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DOWN AND OUT IN NEW ZEALAND: OPENING THE DISCRETIONARY TRUST FOR A BANKRUPT'S CREDITORS

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Abstract

The discretionary trust in New Zealand is a prolific and effective shield against the effects of personal bankruptcy. This paper discusses the interaction between New Zealand discretionary trusts and insolvency law. It analyses the obvious policy problem, that trusts allow settlors to avoid the statutory bankruptcy scheme at will.

Fundamentally, the paper seeks to better protect creditors by bringing trust powers into the insolvency property pool. It begins by addressing the illusory trust debate in the literature, concluding that the illusory trust doctrine is relevant, but distinct. The paper then presents a form-over-substance, or functional, approach to identifying trust powers by looking through otherwise opaque drafting practices. To determine which powers are "property", the paper looks to what bundle of a settlor's rights would best vindicate the social and statutory purposes of insolvency law. Ultimately, it argues that Bennett and Barkley's unlimited self-benefit criteria would best support these purposes. The paper's analysis uses a property law framework to formalise the reasoning in the "trust busting" cases of *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2011] 4 All ER 704 and *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551. The paper recognises there are trade-offs due to New Zealand's weak sham regime. However, it concludes the new pathway is a promising model to open discretionary trusts for creditors, to advance Parliament's intention, and to support a principled approach to trust law.

Trusts, Insolvency, Illusory trusts, settlor control, bundle of rights

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I Introduction

The New Zealand family trust has become the shield to the spear of the settlor's creditors. Over recent decades trusts have been created to give a greater degree of discretion on trustees.[1] Such trusts are remarkably successful at blocking creditors' claims.[2] They protect the settlor from the bankruptcy process in the event of insolvency.

The Supreme Court addressed the rise of settlor control in the family property context in *Clayton v Clayton [Vaughan Road Property Trust]*.[3] This judgment provides the foundation for this paper to create a potential pathway for the Insolvency Act 2006 to open trusts in cases of personal bankruptcy. Specifically, this paper provides a pathway for judges to pass a settlor's equitable interests to their creditors.

This pathway follows Jesse Wall's model of the bundle of rights. I find that powers which allow "unlimited self-benefit" are tantamount to ownership.[4] These powers should be considered the settlor's property. I call this the Proprietary Powers Strategy (PPS). The powers which amount to ownership under the PPS are determined by the particular scheme,[5] in this case insolvency law.

In Part II, I introduce relevant concepts and set out the New Zealand trust and insolvency landscape, showing why the law's efforts are often obstructed. Part III discusses the difference between the illusory trust and powers approaches. In Part IV, I outline how courts can find the functional effect of powers in a trust. I prove that powers which are tantamount to ownership are property in Part V. Part VI contains the crux of this paper, defining what is tantamount to ownership using the statutory purpose of insolvency law, completing the explanation of the PPS. In Part VII, I show how the PPS would apply under the Insolvency Act, before outlining some other considerations and evaluating the approach I propose.

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[1] Jessica Palmer "Controlling the Trust" [2011] Otago LR 3; Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at [1.15]; and Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Paper* (NZLC IP20, 2010) at [2.20].
[2] Philip Trebilco "Theoretical Justifications for the Judicial Approach to Problematic Super Discretionary Trusts" (LLB (Hons) Dissertation, University of Otago, 2021) at 18; and Sinéad Agnew and Ben McFarlane "The Paradox of the Equitable Proprietary Claim" in Ben McFarlane and Sinéad Agnew (eds) *Modern Studies in Property Law* (Hart Publishing, Oxford, 2019) vol 10, 303 at 306.
[3] *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.
[4] Jesse Wall "Taking the Bundle of Rights Seriously" [2019] VUWLR 35; and Mark Bennett "Competing Views on Illusory Trusts: the *Clayton v Clayton* litigation in its wider context" (2017) 11 J Eq 48.
[5] Wall, above n 4, at 747.

II The Landscape

A Trust Law

Centuries of development in the Courts of Equity have established the equitable relationship now recognised as a trust.[6] The traditional trust relationship broadly excludes the settlor.[7] Their role is "transient", and they lose many of their explicit property rights upon the creation of the trust.[8] However, as discussed below, settlors can empower themselves to make decisions by granting themselves rights through the trust deed.[9] The Trusts Act 2019 also directs trustees to be aligned with their wishes.[10]

These relationships, and the management of trusts more generally, are governed by the Trusts Act, which is supplemented by jurisprudence from equity and the common law.[11] The High Court supervises the decisions made by trustees.[12]

Ultimately, trusts enable and recognise a valuable social relationship.[13] The Law Commission recognised that trusts provide many benefits, such as enabling estate planning and joint control of family property.[14] Trusts facilitate such relationships due to their inherent flexibility.[15]

B The New Zealand Discretionary Trust

In contrast with the traditional equitable relationships, modern New Zealand trusts are often created to achieve additional objectives such as asset protection, and to qualify for certain schemes.[16] Now, trust powers are regularly retained by the settlor or a trusted compatriot, a "protector".[17]

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[6] David Hayton *Underhill and Hayton Law of Trusts and Trustees* (14th ed, Butterworths, London, 1987) at art 1; and *Green v Russell* [1959] 2 QB 226 (CA) at 241.
[7] Ian Hardingham *Discretionary Trusts* (2nd ed, Butterworths, Sydney, 1984) at [602]; Sam Short "Are or Were? The Continuing Influence of the Settlor" (2019) 28 NZULR 587 at 28; and Donovan Waters "Trusts: Settlor Reserved Powers" [2006] 25 Est Tr & Pensions J 234 at 238.
[8] Trusts Act 2019, s 13.
[9] Short, above n 7, at 605; and Antony Duckworth "The Trust Offshore" (1999) 32 Vanderbilt Journal of Transnational Law 879 at 910.
[10] Trusts Act, ss 22–27.
[11] Section 5.
[12] Section 8.
[13] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013); and Tobias Barkley "The content of the trust: what must a trustee be obliged to do with the property?" (2013) 19 T&T 452 at 461.
[14] Law Commission, above n 13, at [2.7]; and Law Commission, above n 1, at [2.37].
[15] Law Commission, above n 1, at [3.10]–[3.13]; and Hanoch Dagan "Express Trust: The Dark Horse of the Liberal Property Regime" in Simone Degeling and others (eds) *Philosophical Foundations of the Law of Trusts* (forthcoming, 2021) 1 at 20.
[16] Law Commission, above n 1, at [2.0]–[2.2]; and Kent D Schenkel "Trust Law and the Title-Split: A Beneficial Perspective" [2009] 78 UMKC Law Review 181 at 191.
[17] At [3.10]–[3.13].
[17] At [2.0]–[2.2]; Trebilco, above n 2, at 9; and Donovan Waters "The Protector: New Wine in Old Bottles?" in AJ Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996) 63.

The literature describes this new relationship as "rather uninterested in strict adherence" to the original view of the trust relationship.[18] Trusts of this nature are called New Zealand Family Trusts (NZFTs) for the purposes of this paper.

