 1869 (save that the latter provision applied only to traders).

[106] *Nichols to Nixey* (1885) 29 Ch D 1005.

[107] Section 172 re-enacted the provisions of Sch 3, Pt II, para 31 to the Law of Property (Amendment) Act 1924 (which never came independently into operation) and the provisions of para 31 replaced 'in very substantially different terms' the provisions of 13 Eliz I, c 5: see *Lloyds Bank Ltd v Marcan* [1973] 1 WLR 339, 344, *per* Pennycuick V-C. No change of significance seems to have been made in the present context, however. Equivalent provisions to s 172, and even the Statute of 1571, remain in force in some jurisdictions: see, eg, the Belize Law of Property Act, s 149; the British Virgin Islands' Conveyancing and Law of Property Act, s 81; the Hong Kong Conveyancing and Property Ordinance (c 219), s 172. Each of the Australian States also has legislation based on the 1571 Act.

person thereby prejudiced, the assets of a debtor regarded as available for the payment of his creditors included property which was the subject-matter of a general power of appointment held by him and the exercise of a general power was regarded as a 'disposition' for the purposes of those provisions.[108]

1.30 For the purposes of the Insolvency Act 1986, section 283(4) provides that references to property, in relation to a bankrupt,[109] include references to any power exercisable by him over or in respect of property, except in so far as the power is exercisable over or in respect of property not for the time being comprised in the bankrupt's estate and (*inter alia*) cannot be so exercised for the benefit of the bankrupt. A bankrupt's estate comprises all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, subject to certain exceptions—in particular, property held by the bankrupt on trust for any other person.[110] As well as money, goods, things in action and land, 'property' includes every description of property, wherever situated, and also obligations 'and every description of interest, whether present or future or vested or contingent, arising out of or incidental to property'.[111] The effect of these wide definitions is that any interest which the bankrupt owns under a trust, whether it is vested or contingent, including an interest in default of appointment, will be caught. So, too, will the subject-matter of any general power of appointment conferred on him, but not property subject to a special power or a hybrid power, unless the bankrupt himself is an object of that power. In *Clarkson v Clarkson*,[112] for example, A, B, and C were directors and shareholders of a prosperous company. In 1989, they each took out a life insurance policy for £500,000 in order to provide cash for the other two to buy out the insured director's interest in the company when he died. C's policy was held on trust by A, B, and C, who had a power to appoint the policy and its proceeds for the benefit of the insured director's spouse, children and grandchildren, and the other two directors; and, in default of appointment, on trust for A and B equally. In June 1991, the company went into administrative receivership. In June 1992, the trustees appointed the proceeds of the policy to C's wife. In January and February 1993, all three directors were adjudicated bankrupt. The trustees in bankruptcy of A and B claimed that the appointment (having been made within two years of the bankruptcies) was 'a transaction at an undervalue' within section 339 of the 1986 Act. The Court of Appeal rejected the claim, holding that the creation of the trust by C in 1989 had been a gift, but not the appointment made in 1992. Hoffmann LJ stated:

> The appointment was merely the exercise of a fiduciary power to select the person to whom the gift should go. It has been for centuries a principle of the law of powers that an appointment under a special power takes effect as if it had been written into the instrument creating the power. The appointee takes the property of the settlor and not that of the donee of the power.

1.31 The court was willing to give section 339 a purposive construction, holding that it was clearly intended to enable a trustee in bankruptcy to recover for the benefit of creditors any property which the bankrupt had given away at an undervalue during the relevant period (as defined in section 341). What 'property' did A and B have at the relevant time? Under the settlement, each had a vested interest in the trust fund in default of appointment: however, such an interest was, in its nature, liable to defeasance. Each was a potential object of the power of appointment; but this was nothing more than a right to be considered as a potential appointee. Each was a trustee and

[108] *Townshend* (*Lord*) *v Windham* (1750) 2 Ves 1; *Whittington v Jennings* (1834) 6 Sim 493.
[109] See s 381(1) of the Insolvency Act 1986.
[110] Section 283 (l)–(3).
[111] Section 436.
[112] [1994] BCC 921.

donee of the power (along with C), but this clearly conferred no beneficial interest in the property at all and the power had to be exercised jointly by all three trustees.

1.32 Thus, for the purposes of the Insolvency Act 1986, the crucial factor is not so much whether the power conferred on the bankrupt is a general, hybrid, or special power as such, but whether the power (however it is classified) enables the bankrupt to appoint its subject-matter to himself. A general power in the ordinary sense will clearly be such a power, although (as in the case of section 38(b) of the Bankruptcy Act 1914) a general testamentary power probably is not; a special power in the ordinary sense will also not be within these provisions; and a hybrid power may or may not be, depending on whether the bankrupt is one of the persons excluded from the class of its objects.

1.33 The same approach was recently adopted by the Privy Council in *Tassaruf Mevduati Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd*,[113] in relation to an unfettered power of revocation reserved by the settlor. The plaintiff, a judgment creditor,[114] sought the appointment of receivers by way of equitable execution over the settlor's powers to revoke two Cayman trusts. It was argued that the settlor's right of revocation was a power 'to be regarded as his property' and thus could be the subject of receivership; that powers of revocation were *choses in action* and should, therefore, be deemed to be property and capable of being vested in receivers; and that the court should extend its equitable jurisdiction to grant this remedy because the creditor would otherwise not be able to recover its debt. The defendant relied, *inter alia*,[115] on the established distinction between 'power' and 'property' and the absence of any statutory provision equating them, so that the powers of revocation were not to be regarded as his 'property'. The defendant's arguments were accepted by Smellie CJ and the claim for the appointment of a receiver was dismissed. The Court of Appeal upheld the decision.[116] However, the Privy Council allowed the appeal.[117]

1.34 Lord Collins, delivering the opinion of the Board, accepted that 'the traditional view was that a power was distinct from property, but this was not an absolute rule.' He noted[118] that 'context was all important'; that there was 'no doubt that while for some purposes a power was not property, for other purposes the holder of a general power could be regarded as being for all practical purposes an owner'; and that the 'distinction between the concepts of power and property had not been preserved in all contexts and for all purposes'. The plaintiff also sought an order that receivers be appointed over the power of revocation, so the question arose whether the power was delegable. On this point, Lord Collins referred to various passages in Sugden, *Powers*,[119] where it is stated:

> . . . wherever a power is given . . ., if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare* . . .

[113] [2009] CILR 324; [2010] WTLR 1285. There was no contention that the trust was a 'sham' or otherwise than valid and duly constituted.

[114] The plaintiff had obtained a judgment debt in Turkey and then summary judgment in the Cayman Islands to recover that debt.

[115] He also argued that a power was not a *chose in action*; that granting the remedy sought would be too great an extension of the court's equitable jurisdiction; and that, in reality, the claim was seeking (unauthorized) delegation of the powers and not the vesting of any property in a receiver.

[116] (2009) 13 ITELR 1.

[117] [2011] UKPC 17.

[118] *ibid*., [31], [34], and [43], referring to para 1.08 of the first edition of this book (now para 1.06 above).

[119] 8th edn (1861), 179, 180–1, 195–6. Lord Collins also stated (at [52]) that a power 'is capable of being delegated where the holder of the power owes no duty of trust or confidence to another person', which seems to suggest, on the one hand, that a non-fiduciary power may always be delegated and, on the other, a fiduciary power may never be delegated. Neither proposition is actually correct; and the passages in Sugden do not support any such conclusion. Reposing 'a personal trust or confidence' in the donee simply means, in this context, that it is a 'personal' power in the sense that the identity of the donee is an important element.

> Where the power is tantamount to an ownership, and does not involve any confidence or personal judgement, and no act personal to the donee is required to be performed, it may be executed by attorney in the same manner as a fee-simple may be conveyed by attorney . . .
>
> . . . the rule that a power cannot be delegated, is not . . . a general inflexible rule, but is simply a regulation, that a confidence reposed in one cannot by him be delegated to another. This rule, therefore, is inapplicable to the case [where] no confidence was reposed in A, but the estate was, merely for his own convenience, conveyed to such uses generally as he should appoint.

Having surveyed several English authorities and noted the position in the United States (where the general approach is to take 'a realistic view' of revocable trusts), Lord Collins concluded that the powers of revocation 'are such that in equity, in the circumstances of a case such as this, [the settlor] can be regarded as having rights tantamount to ownership'.[120] The appropriate order would be that the settlor should delegate his powers of revocation to the receivers, so they could exercise them.[121] The decision is entirely consistent with the approach taken to general powers of appointment in situations of insolvency, where the courts look to the substance rather than the form. However, just as in relation to general powers, it is significant that the powers of revocation in *Merrill Lynch* were unfettered and could be exercised at any time by the settlor in favour of himself. The position would have been very different if, for example, the exercise of the powers had been subject to the consent of another.

(4) The rule against perpetuities

1.35 The application of the rule against perpetuities to powers generally is dealt with in greater detail below.[122] For present purposes, it is sufficient to note that, for the purposes of the common law rule, a power which is exercisable by two or more jointly, but which would otherwise be a general power, has been held to be a special and not a general power, both as to its creation and its exercise.[123] A power which is exercisable subject to the consent of another is also a special power.[124] A general testamentary power has a dual aspect: it is regarded as a special power for the purpose of determining the validity of the power,[125] but as a general power for the purpose of determining the validity of its exercise.[126] Hybrid powers were also probably special powers for the purposes of the rule.[127] According to Morris and Leach,[128] the test of a general power, for perpetuity purposes, is whether the donee is in substance the owner, that is, whether he can make himself owner by appointing the property in his own favour.[129] Section 7 of the Perpetuities and Accumulations Act 1964 (which applies to dispositions made after 15 July 1964 and before 6 April 2010)[130]

[120] [2011] UKPC 17, [59].

[121] The objection that an order in favour of a single creditor should not be made where a trustee in bankruptcy had been appointed was dismissed.. The powers of revocation did not vest in the trustee under Turkish law; and the plaintiff had undertaken to make the proceeds available to creditors as a whole.

[122] See Ch 5 below.

[123] *Re Churston Settled Estates* [1954] Ch 334; *Webb v Sadler* (1873) LR 8 Ch App 419.

[124] *Re Churston Settled Estates*, *ibid*. *Re Watts* [1931] 2 Ch 302; and (1955) 71 LQR 242 (AH Droop).

[125] *Wollaston v King* (1868) LR 8 Eq 165; *Morgan v Gronow* (1973) LR 16 Eq 1. See also para 5.32 below.

[126] *Rous v Jackson* (1885) 29 Ch D 521; *Re Flower* (1885) 55 LJ Ch 200 (not following *Re Powell's Trusts* (1869) 39 LJ Ch 188). But see Gray, *The Rule Against Perpetuities*, (4th edn, 1942), section 526.3; and Morris and Leach, *The Rule Against Perpetuities* 1962, with supplement 1964, 138–40. See also paras 5.18–5.20 and 5.31–5.32 below.

[127] *Re Triffit's Settlement* [1958] Ch 852, 860–1, *per* Upjohn J, relying, however, on *Re Watts* [1931] 2 Ch 302 and *Re Churston Settled Estates* [1954] Ch 334, which were concerned with consent and joint powers.

[128] *The Rule Against Perpetuities*, 129.

[129] A power to appoint amongst all persons living at the donee's death, as in *Re Jones* [1945] Ch 105, is not such a power, even though it is similar to a general testamentary power: it does not authorize an appointment to persons not yet born, nor to corporations or charitable or other purposes.

[130] The Perpetuities and Accumulations Act 2009 (Commencement) Order 2010: SI 2010/37.

effectively adopted this view and provided that, for the purpose of the rule, a power of appointment shall be treated as a *special* power unless (a) in the instrument creating the power it is expressed to be exercisable by one person only and (b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power, without the consent of any other person or compliance with any other condition, not being a formal condition relating to the mode of exercise of the power. Thus, the character of a power is determined irrevocably upon its creation: a power which is exercisable by A and B jointly, or by A with the consent of B, will be a special power and will remain so in each case notwithstanding the death of B. The Perpetuities and Accumulations Act 2009 (which applies to instruments taking effect on or after 6 April 2010) retains similar provisions. Thus, at both common law and under statute, the basic distinction between general, special and hybrid powers is ignored and the focus is placed on the question whether the donee is himself an object of the power—on substance rather than form.

