SECRET TRUSTS IN NEW ZEALAND

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It has been suggested that secret trusts are as common in Equity examinations as they are rare in practice.[1] Nonetheless cases do arise on occasion, and *Brown v Pourau*[2] is an interesting recent instance. This article considers that decision and other cases on secret trusts in New Zealand.[3] The issues raised are not just of academic interest as the facts of the cases illustrate. The requirement of fraud, the issue of whether secret trusts are express trusts or constructive and the necessary proof to establish a secret trust are discussed before some tentative conclusions are advanced.

BACKGROUND

In *French v French* Lord Davey said:[4]

> It is now well established ... that if a testator communicates in his lifetime to a proposed devisee or legatee that he has left him his property, and expresses a wish that the property should be disposed of in a particular manner, and the legatee or devisee by acquiescence, or even by silence, accepts that communication, and the testator dies without any repudiation, a trust is fastened upon his conscience, as it is said, and he cannot afterwards either appropriate the property to his own use or dispose of it otherwise than in accordance with the wishes which were thus communicated to him, and which he has accepted.

In the leading case of *Blackwell v Blackwell*[5] the elements necessary to establish a secret trust were held to be (1) intention to create such a trust, (2) communication to the secret trustee and (3) acquiescence by that trustee of the trust.

Secret trusts can be fully secret or half secret.[6] The existence of a fully secret trust is not apparent on the face of the will whilst with half secret trusts the existence but not the terms of the trust are made public in the will. In the case of a fully secret trust the testator[7] may communicate his or her intention to the secret trustee at any time during the testator's own life time, whether before or after making the will, whereas with a half secret trust the testator must communicate his or her intention before or at the time of making the will.[8] In *re Walsh*,[9] the testator the Reverend Walsh made a will leaving his estate to his friend the Reverend Keenan to be distributed "according to instructions to be given hereafter". On the day of his death the testator gave instructions to the Reverend Keenan as to the distribution of his estate but he died before the written instructions could

1 Perrins, *Secret Trusts : The Key to the Dehors* [1985] Conv 248 at 248.
2 [1995] 1 NZLR 352.
3 In *re Walsh, Keenan v Brown and Others* (1911) 30 NZLR 1166, in *re Karsten (Deceased), Edwards v Moore and Others* [1953] NZLR 456, *Quinn v Dean*, Unreported High Court Wellington Registry A 123/84 30 July 1986.
4 [1902] 1 IR 172, 230. See also *Wallgrave v Tebbs* (1855) 69 ER 800 per Sir W Page Wood VC.
5 [1929] AC 318.
6 Half secret trusts are occasionally called semi secret. See Wilde, *Secret and Semi Secret Trusts : Justifying Distinctions between the two* [1995] Conv 366.
7 The term testator includes testatrix in this article.
8 *Blackwell v Blackwell*, op cit, note 5.
9 Op cit, note 3.

be signed and witnessed as would be necessary for a valid codicil. The case is an example of a half secret trust which failed because the terms of the trust were not made before or at the time of the will but later. The Reverend Walsh had wanted the Reverend Keenan, a niece and certain charities to benefit and a sum set aside for the saying of masses for the repose of his soul, but the trust failed and the next of kin took the property.

There has been much legal quibbling over the differences between the two types of secret trusts.[10] They are however both ways of leaving property on death to some person or body not to be mentioned in the will. To provide for mistresses or ex nuptial children[11] is the reason that most commonly springs to mind as the reason for the testator's secrecy but other reasons exist and indeed appear to be more common. The testator might wish to provide for a poor but proud relation. The testator, probably ill or elderly is saved the bother of making a decision by the undertaking of the secret trustee to benefit, in an appropriate manner, the other family members after his or her death. Indeed the testator need not make a will at all but make his or her intestate successor(s) the secret trustee(s).[12]

Secret trusts have existed for centuries.The earliest case which appears to have been reported which illustrates the circumstances in which secret trusts can arise occurred in 1589 in the case of *Rookwood*.[13] A father intended to benefit all three of his sons by charging his land with an annuity in their favour. The eldest son persuaded the father not to charge the land and promised that he would pay the annuities. The father died, and the eldest son who owned the land failed to pay the annuities. The case came before the Court of Kings' Bench, who enforced the payment by assumpsit, stating that there was consideration in not charging the land. The case is interesting in so far as it indicates that secret trust circumstances have existed for many centuries. In many of the early cases[14] the secret trustee failed to carry out the trust. In *Sellack v Harris*,[15] for example, a father had purchased land with some money belonging to his youngest son. On his deathbed he sent for his eldest son and told him that he wanted the youngest son to have the land. After his father's death the eldest son failed to honour his promise to his father to let his brother have the land. The Court held that the youngest son was to have the land. The decision was based on fraud. The idea of fraud being an element in secret trusts arose early. Early cases permitted the application of the doctrine of secret trusts on the ground that equity would not allow the Wills Act 1837 to be used as an instrument of fraud. The fear was that the secret trustee would keep the property since the trusts were not explicitly stated in the will. It is important to bear in mind, however, that in any consideration of the subject the secret trustee might be totally innocent of any mal animo.