NZFTs revitalise the role of the settlor who is now a key player in the trust who will now, sometimes wear the trustee's hat.[19] New Zealand and comparable jurisdictions are increasingly seeing cases where the settlor's position is often de facto equivalent to absolute ownership, when in law they possess only legal title.[20] Given this control, when settlors go bankrupt, insolvency law should step in, but their lack of a vested property interest often defeats their creditors' claims.[21]

C Insolvency Law in New Zealand

In principle, upon bankruptcy, creditors can collectively enforce their claims against debtors, through insolvency.[22] Its processes are governed by the Insolvency Act.[23]

Bankruptcy is a legal status placed upon the debtor when they are adjudicated bankrupt.[24] This occurs when the debtor commits an act of bankruptcy, set out in ss 17–28.[25] Upon adjudication, the Act sets out a complex process. It results in almost all of the bankrupt's property vesting in the Official Assignee (OA), who then disposes of it to repay creditors.[26] Upon completion of the process, or "discharge", a bankrupt is then free from their debts.[27]

Property is defined in s 2. Per *Johns v Johns* and *Erceg v Erceg*, property includes most beneficial interests in trusts.[28] However, the modern trust relationship described above is able to defeat the OA and creditors' claims. These effects are enabled by, among several social factors, a key legal instrument: discretion.[29]

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[18] Short, above n 7, at 1; Adrian Sawyer "Passing the Century Mark: The Urgent Need for Reform of Insolvency Law and Policy in New Zealand" (1999) 3 FLJR 183; and Jessica Palmer "Equity and Trusts" [2019] NZ L Rev 365.
[19] Short, above n 7, at 589.
[20] Tim Akkouh and Christopher Lloyd "Trust-busting after *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev & ors* [2017] EWHC 2426 (Ch)" (2018) 24 T&T 151 at 155–156; and Charles Ipock "An Obscure Tennessee Opinion Uncovers the Veil of Legal Malpractice between Asset-Protection Trusts and the Uniform Trust Code" (2013) 3 St.Mary's LJ 308 at 310.
[21] Law Commission, above n 1, at [2.20].
[22] Ian Fletcher *The Law of Insolvency* (5th ed, Thomson Reuters, London, 2017) at [1-004] and [1-007].
[23] Jim Guest and Morris P *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis, 2022) ["Heath and Whale"] at [2.1].
[24] Insolvency Act 2006, s 55.
[25] Sections 17–28.
[26] Section 7.
[27] Sections 7 and 358B.
[28] *Johns v Johns* [2004] 3 NZLR 202 (CA); and *Erceg (Ivan) v Erceg (Lynette)* [2015] NZHC 594, [2015] NZAR 1239 at [15].
[29] Short, above n 7, at 2.

D The Effect of Discretion

Discretion has a practical effect. It enables trustees to manage complex estates, so that settlors can have their wishes respected through changing circumstances.[30] Discretion also has a particular legal effect: it turns an equitable proprietary interest, into a mere hope or expectation.[31]

Settlors have taken advantage of this protective legal effect. Many trusts are now wholly discretionary,[32] the effect of which is that the beneficial interest is not owned by any one person.[33]As affirmed by the Court of Appeal in *Hunt v Muollo*, a lack of beneficial interest precludes a claim against the beneficial owner of property, because there is a vested proprietary interest.[34] This bars a claim on the property, as the OA cannot use their existing property interests, such as the ability to request a distribution and information to their creditors' advantage.[35] As the OA stands in the shoes of the bankrupt settlor-beneficiary, the trust property cannot vest in them, nor pass onto their creditors.[36] Thus, discretion allows settlors to protect their assets from creditors, thereby defeating the statutory scheme.[37]

E Recent Developments

Discretion has been a major feature of recent decisions, particularly the power of discretionary trusts to defeat claimants in the property relationship context. In *Clayton*, the Supreme Court held that the discretionary powers of the settlor were tantamount to property under the Property (Relationships) Act 1976 (PRA).[38] That property could therefore be used in the Act's asset balancing exercise.

In its judgment, the Court looked to the powers granted to Mr Clayton. When combined, they enabled him to appoint all the property on himself.[39] Consequently, relying on (but ultimately distinguishing) the Privy Council in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* (*TMSF*).[40] Here the Court found that the ability to self-benefit was analogous to a general power of appointment, and so tantamount to ownership.[41] Thus, the Board found that powers were tantamount to ownership and were accordingly open to creditors.

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[30] Schenkel, above n 16, at 184.
[31] *Hunt v Muollo* [2003] 2 NZLR 322 (CA); Wall, above n 4; and Schenkel, above n 16, at 197.
[32] Law Commission, above n 1, at [4.33].
[33] *Hunt v Muollo*, above n 31, at [11].
[34]At [11]; and Hardingham, above n 7, at [605]–[606].
[35] *Kea Investments Limited v Watson* [2021] JRC 009 at [29]; and *Dwyer v Ross* (1992) 34 FCR 463 at 468.
[36] Jeremy Bell-Connell "Can an interest in a discretionary trust ever be a proprietary interest?" (19 May 2001) Dentons Kensington Swan <www.dentons.co.nz>.
[37] Short, above n 7; and Mark Bennett "The Illusory Trust Doctrine: Formal or Substantive?" (2020) 51 VUWLR 193 at 199.
[38] *Clayton*, above n 3, at [98].
[39] At [68].
[40] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2011] 4 All ER 704 [*TMSF*].
[41] At [62].

Clayton was innovative in the way it combined powers and considered discretionary interests in the relationship property scheme.[42] While *Clayton* is an innovation in New Zealand, it is informed by comparative jurisprudence.

F Comparative Jurisprudence

Comparative jurisprudence provides a basis to analyse the normative value of my argument and creates a basis for comparative analysis. Aside from the United Kingdom decisions above, and particular decisions discussed in Parts VI and VII, United States law provides the best comparative jurisdiction. In America, the Uniform Trust Code (UTC) is good law in 34 states.[43] The Code states at § 505 that "a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit".[44] A revocable trust is likewise subject to the claims of the settlor's creditors.[45] The effect of the rule in the UTC is that asset protection trusts which do not contain a clause allowing the trust to resettle in another jurisdiction are ineffective.[46] Creditors can thus reach as much property as they like. By extension, in few jurisdictions in the United States can a settlor create a true asset protection trust.[47]

The *Restatement of Trusts*, which informed the section, stated that it was custom that a settlor could not "use the trust as a shield against [their] creditors".[48] The UTC also said that such a provision "reflects sound policy" by reference to Alaska and Delaware. These two states see a high presence of normatively bad asset protection trusts, much like NZFTs.[49] As such, the UTC rule was founded to block trusts like the NZFT.

Ultimately, New Zealand lags behind America on its trust–insolvency interaction. This supports this paper's normative argument: *Clayton* should be extended to insolvency law, thereby following the United Kingdom in *TMSF* and creating a similar outcome to that produced by the UTC.

G The Legal Issue

The above comparative analysis highlights the significant policy problem created by the NZFT asset protection device, which has become a staple of New Zealand trust law.[50]

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[42] Bennett, above n 37, at 205.
[43] Uniform Law Commission "Legislative Bill Tracking" (5 January 2022) <www.uniformlaws.org>.
[44] Uniform Law Commission *Uniform Trust Code* (Uniform Law Commission, Chicago, 2000) at § 505.
[45] American Law Institute *Restatement of Trusts* (3rd ed, 2000) § 58.
[46] Joseph E Hershewe "Missouri Asset Protection Trusts Debunking the Vulnerability Myth and a Call for Uniformity" (2010) 79 UMKC L Rev 211 at 215; and Alan Newman "The Intention of the Settlor under the Uniform Trust Code Whose Property Is It, Anyway" (2005) 38 Akron L Rev 649 at 674.
[47] Hershewe, above n 46, at 215.
[48] Ipock, above n 20.
[49] Henry J Lischer Jr "Domestic Asset Protection Trusts: Pallbearers to Liability" (2000) 35 Real Prop Prob & Tr J 479; and John E Sullivan "Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust law Competes with Offshore Trusts" (1998) 23 Del J Corp L 423.
[50] Law Commission, above n 1, at [2.20].