(5) **Inheritance tax**

1.36 For estate duty purposes, a power which enabled the donee to appoint to himself was a power to 'appoint or dispose of property as he thinks fit'; he was therefore a person 'competent to dispose' of the subject-matter of the power, in respect of which property estate duty was payable.[131] Thus, unlike the position in relation to section 27 of the Wills Act 1837, it was immaterial that the power in question was not a general power in the ordinary sense and also that the power had not actually been exercised by the donee. As Luxmoore J put it in *Re Penrose*:

> A donee of a power who can freely appoint the whole fund to himself and so acquire the right to dispose of the fund as he thinks fit in accordance with his own volition, is, in my judgment, competent to dispose of that fund as he sees fit, and it can make no difference that this can only be done by two steps instead of one—namely, by an appointment to himself, followed by a subsequent gift or disposition, instead of by a direct appointment to the object or objects of his bounty.

Thus, a hybrid power, and indeed a special power, whose objects included the donee would also caught.[132]

1.37 A similar approach has been adopted for inheritance tax purposes. Section 5(2) of the Inheritance Tax Act 1984 provides that a person who has a general power which enables him, or would, if he were *sui juris* enable him, to dispose of any property other than settled property,[133] shall be treated as beneficially entitled to the property; and for this purpose 'general power' means a power or authority enabling the person by whom it is exercisable to appoint or dispose of property as he thinks fit. Thus, in *Melville v IRC*,[134] a right exercisable by the settlor of property, enabling him to require the trustees to exercise their powers of appointment in such manner as he might direct, formed part of his estate for inheritance tax purposes. The power was a valuable right and was to be taken into account when valuing an estate for the purpose of calculating the value transferred by the settlor on the making of his disposition into trust.

[131] *Re Penrose* [1933] Ch 793; Finance Act 1894, ss 2(l)(a), 22(2)(a).

[132] *Re Richards* [1902] 1 Ch 76; *Re Ryder* [1914] 1 Ch 865; *Re Shuker's Estate* [1937] 3 All ER 25. *cf. Re Pedrotti's Will* (1859) 27 Beav 583; *Re Fox* (1890) 62 LT 762; *Long v Long* (1800) 5 Ves 427.

[133] See s 43 for the meaning of 'settlement' and 'settled property'.

[134] [2001] EWCA Civ 1247; [2002] 1 WLR 407. See also *Sillars v Inland Revenue Commissioners* [2004] STC (SCD) 180; [2004] WTLR 591 (joint bank account).

(6) Delegation

1.38 The creation of a power necessarily involves conferring a discretion of some sort. As a general principle, a person to whom a discretion has been given may not delegate it to another. There are exceptions, however: for example, purely ministerial acts may be delegated;[135] and delegation may be expressly authorized.[136] Moreover, a general power is not subject to the rule against delegation: it is acknowledged that such a power is equivalent, in substance, to property, the owner of which could do with it as he pleases.[137] A special power, on the other hand, is generally subject to the rule, in the absence of one of the recognized exceptions,[138] although it may be otherwise where the donee is himself a member of the class of objects, a circumstance from which it might reasonably be inferred that the rule was not intended to apply. In *Re Triffitt's Settlement* Upjohn J said that all hybrid powers are special powers for the purposes of the rule against perpetuities, but were analogous to general powers for the purposes of the rule against delegation, it being possible to imply an intention to authorize delegation from the size of the class. On this view, it seems immaterial whether or not the donee is himself excluded from the class of objects.

1.39 It is clear, therefore, that no one definition or classification of general, special or hybrid powers will suffice for all purposes. In many cases, the question is whether a particular power is a general, special or hybrid power for the purposes of a particular rule; and it may not be relevant that it has already been classified as one or the other for some different purpose. In the light of such considerations, AD Hughes put forward a different and more elaborate classification of powers.[139] He suggested that the two most important questions were (i) whether the donee could appoint to anyone except himself and (ii) whether the donee can appoint to himself. These two questions are clearly compressed into one if the donee can appoint to anyone at all. On the basis of these two tests, Hughes argued that powers can be divided into four groups: (a) those where both tests are satisfied (that is, general powers in the traditional sense); (b) those satisfying the first test, but not the second (which he calls 'qualified general powers'); (c) those satisfying the second test, but not the first (which he calls 'qualified special powers'); and (d) those where neither test is satisfied (that is, special powers in the traditional sense). This alternative classification is both admirable and useful. However, it is no more exhaustive than any other. For example, a power to appoint to anyone living at the donee's death[140] does not fall within any of categories (a), (b), or (c) and yet still sits uncomfortably in category (d).[141] A general testamentary power is included within category (a), but, as we have seen,[142] it is regarded as a special power for the purpose of determining its validity under the rule against perpetuities. Moreover, this classification takes no account of (i) any restriction on the mode of exercise of a particular power (ii) any requirement for consent or (iii) joint powers. The mode of exercise which is relevant in a particular context is said to be irrelevant, being in fact a constituent part of the rule of law which is being applied to the power, and not a characteristic of the power itself. This may be true. However, consent powers and joint powers cut across the classification because they may, as far as their objects are concerned, fall into any

[135] Farwell, 503–04; *Re Hetling and Merton's Contract* [1893] 3 Ch 269.
[136] *Pilkington v IRC* [1964] AC 612, 639 *per* Lord Radcliffe.
[137] Farwell, 505; *White v Wilson* (1852) 1 Drew 298, 304; *Tassaruf Mevduati Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd* [2011] UKPC 17, [52], [62]. See also n 119 above.
[138] *De Bussche v Alt* (1878) 8 Ch D 286; *Re Morris' Settlement* [1951] 2 All ER 528; *Re Hunter's Will Trusts* [1963] Ch 372; *Pilkington v IRC*, above.
[139] (1962) 26 Conv (NS) 25, especially 40–4.
[140] *Re Jones* [1945] Ch 105.
[141] In *Re Jones*, above, 106, Vaisey J declined to regard the power as a special power because the objects, being the whole human race alive at the donee's death, did not constitute a 'class'.
[142] See para 1.35 above and paras 5.18–5.20 and 5.31–5.32 below.

of the four categories. For some purposes it is immaterial who their objects are: the fact that they are exercisable only with the consent of another or by two persons jointly means that, for those particular purposes, they are special powers. Hughes therefore ends up[143] with a complex classification of powers into several, consent, and joint powers which are in turn subdivided into general, qualified general, qualified special, and special powers. Even then, however, the classification is not exhaustive; it is simply more comprehensive than most others. In any event, the crucial question, in practice, is whether, and if so how, a particular power is affected by particular rules of law directed at particular purposes, and this is a question which is often too complex to be resolved by reference to any scheme of classification.

D. Power and trust

1.40 Another fundamental distinction—indeed, one of much greater importance in modern contexts—is that between 'power' and 'trust'. A trust imposes an obligation, or creates a duty: a power confers an option. A trust is imperative, whereas a power is discretionary. The court will compel the execution of a trust, but it cannot compel the execution of a power.[144] However, although the two concepts are fundamentally different, in many circumstances the dividing line is often indistinct. Powers may be, and often are, conferred on trustees *qua* trustees. In such cases, the basic distinction between power and trust holds true, and the trustee has a discretion which, as a general rule, he is not compelled to exercise. However, the fact that the power has been conferred on a trustee distinguishes it from a power conferred on an ordinary individual (a non-fiduciary): it has been conferred in order to enable the trustee the better to carry out the trusts or obligations imposed on him. A trustee is therefore subject to certain duties in relation to such a power—in particular, to consider its exercise from time to time and to make appropriate efforts to inquire into and ascertain the range and composition of the class of objects of the power—to which an ordinary individual (a non-fiduciary donee) is not subject.[145]

1.41 Where the power in question is a power of appointment, the objects of that power, *qua* objects, will not be entitled to any share of or interest in the subject-matter of the power. Such share or interest as they become entitled to must be given to them by an actual exercise of the power. Subject to any such exercise, others will have vested, but defeasible, interests in the subject-matter of the power.[146] As we shall see,[147] there is a variety of different ways in which a power of this kind may be combined with trusts. For example, there might be an express or implied gift or trust in favour of a class of beneficiaries, subject to a power to select or exclude some members of the class. Alternatively, a power of appointment might be coupled with an express or implied gift in default of any appointment.[148] In some cases, there may be no trust (express or implied) and no gift in

[143] (1962) 26 Conv (NS) 25, 43.

[144] *Re Gulbenkian's Settlements* [1970] AC 508, 518, 525; *McPhail v Doulton* [1971] AC 424, 440–1, 444, 449; *Gisborne v Gisborne* (1877) 2 App Cas 300; *Tempest v Lord Camoys* (1882) 21 Ch D 571; *Wilson v Turner* (1883) 22 Ch D 521; *Re Gadd* (1883) 23 Ch D 134; *Re Courtier* (1886) 34 Ch D 136; *Re Bryant* [1894] 1 Ch 324; *Re Charteris* [1917] 2 Ch 379; *Beyfus v Bullock* (1869) LR 7 Eq 391; *Nickisson v Cockill* (1863) 3 De GJ & Sm 622; *Costabadie v Costabadie* (1847) 6 Hare 410; *Re Beloved Wilkes's Chanty* (1851) 3 Mac & G 440; *Lord v Bunn* (1843) 2 Y & C Ch Cas 98; *Talbot v Marshfield* (1868) 3 Ch App 622; *Marquis of Camden v Murray* (1880) 16 Ch D 161.

[145] See generally Ch 10 below and especially paras 10.05–10.51.

[146] Farwell, 310; *Re Brooks Settlements Trusts* [1939] Ch 993, 996–7; *Duke of Northumberland v IRC* [1911] 2 KB 343, 354.

[147] See paras 3.57–3.79 below.

[148] The differences between these kinds of dispositions is examined further below: see paras 3.57–3.73 below. See also [1970] 54 Can BR 229 (MC Cullity).

default of appointment (express or implied), in which case the subject-matter of the power, or so much thereof as has not been validly appointed, results back to the settlor (or those entitled to his estate). In any event, pending and subject to the exercise of the power, someone[149] will have a vested interest in the subject-matter of the power, such interest being defeasible (in whole or in part) by its exercise. In the nineteenth century, such a power, being found in the context of a trust, was often called a 'trust power'. However, as has been pointed out,[150] such a term is misleading and of little value, for it does no more than indicate that the arrangement in question comprises a power of appointment in conjunction with an element of duty and does not aid an understanding of the essential nature of these arrangements. Consequently, powers of this kind are better regarded as 'mere powers'. Such powers may be conferred on ordinary individuals or on trustees *qua* trustees (or on other fiduciaries *qua* fiduciaries): in neither case is there any obligation actually to exercise the power, but a trustee (or other fiduciary), unlike an ordinary individual, is nonetheless subject to certain duties (such as the duty to consider exercise) imposed by virtue of his office. It is appropriate, therefore, to distinguish between simple 'mere powers' conferred on ordinary individuals, and 'mere fiduciary powers', which are mere powers conferred on trustees (or others in a fiduciary capacity).[151] It is in these senses that these two expressions are generally used in this work, save that it is not considered that the expressions are confined to powers of appointment: the need to distinguish between mere powers and mere fiduciary powers arises from the fundamental difference between the status of their respective donees and such duties (if any) as are owed by them, and these differences in status and duties affect all powers, both dispositive and administrative (although, of course, it is more profound and far-reaching in relation to dispositive powers).

1.42 Trustees (and other fiduciaries) may, however, be subjected to a duty to exercise certain powers conferred on them, and their discretion, their freedom to act or not to act, may be restricted to matters such as the manner in which, or the purposes for which, the power is exercised, the choice of objects, the nature and extent of interests created, and so forth. In such a case, there is a blending of a trust and a power. The duty to exercise the power will be enforced by the court, by one means or another, but there will generally be no compulsion as to the manner in which it is exercised. However, the trustees must fulfil certain obligations in relation to the exercise of their discretion: they must, for instance, consider the exercise of their powers from time to time and make appropriate efforts to inquire into and ascertain the range and composition of the class of objects of the power (as in the case of fiduciary powers referred to above).[152] Such powers were often referred to in the past (sometimes misleadingly) as 'powers in the nature of trusts', 'powers coupled with a duty' or 'trust powers',[153] for they clearly straddle the boundary between power and trust and embody some of the characteristics of both. However, in view of the element of duty involved, they are more commonly referred to nowadays as 'discretionary trusts'. Indeed, discretionary trusts are usually divided into two kinds: 'an exhaustive discretionary trust', under which the relevant property or income must be distributed *simpliciter*; and 'a non-exhaustive discretionary trust', under which such property or

[149] Such a person may also be an object of the power; but his interest pending an appointment will not belong to him by virtue of his status as an object.

[150] [1984] Conv 227 (R Bartlett and C Stebbings).

