A Short History of the Trust

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E nga mana, e nga reo

Tena kotou, tena kotou, tena kotou katoa

We live in an age of profound reform of equity. Overhanging this conference is the Trusts Bill, now awaiting its third reading. The legislature is making the content of general trust law its business. The reform, calculated to make trust obligations more accessible, and trust administration less expensive, reflects a degree of public dissatisfaction with the opacity of equity and the complexity and diminishing relevance of the present, less ambitious legislation.

How did we get ourselves to this point? How did we get ourselves into the business of express trusts at all? This paper offers a brisk review of the relevant legal history of the express trust to orient an understanding of the case for reform in our own age. Perhaps in equity more than any other part of our law, one drives ahead safely with one eye on the rear vision mirror.

PAST

Ancient origins

Equity in the western legal tradition began with the ancient Greeks. The concept we cherish as "equity", they called "epieikeia" — meaning "that which is appropriate" or "right". In the *Illiad*, Achilles, hosting the funeral games, suggests it would be

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"epieikeia" for the person who came last in the games to nevertheless receive a prize. The word was there used to mean that which ought to be done, or was "right" in the circumstances there.

In the mid-fifth century BC, writers then began contrasting "mild epieikeia" with "stubborn justice".[1] At times, too, epieikeia was used to mean "leniency",[2] or something less strict than law.[3] Aristotle's treatment of epieikeia is found principally (although not exclusively) in his *Nicomachean Ethics*. He distinguishes between what is equitably just and what is legally just. Equitable justice is "a correction of legal justice", though that correction is not itself legal. To behave with epieikeia means "to look not to the law but toward the lawgiver; and not to the letter of the law, but to the intention of the lawgiver".[4] The analogies between Aristotle's epieikeia and English equity are palpable. In short, as one commentator aptly puts it, Aristotle's approach to equity is "particularised justice".[5] It is a rejection of the rigorous application of law in order to do what is right in a particular case.

Greece was annexed by the Roman Republic in 146 BC. Hellenism and Aristotelian thinking pervaded the Mediterranean in this time and for many years subsequently. While the Roman Republic adopted a portion of Greece's codified law, there is little suggestion it included in any meaningful sense Aristotle's epieikeia. That is hardly surprising: Aristotle stated that his equity was "unwritten law". The extent to which principles of equity were adopted at all into Roman law has been hotly debated for centuries.

In *De Officiis* Cicero talks about how injustice often arises through chicanery — an over-subtle and even fraudulent construction of the law. Hence *summum ius, summa injuria* — "more law, less justice". He continues:[6]

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1 Darien Shanske "Four Theses: Preliminary to an Appeal to Equity" (2005) 57 Stanford Law Review 2053 at 2056.

2 See for example Richard Schlatter (ed) *Hobbes's Thucydides* (Rutgers University Press, New Brunswick, 1975) at 198.

3 Shanske, above n 1, at 2057.

4 Aristotle *Nicomachean Ethics* (translated ed: W D Ross (translator) *Nicomachean Ethics* (Digireads, 2005)) at ch V.10.

5 Shanske, above n 1, at 2059.

6 Cicero *De Officiis* (translated ed: Walter Miller (translator) *Cicero: De Officiis* (Harvard University Press, Cambridge, Massachusetts, 1938)) at 1.10.33.

> Through such interpretation also a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general went to ravaging their fields by night, because, he said, the truce stipulated "days," not nights. Not even our own countryman's action is to be commended, if what is told of Quintus Fabius Labeo is true … appointed by the Senate to arbitrate a boundary dispute between Nola and Naples, he took up the case and interviewed both parties separately, asking them not to proceed in a covetous or grasping spirit, but to make some concession rather than claim some accession. When each party had agreed to this, there was a considerable strip of territory left behind them. And so he set the boundary of each city as each had severally agreed; and the tract in between he awarded to the Roman People. Now that is a swindling, not arbitration.

Where Aristotle called this principle of relaxing the law where circumstances require it epieikeia, the Romans called it "aequitas". Broadly, that translates to "fairness" — though aequitas was used in some post-classical texts in the sense of a justification for modifying laws in favour of a weaker party. Aequitas and epieikeia have many similarities, and it is fair to assume the Romans drew upon epieikeia in developing their own ideas of equity.[7]

But my focus today is on the express trust, rather than equity more generally. So I move on to that.