NZFTs allow people with adequate legal advice to circumvent a statutory scheme that should apply universally.[51] Avoiding the insolvency scheme by simply creating a trust with little change in the control of property is a morally hazardous.[52] Such trusts allow individuals to avoid the debts they have willingly taken on. Bona fide creditors, who fund our debt-based economy, are left unrepaid,[53] thus breaching the fundamental tenet of law, that contracts must be carried out.[54]

The law does make some attempt to overcome these failures. Existing literature highlights other routes for the OA to open a trust which can overcome discretion. This includes the "collection of debts back",[55] voiding gifts, attacking trustees' liability insurance,[56] and the trustees' lien.[57] However, these are not always possible to implement.[58] Additionally, the Property Law Act 2007 at s 345 allows the OA to set aside dispositions of property, but due to evidential requirements it is rarely applied.[59]

Where traditional remedies are unsuccessful, *Clayton* presents a tool to open the NZFT. Just as *Clayton* opened trusts for family law,[60] I argue courts should do the same for insolvency. Consequently, I argue that some powers are property for the purposes of the Insolvency Act and can be exercised by the OA for distribution to the bankrupt's creditors.

III Powers and the Illusory Trust

As highlighted in *Clayton*,[61] One of the key debates in the literature is over the best method to open discretionary trusts. While some authors prefer the illusory trust approach, in this Part I agree with Wall, and discuss how an approach that is based on powers should be preferred. Distinguishing the PPS from the illusory trust doctrine and justifying using the former sets the foundation of this paper, as the following parts depend on whether we are inquiring into the trust as a whole or the powers inside it.[62]

A Differences between the Powers and the Illusory Trust Approach

The discussion of powers in this paper is inspired by literature on the illusory trust.[63] However, the two ideas, the illusory trust doctrine and the PPS are distinct. While they both cover how to manage discretionary trusts, and have their own value, the powers approach is the most

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[51] Ipock, above n 20; and Schenkel, above n 16, at 191.
[52] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) at 180; and Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" [2010] NZ L Rev 567 at 583.
[53] Schenkel, above n 16, at 191.
[54] See *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2008] HCA 266.
[55] Jim Guest "Creditors vs Trusts - a practical insight" (paper presented to the Trusts Conference, Dunedin, 2007).
[56] Guest, above n 55; and Insolvency Act, ss 204–205.
[57] *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344 at [13]–[22].
[58] Guest, above n 55.
[59] Guest, above n 55.
[60] *Clayton*, above n 3, at [98].
[61] At [118].
[62] *Cummings v Claremont Petroleum NL* [1996] HCA 19, (1996) 185 CLR 124 at 133.
[63] Wall, above n 4.

appropriate for insolvency law. Clarifying the difference between these two ideas, will evidence this, and demonstrate how the powers question is key jurisprudentially and will unlock a practical benefit.

1 Jurisprudential arguments

The distinction is straightforward. The PPS asks to what extent the powers conferred on the donee amount to ownership.[64] The result is that the powers can be used to access assets under a specific legal or equitable scheme. The illusory trust doctrine, meanwhile, inspects the trust and asks whether it has exceeded the bounds of trust law.[65] The two approaches therefore question different things: and the proprietary nature of powers, on one hand, and the limits of a trust on the other.

The two inquiries still overlap significantly. Trusts like *Clayton* will likely be illusory and have powers which amount to ownership.[66] If the powers created amount to ownership, the trust could be categorised as illusory because the irreducible core of obligations are not present.[67]

However, there are two jurisprudential theories which highlight the distinction, both of which are put forward by Wall. Firstly, as discussed in Part VI, the nature of a particular scheme impacts the property rights it captures.[68] As the PPS looks at whether a power amounts to ownership based on the particular scheme, it is statute focused. The Court in *Nation v Nation* evidenced this point by distinguishing between equitable concepts and the statutory scheme.[69] The illusory trust approach, by contrast, is internally focused, looking at whether the trust goes beyond equitable criteria.[70] Thus, the PPS is more flexible. It allows courts to determine the nature of powers based on Parliament's intention for the statute,[71] so courts can capture the most appropriate pool of property for the scheme.

The second distinction flows from the first: that the statutory purpose, and Wall's "social relationship",[72] will be better vindicated.

[64] Wall, above n 4, at 747.
[65] Bennett, above n 4, at 52–53.
[66] Larna Jensen-Mccloy "What is the real impact of *Clayton* v *Clayton*?" (2019) 16(4) The Property Lawyer 20 at 23; and *Pugachev*, above n 52, at 179.
[67] Bennett, above n 4, at 53; and Wall, above n 4, at 747.
[68] At 743.
[69] *Nation v Nation* [2005] 3 NZLR 46 (CA).
[70] Wall, above n 4, at 747.
[71] At 747; and Henry E Smith "Property as the Law of Things" (2012) 125 Harv L Rev 1691 at 1697.
[72] Wall, above n 4, at 737.

Wall argues that

> "absent a ballast value [the social value the statute progresses, to which legal interpretation attaches] we have to accept the singular moral ends of trust law as giving effect to settlor autonomy".[73]

The literature disputes Wall's view of equity's moral value. Penner argues that the combination of principles set out in his 2010 article set that the bounds of trust law, thus equity's ballast value.[74] Dagan and Samet believe settler autonomy is a potential ballast value.[75] They say this can be "justified as a form of ownership in a modern democratic society" as avoidance of statutes is runs contrary to autonomy.[76] Likewise, Bennett and Hofri-Winogradow's detailed analysis provides a further view, that settler autonomy is trust law's ballast value, but should disincentivise settlors from avoiding statutory schemes.[77] As the illusory doctrine is internally focused, Penner's equitable principles would be progressed under an illusory approach.[78]

While Penner's principles are admirable, they logically cannot better vindicate Parliament's intention than a powers approach could.[79] This is because a powers approach enables trusts to be interpreted as best suits each particular statute, rather than taking a one size fits all interpretation.[80] Thus, across the statute books, Wall's model enables courts to better enforce statutory purposes and "social relationships".[81]

2 Practical arguments

In addition to the above jurisprudential benefits, the PPS also has a pragmatic benefit, in that it is based on approved judicial reasoning. It has been good law for years that powers can be property.[82] Their Lordships in *TMSF* wholeheartedly affirmed this proposition.[83] Likewise, in New Zealand the PPS is a mere reapplication of *Clayton* (together with other significant authority) from family law to insolvency law.[84] Illusory trusts, by contrast, while formed from sound jurisprudential scholarship, are unsupported by New Zealand courts.[85] Their Honours in

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[73] At 751.
[74] James Penner "An Untheory of the Law of Trusts or Some Notes Towards Understanding the Structure of Trusts Law Doctrine" (2010) 63 CLP 653 at 663.
[75] Dagan, above n 15, at 47.
[76] At 3.
[77] Mark Bennett and Adam Hofri-Winogradow "The Use of Trusts to Subvert the Law: An Analysis and Critique" (2021) 41 OJLS 692 at 718.
[78] Wall, above n 4, at 751.
[79] At 751.
[80] At 751.
[81] At 751.
[82] *Re Churston Settled Estates* [1954] 1 Ch 334 at 344; *TMSF*, above n 40, at [32] and [42]–[43]; and *Re Triffitt's Settlement* [1958] Ch 852 at 861.
[83] *TMSF*, above n 40, at 52.
[84] *Clayton*, above n 3; *Harrison v Harrison* [2008] NZHC 2580 at [10]; *Walker v Walker* [1983] NZLR 560 at 572; *Robertson v Robertson* FAM-2009-004-001627/1628, 19 Nov 2009 ; and Law Commission, above n 1, at [4.33].
[85] *Clayton*, above n 3, at 128.