[151] Bartlett and Stebbings (*ibid.*, 228–9) suggest that a power of appointment given to a fiduciary as such should be called a 'trust power'; and, indeed, that this is the only occasion in which it is appropriate to use that term. However, it is preferable to avoid using this expression altogether if possible. In addition, recent cases (eg *Re Hay's Settlement Trusts* [1982] 1 WLR 202) tend to use the term 'mere power' in relation to trustees. Consequently, the expression 'mere fiduciary power' is preferred here.

[152] See paras 10.05–10.51 below, and Ch 10 generally.

[153] Even in *McPhail v Doulton* [1971] AC 424, the relevant disposition was referred to as a 'trust power'. See also [1976] 54 Can BR 229 (MC Cullity).

income must be distributed unless the trustees have power not to distribute and to dispose of or utilize it in some other way, such as, for example, a power to accumulate income. The expressions 'discretionary trust', 'exhaustive discretionary trust', and 'non-exhaustive discretionary trust' are generally used in this work in the senses ascribed to them above. The basic idea is that of a power or discretion which must be exercised. In practice, such an obligation will generally affect only trust income, and perhaps trust capital, but the underlying notion of an obligation coupled with a discretion is clearly capable of applying to any kind of power, be it dispositive or administrative.

1.43 In response to the emergence of the discretionary trust and the increasing significance of the distinction between fiduciary and non-fiduciary powers, Warner J concluded, in *Mettoy Pension Trustees Ltd v Evans*,[154] that the classification of powers into powers simply collateral, powers in gross, and powers appendant (or appurtenant)[155] was now of antiquarian interest only. Instead, he accepted a more pertinent classification of powers into four categories:

> Category 1 comprises any power given to a person to determine the destination of trust property without that person being under any obligation to exercise that power or to preserve it. Typical of powers in this category is a special power of appointment given to an individual where there is a trust in default of appointment. In such a case the donee of the power owes a duty to the beneficiaries under that trust not to misuse the power, but he owes no duty to the objects of the power. He may therefore release the power but he may not enter into any transaction that would amount to a fraud on the power, a fraud on the power being a wrong committed against the beneficiaries under the trust in default of appointment.[156] It seems to me to follow that, where the donee of the power is the only person entitled under the trust in default of appointment, the power is not a fiduciary power at all, because then the donee owes no duty to anyone. That was the position in In *Re Mills* [1930] 1 Ch. 654 and will be the position here if the discretion [in question] is in category 1. Category 2 comprises any power conferred on the trustees of the property or on any other person as trustee of the power itself: per Romer L.J. at p. 669 'a fiduciary power in the full sense'.[157] A power in this category cannot be released; the donee of it owes a duty to the objects of the power to consider, as and when may be appropriate, whether and if so how he ought to exercise it; and he is to some extent subject to the control of the courts in relation to its exercise:[158] Category 3 comprises any discretion which is really a duty to form a judgment as to the existence or otherwise of particular circumstances giving rise to particular consequences. Into this category fall the discretions that were in question in such cases as *Weller v. Ker*;[159] *Dundee General Hospitals Board of Management v. Walker*;[160] and *Kerr v. British Leyland (Staff) Trustees Ltd* and *Mihlenstedt v. Barclays Bank International Ltd*[161] Category 4 comprises discretionary trusts, that is to say cases where someone, usually but not necessarily the trustees, is under a duty to select from among a class of beneficiaries those who are to receive, and the proportions in which they are to receive, income or capital of the trust property.

Thus, using the terminology adopted earlier in this chapter, 'mere powers' fall within category 1; 'mere fiduciary powers' fall within category 2; and 'discretionary trusts' fall within category 4.[162]

[154] [1990] 1 WLR 1587, 1613–14. See also paras 17.11–17.13 below.

[155] See Ch 9 generally for the doctrine of fraud on a power. See also Buckley J's classification into 'beneficial powers' and 'vicarious powers' in *Re Wills Trust Deeds* [1964] Ch 219; see paras 17.06–17.10 below.

[156] *Re Mills* [1930] 1 Ch 654.

[157] An example of this being said to be the powers of the manager of a unit trust.

[158] *Re Abraham's Will Trusts* [1969] 1 Ch 463, 474, *per* Cross J; *Re Manisty's Settlement* [1974] Ch 17, 24, *per* Templeman J; *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 210, *per* Megarry V-C.

[159] (1866) LR 1 Sc & Div 11.

[160] [1952] 1 All ER 896.

[161] [1989] IRLR 522.

[162] Category 3 does not contain some different kind of power as such. Discretions of the kind placed in category 3 can apply to any kind of power or trust and are usually part of some precondition which must be satisfied before a particular power or trust can be exercised or take effect.

1.44 Such a classification clearly focuses on the differences in the nature and extent of the duties and obligations (if any) attaching to different kinds of powers, or arising from the differences in status of particular donees. These are matters of considerable importance, particularly in the context of modern settlements with very large classes of beneficiaries or objects and also 'commercial' trusts, such as occupational pension scheme trusts. Such duties will be examined in detail below.[163] Merely focusing on the status and the obligations of the donee says nothing, however, about other matters, such as the objects of any powers and discretions falling within any of the four categories, and very little about the purposes for which they were conferred. Thus, a power or discretion with a limited class of objects (that is, a special power) could fall within category 1, 2, or 3; and a hybrid power could fall within category 1 or 2 (but not category 3).[164] Indeed, this categorization is not necessarily confined to dispositive powers and discretions (although these are the more likely to be involved): administrative powers are also capable of being placed in any one of categories 1, 2 or 3. It is not, therefore, a classification which replaces all others: it provides a different perspective on the creation, operation and effect of different powers and discretions, but it is one which must be combined with the more traditional division into general, special and hybrid powers. Moreover, too much ought not to be read into Warner J's examples of the kind of power or discretion that might fall within each category. Thus, the donee of a power may well be both a trustee and the sole person entitled in default of appointment (and even one of the objects of the power), in which case the power will be a mere fiduciary power (within category 2) and not simply a mere power (within category 1), despite Warner J's reference to *Re Mills* in category 1. Nevertheless, subject to such reservations, the *Mettoy* classification is central to the matters dealt with in this book.

1.45 It is a question of intention as to whether a mere power or mere fiduciary power or a discretionary trust has been created. It is often difficult to differentiate the last two,[165] in particular, even by process of construction. Nevertheless, once the identity of the beast has been ascertained, the principles of law which appertain or attach to it are generally clear and, despite a substantial degree of similarity and convergence in certain areas, such as in the requirement of certainty of objects,[166] the distinction between powers and trusts (including discretionary trusts) remains fundamental and continues to exert a profound influence. Having said this, it is also important that the principles and doctrines applicable to fiduciary powers and trusts are not applied, by analogy or otherwise, to powers which have no 'fiduciary' content or aspect at all. Many powers, some potentially affecting the interests of others, are found in contract or conferred by statute and they are not necessarily 'fiduciary' in nature at all.

1.45A Another important consideration, often overlooked or occasionally even deliberately ignored, is that there are crucial differences between the duties of trustees (necessarily owed in equity) and duties owed at common law (in contract or tort).[167] Liability for breach of duty by a trustee does not depend on causation, foreseeability, or remoteness of damage. There is no defence of contributory negligence. There is no need for a wronged beneficiary to mitigate his loss, but it may matter if he does not have 'clean hands'; and any relief which he may obtain may be on terms or tailored to the circumstances. In short, the source, nature, and basis of liability are completely different. Moreover, it is often assumed that the liability of trustees is based on the same standard of 'care',

[163] See Ch 10 generally.
[164] See also paras 10.33–10.43 below.
[165] See paras 3.77–3.78 below. See also *McPhail v Doulton* [1971] AC 424, 448–9, *per* Lord Wilberforce.
[166] See Ch 4 below.
[167] See, eg, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 205, per Lord Browne-Wilkinson. See also para 1.48 below.

irrespective of the nature of the particular breach, whereas this is clearly not the case. In some circumstances, the liability of a trustee is almost 'strict',[168] for example, if he distributes trust assets to someone who is plainly not a beneficiary or object: it does not depend on carelessness or imprudence. In other cases, for example, carrying out his duty to invest, liability is based on lack of 'prudence' and the failure to avoid risk[169] (although the standard may now be that of 'reasonableness' under the Trustee Act 2000). In yet other situations, for example, in exercising discretionary powers to distribute trust income to or amongst a class of objects, liability depends on irrationality: it can be established only if the decision or action was such that no rational trustee in that same position would have acted in the same way. In addition, the standard expected of a professional trustee is higher than that required of a non-professional.[170] Therefore, when assessing whether a trustee is or is not liable for breach of trust—and, in the present context, whether or not he is liable for a 'wrongful' exercise of his powers—one must have regard, not just to the nature and purpose of the power in question, but also to the standard applicable in the particular circumstances of that specific case.

E. Bare powers and fiduciary powers

1.46 All powers conferred on trustees *qua* trustees are fiduciary powers (whether they are obliged to exercise them or not). There is a growing tendency, which this book does not share, to regard some of the obligations of a trustee as non-fiduciary in some sense. This tendency is based largely on some *dicta* of Millett LJ, in *Bristol and West Building Society v Mothew*:[171]

> The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties . . . In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.

In one sense, this is obviously true. For example, a trustee who permits a nuisance to be committed on trust-owned land is clearly liable to his neighbours in tort. His duty of care exists purely at common law; and his fiduciary status is entirely immaterial. The same would be true even where the victim of the nuisance happened to be a beneficiary of the trust. Similarly, a solicitor-trustee who, in his role as solicitor, gave negligent advice to a client would be liable for the common law tort of negligence (not to mention breach of contract). Again, this would seem to be true even though a fiduciary relationship existed between him and his client: in the absence, perhaps, of some unusual factor, his duty of care would not arise out of his status as a fiduciary.[172] However, Millett LJ clearly meant to convey a much wider principle than this, for he stated further:

> It is similarly inappropriate to apply the expression to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties. If it is confined to cases where the fiduciary nature of the duty has special legal consequences, then the fact that the source of the duty is to be found in equity rather than the common law does not make it a fiduciary duty. The common law and

[168] It is conceivable that, in certain circumstances, a trustee may still qualify for relief under s 61 of the Trustee Act 1925.

[169] *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] 1 Ch 515, 531–2.

[170] *ibid*, 534.

[171] [1998] Ch 1, 16: described as 'a masterly survey of the modern law of fiduciary duties' in *Johnson v EBS Pensioner Trustees Ltd* [2002] Lloyd's Rep PN 309, [37].

[172] This seems to have been true of Motthew himself, whose fiduciary duties were narrowly defined. It is well established, of course, that the precise duties of any particular fiduciary can vary according to the circumstances of each case.

> equity each developed the duty of care, but they did so independently of each other and the standard of care required is not always the same. But they influenced each other, and today the substance of the resulting obligations is more significant than their particular historic origin.

And, as if this were not contentious enough, he added:[173]

> Although the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context is in my opinion a distinction without a difference. Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.

1.47 Apart from the somewhat startling dismissal of such differences as 'merely the product of history', such sweeping conclusions are unorthodox to say the least. As Meagher, Gummow and Lehane point out,[174] a trustee does not owe a common law duty of care to protect a beneficiary from economic loss affecting the beneficial interest. 'Liability in equity is based on active conduct with knowledge, and not on a mere failure to meet an objective standard of care.'[175] The trustee is the legal owner of the money/assets. A legal owner owes no common law duty of care to others in his management and administration of his own property. 'A legal owner is free to give his property away, sell it at an undervalue, fail to sell it at an opportune time, leave it uninsured, neglect it, fail to derive income from it, damage it, or destroy it. However, all these acts would be breaches of the trust if the owner were a trustee. . . . Since the common law did not recognise equitable ownership a legal owner could not owe a common law duty of care to the equitable owner as such.' In addition: 'It is far from clear that the principles underlying the tort of negligence would produce the same results as the test . . . requiring exercise of the same care and skill as an ordinary prudent businessman with the defendant's knowledge and experience would employ if acting on his own behalf. Apart from any other consideration, the test in negligence is wholly objective.'[176]

1.48 It seems clear that Millett LJ, in *Mothew*, relied heavily on certain *dicta* of Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd* and on a relatively obscure Western Australian decision in *Permanent Building Society (in liq) v Wheeler*.[177] In *Henderson*, Lord-Browne Wilkinson stated:[178]

> The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of a general duty to act with care imposed by law on those who take it upon themselves to act for or advise others. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description. It is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold.