The Roman "trust"

Blackstone saw Roman law, and in particular the *fideicommissum*, as the progenitor of the English use — itself the progenitor of the trust as we know it. Yet the first line of David Johnston's book *The Roman Law of Trusts* reads "[t]rusts did not exist in Roman law". In consequence, the author goes on to promise a book of real brevity.[8] William Buckland's collected lectures, *Equity in Roman Law*, has a dismissive heading, "No Trust Concept".[9] Nevertheless trust analogues can be identified in Roman law, and the *fideicommissum* is of particular interest.

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7 Shanske, above n 1, at 2061.

8 David Johnston *The Roman Law of Trusts* (Clarendon Press, Oxford, 1988) at 1. He goes on to say, however, that "trust" is the ideal word in legal English to translate the Latin fideicommissum. The book is not overlong at 318 pages.

9 William Buckland *Equity in Roman Law* (William S Hein & Co, New York, 2002).

The *fideicommissum* emerged — perhaps as early as two centuries BC — as a tool to circumvent problems in the Roman law of succession. Infants and non-Roman citizens could not take directly as legatees. Romans would frequently "commend" property to others in their wills for safe-keeping - together with an expression of intention that the property be passed on to or held for a third party, a *commendatione*.[10] But a *commendatione* was not legally enforceable, and depended on the good faith of the recipient of the property. This resulted in numerous instances of "glaring perfidy". Subsequently the Emperor Augustus "commanded the consuls in certain cases to enforce the duty by their authority. And this being deemed equitable, and being approved by the people, there was gradually developed a new and permanent jurisdiction, and trusts became so popular that soon a special praetor was appointed to hear suits relating to them".[11] This was the *fideicommissary praetor*.

An interesting comparison can be made to the medieval feoffment to use device — which I will return to. But the Roman trust arose as a solution to the injustice that legal formality would cause, and was applied in a paralegal setting. There is little indication that the obligations of the person entrusted with the property were any greater than complying with the express intentions of the testator. The rigorous set of obligations fiduciaries now find themselves in is not found to any great extent in the ancient Roman law.

Roman law and Roman legal concepts diffused throughout the European continent during the height of the Roman Empire and well after its fall, with Justinian's codes eventually providing the underpinning of common law across western Europe.[12]

Britain was no exception. Britain of course was a Roman province for almost 400 years, until 410 AD. The influence of Roman law, in particular on land tenure, remained in fragmented post-Roman Britain.[13] Between the years 600 and 1035 several codes were promulgated by different British kings. In about 600 Ethelbert, King of Kent, compiled a code of Kentish laws in Roman fashion, imitative in method

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10 Johnston, above n 8, at 22.

11 *Institutes of Justinian*, 2.23.1.

12 Howard L Oleek "The Historical Nature of Equity Jurisprudence" (1951) 20 Fordham L Rev 23 at 32.

13 Edward D Re "The Roman Contribution to the Common Law" (1961) 29 Fordham Law Review 447 at 459.

if not content of Justinian's code (known to Ethelbert through Saint Augustine).[14] Other kings followed his lead, notably Alfred and Canute. Canute visited Rome and, following his return, undertook a great deal of codification in both Denmark and England, both of which he reigned over. The development of law over the period 600–1066 was heavily marked by Roman influence and Christianity. I will return to this shortly.

William the Conqueror's decisive victory in the Battle of Hastings in 1066 completed the Norman conquest. Despite his penchant for systematising the administration of governance in England, no sweeping legal change was made immediately following the conquest. The law as it then existed was largely left to develop on its own, William recognising the early common law system as essentially sound, and its continuation as assisting the maintenance of post-conquest peace.[15]

But Roman law continued to press across the channel with William: his Archbishop of Canterbury, Lanfranc, had been a scholar both of Roman law and Aristotelean philosophy. So too was his successor but four, Theobald, primate from 1139 to 1161. It was Theobald who brought the Roman law scholar Vacarius to England to teach at Oxford. His studies of Justinian's codes influenced directly Bracton's more chauvinistic studies of English law in the 13th century.[16] And Theobald's successor, Thomas Becket, Henry II's troublesome priest, was another who had studied Roman laws at Bologna.