Clayton, in particular, rejected the illusory label as unhelpful.[86] While the Judges' comments are not fatal to the doctrine, they indicate that a court will be cautious when seeking to apply the theory in future. Thus, the powers approach, having already been accepted in New Zealand, is more likely to be accepted again.

B Conclusion

The PPS and illusory trust approaches are distinguishable. The PPS is statute-focused and will better advance the purposes of the relevant legal schemes.[87] Given its practical and jurisprudential benefits, the PPS is preferred. The result of the PPS's selection is not that trust property will vest in the OA; rather, following *TMSF* and *Clayton* the OA will get the relevant powers.[88]

IV On What Basis Should we Identify Powers?

As the foregoing analysis justifies the PPS and a powers approach, the question arises, how should such powers be identified? Clearly, few trusts will have a general power of appointment or revocation.[89]

Yet trusts include these powers in substance.[90] Therefore, our traditional views are ineffective. They focus on the form over the substance of the deed, which leads to weak outcomes.[91] Simply looking at the words of the deed allows clever drafting to obfuscate courts' decision-making. Consequently, as noted by Bennett, a "formal" view traditionally fails to identify what the trust powers actually allow a settlor to do, which Wall defines as the "functional" trust relationship.[92] Thus, we can infer that it would also fail to find a power analogous to ownership.

I therefore argue that the OA should take a substance, or functional approach, which would logically create a greater pool of property than a formalistic view alone.[93] Such a result would bring cleverly drafted NZFTs within the scope of the PPS. This method to identify powers is the platform for the definition of tantamount to ownership in part VI.

JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev illustrates the benefit of taking a substance-based approach.[94] In *Pugachev*, the defendant had enormous discretionary powers.[95] The Court found the trust was a sham, as the powers inside it practically amounted

[86] At 128.
[87] Wall, above n 4.
[88] *TMSF*, above n 40; and *Clayton*, above n 3.
[89] *Clayton*, above n 3, at [14].
[90] *Clayton*, above n 3 at [56]; and *TMSF*, above n 40, at [40]–[44].
[91] Bennett, above n 37, at 204.
[92] At 204; and Wall, above n 4, at 749–750; and Jesse Wall "The functional–formal impasse in (trust) property" (2017) 14 Int JLC 437 at 438.
[93] *Clayton*, above n 3, at [84]; Wall, above n 4, at 749; and Wall, above n 92, at 443.
[94] *Pugachev*, above n 52, at [438]–[442] citing *European Central Bank v Document Security Systems Inc* [2008] EWCA Civ 192 at [5].
[95] At [265]–[278].

to ownership.[96] In so finding, the Court was wary of letting a formal view of trusts prevent a just outcome. A formal view prevents courts from constructing the functional sum of the powers in trusts.

A substance-based approach, by contrast, looks to the substance of the trust deed and tests what its functional effects are rather than relying on the deed alone.[97] It therefore necessarily captures more property. Thus, considering the negative outcomes of the formal view, and following the advice of Bennett, a substance-based approach is preferred.[98]

Now, a substance-based approach must be selected from the plethora of approaches available. Bennett identifies a series of ways to analyse the functional powers and effect of trusts.[99] Of these methodologies, an external look-through regime is most relevant.[100] This regime does not widen the definition of property but expands the pool by allowing the OA to identify rights that would be captured, had they not been concealed by clever drafting. Critically, the word "external", [101] is deceiving. An analysis of external circumstances is primarily used to find a sham.[102] A detailed discussion of sham theory is outside the scope of this paper, apart from the discussion in part VII.

Thus, in this Part I apply Bennett's substance-based look-through regime which was also found in *Clayton*.[103] This strategy unlocks the NZFT, as it allows a court to see the functional effect of the trust. I can then apply *Clayton*'s model and use it to find powers which are tantamount to ownership for the purposes of insolvency law.

A Application to the Trust Law and Insolvency Interaction

Clayton provides a base to apply the look-through regime to insolvency law. A formula to identify powers is necessary to find that they can be property. However, *Clayton* first needs to be dissected so that the rule can be identified and extracted.

1 Clayton

In *Clayton*, the Court of Appeal looked to the "practical effect" of the powers created by the trust.[104] In particular, the Court looked to the powers created by the trust deed under cls 14.1, 11.1 and 19.1.[105] These clauses allowed Mr Clayton to apply any or all of the trust property to

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[96] At [442].
[97] Bennett, above n 37, at 205; Wall above n 92, at 438. and Underhill and Hayton *Law Relating to Trusts and Trustees* (19th ed, 2016) at [1.86].
[98] Bennett, above n 37, at 204.
[99] At 204; and Wall above n 92, at 438.
[100] At 204; and Law Commission *Review of the Law of Trusts Preferred Approach* (NZLC IP31, 2012).
[101] Bennett, above n 37, at 204.
[102] Thomas Probert "A Lost Opportunity? Omission of the Illusory Trust Doctrine from the Trusts Act 2019" (2019) 50 VUWLR 681 at 695.
[103] Bennett, above n 37, at 205.
[104] *Clayton*, above n 3, at [56].
[105] At [56].

any beneficiary, bring forward the date at which the property vested, and resettle the trust fund to any other trust which shared a trustee.[106]

In assessing whether these powers amounted to property, as Bennett notes, their Honours used a de facto look-through regime to find the functional effect of the powers.[107] The Court inspected the functional effect that the powers could have when used together. Their Honours found that Mr Clayton could use the powers to appoint all the assets on himself. Thus, the powers were analogous to a general power of appointment. The Court then affirmed this in *Re Triffitt's Settlement*,[108] holding that such powers were tantamount to ownership.

2 Clayton's impact

With respect, the Court made the correct judgment. By looking to substance over form, the Court constructed a general power of appointment out of the existing powers.[109] This approach means a court can analyse the powers, which drafting would otherwise obscure. To omit this analysis would thus place the OA in a state of wilful ignorance. As such, the OA would be left with a formal view of powers which is totally disconnected from reality.

Viewing the functional nature of powers enables courts to open trusts protected by discretion. A better assessment of the assets and control in a trust will support statutory schemes to function properly.[110] The improved statutory outcomes are shown in *Clayton*, where the powers found by the Court's functional analysis were used in the PRA calculus.[111] This, as *Clayton* shows,[112] will better vindicate Parliament's legislative intention.

3 Bankruptcy

The OA should be able to utilise the look-through regime. A look-through approach aligns well with the purpose of the OA's powers, which is to garner the appropriate pool of property.[113] The OA is empowered to do this via an array of powers, such as s 236, sub-pt 5, and by bringing a claim under s 412 of the Insolvency Act. Ultimately, the job of the OA would be a Sisyphean task if they could not use a functional view in order to do so.

The natural operation of the Act also means the OA should be able to use the look through regime. By extension, this breaks an argument that the OA's statutory powers should be interpreted narrowly. Powers which can only be identified by a look-through approach could have been used by the settlor. So, arguably per s 101(1)(b) and sch 1(s), they can then be

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[106] At [57].
[107] Bennett, above n 37, at 205.
[108] *Re Triffitt's Settlement*, above n 82, at 861.
[109] Wall above n 92, at 451.
[110] Law Commission, above n 1, at [3.20] citing *In Re Cox* (1993) 4 NZBLC 102,967; and Heath and Whale, above n 23, at [4.37].
[111] At [107].
[112] At [81].
[113] Law Commission, above n 1, at [3.15]–[3.21]; and Heath and Whale, above n 23, at [6.1] and [6.10].

exercised by the OA.[114] An argument that the statute is so restrictive that it would allow the OA to use general powers in a trust but preclude them from identifying them in the first place would create an inconsistency in the statute.[115] Thus, the operation of the Act shows the OA should be able to use the look-through regime.