[173] [1998] Ch 1, 17.
[174] RP Meagher, W Gummow and J Lehane, *Equity: Doctrines and Remedies* (4th edn, Lexis Nexis Butterworths, Australia, 2002) ed by RP Meagher, JD Heydon and MJ Leeming ('Meagher, Gummow and Lehane'), 210–18, [5-295]–[5-330].
[175] *Wickstead v Browne* (1992) 30 NSWLR 1, 19, *per* Handley and Cripps JJA.
[176] Meagher, Gummow and Lehane, 214.
[177] (1994) 11 WAR 187, 235–6, 237, 239.
[178] [1995] 2 AC 145, 205.

Similar observations were made in *Permanent Building Society (in liq) v Wheeler*.[179] 'It is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to the beneficiary is a fiduciary duty. In particular, a trustee's duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty.' It was also stated: 'the tortious duty not to be negligent, and the equitable obligation on the part of a trustee to exercise reasonable care and skill are, in content, the same.'

1.49 Having referred to 'these elegant, almost lapidary, remarks',[180] Meagher, Gummow and Lehane point out that Lord Browne-Wilkinson's observations were not only unnecessary for his decision but are also not supported by the authorities which he quoted.[181] Moreover, although it is accepted that it is 'less controversial' to say that true fiduciary duties are distinct from duties of care, it is also pointed out that Lord Browne-Wilkinson himself apparently denied this.[182] Indeed, one may well ask whether the 'duty of care', when applied to a trustee, could be anything other than a fiduciary duty, on the basis that it is a duty which is necessarily inherent in the particular 'true fiduciary duty' which that trustee is carrying out.[183] For example, equity imposes a duty of care on a fiduciary to ensure that the principal's interests are protected: it arises out of the essential duty of loyalty, because true loyalty demands that the fiduciary exercise care in discharging his responsibility for the property. 'It would be an odd perception of loyalty to suggest that [fiduciaries] must subordinate [their] own interests to those of their [charges], but that they can do so negligently'.[184] The duties of a trustee *qua* trustee are by their very nature fiduciary duties; and the powers conferred on a trustee *qua* trustee are fiduciary powers. As Meagher, Gummow and Lehane aptly conclude:[185] 'The relentless pressure of errant fiduciaries to narrow down their duties or re-classify their breaches in a manner favourable to a refusal of relief, or a grant of only attenuated relief, should not be assisted by a stereotyped, mechanical and a priori approach, or by a mere repetition of slogans.' In any event, if it is indeed the case, as Millett LJ himself noted,[186] that a trustee's (or fiduciary's) duty of care is not to be regarded as 'fiduciary', but is still 'equitable', it is not entirely clear what practical difference this would make, provided, of course—and this is a crucial proviso—one does not follow Millett LJ to the point of applying common law rules of causation, remoteness of damage, and measure of damages by analogy. As McLachlin J stated, in *Norberg v Wynrib*:[187]

> The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness.
>
> Equitable remedies, including equitable compensation have elements that may be seen to be more punitive and deterrent than common law remedies available in similar factual situations. This may

[179] (1994) 11 WAR 187, 235–6, 237, 239.

[180] At 212, where a list of cases in which they have been cited with approval is given. It is also pointed out that these passages are themselves unclear and actually capable of being understood in several different ways.

[181] *Nocton v Lord Ashburton* [1914] AC 932, 948; *Robinson v National Bank of Scotland Ltd* 1916 SC (HL) 154, 157.

[182] *White v Jones* [1995] 2 AC 207, 271: in every fiduciary relationship 'fiduciary . . . duties of care' arose. See also *Silven Properties Ltd v Royal Bank of Scotland* [2004] 4 All ER 484, [29].

[183] The 'duty of care' in s 1 of the Trustee Act 2000 is discussed in Thomas and Hudson, paras 10.50–10.56, where the same criticism of *Motthew* is also set out.

[184] *Russell McVeagh McKenzie Bartleet & Co v Tower Corp* [1998] 3 NZLR 641, 668, *per* Thomas J. It has also been pointed out that the line between breach of a duty of due diligence owed by a director and breach of a fiduciary duty to act in good faith in the best interests of the company is not an easy one to draw: *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* (1997) 26 ACSR 544, 580.

[185] At 217. Nor, it might be added, with such a startling dismissal of historical development.

[186] [1998] Ch 1, 18.

[187] [1992] 2 SCR 226, 272; approved by the High Court in *Pilmer v Duke Group Ltd (in Liquidation)* [2001] HCA 31; (20010 207 CLR 165, [71]. See also *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, [14], [20].

> occur, for example, by reason of the application of different rules of liability, principles of causation or tests of remoteness. The integrity of equity as a body of law is not well served by adopting a common law remedy developed over time in a different remedial context on a different conceptual foundation. The fact that exemplary damages are awarded in tort is … not a basis for asking 'Why not?' in equity.
>
> . . . Mason P poses the question of whether the development of equity jurisprudence should proceed by way of analogy with tort or by way of analogy with contract. It is not apparent to me that analogical reasoning at this level of generality is appropriate. Each is a distinct body of law with its own integrity.

This remains the position in England too[188] and is certainly the position adopted in this book.

1.50 Powers may also be conferred, of course, on others in a fiduciary capacity, although they are clearly not trustees as such, in which case such powers may also be fiduciary powers and may be subject to duties similar to those that would be imposed on trustees. This is not to say, however, that *all* powers conferred on anyone and everyone who holds a fiduciary position are necessarily fiduciary powers. This is plainly not the case. An agent, such as a solicitor for example, will owe a mixture of contractual, tortious, and fiduciary obligations; and the nature of his liability will depend on the particular duty which has been breached. The status of a power as a fiduciary or non-fiduciary power will therefore be a significant factor in determining the nature and scope of those duties (if any) to which the donee is subject in relation to that power, notwithstanding that he cannot be compelled to exercise it.[189] Thus, the extent to which a power actually confers an option, or the width of the discretion actually conferred on the donee, will vary according to whether or not that power is a fiduciary or a non-fiduciary power. A distinction is often made, therefore, between *bare* powers, which are conferred on persons in their personal and not in a fiduciary capacity, and *fiduciary* powers, which are conferred on persons by virtue of their status or office.

1.51 It also seems to have been accepted that fiduciary duties are necessarily and exclusively negative or proscriptive.[190] However, this, too, is not a view accepted in this book. Rather, it is argued that fiduciary duties are not simply and exclusively proscriptive but can also be prescriptive (indeed, that this is self-evident in the case of active trustees). An active trustee's overriding fiduciary duty is positive in nature: it is to promote the best interests of the trust and of his beneficiaries.[191] It is not simply to avoid causing harm or damage: fiduciary obligations are not an equitable equivalent of some sort of tort. The trustee, in effect, undertakes a particular task (recognizable only in equity) and that task is to act, to perform or carry out certain functions, but only for the benefit of

[188] See, eg, *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598, [89]. See also *White v Jones* [1995] 2 AC 207, 262, 265–6, 276; but *cf. Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266; [2011] WTLR 997.

[189] Moreover, a person may take upon himself the role of a fiduciary by a less formal arrangement than formal appointment, contract, or self-appointment: *Lyell v Kennedy* [1889] 14 App Cas 437, 459–60; *Boardman v Phipps* [1967] 2 AC 46, 100, 118, 126–7; *Walden Properties v Beaver Properties Ltd* [1973] 2 NSWLR 815, 833. Trustees may claim relief under s 61 of the Trustee Act 1925 where they have acted honestly, reasonably and ought fairly to be excused; but there is no such protection for agents, partners, protectors, and most other fiduciaries.

[190] See paras 1.52–1.58 and Ch 10 below.*Breen v Williams* (1986) 186 CLR 71, 113, 137–8; *Pilmer v Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165, 197–9. This may be a peculiarly Australian phenomenon, however. It is not the case, eg, in Canada and the US. See also PD Finn, *Fiduciary Obligations*, para 30; DJ Hayton, 'Fiduciaries in Context: An Overview' in PH Birks (ed), *Privacy and Loyalty* (Oxford, Clarendon Press, 1997), 290–1.

[191] As applied to a director (whose fiduciary duties are unquestionably less rigorous than those of a trustee) in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [34], [38], [41]. See, in particular, paras 10.152–10.177 below; and (2008) 2(3) *Journal of Equity* 177 (GW Thomas) and 245 (M Scott Donald). See also JD Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?', and J Getzler, 'Am I my Beneficiary's Keeper?', both in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, Thomson, 2005), Chs 9 and 10 respectively; and (2000) 34 Israel LR 3, reprinted in (2002) 16 TLI 34 (PH Birks). See also *Re Brogden* (1888) 38 Ch D 546, 571.

another; and it is a necessary corollary of this exclusivity that he is prohibited from doing certain things. The 'no conflict' and 'no profit' rules are subsidiary to, and often misleading formulations of, the positive obligation.[192]

1.52 It has been suggested[193] that, although the term 'fiduciary power' implies that there is something inherent in the power itself that is fiduciary, rather than in the position of the donee, the expression really denotes a power conferred on the holder of a fiduciary office. The term 'an office' is used in this context to denote a position carrying with it certain powers and duties, one that exists for another's benefit, and exists independently of the person who happens to hold it.[194] This particular description provides an adequate working definition for most practical purposes and it is in this sense that the expression 'fiduciary power' is generally used in this work. However, it is not appropriate in all contexts. First, it does not satisfactorily describe all fiduciary powers. There is no reason why one specific fiduciary power can not be conferred on a person who has no other role (fiduciary or non-fiduciary) to play. One common example is a power to appoint new trustees, which is generally acknowledged to be a fiduciary power,[195] but which need not be (and often is not) conferred on trustees or the holders of any office as such. In such a case, it seems somewhat artificial and unnecessary to categorize the holder of such a power as someone who holds a fiduciary 'office'. Secondly, there is no such consistent usage in reported cases. The expression 'fiduciary power' is sometimes used, particularly in the older cases, simply to describe a power which the donee must exercise (if at all) in good faith and for the benefit of another.[196] In this sense, the donee of a special power of appointment who is not a trustee (and does not occupy any other fiduciary office) has sometimes been said to be a fiduciary, but this usage seems to be intended only to indicate or underline the fact that the donee cannot exercise that power in favour of himself and that he owes a duty of good faith to its objects. The power exists for the benefit of the objects and they (or some of them) may be benefited by its actual exercise, but the donee cannot properly be said to be holding a fiduciary position or office in relation to such objects (and, as a result, he may release the power).[197] This particular usage seems to have survived in some contexts: for example, the powers of an employer in relation to an occupational pension scheme, of which the employer is not a trustee, have sometimes been held to be fiduciary powers, despite the fact that the employer does not hold a fiduciary office as such.[198] In all these cases, it is inappropriate and somewhat circular to describe the donee of the particular power as the holder of a fiduciary office: it is only because certain 'fiduciary' obligations are attached to the power itself that the donee can reasonably be said to be in a 'fiduciary' position at all: it is not the case that the power is a fiduciary power if it has been conferred on someone holding a fiduciary office. On the other hand, it makes sense in most contexts to talk of someone holding a 'fiduciary office': a particular power or, more usually, a cluster of different powers will have been conferred on whichever person holds the office for the time being, for the exclusive benefit of others. Any power conferred on such a person (whether *ab initio* or subsequently), as holder of that office, and any duty owed in the exercise of such power,

[192] See also paras 1.59–1.60 below.
[193] PD Finn, *Fiduciary Obligations* (1977), 3.
[194] *ibid*., 8.
[195] *Re Skeats' Settlement* (1889) 42 Ch D 522, especially 527; *Re Newen* [1894] 2 Ch 297; *Re Sampson* [1906] 1 Ch 435; *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd* [2008] EWHC 2054 (Ch); [2008] PLR 345; *Rawcliffe v Steel* [1993] Manx LR 426; *Papadimitriou, Petitioner* [2004] WTLR 1141; *Morant & Co Trustees Ltd v Magnus* (2003-04) 6 ITELR 1078. *cf. Montefiore v Guedalla* [1903] 2 Ch 723.
[196] *Howard Smith Ltd v Ampol Ltd* [1974] AC 821, 834 (directors' power to issue shares); *Re Penrose* [1933] Ch 793, 805. See also the cases referred to in paras 17.23–17.29 *et seq*.
[197] See Ch 17 below.
[198] See, eg, *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587.

will be 'fiduciary' in nature, unless there is some clear indication to the contrary. In any event, the expression 'fiduciary power' generally identifies and refers to a power conferred on a person in a fiduciary capacity and this is the sense generally adopted here. Where a broader or different meaning is ascribed to the expression, this should be clear from the particular context.