The principal operating theory is that the use emerged in England in the thirteenth century at the hands of the Franciscan friars — who employed it to convey land to their use when the laws of their order precluded ownership of land individually or collectively.[17] The ecclesiastical adoption of the use was compounded and enlarged by the Statutes of Mortmain in 1279 and 1290, aimed at prohibiting the clergy from

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14 At 459.

15 As Robert Tombs puts it, slightly extravagantly, "The Normans added nothing to it because it worked and helped them to rule": *The English and their History* (Allen Lane, London, 2014) at 46.

16 At 33. See also Thomas Scrutton *The Influence of Roman Law on the Law of England* (Cambridge University Press, Cambridge, 1885) at 120–121.

17 F W Maitland *Equity: A Course of Lectures on Equity* (rev ed John Brunyate)(University Press, 1947) at 25.

receiving gifts of land. The use enabled the benefits of proprietorship (other than proprietorship itself) to be conveyed. The evasion set in train a conflict between clergy and King that had its endgame in the Statute of Uses — to which I will return.

That Roman law would supply the basic template for the English trust (initially, "use") is logical enough given the common nature of the instruments, their common purpose of the evasion of restraint, the influence of Roman law on early English equity and the ecclesiastical origins of both equity and the use.[18] But the *fideicommissum* was testamentary in nature, whereas the use seldom was. And the trustee equivalents had quite different interests: the *haeres fiduciarius* in the *fideicommissum* did not hold the equivalent of legal title, unlike the English feoffee to use in the later device.[19]

The Roman theory is not without competition from other sources. The *Lex Salica* of the Germanic Salic Franks had the *salmannus*, an *inter vivos* transfer of land to the *salman* who held it to the use of the donor during life and was then bound to convey it to another donee on the donor's death. There is a theory — not without some evidential difficulties — that this use came to England with the Normans.[20]

A competing theory draws the medieval English use from an Islamic charitable device, the *waqf.* It is certainly a later device than the *fideicommissum* — perhaps emerging in the eighth century AD. Again it is suggested the *waqf* appealed to the Franciscans as a device to permit their order to hold property despite their vow of poverty. This theory suggests that rather than the Franciscans drawing on their knowledge of Roman law and the *fideicommissum*, they instead brought the *waqf* home from the Fourth Crusade in the 13th century.[21] The theory is at least plausible.

The medieval English trust

The origins of equity in English law, however, are popularly understood to today's lawyers to begin with the establishment of the Chancellor and the Court of Chancery.

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18 Brendan Brown "The Ecclesiastical Origin of the Use" (1935) 10 Notre Dame L Rev 353.

19 Avisheh Avini "The Origins of the Modern English Trust Revisited" (1996) 70 Tul L Rev 1139 at 1149.

20 Barton suggests there is no clear evidence of Norman usage of the salmannus: J L Barton "The Medieval Use" (1962) 81 LQR 562.

21 Monica Gaudiosi "The Influence of the Islamic Law of Waqf on the Development of the Trust in England" (1988) U Penn L Rev 1231 at 1244–1245.

The medieval chancellors were mostly clerics. The Chancellor was after all the keeper of the King's conscience. Who better to exercise that conscience than a person learned in Christianity? As John Selden once observed, "Equity in Law is the same thing that the Spirit is in Religion".[22] Every Chancellor from 1380 to 1488 was a cleric.[23] The last but one was Wolsey, in Henry VIII's time.

The Christian influence over the Chancery was profound. Two important and informative features emerge from this. First, clergy were well trained in both canon law and Roman law. Secondly, Christian morality had inherited from Judaism a firmly individualistic outlook. Salvation of an individual's soul was dependent on the acts of that person during their life time. The development of English equity operated *in personam*, that is, upon the conscience of the defendant. While the Court of Chancery was not an ecclesiastical court, for a long time its presiding officer would be ecclesiastic. The principles that subsequently developed therefore applied a Christian morality with a Roman legal form. This is the rootstock of the equity we practise in the 21st century, from Invercargill to Kaitaia.

Indeed, through the Chancellor "it was only natural that the doctrines and methods of the civil law should find entrance largely into this branch of the English law".[24] In the light of this, the Court of Chancery has been described as "Roman to the backbone".[25] In short, English equity was invented and administered by clerical Chancellors who were heavily indoctrinated with Roman law. The influence of Roman law on the English law of equity is undeniable.