B Conclusion

From this analysis, it is clear that powers should be identified functionally. This would broaden the scope of the PPS to open trusts which are previously obscured by clever drafting. Judges should be willing to apply *Clayton's* look-through regime to cases of bankruptcy.

V Can Powers Amount to Property for Insolvency Law?

Correctly identifying the functional powers created under the trust is not the end. In order for the PPS to work, the powers still need to give effect to the particular legal scheme.[116] *Clayton* and *TMSF* again inform our analysis.[117] They define powers which are tantamount to ownership as property. However, the critical question is one of jurisprudential compatibility.[118]

A Compatibility

Both New Zealand and English authority hold that powers which are tantamount to ownership are property. This is compatible with insolvency law.

Firstly, the Insolvency Act's definition of property is compatible with the PPS. Property is defined widely under s 3 of the Insolvency Act as "rights, interests and claims in relation to property". New Zealand authority supports a characterisation that the Act's definition is wide.[119] Clearly, what the powers amount to are rights exercisable by the donee to award themself property. There is no right more related to property, as demonstrated by the Board in *TMSF* when addressing a comparable provision.[120] As such, powers which are tantamount to ownership will meet the standard.

This idea was arguably approved in *Clayton*, which cited *TMSF*. Their Honours noted that "[t]he Privy Council determined … [it was] appropriate to treat the power as property in an insolvency context".[121] The Supreme Court would have surely stated so if they disagreed with *TMSF*'s reasoning or wanted the powers as property approach to be confined to the PRA. The Court in *Clayton* also went further, stating that "the power of appointment may be treated as

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[114] George Farwell *A Concise Treatise on Powers* (3rd ed, Stevens, London, 1936) at 508.
[115] Heath and Whale, above n 23, at [6.15].
[116] *Clayton*, above n 3, at [68].
[117] At [61]; and *TMSF*, above n 40, at [40]–[44].
[118] *Clayton*, above n 3, at [61]; and *TMSF*, above n 40, at [40]–[44].
[119] *Erceg (Ivan) v Erceg (Lynette)*, above n 28 at [15]; *Official Assignee v NZI Superannuation Life Nominees Ltd* [1995] 1 NZLR 684 (HC) at [38]; and *Official Assignee v Trustees Executors Ltd* [2014] NZHC 345.
[120] *TMSF*, above n 40, at [31]; and *Clarkson v Clarkson* [1994] BCC 921 (CA).
[121] *Clayton*, above n 3, at [69].

property for some purposes even where there is no legislative provision requiring that to be done".[122]

The PRA and the Insolvency Act do not require comparative statutory analysis, to extend *Clayton* to insolvency. The Insolvency Act's definition of property is wide. As general powers have long been considered delegable, they are not on the fringe of the definition.[123] So, even a reading of the Insolvency Act which finds the definitions of property in the Insolvency Act and the PRA not to be analogous for some purposes is unlikely to exclude general powers. For example, Atkin's narrow reading[124] would still arguably include general powers as a "right and interest".

I also look to the law of powers, whose position is clear: powers can be tantamount to ownership. In Farwell's *Concise Treatise on Powers*, the author argues that general powers can be property,[125] as did the Court in *Wright v Morgan*.[126] This position was affirmed in *Clayton*.[127] Likewise, the literature supports this idea that property is formed from rights and powers, with Wall citing American authority from Smith and Dagan, leading the charge in support.[128]

English authority likewise supports this proposition. *Clarkson v Clarkson* in discussing the definition of property in the United Kingdom statute, disagreed with *Re Mathieson*, where it was held that general powers were not property.[129] Likewise, *Re Triffitt's Settlement* held that "[w]here there is a completely general power in its widest sense, that is tantamount to ownership".[130] These cases affirm a strong line of precedent holding that general powers are property.

B Conclusion

Therefore, the authority and literature are clear: powers can amount to property for the purposes of insolvency law. This proposition was well summarised in *Clarkson v Clarkson*: "To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes".[131]

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[122] At [81].
[123] Unlike, for example, rights to information, see *Kea Investments Limited v Watson*, *above* n 37.
[124] Bill Atkin "What Kind of Property is 'Relationship Property'?" (2016) 47 VUWLR 345 at 346.
[125] Farwell, above n 114, at 505 ; and *Re McEwen* [1955] NZLR 575 (SC).
[126] *Wright v Morgan* [1926] AC 788 (PC).
[127] *Clayton*, above n 3, at [61].
[128] Wall, above n 4, at 738; Smith, above n 71, at 1711; and Hanoch Dagan "Pluralism and Perfectionism in Private Law" (2012) 112 Colum L Rev 1409 at 1416.
[129] *Clarkson v Clarkson*, above n 120, at 931; and *Re Mathieson* [1927] 1 Ch 283 (CA).
[130] *Re Triffitt's Settlement*, above n 82, at 861.
[131] *Clarkson v Clarkson*, above n 120, at 931.

VI What is Tantamount to Ownership?

This paper has established how to identify powers and has found that those powers which are tantamount to ownership can be property. However, criteria to find the relevant powers are necessary for the PPS to function, before it can be evaluated.

Prima facie, only a general power of appointment would be tantamount to ownership.[132] While a general power of appointment is property, this categorisation is not exclusive. Courts have found that powers analogous to a general power of appointment are property.[133] The Court in *TMSF* found that a power of revocation was analogous to a general power of appointment because it was tantamount to ownership.[134] Per *TMSF* and *Clayton*, it is not a general power that passes, but one that is tantamount to ownership.[135] Therefore, a test for powers that are tantamount to ownership in insolvency law must be constructed. Jesse Wall's bundle of rights approach informs this analysis.[136]

A The Bundle of Rights Approach

Wall presents an alternative way of defining property for the purposes of statutory schemes. The model argues that the term "property" is defined by the rights in the relevant bundle that one can exercise. That bundle is in turn defined by the social value progressed by the relevant statutory scheme.[137] The bundle should also be defined by the statutory purpose. Here, Wall builds on the theories progressed by Smith and Dagan.[138]

The argument is founded on common sense. The bundle of rights at stake under the PRA is a different bundle to the Property Law Act, as the two statutes have different purposes and espouse different values.[139] So, naturally, their definitions of property are not analogous.[140] Thus, different statutes require different bundles of rights for powers in trusts to be tantamount to ownership. Thus, traditional statutory interpretation techniques support a bundle of rights inquiry.

The bundle of rights approach is a robust way to determine what is tantamount to ownership, thus enabling the PPS. Taking a principles-based approach abates the need for further definition. It also unlocks the practical benefits of being statute-based, as explained in Part III. However, we must first assess how it fits with insolvency law.

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[132] At 861.
[133] *TMSF*, above n 40, at [60].
[134] At [59].
[135] At [59]; and *Clayton*, above n 3, at [104].
[136] Wall, above n 4, at 747.
[137] At 746.
[138] Smith, above n 71; and Dagan, above n 129.
[139] Atkin, above n 124, at 346.
[140] At 346.

B Insolvency Law

To determine the appropriate bundle, we must understand the statutory purpose of the Insolvency Act and the social value progressed by the scheme.

1 Statutory purpose

Determining the statutory purpose of the Insolvency Act requires an analysis of the Act, literature and textbooks. The Insolvency Act does not contain an explicit statutory purpose.[141] However, the Insolvency Law Reform Bill 2005, which later became the Act, contained an explanatory note which set out five objectives.[142] As noted by Keeper, the Minister did not state which purpose was to be prioritised.[143] The third and fourth policy objectives of the bill are most relevant:

3. to maximise the returns to creditors by providing flexible and effective methods of insolvency administration; and
4. to rehabilitate bankrupts.