1.53 Many of the general principles dealt with here apply to both bare powers and fiduciary powers, but not all. However, in broad terms, a bare or personal power can be exercised only by the person or persons to whom it is given;[199] and, where it is given to several persons, it cannot be exercised by the survivor or survivors of them unless the contrary is expressed in the instrument creating the power.[200] In contrast, a power conferred on persons in their capacity as holders of a particular office, such as a power conferred on trustees *qua* trustees, is attached to that office and, in the absence of a contrary intention, may therefore be exercised by surviving office holders and by those who succeed to that office.[201] The holder of an office does not necessarily occupy a fiduciary position or owe fiduciary duties. Thus, the Crown will not become a fiduciary unless it chooses to do so; and a duty imposed by statute will not, as a general rule and of itself, impose fiduciary duties on a person (although the statute may, of course, provide otherwise).[202] Moreover, express provision may sometimes be made to relieve a person from any fiduciary obligations which he might otherwise owe.[203] Nevertheless, as a general rule, in private law, there is a close correlation between office holding and fiduciary duty.

1.54 Ascertaining whether or not a particular person is a fiduciary or whether or not a particular relationship is a fiduciary relationship is often a matter of some difficulty, for there is no comprehensive definition in English law of the terms 'fiduciary' and 'fiduciary relationship'.[204] According to Fletcher Moulton LJ, in *Re Coomber*:[205] 'Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and

[199] Statements in *TMSF v Merrill Lynch Bank and Trust Company (Cayman) Ltd* [2011] UKPC 17, [51]–[52] which seem to suggest that a power may be delegated 'where the holder of the power owes no duty of trust or confidence to another person' are misleading.

[200] *Re Harding* [1923] 1 Ch 182; *Re Beesty's Will Trusts* [1966] Ch 223; Farwell, 514.

[201] *Re Bacon* [1907] 1 Ch 475; *Re Smith* [1904] 1 Ch 139; *Re De Sommery* [1912] 2 Ch 622; *Bersel Manufacturing Co Ltd v Berry* [1968] 2 All ER 552; Trustee Act 1925, s 18(1). The topic of 'survivorship of powers' is dealt with in greater detail below: see paras 7.79–7.92 below.

[202] *Tito v Waddell (No 2)* [1977] Ch 106, 212, 235; *Swain v The Law Society* [1983] 1 AC 598, 618.

[203] See, eg, *Kelly v Cooper* [1993] AC 205 (implied term in a contract with an estate agent). cf. *Hilton v Barker Booth & Eastwood* [2005] UKHL 8; [2005] 1 WLR 567. See also *Premium Real Estate Ltd v Stevens* [2008] NZCA 82, [66]; *Amaltal Corporation Ltd v Maruha Corporation* [2007] NZSC 40; [2007] 3 NZLR 192, [19]–[21]; *ASIC v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963, [276]–[281]; (2008) 124 LQR 15 (J Getzler); (2006) 122 LQR 1 (J Getzler); (1993) 109 LQR 206 (Brown).

[204] See, eg, *Ex p Dale & Co* (1879) 11 Ch D 772, 778, where Fry LJ stated: 'What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestuis que trust*.' As LS Sealy has pointed out, this is not a definition but simply a description of a common feature of fiduciary relationships: [1962] CLJ 69, 72–3. See also PD Finn, *Fiduciary Obligations* (1977); Meagher, Gummow and Lehane, Ch 5; Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Toronto, Carswell Co, 1989); PD Finn, 'Fiduciary Law and the Modern Commercial World' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford, 1992), 7–42; RP Austin, 'Moulding the Content of Fiduciary Duties' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (1996), 153–75; JC Shepherd, *The Law of Fiduciaries* (1981); [1976] 54 Can BR 229 (MC Cullity); (1981) 97 LQR 51 (JC Shepherd). See also Arnup JA in *Laskin v Bache & Co* (1972) 32 DLR (3d) 385, 392; [1963] CLJ 119 (LS Sealy); (1975) 25 UTLJ 1 (Weinrib); (1975) 53 Can BR 771 (Beck); (1989) 68 Can BR 1 (JRM Gatreau); (1993) 36 *Jo of Law and Economics* 425 (FH Easterbrook and DR Fischel); (2000) 34 *Israel LR* 3, republished in (2002) 16 TLI 34 (P Birks).

[205] [1911] 1 Ch 723, 728. It is significant that he made this observation immediately after warning of 'the danger of trusting to verbal formulæ'.

another where the one is wholly in the hands of the other because of his infinite trust in him.' In *Reading v R*,[206] Asquith LJ provided a similar description:

> A consideration of the authorities suggests that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise . . . and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available . . .

1.55 Other, similar attempts have been made, by both judges[207] and academics,[208] at describing the key elements of a fiduciary relationship. One of the more comprehensive is that put forward by Ford and Lee:[209]

> A fiduciary relationship exists where:
> (a) one person, the fiduciary, has undertaken to act in the interests of another person, the principal, or in the interests of the fiduciary and another person;
> (b) as part of the arrangement between the fiduciary and the principal the fiduciary has a power or discretion capable of being used to affect the interests of the principal in a legal or practical sense;
> (c) the principal is vulnerable to abuse by the fiduciary of his or her position; and
> (d) the principal has not agreed, as a person of full capacity who is fully informed, to allow the fiduciary to use the power or discretion otherwise than in the principal's interests.

Even this definition, however, clearly does not capture all fiduciary relationships, including the paradigm example—the trust. There is usually no 'arrangement' between the trustee (the 'fiduciary') and the beneficiaries or objects of his trust (the 'principal'); and the trustee is often under a *duty* to act (and does not just have 'a power or discretion capable of' affecting the beneficiaries or objects). A more useful description, perhaps, is provided by PD Finn:[210]

> A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of his own several interest. Put crudely, the central idea is service of another's interests.

1.56 It is clear from all these formulations that the types of fiduciary relationship can and do vary widely according to the factual circumstances which give rise to them;[211] and general descriptions can not really capture all their common characteristics without achieving such a level of generality as to have little practical utility. Indeed, it has been said that the categories of cases in which fiduciary

[206] [1949] 2 KB 232, 236.

[207] In *White v Jones* [1995] 2 AC 207, 271, eg, Lord Browne-Wilkinson stated: 'The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B.' See also *Turner v Kleinwort Benson (Trustee) Ltd* [2005] EWHC 2442 (Ch). Extra-judicially, Sir Anthony Mason described 'the fiduciary relationship as a concept in search of a principle': PD Finn (ed), *Essays in Equity* (Sydney, 1985), 246.

[208] There is a vast and growing body of literature on 'fiduciary relationships' generally. In addition to the works referred to in n 204 above, see also more recent contributions in M Conaglen, *Fiduciary Loyalty* (Oxford, Hart Publishing, 2010) and (2005) 121 LQR 452 (M Conaglen), both of which ought to be read in conjunction with (2007) OJLS 327 (Rebecca Lee); also (2004) 83 Cab BR 1 (R Flannigan); (2005) 114 Yale LJ 929 (J Langbein); (2005) 47 William and Mary LR (MB Leslie); [2006] NZLR 209 (R Flannigan); (2009) 68 CLJ 293 (RC Nolan).

[209] *Principles of the Law of Trusts* (3rd edn, 1996), para 22–40.

[210] PD Finn in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations*, (Oxford, 1992), 9.

[211] *Chan v Zacharia* (1984) 53 ALR 417, 430, *per* Deane J.

obligations arise is no more closed than the categories of negligence at the common law.[212] The position of fiduciaries and the duties and obligations which they owe are therefore not the same in all circumstances. As Lord Browne-Wilkinson indicated, in *Henderson v Merrett Syndicates*:[213]

> . . . the phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case. Although so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised), the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent.

1.57 This is not the place in which to pursue these questions in any detail. Nor is there any need to do so. We are primarily concerned with trustees and those in analogous positions, such as personal representatives, agents, directors of companies and others. Trustees are clearly fiduciaries in that they act for or in the interests of their beneficiaries; and their powers are clearly given to them in order to enable them the better to carry out their duties, and to be exercised for the benefit of others. Where property is vested in or under the control of a fiduciary *qua* fiduciary, he is essentially in a position similar to that of a trustee,[214] although, of course, the existence of a fiduciary relationship does not require property to be vested in anyone.[215] Other relationships which are well-recognized as fiduciary relationships include, for example, those of principal and agent;[216] partner and co-partner;[217] director and company;[218] senior manager and company;[219] solicitor and client;[220] mortgagee and mortgagor;[221] and also the relationship between Crown servants and the Crown.[222] Other fiduciary relationships may arise, be undertaken, or are imposed on the basis of the peculiar facts of a particular case.[223] As has rightly been observed, any test for the existence of a fiduciary relationship 'can only be stated in the most general terms and all the facts and

[212] PD Finn in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Toronto, Carswell Co, 1989), 4; and see also *Laskin v Bache & Co* (1972) 32 DLR (3d) 385, 392, *per* Arnup JA.

[213] [1995] 2 AC 145, 206. See also *White v Jones* [1995] 2 AC 207, 271; *Silven Properties Ltd v Royal Bank of Scotland* [2004] 4 All ER 484, [29].

[214] *Tito v Waddell* (*No 2*) [1977] Ch 106, 220–8.

[215] See paras 1.59–1.60 below.

[216] *Lowther v Lowther* (1806) 13 Ves 95, 103; *Ian Scott & Co v Medical Installations Co. Ltd* (1981) 258 *Estates Gazette* 556; and see, generally, *Bowstead on Agency*, 156 *et seq*.; and Meagher, Gummow and Lehane, Ch 5 generally and especially paras [5.10], [5.190]–[5.230].

[217] *Bentley v Craven* (1853) 18 Beav 75; *Dean v McDowell* (1878) 8 Ch D 345, 350–1; *Helmore v Smith* (1887) 35 Ch D 436, 444; *Aas v Benham* [1891] 2 Ch 244, 255–6. The fiduciary duties can come into existence before the execution of the partnership agreement (*United Dominion Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 12; *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35, [325]–[326]) and can subsist after the dissolution of the partnership (*Don King Productions Inc v Warren* [2000] Ch 291; *Chan v Zacharia* (1984) 154 CLR 178; *Edmonds v Donovan* (2005) 12 VR 513, [56]–[61]). But see *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195; *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428.

[218] *Selangor United Rubber Estates Ltd v Cradock* (*No 3*) [1968] 1 WLR 1555; and see also [1967] CLJ 83 (LS Sealy).

[219] *Sybron Corp v Rochem Ltd* [1984] Ch 112, 127.

[220] *McMaster v Byrne* [1952] 1 All ER 1362; *Brown v IRC* [1965] AC 244.

[221] *Farrar v Farrars Ltd* (1888) 40 Ch D 395. See also *Kennedy v de Trafford* [1897] AC 180; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949; *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410; *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1394; *Predeth v Castle Phillips Finance Co Ltd* [1986] 2 EGLR 144; *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536; *Palk v Mortgage Services plc* [1993] 2 WLR 415, especially 420; *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 26; *Huish v Ellis* [1995] BCC 462. *cf. Mahomed v Morris (No 2)* [2001] BCC 233; [2000] 2 BCLC 536: 'liquidators as agents of a company had no fiduciary duties to the creditors of a company.'

[222] *A-G for Hong Kong v Reid* [1994] 1 AC 324; *Reading v A-G* [1951] AC 507; *A-Gen v Observer Ltd* [1990] 1 AC 109.

[223] eg, in certain circumstances and for certain purposes, the relationship between financial adviser and client (*Hodgkinson v Simms* (1995) 117 DLR (4th) 161; *Arthur Andersen & Co v Gibson* [2002] BCL 175; *Townsend v Roussety & Co (WA) Pty Ltd* [2007] WASCA 40, [127]–[130]); or that between joint venturers (*United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1, 10–11); or between stockbroker and his client (*Re Franklyn*

circumstances must be carefully examined to see whether a fiduciary relationship exists'.[224] This work does not examine each such relationship separately, nor how a fiduciary relationship may come into existence. Instead, in relation to fiduciary powers, it focuses on the obligations attaching to powers conferred on trustees as such or on those whose fiduciary position is broadly similar to that of trustees, either because they hold property for the benefit of another or because they have conferred upon them some power which is broadly similar in kind to a power which might be conferred on a trustee such as a 'protector' of a settlement.[225] It must always be borne in mind, however, that, as the nature and degree of fiduciary obligations will vary from case to case and from fiduciary to fiduciary,[226] so too will the scope and nature of the powers conferred upon each fiduciary for the purpose of carrying out those obligations.