The Chancellor's Court was, by Tudor, times a well-established institution. Only with St Thomas More were Chancellors regularly appointed from the ranks of practising lawyers.[26] By this point the Court of Chancery had had several hundred years to be absorbed of Christian values and Roman law.

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22 John Selden *Table Talk* (Pollock Ed, 1927) at 43. Later in this passage Selden goes on to make his celebrated observation about the measure of Equity being the Chancellor's foot.

23 Scrutton, above n 16, at 153.

24 James Hadley *Introduction to Roman Law* (D Appleton and Co, New York, 1880) at 47.

25 Scrutton, above n 16, at 2.

26 Victor Windeyer *Lectures on Legal History* (Law Book Company, Sydney, 1938) at 253.

The concept of the express trust arose in English real property law in the "feoffment to use". The "use" derived from the Latin *ad opus* meaning "on his behalf". As noted, it appears first to have been used in medieval England to allow land to be held on behalf of religious orders who had pledged vows of poverty and were therefore unable to own land.

It was subsequently used by landowners, beginning in the 14th century, to effectively pass on land after death but avoid feudal inheritance rules.[27] Land could be devised by will only to the eldest male heir. If that heir was an infant, the feudal lord of the heir gained wardship rights, at great potential profit to both lord and King. By feoffment to use land was instead conveyed to a group of joint tenants (the feoffees — in effect, trustees) who held the land for landowner's benefit during his life and his heir's benefit (the *cestui que use*) until devise according to the terms of use. There are many Chancery decisions enforcing uses of this kind. This is reminiscent of the Roman *fideicommissum*; it developed for similar reasons involving the holding of land for persons legally incapacitated.

But a rapacious Henry VIII, seeing profits diverted from his Treasury, put paid to this device in *Lord Dacre's Case* in 1535 — with the connivance of his pliable Chancellor, Sir Thomas Audley.[28] In 1533 Lord Dacre had died. His heir, Thomas, was a minor aged 18. Dacre's estate comprised manors in thirteen counties — including the magnificent Herstmonceux Castle in Sussex. The majority was devised by feoffment to use, with the direction that it be conveyed to Thomas upon his coming of age. Henry seized on the case to assert that land could not be willed by use.

The common law Judges were assembled in the Exchequer chamber together with Chancellor Audley and Master of the Rolls, Sir Thomas Cromwell — each of whom supported the King's stance. Courageously, the Judges split on the legitimacy of the use. This would not do. The King commanded the Judges to attend upon him and to agree in their opinion. And that "those who were of opinion that the will was void would have the King's good thanks". The Judges no longer divided. Of how they were thanked, history is obscure.

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27 David Seipp "Trust and Fiduciary Duty in the Early Common Law" (2011) 91 Boston L Rev 1011.

28 *Lord Dacre's Case* (1535) 1 Spelman's Reports, Uses, pl 4.

One consequence was the enactment of the Statute of Uses the following year. It is described by Professor Milsom as part of the "fiscal feudalism of the Tudors".[29] The statute worked by "executing the use", promoting transfer of legal title to the beneficiary. One consequence of the reform was the beneficial restoration to lord (and King) of the otherwise diverted valuable incidents of wardship and marriage.

Thomas, the ninth Lord Dacre, came into the estate the following year. He did not enjoy it long. In 1541 he and seven other young men went poaching in an adjacent estate. A gamekeeper was killed, and Thomas and his cronies were arraigned for murder. The ubiquitous Audley, now in his capacity as Lord High Steward, presided. After initially pleading not guilty Thomas changed his plea and threw himself upon the mercy of the King. Some indication of vclemency must have been given to elicit that plea. But no mercy was forthcoming. Despite his noble standing, Thomas was hanged at Tyburn rather than executed. His estates were forfeit.

By the first *Lord Dacre's Case* Henry gained Thomas's wardship. By the second case Henry gained his estate.[30]

At the same time the Court of Chancery began to develop a body of decisions relying on concepts such as "trust" and "confidence".[31] Breach of trust or confidence would often sound in a remedy in the Court of Chancery even if the common law courts would turn the applicant away. These developments were not limited to Chancery. Common law actions for account (by landowners against bailiffs and rent collectors) and for waste (against guardians who abused wardships of infant heirs) also had a fiduciary character.[32]

Eventually these concepts evolved into the well-worn (and much abused) word "fiduciary" that we now so frequently use for a relationship based on powers conferred or assumed, but short of express trusteeship. One of the first uses of that word by a judge is found in a decision of 1717 in which a landlord sued a tenant who had dug on

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29 S F C Milsom *Historical Foundations of the Common Law* (2nd ed, Butterworths, London, 1981) at 220.