These purposes stand out in the scheme. The first is enabled by the vesting of all but the most critical current and after acquired property in the OA, which is then sold for the creditors' benefit.[144] There is no choice open to the bankrupt; the property vests as a matter of law.[145] This illustrates Parliament's desire to maximise returns. Likewise, the Act's definition of property is wide, so as to maximise the pool of available property.[146] The second purpose is furthered by the Act's discharge mechanism, with unpaid debts being written off following bankruptcy.[147]

Fletcher's authoritative text states that the purpose of the adjudication scheme is to "function as a mechanism of re-distribution".[148] Heath and Whale's text likewise agrees in principle.[149] When specifically discussing purpose, Jim Guest, writing for Heath and Whale agreed that the purpose of the Act itself was to meet the policy objectives outlined in the Bill.

Literature on the 2005 reforms has noted that the Insolvency Act failed to communicate a purpose. Therefore, academics have undertaken significant socio-legal analysis to determine

[141] Trish Keeper "Should Pension Savings Be a Protected Property at Bankruptcy?" (2017) 17 QUT Law Review 97 at 100.
[142] Insolvency Law Reform Bill 2005 (14-1).
[143] Keeper, above n 140 at 100; and (26 October 2006) 634 NZPD 6171.
[144] Insolvency Act, s 101.
[145] Section 101.
[146] Section 3; *Erceg v Erceg*, above n 28, at [15]; and *The Official Assignee v Trustees Executors Ltd*, above n 121.
[147] Insolvency Act, sub-pt 1.
[148] Fletcher, above n 22, at [3-002].
[149] Heath and Whale, above n 23, at [2.5].

the purposes of the scheme. In summarising the substantial body of literature, we find two relevant purposes:[150]

1. Maximising returns to creditors; and
2. Rehabilitation and a clean start for the bankrupt.

Thus, the literature and my analysis of the Bill are aligned. We can therefore use the purposes in the literature for further analysis.

2 The social values

The word "maximising" informs the first social value. Maximising means that bankrupts should repay what they owe to the absolute best of their ability. This purpose is creditor-focused.

Thus, bankruptcy seeks to uphold the social value of maximising repayment.[151] This is one of the brute facts of bankruptcy, with Jackson and Scott calling maximisation of returns the "central objective".[152] Few cases or jurisprudence question the maximisation value. For example in *Darby v Official Assignee* (Darby), his Honour held that the "purpose is for the Official Assignee powers to gather in the assets of the bankrupt, realise them, and distribute them to creditors."[153] Thus, debtors should not be able to ignore their debts and should have to give up all possible assets to repay them. The maximising value also stems from bankruptcy's secondary role as a credit enforcement mechanism, as highlighted by Heath and Whale and in *Laywood v Holmes Construction Wellington Ltd*.[154]

So, given the value is to maximise returns to creditors, the bundle of rights which make up a power which is tantamount to ownership for insolvency law, would need to take a wide approach to maximise the pool of property captured. Thus, the potential bundle would need few rods.

Rehabilitation informs the second purpose.[155] This has become an internationally recognised part of the philosophy of insolvency.[156] Many Commonwealth jurisdictions now take a "fresh

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[150] Sawyer, above n 18; Paul Heath "Consumer Bankruptcies: A New Zealand Perspective" (1999) 37 Osgoode Hall Law Journal 427; Keeper, above n 140; and *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243.
[151] Donald R Korobkin "Rehabilitating Values: A Jurisprudence of Bankruptcy" (1991) 91 Colum L Rev 717 at 729.
[152] Thomas H Jackson and Robert E Scott "On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain" (1989) 75 VA L Rev 155 at 160.
[153] *Darby v Official Assignee* [2012] NZHC 22 at [16].
[154] Heath and Whale, above n 23, at [2.2]; and *Laywood v Holmes Construction Wellington Ltd*, above n 149.
[155] Heath and Whale, above n 23, at [2.2]; and *Darby v Official Assignee*, above n 152.
[156] John D Honsberger "Philosophy and Design of Modern Fresh Start Policies: The Evolution of Canada's Legislative Policy" (1999) 37 Ogoode Hall LJ 171 at 172 and 186; and Sawyer, above n 18, at 202.

start" approach.[157] Thus, rehabilitation is a two-way process. Bankrupts are rehabilitated in exchange for disclaiming all but the most critical property.

Therefore, insolvency creates aims to rehabilitate, which is enabled by a fair exchange:[158] a total loss of property, for the repayment and forgiveness of debts. Moreover, the clean start words inform this idea. As his Honour in *Darby* stated, this "mak[es] the bankrupt accountable for [their] actions",[159] while also highlighting the punitive purposes of insolvency.[160] These points show that moral guilt is wiped clean through the operation of the statute. Arguably, a debtor could not have a clean start if they held substantial personal property in a trust throughout the bankruptcy. It would mean the bankrupt was not starting anew, being held responsible, nor giving their creditors a fair deal. So, they could not have their moral guilt wiped away. Thus, the second purpose, like the first, implies that few rods would be required in the bundle.

3 The model

The potential model must advance the statutory purposes of maximising returns and a clean start. Moreover, it must support the values of a fair exchange and total repayment.

Bennett, in summarising a significant body of literature, presents several potential models. Ultimately, Bennett and Barkley's unlimited benefit (UB) model (UBM) is the most appropriate.[161] Under UBM, powers are tantamount to ownership if the settlor could "benefit themselves to the detriment of the beneficiaries".[162] Barkley gives numerous examples of such powers in his 2013 article.[163] Following the PPS, UB could be found when the powers contain any combination of powers, including powers of appointment, revocation and resettlement**.**

Bennett, who proposes the UBM, uses it to define the limits of a trust for the purposes of the Illusory trust doctrine.[164] However, as established, there is significant overlap between illusory trusts and the PPS. Thus despite being an illusory trust model, UBM can still apply to the PPS.[165]

4 The statutory purposes and social values

The UBM supports the statutory purpose. It is a strict requirement. As a result of looking to dispositive powers,[166] The UBM looks solely to the property, and whether it could be given by

[157] Elizabeth Warren "A Principled Approach to Consumer Bankruptcy" (1997) 71 Am Bankr LJ 483 at 483.
[158] At 483.
[159] *Darby v Official Assignee*, above n 152 at [19].
[160] At [10].
[161] Bennett, above n 4, at 65–66 ; Tobias Barkley, above n 13, at 453; and Jessica Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" [2010] NZ L Rev 541.
[162] *Clayton*, above n 3, at [58]; Wall, above n 4; and Bennett, above n 4, at 17.
[163] Barkley, above n 13, at 456.
[164] Bennett, above n 4, at 65–66.
[165] Bennett, above n 4; Bennett, above n 37; and Barkley, above n 13.
[166] At 18; and Bennett, above n 37, at 17.

the bankrupt to their creditors. This aligns with the maximisation statutory purpose and value. With a laser focus on dispositive powers, the OA can properly identify the property the bankrupt could use to repay their creditors. This advances the repayment social goal also. Furthermore, as shown in *Clayton*, a strict inquiry means the OA can enlarge the relevant pool of property.[167] Thus, UBM's inquiry is a promising model to maximise returns to creditors, meeting the statutory and social purposes.

The other statutory purpose and value –fair exchange –is vindicated by placing transfer at the heart of the UBM. As it looks to what the bankrupt could distribute, a UBM approach ensures that the debtor is not holding out.[168] Thus, UBM ensures the exchange is a fair one, by certifying that the pool of property is all that the bankrupt could give. Additionally, the UBM ensures the bankrupt cannot simply distribute to themselves following discharge.[169] Consequently, the bankrupt has a clean slate from which to start again. This also supports the second statutory purpose.