1.58 A power conferred on an individual for his own exclusive use and benefit[227] cannot be a fiduciary power. However, a power is not necessarily a bare power simply because the donee is one of the persons who may be benefited by an exercise of that power. Thus, the powers conferred on a tenant for life under the Settled Land Acts were clearly fiduciary powers.[228] They were conferred on him in the interests of the settled estate[229] and, upon their exercise, he had to have regard to that fact and also to the interests of other beneficiaries. Indeed, he is deemed to be a trustee for all parties[230] and he must exercise his powers 'as if he were an independent trustee for himself and all the other members of the family—that is, he is to exercise his discretion as a fair and honest and careful trustee would under the circumstances'.[231] However, he could also take his own interests into account and exercise his powers for his own benefit. Indeed, it has been said that, provided the transaction was otherwise a proper one, it would not be invalidated because the tenant for life was motivated by 'ill will or caprice, or because he does not like the remainderman, because he desires to be relieved from the trouble of attending to the management of land, or from any other such

(1913) 30 TLR 187; *Armstrong v Jackson* (1917) 2 KB 822; *Christoforides v Terry* [1924] AC 566, 574; *Re Arthur Wheeler & Co* (1933) 102 LJ Ch 341; *Daly v Sydney Stock Exchange* (1986) 160 CLR 371, 377).

[224] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 72, *per* Gibbs CJ; *Kelly v Cooper* [1993] AC 205, 215.

[225] It is considered that, in the absence of some indication to the contrary, such a protector occupies a fiduciary position. See *IRC v Schroder* [1983] STC 480; *Steele Paz Ltd* [1993-95] Manx LR 426; *Rahman v Chase Bank (CI) Trust Co Ltd* [1991] JLR 103; *Von Knieriem v Bermuda Trust Co Ltd and Grosvenor Trust Co Ltd* (1994) 1 Butterworths Offshore Cases 116–25; *Rawson Virgo v Perlman* (Bahamas SC, 25 April 1995); *Re Z Trust* [1997] CILR 248; *Re A Irrevocable Trust* (1999–2000) 2 ITELR 482; *Re Osiris Trustees* (2000) 2 ITELR 404; *Papadimitriou v Petitioner* [2004] WTLR 1141; *HSBC International Trustee Ltd v Wong Kit Wan*, also known as *Re Circle Trust* [2007] WTLR 631; *Basel Trust Corp (Channel Islands) Ltd v Anstalt*, also known as *Re Bird Charitable Trust* [2008] WTLR 1505; *Centre Trustees (Channel Islands) Ltd v Van Rooyen* [2009] JRC 109; [2010] WTLR 17; *Crocker-Citizens National Bank v Younger* (1971) 4 Cal 3d 202. See also Thomas and Hudson, paras 23.34–23.36; DWM Waters, 'The Protector: New Wine in Old Bottles?' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Oxford, 1996), 63–122; R Ham, M Tennet and J Hilliard, 'Protectors' in J Glasson and GW Thomas (eds), *The International Trust* (2nd edn, Jordans, 2006) 193; (1995) 9 TLI 108 (P Matthews); (1995) 4 JITCP 131 (A Duckworth); (1996) 5 JITCP 18 (A Penney); (1995) 4 Trusts & Trustees 12 (AJ Conder); (1993) 1 JITCP 88 (RC Lawrence); (1987) 2 *Trusts and Estates* 4 (D Bates and S Phelps); (1989) 3 *Trusts and Estates* 60 and 69 (A Duckworth and J Goodwill). See, in particular, A Holden, *Trust Protectors* (Jordans, 2011).

[226] A person may even be a fiduciary in respect of part of his activities but not in respect of other parts: *New Zealand Netherlands Society Oranje Inc v Kuys* [1973] 2 All ER 1222, 1225.

[227] See, eg *National Trustees, Executors & Agency Co of Australasia v Boyd* (1926) 39 CLR 72, *Re Hart's Will Trust* [1943] 2 All ER 557; *Re Wills' Trust Deeds* [1964] Ch 219, 228.

[228] *Re Boston's Will Trust* [1956] Ch 395; *Re Gladwin's Trusts* [1919] 1 Ch 232.

[229] *Lord Henry Bruce v Marquess of Ailesbury* [1892] AC 356.

[230] *Hampden v Earl of Buckinghamshire* [1893] 2 Ch 531; *Re Earl of Stamford and Warrington* [1916] 1 Ch 404; *Wheelwright v Walker* (*No 1*) (1883) 23 Ch D 752; *Re Earl Somers* (1895) 11 TLR 567; *Re Hunt's Settled Estates* [1905] 2 Ch 418; [1906] 2 Ch 11; *Re Pelly's Will Trusts* [1957] Ch 1, 18–19 *per* Jenkins LJ. See also Carson's *Real Property Statutes* (3rd edn, 1927), 966–7.

[231] *Re The Earl of Radnor's Will Trusts* (1890) 45 Ch D 402, 417, *per* Lord Esher MR.

object, or with any such motive'.[232] In short, the tenant for life was both a trustee of his powers and a beneficiary under the settlement:[233] his was 'a highly interested trusteeship'.[234] The position of a tenant for life of settled land, with its inherent conflict of self-interest and fiduciary obligations towards others, may perhaps be regarded as *sui generis*, being a creation of and subject to a peculiar statutory code. However, the same combination of fiduciary obligation and self-interest is also often encountered in the context of modern pension schemes. There is no prohibition in law to the effect that someone in a fiduciary position (including a trustee) cannot also be a beneficiary of a trust imposed, or an object of a power conferred, on him. Indeed, it is not uncommon for a person to be a trustee, a donee of a power of appointment (which will still be a fiduciary power), and an object of that power at the same time.[235] Difficult questions of conflict of interest may arise in such cases.[236] Nevertheless, the fact remains that a power may be a fiduciary power notwithstanding that the donee of that power is also one of its objects (such powers sometimes being called 'qualified fiduciary powers').

1.59 Precisely how fiduciary duties interact with non-fiduciary duties is a question that has exercised many people in recent years. The duty of loyalty is said to lie at the core of fiduciary law; and some of the components of this duty are well known. As Millett LJ stated, in *Bristol and West Building Society v Motthew*:[237]

> A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.

However, this does not say much about the nature and broader function of fiduciary duties generally or the duty of loyalty in particular. One recent analysis, by Matthew Conaglen,[238] concludes: 'The fiduciary concept of loyalty . . . is best understood as the summation of the various doctrines that are applied peculiarly to fiduciaries, rather than as a legal duty that is directly enforceable in its own right.'[239] It is unlikely that many would disagree with this general view. However, the analysis also concludes:[240]

> The idea of the fiduciary concept of 'loyalty' is a subsidiary and prophylactic mode of protection for non-fiduciary duties. Its function is to make it more likely that the non-fiduciary duties that comprise the fiduciary's undertaking will be properly performed. It does this by requiring the fiduciary to eschew influences that might sway him away from such proper performance.

This particular suggestion is more difficult to justify or accept; and it has been described (by Rebecca Lee) as 'conceptually superfluous and doctrinally unsound'.[241] That fiduciary duties could and often do have a supporting role in the enforcement—or, at least, in encouraging the

[232] *Cardigan v Curzon-Howe* (1885) 30 Ch D 402, 417, *per* Chitty J. See also *Re Hart's Will Trust* [1943] 2 All ER 557.
[233] *Re Pelly's Will Trusts* [1957] Ch 1, 18–19.
[234] *Re Earl of Stamford and Warrington* [1916] 1 Ch 404, 420, *per* Younger J.
[235] See, eg, *Re Beatty* [1990] 1 WLR 1503; *Re Drexel Burnham Lambert (UK) Pension Plan* [1995] 1 WLR 32. See also *Re Penrose* [1933] Ch 793 (where the donee was only one of several trustees, and the power was not a fiduciary one). See also *The Cotorro Trust* case (a decision of Smellie J in Chambers in the Grand Court of the Cayman Islands, 2 June 1997: unreported), referred to in Ch 11 below. *cf. Re Wills' Trust Deeds* [1964] Ch 219, 228: see para 17.06 below.
[236] See Ch 12 below.
[237] [1998] Ch 1, 18.
[238] M Conaglen, *Fiduciary Loyalty* (Oxford, Hart Publishing, 2010).
[239] *ibid.*, 269.
[240] *ibid.* Needless to say, the arguments in support of this conclusion can be assessed properly only by reading the book.
[241] (2007) 27 OJLS 327, 328. She also calls the argument 'a travesty of the fiduciary doctrine' (338).

performance—of non-fiduciary obligations seems tolerably clear.[242] Contractual terms may, for example, serve to impose fiduciary obligations where none would otherwise exist, or to modify or limit the scope of those that would otherwise apply.[243] However, it is very difficult to see the justification for the conclusion that this is their primary function. As Lee points out, Conaglen's analysis is not supported by the authorities. There is no indication of a non-fiduciary duty in *Keech v Sandford*,[244] *Aberdeen Railway v Blaikie Bros*,[245] or *Regal (Hastings) Ltd v Gulliver*.[246] Indeed, in *Keech v Sandford* and *Regal*, what Conaglen would regard as a non-fiduciary duty (renewing a lease in one case, buying shares in a company in the other) was not capable of being performed at all, so it is far-fetched to conclude that the enforcement of a fiduciary duty in each case was in support of something incapable of performance. Moreover, as Lee points out, the analysis presupposes, and is dependent upon, the co-existence of non-fiduciary duties. It is not clear why or how the actual performance of the non-fiduciary duty (for example, fulfilling the contractual obligation) should still leave room for the application of a fiduciary duty. On the other hand, if there is a failure to perform a non-fiduciary duty, but there is no 'disloyalty', there is surely no basis upon which to impose the additional burden of a fiduciary duty as well.[247] In addition, fiduciary duties can and often do exist without the co-existence of non-fiduciary duties. In short, it is extremely difficult to escape from the traditional view of fiduciary obligations as (primarily) having an independent existence and function:[248] their primary purpose is to act as a strict deterrent, a form of strict liability which applies irrespective of fault or absence of bad faith. This is not to deny that equitable doctrines and remedies evolved, in large part, so as to make good the deficiencies of the common law. However, this was not their sole function; and it merely confuses matters when the boundaries between the two bodies of law are re-aligned randomly or ignored.[249]

1.60 In any event, Conaglen acknowledges that there is 'no judicial consensus . . . about a general definition to identify when fiduciary duties arise'.[250] In truth, there is no single unifying principle, save at the most general of levels; and attempts to produce one seem doomed to fail. Fiduciary relationships arise in a wide variety of different circumstances and for a wide variety of different reasons. Trust and confidence, and the fiduciary obligations which are then attached, may arise in situations of vulnerability, such as where someone is at the mercy of another's discretion; or of dependency, such as partnerships; or because they are voluntarily undertaken (most trusts and agencies and almost all commercial agreements). They may be based on the reasonable expectations of the

[242] eg, the contractual relationship itself may impose a fiduciary duty of loyalty in support of other obligations (*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 99–100) or they may not (*Francis v South Sydney District Rugby League Football Club Ltd* [2001] FCA 1306; *Kelly v Cooper* [1993] AC 205, 215). See also *Chan v Zacharia* (1984) 154 CLR 178, 195.

[243] *Kelly v Cooper* [1993] AC 205 (implied term in a contract with an estate agent); *NZ Netherlands Society v Kuys* [1973] 1 WLR 1126, 1130; *Movitex Ltd v Bulfield* [1988] BCLC 104; *Hordern v Hordern* [1910] AC 465, 475; *Wilkins v Hogg* (1861) 31 LJ Ch 41. Cf *Hilton v Barker Booth & Eastwood* [2005] UKHL 8; [2005] 1 WLR 567. See also *MacIntosh v Fortex Group Ltd* [1997] 1 NZLR 711, 717 ('fiduciary relations must be read in the light of concurrent contractual obligations'); *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, 15, 17; *Palantrou Pty Ltd v Knight* [2009] NSWSC 677, [14]–[15]; *Premium Real Estate Ltd v Stevens* [2008] NZCA 82, [66]; *Amaltal Corporation Ltd v Maruha Corporation* [2007] NZSC 40; [2007] 3 NZLR 192, [19]–[21]; *ASIC v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963, [276]–[281]; (2006) 122 LQR 1 (J Getzler); (1993) 109 LQR 206 (Brown).

[244] (1726) Sel Cas Ch 61.

[245] (1854) 1 Macq 461.

[246] [1967] 2 AC 134.

[247] *ibid*., 331–2.

[248] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, [14], [20], [29].

[249] See paras 1.46–1.49 above.