30 *Letters and Papers, Foreign and Domestic, Henry VIII* (HMSO, 1898) vol 16 at 449.

31 L S Sealy "Fiduciary Relationships" (1962) 20(1) CLJ 69 at 69–70.

32 Seipp, above n 27, at 1034.

the leased land. Cowper LC described the tenant as "a sort of fiduciary to the lord, and it is a breach of the trust which the law purposes in the tenant, for him to take away the property of the lord".[33] The principle then established by Lord Thurlow in the 1788 decision of *Gartside v Isherwood* was that "if a confidence is reposed, and that confidence is abused a court of equity shall give relief".[34] Over the past 250 years that general principle has stood the test of time remarkably well. Although the language we use to describe fiduciary relationships has become a little more specific, and certain classes of relationship are now presumptively fiduciary, in substance the principle is little better defined.

Undoubtedly in the first 400 or so years of the Chancery's existence, both the individualistic morality of the ecclesiastic chancellors and their knowledge of Roman law came to bear. The courts of equity would enforce trust and confidence relationships *in personam*, that is as between the parties, despite no *legal* obligation to do so. Indeed, frequently this arose in circumstances where one party *sought* to rely upon their legal rights. Equity served the function of Aristotle's epieikeia. It was a correction of legal justice.

New Zealand adoption

Trust law emerged as part of the rules of equity derived from the English Courts of Chancery. From its earliest times, the trust's purposes have been to settle land and assets for future generations of a family, to reduce onerous taxation and to avoid creditors. From earliest times too, the trust has demonstrated that it is indeed an "institute of great elasticity and generality", as Maitland put it.[35]

New Zealand never had separate common law and Chancery courts.[36] When the Supreme Court of New Zealand was established by ordinance in late 1841, it adopted

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33 *Bishop of Winchester v Knight* (1717) 1 P Wms 406 at 407.

34 *Gartside v Isherwood* (1788) 1 Bro C C 558 at 560, citing *Filmer v Gott* (1770) 4 Bro PC 230.

35 Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, Wellington, 2010) at [2.75], citing F W Maitland *Equity – a Course of Lectures* (1909) revised by J Brunyate (Cambridge, Cambridge University Press, 1936) at 23; and W S Holdsworth *History of English Law* (Methuen & Co Ltd, London, 1903) vol IV at 408.

36 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 8.

a simple, unified jurisdiction.[37] This was confirmed by s 16 of the Supreme Court Act 1882, which defined the Supreme Court's jurisdiction as being "all the jurisdiction which it had at the time of the commencement of this Act, and all judicial jurisdiction which may be necessary to administer the laws of the colony".[38]

However, as in England, aspects of the *administration* of trust law were legislated for, rather than being left to the courts. New Zealand's first Trustee Act was passed in 1883. There followed several amendment Acts from 1891 until 1907 and in 1908 a consolidated Trustee Act was passed. This was a comprehensive statute of 113 sections covering powers of the Supreme Court (the first 65 sections), relief of trustees and delegation of such powers.[39]

In 1956, the current Trustee Act came into force. It was based on the English Trustee Act 1925 "to give the benefit of the United Kingdom cases and textbooks", modified to suit New Zealand circumstances.[40] As the Hon J R Marshall MP put it in the Bill's first reading, "[the] Bill consolidates and amends the Trustee Act of 1908. It contains a large number of amendments, concerning some of which advantage has been taken of amendments made in the United Kingdom and New South Wales legislation".[41] Furthermore, said the Hon H G R Mason QC MP:[42]

> Our law should as far as possible use the same expressions as those that are used in the Old Country when the subject matter is the same. That is a well recognised method and a very acceptable way of doing things.

In following the English approach, the Trustee Act is a facilitative adjunct to the trust instrument and common law rules, rather than affecting the substance of the law.[43]

In New Zealand trust law today most of the rules surrounding the creation and use of trusts stem from long-standing principles of equity and English cases. That is

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37 Supreme Court Ordinance 1841 (Ordinance 1, Session 2, 1841); and Butler, above n 366, at 8.