Re Snowden[16] provides a modern example. Miss Foster, an 86 year old widow decided to change her will. She had no children of her own, her closest relations were her brother (eighteen months older and with whom

10 Sheridan, *English and Irish Secret Trusts* [1951] LQR 314 at 327.
11 *Re Boyes* (1884) 26 ChD 531.
12 *Sellack v Harris* (1708) 2 Eq Ca Ab 46.
13 (1589) Cro Eliz 164. Discussed by Sheridan, op cit, note 10 at 314-5.
14 eg *Thynn v Thynn*, 1 Vern 296.
15 Op cit, note 12.
16 [1979] 1 Ch 528.

she lived), and a number of nieces and nephews and their children. The widow was apparently undecided as to how she should dispose of the residue of her estate and under her will it was left to her brother absolutely on the basis that he would know how to deal with it. She died six days after signing her will and her brother died another six days after his sister. He left all his estate to his only son. The Court held that there was no more than a moral obligation imposed on the brother to dispose of the property. No secret trust existed. The circumstances are similar to those in Brown v Pourau discussed below. In *Re Snowden* Megarry VC expressed the modern view on secret trusts when he said:[17]

> the whole basis of secret trusts ... is that they operate outside the will, changing nothing that is written in it, and allowing it to operate according to its tenor, but then fastening a trust on to the property in the hands of the recipient.

As the trust arises outside or dehors the will there is no conflict with the requirements of the Wills Act.[18]

In *Brown v Pourau* the Court had to consider a number of issues concerning secret trusts. One important issue which was discussed in the case was the classification of such trusts. Are secret trusts express, implied or constructive? Secret trusts of land is another issue which Hammond J had to consider in his judgment. Proof of a secret trust is the third issue raised in *Brown v Pourau*. Finally the concept of fraud is examined. The concept of fraud has traditionally been used to explain and justify secret trusts. Each issue will be considered in turn.

Express, Implied or Constructive Trusts?

Some cases and some academic writers view all secret trusts as express, other cases and other commentators take the opposite view.[19] It has also been suggested that half secret trusts are express and that fully secret trusts are constructive. One writer[20] takes the view that whether secret trusts are express, resulting implied or constructive depend on the evidence in any given case. It has also been suggested that the question whether a fully secret trust is express, implied or constructive is, strictly speaking, a misguided one, and that academics have rushed in where the Courts have feared to tread with an almost inevitable lack of consistency or agreement.[21] The question is important in New Zealand because of section 49A of the Property Law Act 1952 (formerly section 7 Statute of Frauds 1677). Section 49A(2) states that "a declaration of trust respecting any land or any interest in land shall be manifested and provided by some writing signed by some person who is able to declare such trust or by his will." Section 49A(4) holds that the section does not affect the creation or operation of resulting, implied or constructive trusts.[22]

Another reason for classifying secret trusts into express or constructive relates to the requirements necessary to create trusts. To have a valid express trust the "three certainties" are required. It must be established that

17 Ibid, at 533.
18 Hayton and Marshall, *Cases and Commentary on the Law of Trusts* (9th edn1991) at 104.
19 See Hammond J in *Brown v Pourau*, op cit, note 2, at 367 for a survey of the commentators.
20 Perrins, op cit, note 1, at 253.
21 Burgess, *The Juridical Nature of Secret Trusts* (1972) 23 NILQ 263 at 268.
22 The English legislation is to be found in s. 53 Law of Property Act 1925 (UK).

the testator intended to create a trust, there must be certainty of subject matter and the objects or beneficiaries of the trust must be certain. The "three certainties" are not required in the case of constructive trusts, which arise by operation of law.

Express

Those favouring the view that secret trusts are express emphasise that such trusts are "based on the expressed intention of the testator communicated to and acquiesced in by the secret trustee".[23] The case of *Re Baillie*[24] is cited in support of this view. In that decision a half secret trust of land was held to be ineffective because of the absence of the necessary writing required by Section 7 Statute of Frauds 1677.[25] This decision suggests that half secret trusts, at least, are express.[26]

Re Beckbessinger[27] concerned the doctrine of incorporation by reference. The testator had left the residue of his estate to two named persons "to be held by them in accordance with a confidential memorandum which I have given to them". Tipping J held that the memorandum[28] had been properly admitted to probate but his Honour added for the sake of completeness that if the contrary was held, the case would almost certainly be one of a half secret trust. A trust was intended and the so called confidential memorandum would have constituted sufficient evidence to establish the terms of the trust, uncertainty aside.[29] Tipping J by saying a trust was intended could be seen as supporting the express trust argument and the need for certainty of objects.