[250] *Fiduciary Loyalty*, 269.

parties[251] or simply because one party has acted unconscionably towards another.[252] Even within certain well-recognized categories of fiduciary, there is still a need to ascertain the subject-matter over which the particular fiduciary obligation is alleged to extend.[253] Both the existence and scope of the fiduciary duty, including any express or implied limitations,[254] will depend on the particular circumstances and, very often, on the terms of the relevant instrument,[255] or even the actual conduct of the parties[256] or usual practice in that context. This book does not purport to provide a detailed analysis of the nature of a fiduciary relationship, nor how one may arise or be imposed. It deals with powers, both fiduciary and non-fiduciary; and its focus is on the doctrines and principles that apply to powers generally, and in some cases to particular kinds of power, but on the basis that they have already been classified as one or the other. In other words, some doctrines discussed here apply to powers of all kinds, whereas others apply only to fiduciary powers, but there is no sustained investigation in order to try to explain or justify why a particular power is, or ought to be, classified as fiduciary or non-fiduciary in the first place.

F. The influence of public law

1.61 It is, of course, a statement of the obvious to say that powers play a prominent role in all aspects of public law, which is, after all, 'a medley of common law and equity, cemented by statute'.[257] It is plain that many of the issues in public law are strongly analogous to those that arise in the law of fiduciaries and that, over the years, there has been extensive cross-fertilisation between these areas. Many of the doctrines and principles of public law owe their origin to equitable principles, as Sir Anthony Mason has observed:[258]

> Equitable doctrines and relief have extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint. In the field of public law, equitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.

[251] PD Finn, 'The Fiduciary Principle' in TG Youdan, *Equity, Fiduciaries and Trusts* (Toronto, Carswell Co, 1989), 46–7. There is then a problem in distinguishing between fiduciary duty and estoppel.

[252] Unconscionability, however, implies a lesser standard, ie not to act to the detriment of another, rather than to prefer that other's interests to the exclusion of one's own: *Woodson (Sales) Pty Ltd v Woodson (Aust) Pty Ltd* (1996) 14,685, 14,705–06.

[253] *University of Nottingham v Fishel* [2001] RPC 22, [88]; *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 408–09; *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1, 5.

[254] *Kelly v Cooper* [1993] AC 205.

[255] *Wilkins v Hogg* (1861) 31 LJ Ch 41; *Armitage v Nurse* [1998] Ch 241, 252–3; *Friend v Brooker* (2009) 72 ACSR 1, [86]; *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, 17; *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 23. Even a denial or disclaimer of a fiduciary relationship may not be decisive: they may have agreed to a state of affairs which the law regards as one, 'even if they do not recognize it themselves and even if they have professed to disclaim it': *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130, 1137, *per* Lord Pearson, referring to *Ex p Delhasse* (1878) 7 Ch D 511. See also *Hollis v Vabu Pty Ltd* (20010 207 CLR 21, [58]; (2006) 122 LQR 1 (J Getzler); (1993) 109 LQR 206 (Brown).

[256] *Hordern v Hordern* [1910] AC 465, 475; *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, [467]. See also paras 12.21–12.23 below (relating to appointment of trustees).

[257] HG Hanbury, 'Equity in Public Law' in *Essays in Equity* (Oxford, Clarendon Press, 1934), 83.

[258] (1994) 110 LQR 238. See also D Oliver, *Common Values and the Public-Private Divide* (London, Butterworths, 1999); D Oliver, 'Review of (Non-Statutory) Discretions', in C Forsyth, *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000), 307–25; [1987] PL 543 (D Oliver). Robert French CJ, 'The Interface Between Equitable Principles and Public Law', a lecture delivered to the Society of Trust and Estate Planners in Sydney, NSW, 29 October, 2010.

Equitable remedies, especially the injunction and declaration, became prominent precisely because the prerogative writs were inadequate. However, the parallels and influences are much wider than this.

1.62 On a broad level, public officials have long been regarded as holding their offices and powers 'on trust',[259] even if the notion of 'trust' carries different connotations in public law.[260] As Megarry V-C observed, in *Tito v Waddell (No 2)*:[261]

> Certainly in common speech in legal circles 'trust' is normally used to mean an equitable relationship enforceable in the courts and not a governmental relationship which is not thus enforceable . . . the term 'trust' is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction, but also other relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind [are] 'trusts in the lower sense'; trusts of the latter kind [are] 'trusts in the higher sense'.

The notion of public officials, including Members of Parliament, as 'trustees' fell out of prominence, probably as a result of the development of other principles, such as electoral accountability, cabinet responsibility, parliamentary scrutiny, increased regulation, and so on.[262] However, it has clearly re-emerged as a potent concept in recent years to deal with gross abuses of power by elected public officials.[263] In many other areas, too, there are explicit overlaps between public law and private fiduciary powers. In some cases, public bodies are explicitly declared to be statutory trustees or have the duties and powers of trustees imposed on them by legislation.[264] In others, public officials have a direct role in the monitoring and enforcement of 'public' trusts—especially charities. In yet others, statutory powers are conferred on fiduciaries, such as directors, but expressly declared to apply 'in the same way as common law rules or equitable principles'.[265]

1.63 Historically, the 'purposive' approach to the interpretation of instruments, including statutes, was also said to have its roots in equity. Indeed, the concept of 'equitable interpretation' of a statute has a long history. The position was summarized by Story:[266]

> So, words of a doubtful import may be used in a law, or words susceptible of a more enlarged or of a more restricted meaning, or of two meanings equally appropriate. The question, in all such cases,

[259] See, eg, PD Finn, 'The Forgotten "Trust": The People and the State' in M Cope (ed), *Equity: Issues and Trends* (Federation Press, 1995), 131–51; (2005) 68 MLR 554 (T Daintith); (2006) 69 MLR 514 (J Barratt).

[260] It is not a trust 'which any court would enforce . . . it [is] only a "moral" trust': FW Maitland, *Collected Papers* (1911), vol 3, 403. See also AV Dicey, *The Law of the Constitution* (10th edn, 1960), 75.

[261] [1977] Ch 106, 216. See also *Kinloch v Secretary of State for India* (1887) 7 App Cas 619, 625–6; *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56, 72; *Swain v Law Society* [1983] 1 AC 598.

[262] PD Finn, above, 134. Of course, actual bribery of electors for Parliament has long been a crime at common law (*R v Pitt* (1762) 1 W Bl 380; *Hughes v Marshall* (1831) 2 Cr & J 118, 121); so has bribery of one who can vote at an election for alderman (*R v Steward* (1831) 2 B & Ad 12; and see also *R v Beale*, cited in note to *R v Whitaker* [1914] 3 KB 1283, 1300); so have a promise to bribe a municipal councillor as to the election of mayor (*R v Plympton* (1724) 2 Ld Raym 1377); bribery of electors for assistant overseer of a parish (*R v Jolliffe*, cited in *R v Waddington* [1800] 1 East 143, 154; *R v Lancaster* (1890) 16 Cox CC 737. The application of the principle is not confined to public servants in the narrow sense, under the direct orders of the Crown.

[263] See, eg, *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The notion of 'trust' in public law is not necessarily (indeed it is infrequently) attached to 'public property' as such (although, of course, it could: see, eg, *A-G v Wandsworth District Board of Works* [1877] 6 Ch D 539, 541–3; *Roberts v Hopwood* [1925] AC 596, 603–04; *Bromley LBC v Greater London Council* [1983] 1 AC 768, 815). Rather, it is normally applicable to the public office as such. See also *A-G for Hong Kong v Reid* [1994] 1 AC 324.

[264] See, eg, *Re Ahmed & Co* [2006] EWHC 480 (Ch); (2005–06) 8 ITELR 779; *Re Global Trader Europe Ltd (In Liquidation)* [2009] EWHC 602 (Ch); [2009] 2 BCLC 18; *Re Lehman Brothers International (Europe) (In Administration)* [2010] EWCA Civ 917; [2011] Bus LR 277.

[265] Companies Act 2006, s 170(3), (4).

[266] J Story, *Commentaries on Equity Jurisprudence* (Stevens and Haynes, 1884), Ch 1, para 3.

must be, in what sense the words are designed to be used; and it is the part of a judge to look to the objects of the legislature, and to give such construction to the words as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of equity as contradistinguished from a strict adherence to the mere letter of the law.

In this broad sense, equity might also claim to have given birth to 'the principle of legality', i.e. the principle that the legislature does not intend, by implication, to displace fundamental principles of law.[267] Perhaps this claims for equity rather more than it is entitled to.[268] In any event, it probably no longer matters, for the construction of statutes (or of instruments generally) no longer distinguishes between an 'equitable' and a 'common law' approach.

1.64 Of more direct concern here are the close parallels between the principles applicable to the exercise of powers in public and private law. Powers conferred on public officials and bodies must be exercised within the boundaries set by the terms of the relevant powers and only for the purposes for which those powers were conferred.[269] In essence, these requirements mirror the doctrines of excessive and fraudulent exercises of a power by private donees (irrespective of whether their powers are fiduciary or not). Similarly, powers of public officials must be exercised rationally (or, at least, not irrationally), on the basis of relevant information and not capriciously or out of prejudice.[270] This again mirrors the duties imposed on donees of fiduciary powers. 'Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely—that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended'.[271] In particular, the grounds on which the exercise of fiduciary powers may be challenged are remarkably similar to those laid down as the basis for judicial review in public law.[272] Indeed, the classic statement of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[273] ('the *Wednesbury* principles') are said to have been 'rooted in the law as to misuse of fiduciary powers'.[274] The *Wednesbury* principles have certainly been applied extensively—sometimes explicitly, sometimes implicitly—in relation to the exercise of fiduciary powers in private law, for example, in relation to the actions of company directors and of a company chairman;[275] to the decisions of trustees of pension funds;[276] and, until recently, almost routinely in relation to the application of the so-called 'rule in *Hastings-Bass*'.[277] The parallels

[267] See para 2.24 below.

[268] Judges had administered equity in the formative period of the common law, but in the 14th and 15th centuries, they adopted a policy which curtailed the extension of statutes beyond their strict words; but, in the 16th century, the process was gradually reversed: [1976] Eng Hist Rev 506, 515 (GW Thomas). Lord Hoffmann's *West Bromwich* principles of statutory construction (see Ch 2 below) did not initiate a new process, it seems.

[269] *Porter v Magill Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, 463–4.

[270] *Dallman v King* (1837) 4 Bing NC 105.

[271] *R v Tower Hamlets LBC, Ex p Chetnik Developments Ltd* [1988] AC 858, 872, *per* Lord Bridge, quoting from Wade and Forsyth, *Administrative Law* (8th edn, 2000), 356–7. See also *Credit Suisse v Allerdale Borough Council* [1997] QB 306, 333; *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207, 214; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1058, 1061; *R v Board of Education* [1910] 2 KB 165, 181.

[272] The duties of donees of powers in private law are discussed in detail in Ch 10 below; but see, eg, *Scott v National Trust* [1998] 2 All ER 705, 717.

[273] [1948] 1 KB 223, 228–31.

[274] *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation* [1990] FCA 139 (1990) 96 ALR 153, 167, [49], per Gummow J, referring to [1982] 46 Conv 432, 438 (A Grubb).

[275] *Re a Company, ex p Glossop* [1988] BCLC 570; *Byng v London Life Association* [1990] Ch 170. See paras 10.119–10.124 below.

[276] *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27; *Harris v Lord Shuttleworth* [1994] ICR 989, 999; *Edge v Pension Ombudsman* [2000] Ch 602; *Kerr v British Leyland (Staff) Trustees Ltd (1986)* [2001] WTLR 1071.

[277] The Court of Appeal has recently held that no such rule exists: *Pitt v Holt, Futter v Futter* [2010] EWCA Civ 197. See paras 10.76–10.79 and 10.86–10.101 below for a detailed discussion of this decision. It remains the case, however, that some decisions which referred to *Hastings-Bass* did not actually rely on it for the final decision: see, eg, *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch); [2005] BCLC 175.

between judicial review in public law and the review of exercises of discretionary powers by trustees and other fiduciaries are obvious. As Chadwick LJ observed, in *Edge v Pensions Ombudsman*,[278] it is 'no coincidence that courts, considering the exercise of discretionary powers by those to whom such powers have been entrusted (albeit in different contexts), should reach similar and consistent conclusions; and should express those conclusions in much the same language'. This has even led some public lawyers to argue that 'a common set of values underpins decision-making and control of power in both public and private law', an argument which is 'deployed to challenge the justification for maintaining clear distinctions between public and private law process in debates about the constitutional foundations of judicial review.'[279]

1.65 These are dangerous comparisons, however, and it is not at all clear how far they can or ought to be carried. The parallels are certainly not exact. As Robert Walker J stated, in *Scott v National Trust*:[280]

> In reaching decisions as to the exercise of their fiduciary powers, trustees have to try to weigh up competing factors, ones which are often incommensurable in character. In that sense they have to be fair. But they are not a court or an administrative tribunal. They are not under any general duty to give a hearing to both sides (indeed in many situations 'both sides' is a meaningless expression) . . .