38 The current jurisdiction of the High Court is provided for in similar terms by s 16 of the Judicature Act 1908, which states that "the Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand".

39 Law Commission, above n 35, at [4.32].

40 J G Hamilton "The Trustee Act 1956" [1957] NZLJ 7; Law Commission, above n 35, at [4.32].

41 (20 September 1956) 310 NZPD 1931.

42 (11 October 1956) 310 NZPD 2384.

43 Law Commission, above n 35, at [4.4].

understandable. We are dealing here with fundamental property rights, and (as well) very long term dispositions of property. Caution, perhaps conservatism, is called for. Certainly that is the approach the Courts have taken to date when dealing with express trusts. There are few distinctive New Zealand authorities on the express trust. When judges write in this area, more than in any other these days, they draw upon English authorities and texts — *Lewin on Trusts* being a particular favourite of New Zealand equity lawyers and judges.[44]

When a group of New Zealand equity lawyers (I being one of them) gathered in the late 1990s to write the text *Equity and Trusts in New Zealand* — appropriately known generally as *Butler* — it was to write a distinctive textbook on New Zealand equitable principles.[45] Yet an unscientific but illuminating review of the footnotes in the first ten chapters of our book (which deal with the express trust) demonstrate a preponderance of English sources underpinning "New Zealand" law.

There is nothing necessarily wrong with that; it simply demonstrates the stability of that aspect of the jurisdiction. New Zealand authorities on the express trust come into their own in areas where legislation has intruded. Subjects like the appointment and removal of trustees, relief of trustees, application for Court directions and variation of trusts stand out. Otherwise, distinctive New Zealand equitable principles operate at a slight remove from the express trust, in subjects like capacity, the rights of beneficiaries to information, the review of trustee powers for unreasonableness, sham trusts, constructive trusts and equitable remedies more generally.

PRESENT

Let me touch here on the Trusts Bill, currently awaiting its third reading. Others are talking about it in more detail, so I will be brief.

The current Trustee Act is facilitative, rather than definitive. As the Law Commission noted, it says nothing about what a trust is. It does not contain rules about how a valid trust may be established, how initial trustees are to be appointed, or who they may be.

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44 Lynton Tucker et al *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2018).

45 Andrew Butler (ed) *Equity and Trusts in New Zealand* (1st ed, Brookers, Wellington, 2003) at ix.

It says nothing of settlors or beneficiaries. It is called the "Trustee Act" yet contains only one statement about the standard expected of trustees (in addition to the investment powers in Part 2 of the Act).[46]

The only substantial amendments to the Trustee Act since its introduction have been the power of the court to vary a trust in sections 60 and 60A in 1960 and the substitution of a new Part II of the Act in 1988 relating to trustees' investment powers.[47]

There was growing dissatisfaction with the Trustee Act. In 2002 Sir Geoffrey Palmer said review of the Act was long overdue.[48] Justice Blanchard said it "contained large slabs of undigested text on obscure topics" alien to a modern commercial context.[49] Following an extensive review by the Law Commission and feedback from public consultation on an exposure draft, the Trusts Bill was introduced into Parliament in 2017.

As is apparent from clauses 3 and 4 of the Bill, its twin focus is on making trust law accessible (read, easier to understand and apply) and reducing the cost of trust administration. In part that reflects the popularity of the trust (in particular, the discretionary trust) in New Zealand. It is said that there may be anything between 300,000 and 500,000 trusts extant in New Zealand today.[50] The rise of the retail express trust since the 1950s has been driven by estate and gift duties, differential marginal income tax rates and more prosaic matters like superannuation surcharges and WINZ benefit capital thresholds.[51]

The Bill has passed its first reading with broad party support and the Justice Committee has now examined the Bill, recommending that it be passed (with some amendments). One of them, strongly supported by the senior judges, was that

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46 Law Commission, above n 35, at [4.53].
47 At [4.33].
48 At iii.
49 In his keynote address at the 2001 Law Society Trusts Conference: Law Commission, above n 35, at [1.10].
50 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [2.3].
51 Law Commission, above n 35, at [2.37]–[2.42].

the newly extended jurisdiction of the Family Court be subject to a High Court power to transfer proceedings into that court — the traditional authority on trust law.[52]