As such, UBM is a promising model to vindicate the Insolvency Act's purpose and social values through the analysis of what rights are tantamount to ownership.

5 Authority

The case law shows UBM is a promising model. Firstly, *Clayton* was decided on the basis of UB.[170] The Supreme Court looked to the powers of disposal, which is a de facto application of UBM. Likewise, in *TMSF* the Board looked at the ability of the defendants to distribute the property through a power of revocation.[171] Again, the Court was looking to the defendant's ability to dispose of property. *Clayton* and *TMSF* therefore demonstrate that UBM is a legally sound model for determining ownership of powers.

The literature also highlights the judicial approval of the UBM. Bennett in a series of articles demonstrates that the limits of a trust would be breached if a settlor were able to self-benefit to the detriment of the other beneficiaries.[172] In his 2018 paper, Bennett points to *Harrison v Harrison* and *B v X* as authority for this proposition.[173] Fogarty J held that the key factor in *Harrison* was the ability for the settlor to benefit themselves. Likewise, the key proponent of UBM, Barkley, cites *Re Triffitt's* where the Court used UBM to void a trust. However, Barkley also discusses how in *Rafferty v Philp* the Court disagreed with *Re Triffitt's*.[174] *Rafferty v*

[167] *Clayton*, above n 3, at [108].
[168] At [5]; and Bennett, above n 37, at 17.
[169] Barkley, above n 13, at 453–454.
[170] *Clayton*, above n 3, at [108]; and Bennett, above n 4, at 53.
[171] *TMSF*, above n 40, at [12], [52] and [59].
[172] Bennett, above n 4, at 65–66.
[173] At 18; *Harrison v Harrison*, above n 83 at [26]; and *B v X* [2011] 2 NZLR 405 (HC) at [83].
[174] Barkley, above n 13, at 463–464; and *Rafferty v Philp* [2011] EWHC 709 (Ch) [33]–[37].

Philp's impact can be minimised, as *Clayton* and *TMSF*, which are more persuasive endorsed *Re Triffitt's*.[175] Therefore, there is substantial judicial support for the basis of the UBM.

Likewise, the American literature normatively supports the UBM. The drafters of the Uniform Trust Code de facto used the UBM.[176] Section 505 of the Code makes everything the settlor could use to self-benefit open to a settlor's creditors.[177] Thus, the drafters were in effect creating a UBM through statute.[178]

Consequently, UBM is a practical and jurisprudentially sound model for the analysis of when powers are tantamount to ownership which will advance the statutory and social purposes of insolvency law.

C Conclusion

Powers which allow for UB are tantamount to ownership for the purposes of insolvency law. There is no need for further definition.

Ultimately, the UBM is promising and jurisprudentially robust. The nature of UBM's inquiry is strict; it looks to maximise the pool of property and enables the OA to carry out their role. UBM creates positive outcomes by advancing the statutory purposes and social values of rehabilitation and maximising returns to creditors. Therefore, UBM is the right model and can be incorporated into the PPS for the purposes of insolvency law.

VII Operation of the Act and Evaluation

Now that the test is defined, the OA can use the PPS for the benefit of the bankrupt's creditors under the Act.

A Operation of the Act

The Act and PPS would normally interact along the following steps:

1. A bankrupt is adjudicated bankrupt by virtue of committing one of the acts of bankruptcy under ss 17–28 of the Insolvency Act.
2. The bankrupt's powers then vest in the OA via s 101(1)(b).[179]
3. To determine whether they can exercise those powers, the OA uses a look-through approach to see if the powers together could enable UB.[180]
4. The relevant powers are deemed tantamount to ownership so are wholly delegable to the OA.[181]

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[175] *Clayton*, above n 3, at [80]; and *TMSF*, above n 40, at [52] and [59].
[176] Lischer, above n 49; and Sullivan, above n 49.
[177] Uniform Trust Code § 505.
[178] Section 505 (commentary).
[179] Insolvency Act; and Farwell, above n 114, at 505.
[180] Bennett, above n 37, at 205.
[181] *TMSF*, above n 40, at [62]; *Re Triffitt's Settlement*, above n 82, at 861.

5. The OA can then use their powers in sch 1(f)–(g) of the Act to exercise the powers to distribute the trust property for the bankrupt's own benefit.
6. The trust property is placed in the pool with the other assets and is distributed through normal bankruptcy processes.

An argument could be made following *Kea Investments Limited v Watson* that the OA could not exercise the powers vested in them.[182] There, the Jersey Court held that the trustees would have to consider a stranger to the trust, which would be a fraud on a power.[183] Prima facie, applying *Kea* to the PPS seems to present a risk. However, as the powers are the property of the defendant, the trustees' objections are irrelevant. Authority supports this proposition. In *Re Triffitt's Settlement*, the Court found general powers can be devolved without the trustees' permission.[184] Consequently, the *Kea* argument is rebuttable.

This line of argument was also addressed in several other common law decisions which found powers were property.[185] However, to discuss these cases in depth would exceed the scope of this paper. The salient point is that the *Kea* argument is rebuttable.

Ultimately, as shown by the analysis above, the PPS arguably operates successfully within the framework of the Insolvency Act.

B Procedural issues

While the PPS is arguably compatible with statute, two procedural questions arise. They are: why not pass the assets directly and why create a power which is tantamount to ownership?

1 Why not pass the property?

The first question can be disposed of quickly. The question of whether having a general power of appointment *is* ownership is complex and undecided. It has been debated by theorists and the Court.[186] As such, an answer would require a broader study of property law, which is out of scope for this paper. Moreover, as the PPS is compatible with the Insolvency Act regardless of whether a general power is ownership, excluding further analysis on this question is justifiable.[187]

Passing the powers instead of the assets also provides ancillary benefits. It means that s 104 can be ignored. The section states that property held in trust for another does not pass to the OA. However, the PPS looks to the powers, rather than any assets. Powers are not property held in trust, so are arguably not captured. The general powers are not held for any other person,

[182] *Kea Investments Limited v Watson*, above n 37.
[183] At 29.
[184] *Re Triffitt's Settlement*, above n 82, at 861.
[185] *Blight v Brewster* [2012] EWHC 165 (Ch); *Y v R* (Cayman Islands) (2018) 1 CILR 1; and *JSC VTB Bank v Skurikhin* [2020] EWCA Civ 1337.
[186] *TMSF*, above n, 40 at [33] and [43]; Barkley, above n 13; and Farwell, above n 114, at 1.
[187] Wall, above n 4; *TMSF*, above n 40; and *Clayton*, above n 3, at 138.

they are held solely by the bankrupt as they are tantamount to ownership. [188] Something that is owned completely by one cannot be held for another.[189] Thus, s 104 arguably does not restrict the powers of the OA in applying the PPS.

2 Why create a power?

Secondly, The PPS requires a functional identification of powers which are tantamount to ownership, to be delegated to the OA. Simply finding the powers individually are property to be delegated would fail.

Powers under s 101(1)(b) only pass if they can be used.[190] Per *Dwyer v Ross*,[191] if the OA exercised non-general powers, it would lead to a breach of trust.[192] Likewise, *Re Triffitt's* held that non-general powers are non-delegable unless by explicit instruction.[193] Therefore, powers that cannot be used to the detriment of the other beneficiaries fall outside of the statute and do not pass. Arguably the OA could not exercise these powers even if they did pass.

However, Citing *Clarkson* and *Re Triffitt's*,[194] the Board in *TMSF* found that general powers are therefore delegable and wholly exercisable by both the bankrupt and the OA.[195] Thus, the procedural step allows the OA to use the powers for the bankrupt's creditors.