Moreover, there are clearly safeguards in the context of judicial review in administrative law which are not available to trustees, such as the need for leave to seek review and strict time limits within which to do so. Indeed, in the recent decision in *Pitt v Holt, Futter v Futter*,[281] the Court of Appeal regarded these differences as too marked to be helpful. Lloyd LJ, delivering the leading judgment, stated:[282]

> For my part, I would wish to discourage reference to such public law principles in relation to trust law, since trust law has plenty of satisfactory means of dealing with the issues that arise under trusts, and those issues are inherently different from those arising in public law.

Mummery LJ was equally dismissive:[283]

> . . . analogies with judicial review in public law are unhelpful and unnecessary. There is an elementary distinction between, on the one hand, the liability in private law of a fiduciary for breach of duty and, on the other hand, the availability of judicial review for the control of abuses of public power. There are surface similarities in the language of discretion and in the debates about the limits of discretionary power, but the contexts are so different that it is dangerous to develop the private law of fiduciaries by analogy with public law on curbing abuse of power. Judicial review in public law is concerned with the lawfulness of decisions and acts of public authorities to ensure that they are acting within the limits of a power usually set by statute. Breaches of duty in fiduciary law relate to discretionary dispositive powers privately entrusted to a fiduciary who has been selected to exercise the powers for the benefit of members within a designated class. The discretion of the fiduciary is not controlled by the court, which will not interfere with matters of judgment by the fiduciary. The only ground on which the court will review the exercise of the discretion is that of a breach of fiduciary duty. The underlying principles of fiduciary law and private property law are conceptually different from the public interest basis for reviewing the lawfulness of administrative action.

Thus, a strong tendency to invoke *Wednesbury* principles in the context of fiduciary powers has effectively been brought to a halt.

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[278] [2000] Ch 602, 627–30.
[279] (2005) 68 MLR 554, 556–7 (T Daintith): the author himself does not accept this argument, however.
[280] [1998] 2 All ER 705, 718. See also *Vidovic v Email Superannuation Pty Ltd* (1995) NSWSC, unreported decision of Bryson J, 3 March 1995.
[281] [2010] EWCA Civ 197. See paras 10.78–10.80 and 10.88–10.103 below.
[282] [2010] EWCA Civ 197, [77].
[283] *ibid.*, [235].

1.66 There is some uncertainty, therefore, as to the extent (if any) to which the principles of public law have an influence on various aspects of private law of powers. This is a question that might arise in relation to the construction and operation of the provisions of trusts and other arrangements which have a 'public' aspect, such as pension schemes and charities; or it might still arise in connection with judicial review, or in a number of other areas. It may also be relevant in connection with powers or discretions conferred or reserved in commercial contracts and the question whether their exercise may be subject to some limitation, e.g. power conferred on one party to approve or consent to a particular activity,[284] or to approve the progress of construction works[285] or the quality of chattels.[286] Here, too, the courts have occasionally flirted with the *Wednesbury* 'reasonableness' test, but often striking a note of caution as to its appropriateness in commercial matters where party autonomy is usually paramount.[287] (Such cases do not usually involve fiduciary obligations, however, and would be better regarded as simply involving the question whether a particular term could be implied or not[288]—which gives rise to completely different considerations and which does not have a particularly 'equitable' component.) Nonetheless, it seems indisputable, despite the observations of Lloyd LJ and Mummery LJ in *Pitt v Holt*, that there are very similar principles at work in all these spheres and certainly that the analogies between judicial review in public law and fiduciary law are very close. This is historic fact; and it has also, as we have seen, been recognized in equally broad observations made by other judges in the Court of Appeal. Hence, at various points in this book, references are made to similar issues and principles in public law. There are, of course, 'surface similarities in the language of discretion', as Mummery LJ rightly observed. However, the contexts are indeed so different that drawing analogies may well be 'unhelpful and unnecessary'. The similarities and analogies can not be denied and indeed ought not to be denied, but, in the vast majority of cases involving the exercise of powers in private law, they are not likely to be of any assistance, if only because the particular contexts will be so different.

1.67 This may not always be the case, of course. For example, the notion of 'legitimate expectations' has crept into the law of trusts and fiduciary law generally in recent years,[289] although it remains unclear as to when and in what circumstances it will actually apply. Indeed, in *O'Neill v Phillips*,[290] Lord Hoffmann declared: 'The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application.' However, it does not seem to be an equitable concept and was borrowed from public law.[291] It remains to be seen whether it will take root in the law of powers and, if so, whether it will do so by analogy with public law. Similarly, there is a debate among public lawyers themselves as to whether the *Wednesbury* principles have been, or should be,

[284] See, eg, *Montgomerie v Carrick* (1848) 10 D 1387 (Court of Session): power to approve locations of future coal pits. The power could be expressed to be exercisable if the donee 'thinks fit', 'is satisfied', 'in his sole discretion' and so on.

[285] *Stadhard v Lee* (1863) 4 B&S 364.

[286] *Andrews v Belfield* (1857) 2 CBNS 779; *Repetto v Friary Steamship Co* (1901) 17 TLR 265; *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] AC 402; *Docker v Hyams* [1969] 1 WLR 1060.

[287] See, eg, *The 'Vainqueur Jose'* [1979] 1 Lloyds LR 557, 574; *Shearson, Lehmann Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyds LR 570, 624–32; *Abu Dhabi National Tanker Co v Product Star Shipping Ltd* [1993] 1 Lloyds LR 397; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 416-7, 460; *Paragon Finance plc v Staunton* [2002] 2 All ER 248, 258–63. See also paras 7.67–7.69 below.

[288] See, eg, *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] 2 All ER (Comm) 299.

[289] *Scott v National Trust* [1998] 2 All ER 705, 718; *O'Neill v Phillips* [1999] 1 WLR 1092, 1102.

[290] *O'Neill v Phillips, ibid.*, 1102; *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 416, [17]; *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch), [40].

[291] [1999] 1 WLR 1092, 1102; *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14, 19. See, eg, *R (on the application of Huitson) v Revenue and Customs Commissioners* [2011] EWCA Civ 893.

supplanted by tests of proportionality (as in the case of the administrative law of several European jurisdictions) or of plain reasonableness;[292] and, if this were to occur, perhaps a similar development might occur, by analogy, in relation to fiduciary law. After all, there is also a strong argument that the rights of beneficiaries of trusts and the objects of fiduciary powers ought to have greater protection,[293] one means being to recognize less strict requirements for challenging the discretionary decisions of trustees. At present, however, it seems more likely that the influence of private law on public law may well be stronger, as new ways of controlling abuses of power by public officials are sought and as more far-reaching powers to interfere with and affect matters of 'private' law are increasingly conferred on public officials. In any event, the crucial point is that, even if we accept that the exercise of powers, in public and private law alike, is governed by similar (perhaps common) decisional standards and processes, these will inevitably have a different impact and effect, depending on the particular context in which they are applied and the specific purpose of the relevant power.

G. Context and construction

1.68 This work is concerned with general principles. It is acknowledged, of course, that general principles often operate differently, or not at all, in relation to particular cases. Individual powers and discretions will be examined at various points if and in so far as they provide examples of the manner in which a particular general principle operates or illustrate some departure from the norm. However, there is no separate detailed treatment of individual powers as such. There is, of course, a danger in such a course. Much of the law relating to powers and discretions evolved over several centuries in the context of family trusts and settlements, or in relation to antiquated forms of conveyancing. That it has survived and been adapted successfully to deal with more modern arrangements and circumstances is clear. However, at various points, this adaptation has been somewhat strained. The development of the law relating to the certainty of objects of mere powers and of discretionary trusts is one example;[294] distinguishing the conceptual elements of a non-exhaustive discretionary trust is another. Increasingly, the law of powers is being applied in the context of 'commercial' trusts, such as occupational pension schemes, where the underlying arrangements are based more on contract and commercial dealings rather than bounty.[295] Thus, the general principles have to be adapted still further and in different ways. It remains to be seen whether this process will be successful[296] and whether occupational pension scheme trusts and other 'commercial' arrangements, such as joint ventures,[297] can be subjected to, or conveniently brought within the scope of, well-established equitable principles. However, two general points ought perhaps to be emphasized here.

[292] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410–11.

[293] The decisions in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, and *Breakspear v Ackland* [2009] Ch 32 arguably being steps in this direction.

[294] Certainty of objects is dealt with in Ch 4 below.

[295] See paras 2.25–2.36 below.

[296] Many of the elaborate provisions of the Pensions Acts suggest that the general law, including the law of powers, is not adequate in this context.

[297] *Chirnside v Fay* [2004] 3 NZLR 637, [51] (point not affected on appeal [2006] NZSC 68); *Meinhard v Salmon,* 164 NE 545, 546, (NY CA, 1928); *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1, 10–11, 15; *Phosphate Resources Ltd v Western Stevedores Pty Ltd* [2003] WASC 84; *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers* [2005] VSCA 113. See also McPherson, 'Joint Ventures' in PD Finn (ed), *Equity and Commercial Relationships* (Law Book Co, 1987), 19; [1999] JBL 538 (Loke).

1.69 The first is the central importance of the intentions of the donor of the power: questions as to the kind of power created, its scope, and the duties and obligations (if any) which are attached to it or to its exercise, are generally determined by process of ascertaining what the creator of that power intended (which in some cases may involve difficult questions of construction). Within the limits and requirements of the law, his intentions tend to predominate and prevail (but he cannot, for example, contravene public policy, such as the rule against perpetuities, or ignore requirements of certainty). Such intention must generally be gathered from the actual words used in the instrument of creation, construed as at the time of its execution, in the context of the instrument as a whole and in the light of all the relevant circumstances, and with the aid of such extrinsic evidence as may be admissible, and not from what may have been intended to have been written, nor on the basis of subsequent declarations or conduct which might indicate what the donor supposed was the effect of the instrument. The general principles of construction applicable to instruments generally (including statutes) are dealt with in detail in Chapter 2 below.

1.70 The second point is equally obvious, though often overlooked, and it concerns the importance of the *purpose* for which a particular power or discretion is created and the context or circumstances in which it is intended to operate. Of course, some powers have a very specific purpose;[298] others are intended to confer the maximum possible flexibility.[299] The nature, scope, and purpose of a power is a question of construction in the first instance. However, the context in which the power is conferred must also be considered. Powers conferred on the tenant for life of settled land were intended to benefit the settled estate as a whole,[300] although the tenant for life could lawfully take his own self-interest into account in their exercise, but there is no reason why similar powers conferred on (say) trustees of a discretionary trust should be subject to the same considerations. In addition, it is permissible to take into account the general usages and practices of the legal profession (and other relevant experts), such as the general practices of conveyancers, specific statutory provisions or regulations which the conferring of a particular power was intended to deal with or avoid, and books of precedents from which a particular provision may have been derived.[301] Similarly, the court's approach to the construction of documents relating to pension schemes 'should be practical and purposive, rather than detached and literal'.[302] This aspect is also dealt with in Chapter 3 below, although it will inevitably figure prominently at various points throughout this book.

1.71 The context and surrounding circumstances may therefore clearly be important aids to construction. They both explain and justify why similar, if not identical, powers and discretions are often construed in different ways and held to operate in a different manner and with different effects. This may often lead to uncertainty, but it also provides a valuable degree of flexibility and a means by which general principles may be adapted to meet the needs of novel circumstances and conditions.

[298] Such as directors' power to register a transfer of shares: *Re Bell Bros Ltd* (1891) 65 LT 245; *Re Gresham Life Assurance Company* (1872) 8 Ch App 446; *Moffat v Farquhar* (1877) 7 Ch D 591; *Re Stranton Iron Company* (1873) LR 16 Eq 559; *Robinson v The Chartered Bank* (1865) LR 1 Eq 32.

[299] *Duke of Bedford v Marquess of Abercom* (1836) 1 My & Cr 312; *Kearns v Hill* [1991] PLR 161; *Karger v Paul* [1984] VR 161.

[300] See para 1.58 above.

[301] *Dunn v Blackdown Properties Ltd* [1961] Ch 433, 436; *Re Trafford's Settlement* [1985] Ch 32, 36.

[302] See, eg, *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1610; *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589, 596–7; *LRT Pension Fund Trustee Co Ltd v Hatt* [1993] OPLR 255; *Edge v Pensions Ombudsman* [1998] PLR 15, 30; *Re The National Grid* [1997] PLR 157; and especially paras 2.26–2.35 below. *cf. Cowan v Scargill* [1985] Ch 270.