The Bill represents a radical shift in New Zealand's trust law, being the first clear divergence from the English approach. Rather than simply dealing with the administration of trusts, the Bill seeks to express core equitable principles in legislative form. So we will have legislation that for the first time expresses the core character of an express trust and the essential duties of trustees (divided between mandatory and displaceable default duties). It legislates for the provision of information by trustees (a contentious topic that the Bill may stoke rather than resolve). It enlarges (and generalises) the powers of trustees, and clarifies their liabilities, indemnities and protections. It radically revises the rule against perpetuities in relation to trusts, fixing a maximum duration of 125 years for most trusts. It increases powers of self-determination of beneficiaries acting in totality, simplifies the processes for removal and variation of trusts and encourages the use of alternative dispute resolution.

The Bill therefore modifies (and partly codifies) equity in relation to the express trust. In its early life as an Act it may well encourage, rather than discourage litigation, as arguments over interpretation of this semi-codification of equity erupt. But they will settle down, and there is much good indeed in the Bill, in the provisions I have just summarised.

Apart from the potential for a temporary spike in litigation, where is all this taking us?

FUTURE

I finish with two comments as to the future path of equity and the express trust.

The first is that the genie cannot be returned to the bottle. If Parliament engages in the semi-codification of equity, in relation to the express trust, it will face demands in future to codify more aspects of the express trust, and then to embark on legislation of other areas altogether.

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[52] See now Trusts Bill 2017 (290-2), cl 136(6).

So that prospect lies squarely ahead of us. Equity lawyers and judges should strive to ensure that the future expression of equitable obligations in unlegislated areas is contemporary and coherent. In that way future claims of undue complexity and inaccessibility of principle – the rallying cry for reform of the Trustee Act – may perhaps go unmade.

The second is a mild prognostication that tikanga Māori concepts will increasingly influence equity in New Zealand — even in relation to trusts involving non-Māori. Equity is both principle and collective ethos, the latter inherently receptive and influential upon the former. In *Takamore v Clarke* Elias CJ observed that "Māori custom according to tikanga is therefore part of the values of the New Zealand common law".[53] And the Waitangi Tribunal has suggested the Treaty of Waitangi requires "a genuine infusion of the core motivating principles of mātaraunga Māori — such as whanaungatanga and kaitiakitanga — into all aspects of our national life".[54]

Whanaungatanga is described by Williams J as the "glue that held, and still holds, the system together, the idea that makes the whole system make sense — including *legal* sense".[55] Māori society being fundamentally relational, tikanga Māori emphasises the responsibility owed by the individual to the collective, individual rights depending on mutuality and reciprocity of responsibilities. Whanaungatanga is the source of these kinship rights and obligations. That may sound a long remove from the original individualism of equity. But the Trusts Bill already takes long steps on that path by its enlargement of rights generally, especially those of beneficiaries.

The tikanga concept most proximate to equity is of course *kaitiakitanga*. It is a term coined in relatively recent times to give explicit expression to "the idea that any right over a human or resource carries with it a reciprocal obligation to care for his, her or its physical and spiritual welfare".[56] It is often described as importing notions of

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53 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]. See the discussion by Valmai Toki "Lessons from the Navajo Tribal Courts – Tikanga Māori as Common Law" (2018) 28 NZULR 197 at 204.

54 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 248.

55 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 4.

56 At 4.

guardianship, or stewardship, although that description lacks the core spiritual dimension that animates the concept.[57] Kaitiakitanga conjoins with whanaungatanga, as no right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource.

This is stuff for intensive analysis at another time. For the present, my modest proposition is simply that the very Englishness of equity is bound to change in 21st century, multicultural Aotearoa New Zealand. It already has: the Trusts Bill marches us in a new, more idiosyncratic and antipodean direction. Inevitably the ethos of New Zealanders will gradually embrace more of the ideas of tikanga Māori. That evolving ethos will inform equity, regardless of ethnicity. Equity should no longer be seen as quintessentially, exclusively English. It must reflect the shared values of the whole community, including some shared concepts of tikanga Māori. It does not seem at all unlikely that both whanaungatanga and kaitiakitanga will influence equity, gradually and more generally, in my second decade as a Judge, and thereafter.

No reira, tena koutou, tena koutou, kiora tatou katoa.

Thank you for your kind attention. Thank you, and good morning.

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57 Waitangi Tribunal, above n 54, at 105.