The procedural step is a fortiori justified when the OA uses the look-through regime. No power in a trust alone is likely to be a general power of appointment, so the OA would be barred from making any distributions. However the OA will look to find a general power which is tantamount to ownership from the individual powers' cumulative effect. As such, the procedural step arguably allows powers which would otherwise be blocked to ignore the restriction of s 101(1)(b), improving the efficacy of the PPS.

3 Conclusion

The answers to these questions justify both passing powers and creating a power which is tantamount to ownership. Ultimately, the answers above allow the PPS to function.

C Benefits

Ultimately, the strategy presented in this paper is a promising and judicially sound pathway for the OA and judges to open the NZFT.

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[188] *TMSF*, above n 40, at [60].
[189] At [53]; *Re Triffitt's Settlement*, above n 82, at 861; and *Clarkson v Clarkson*, above n 120, at 931.
[190] Insolvency Act, s 101(1)(b).
[191] *Dwyer v Ross*, above n 35 at 468.
[192] At 468.
[193] *Re Triffitt's Settlement*, above n 82, at 861.
[194] *TMSF*, above n 40, at [53]; *Re Triffitt's Settlement*, above n 82; and *Clarkson v Clarkson*, above n 120.
[195] At [53].

As established throughout this paper, the PPS will advance the purposes of insolvency law by opening bad trusts and maximising the returns to creditors. By looking at the true nature of the trust and capturing powers that allow self-benefit, the strategy will give the OA greater ability to access property. Thus, the PPS will improve the position of creditors and vindicate the scheme's social values and statutory purpose. This would destabilise, at least in part, the incentive behind the NZFT.[196]

Ultimately, the restrictions on trusts will lead to a good policy outcome. Low discretion trusts will be incentivised, as they are the only ones not captured by UBM.[197] As such, settlors can give effect to the positive social relationships outlined in Part I in a manner that respects the insolvency scheme and their creditors' claims. In theory, the problem of discretionary asset protection trusts could be disincentivised, like in PRA literature post *Clayton*,[198] and the benefits associated with the UBM model are promising.

However, practical reality often precludes these perfect results. To gain a proper assessment of the model, we must consider the various statutory, equitable and realistic challenges that may arise.

D The Fiduciary

Fiduciary duties could present a risk to the UBM. A fiduciary power generally prevents a trustee from exercising their powers for their own benefit, to the detriment of other beneficiaries. So, there would be no ability for UBM, so the trust would block the OA.

However the traditional view is arguably incorrect. Bennett concludes that possessing UB powers means that a settlor could distribute to themselves; thus, the fiduciary constraint which prevents self-benefit does not exist.[199] For example, trustees who can self-benefit without causing a breach of trust or fraud on a power. Wall has likewise argued that "fiduciary" is an instruction for carrying out a duty, so comes after the duty, which can be categorised as granting UB.[200] Thus, fiduciary powers are arguably not fatal to the UBM. Ultimately the Board's decision in *TMSF* sets down the final rule which supported Bennett's conclusion.[201]

In practice, courts are likely to be more flexible. Their Honours in *Clayton* applied a different framework, constructing an opt-out of the normal fiduciary obligations from the clauses of the deed.[202] The relevant clauses stated Mr Clayton did not have to consider the interests of the

[196] Short, above n 7.
[197] Uniform Trust Code § 505 (commentary).
[198] Jensen-Mccloy, above n 66, at 27; and Atkin, above n 124, at 360.
[199] Bennett, above n 37, at 227.
[200] Wall, above n 4, at 748.
[201] *TMSF*, above n 40, at [62].
[202] *Clayton*, above n 3 at [58].

beneficiaries. So, even if Bennett's approach is not applied, courts are willing to be flexible in finding the true nature of the trust.[203]

Furthermore, the interaction between UBM and fiduciary duties incentivises good trusts. Trusts with fiduciary duties may block the PPS. The result of this would likely be that trusts would need to implement a series of protections. Courts may need to reasonably believe a settlor could not make a distribution to themselves using any combination of the powers in the trust. A mere second trustee may not be enough, especially if they could be removed.[204] So, by creating strong fiduciary obligations to avoid the PPS, settlors are not committing a moral sin.

E Shams

The existing New Zealand sham regime may limit the practical efficacy of the PPS. This is necessarily relevant in our evaluation of the model. Settlors of NZFTs will want to avoid the liabilities of property brought by the PPS. While many will abstain from dishonest purposes, some will create false relationships disguised as a trust, as shown by the rise of shams.[205] As shams also evade other trust accountability mechanisms, like the PRA, incentivising shams is a negative externality of the PPS.

The existing New Zealand sham regime is weak, so it cannot act in conjunction with the PPS to improve trust accountability. *The Law of Trusts* states that the Trusts Act 2019 made proving a sham a herculean task.[206] This plays out in the courts. There are few sham cases, of which even fewer are successful. Like with s 412 of the Property Law Act, evidence will often be hard to find.[207] However, Commonwealth courts are arguably moving in favour of shams, with a sham being found in *Pugachev*.[208] So, the risk of incentivising shams by following PPS is unlikely to be abated by the current sham regime in the near future. This negative externality must be considered against the benefits associated with the regime.

F Overall Evaluation

Overall, the PPS is a promising innovation for opening trusts which were previously indefeasible and granting creditors far greater repayments than were previously possible. The risk of incentivising shams is real. However, remedying that risk is the role of the sham regime, which is out of the scope of this paper. Furthermore, the sham risk does not outweigh the rights of creditors to be repaid, and the vindication of Parliament's intention. Therefore, UBM is a promising model with which to manage trusts and bankruptcy.

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[203] If settlors are plainly benefitting themselves through a rough interpretation of the trust deed, a sham may also arise.
[204] *Clayton*, above n 3.
[205] Jessica Palmer "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ L Rev 81 at 82.
[206] Chris Kelly and Greg Kelly *Garrow and Kelly: The Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2020) at [A.2].
[207] At [A.2]; and Palmer, above n 1, at 24.
[208] *Pugachev*, above n 52, at [456].

VIII Conclusion

The interaction between equity and insolvency has long allowed settlors to create highly discretionary trusts and prevented creditors from being repaid. However, the PPS is a promising remedy to this legal failure. Following the landmark decisions of *Clayton* and *TMSF*, and using Jesse Wall's bundle of rights approach, I present a model that would better support creditors and vindicate the purposes of insolvency law.

I discussed how the look-through regime is the key for the PPS. Then I applied the PPS to insolvency law using *Clayton*, *TMSF* and the Insolvency Act. By using a look-through regime, the powers that amounted to ownership could be seen functionally, as the cumulative effect of several other powers. This strategy significantly widened the scope of the PPS over a bare reading of the trust deed alone.

Bennett and Barkley's UBM properly answered the question of what was tantamount to ownership.[209] The UBM is an encouraging model that respects insolvency's dual statutory purposes of maximising repayments to creditors and rehabilitating the debtor. With UBM incorporated into the PPS, the OA will be vested with the powers, and can exercise them for the benefit of the bankrupt's creditors.

My model is a promising method to increase repayments to creditors, while encouraging good trusts. While it is limited by the sham regime, this consideration in no way outweighs the vindication of statutory purpose and better returns to creditors brought about by the PPS. Ultimately, the PPS is a substantial improvement against the status quo. It supports Parliament's intentions and progresses the social goals of the statute.

New Zealand could break the shield of the NZFT. With the PPS creditors will likely be better repaid, the law will likely be more principled, and Parliament will likely have its intentions vindicated. Or, courts could continue as before, leaving themselves unarmed against the NZFT.

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[209] Bennett, above n 4, at 65–66; and Barkley, above n 13.

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