Constructive Trusts

Various arguments have been put forward to support the idea that secret trusts are in fact constructive trusts. These may be summarised as follows:

First, fully secret trusts are no different in principle from other trusts. In any case where a person obtains property by fraud or by abuse of a fiduciary position he or she is bound to hold that property on trust for the person with the best equity. Fully secret trusts are seen as but one illustration of the broad principle of constructive trusts and should be recognised as such.[30]

Ford and Lee[31] for example classify secret trusts as constructive trusts by focusing on the promise made by the secret trustee to hold the property for another. Equity regards it as fraudulent for the secret trustee not to carry out his or her promise and will not allow such a trustee to invoke legislation to defeat the undertaking. Equity allows the secret beneficiary or beneficiaries to enforce the trust in order to prevent the fraud that would arise as a consequence of the secret trustees refusal to carry out the promise upon which the deceased has relied.

23 See Pettit, *Equity and the Law of Trusts* (6th edn 1989) at 108, et seq, and see Oakley, *Constructive Trusts* (2nd edn, 1987) at 129, et seq.
24 (1886) 2 TLR 660.
25 Now s. 49A(2) Property Law Act 1952 (NZ) and s. 53(1) Law of Property Act 1925 (UK).
26 Burgess argues that at best *Re Baillie* is a weak authority and that the comments made in the case on this point are obiter. See Burgess, op cit, note 21 at 271 and cf. *Ottoway v Norman* [1971] 3 All ER 1325.
27 [1993] 2 NZLR 362.
28 The memorandum imposed a trust which failed the certainty of objects test.
29 Op cit, note 27.
30 Sheridan, op cit, note 10 at 323-4, takes this view.
31 Ford and Lee, *Principles of the Law of Trusts* (2nd ed., 1990) at 238, et seq.

Secondly, the concept of unjust enrichment has been used to support the constructive trust argument. Hayton[32] argues in terms of the secret trustee being unjustly enriched if he or she could retain the property. He sees the constructive trust as a remedial device used to prevent unjust enrichment. Cope[33] regards the trust which is imposed upon a secret trustee as remedial in nature and hence as a constructive trust, with the justification for the remedy depending on fraud, wrongdoing and unconscionable conduct.[34]

The constructive trust is used as a remedy to prevent the legatee from disregarding the undertaking and claiming the benefit for him or herself to the exclusion of the object. It has the effect of preventing the unjust enrichment of the legatee although it is not unjust enrichment which provides the justification for the imposition of the constructive trust. Rather it is the unconscionable conduct of the legatee.

Thirdly, the House of Lords in the leading case *Blackwell v Blackwell*[35] did not regard secret trusts as express. Viscount Sumner said:[36]

For the prevention of fraud, equity fastens on the conscience of the legatee a trust, a trust that is, which would otherwise be inoperative; in other words it makes him do what the will itself has nothing to do with; it lets him take what the will gives him and then makes him apply it as a Court of Conscience directs, and it does so in order to give effect to the words of the testator which would otherwise be inoperative.

Another argument is that express trusts require formalities and the essence of a secret trust is that it operates in spite of the rules as to form.[37] Secret trusts are a type of trust where ordinary requirements and restrictions have no place. Writers such as Burgess argue that the courts' use of the concept of fraud is only a screen behind which they do their real job — enforcing the agreement. Why, he asks, should a beneficiary under an informal arrangement have a better equity than one under the will? Burgess considers secret trusts to be implied or resulting trusts and "that in the sense that an implied trust is a trust imputed by law it is therefore a constructive trust".[38]

Burgess has argued that:[39]

1. Express trusts must be completely constituted, a requirement not applying to secret trusts.[40]
2. If secret trusts were express the maxim that "Equity will not permit a trust to fail for want of a trustee" would apply; yet case law indicates the opposite conclusion.[41]

32 Hayton, "Constructive Trusts : Is the Remedying of Unjust Enrichment a Satisfactory Approach?" in *Equity, Fiduciaries & Trusts* (1989), p 219.
33 Cope, *Constructive Trusts* (1st edn 1992) at 525.
34 Ibid.
35 Op cit, note 5.
36 Ibid.
37 See Burgess, op cit, note 21, at 272.
38 Burgess cites *Standing v Bowring* (1885) 31 ChD 282 where Lindley LJ said: "Trusts are neither created nor implied by law to defeat the intentions of donors and settlors; they are created and implied or held to result in favor of donors and settlors in order to carry out and give effect to their intentions expressed or implied."
39 Burgess, op cit, note 21.
40 See *Re Gardner (No. 2)* [1923] 2 Ch 230.
41 In *Re Maddock* [1902] 2 Ch 220 it was felt that if the testator outlived the secret trustee the secret trust would die with the secret trustee's death.

3. If secret trusts were express then in the case of fully secret trusts the trustees would hold as joint tenants (as express trustees do not hold as anything else). Secret trustees are not so restricted.
4. Under an express trust a trustee can be a beneficiary, whilst a secret trustee may not also be a beneficiary.[42]
5. The declaration of trust in the case of a half secret trust is a declaration not of a secret trust but of an express resulting trust. The effect of a provision leaving property to X on trust without declaring what the trusts are is that X will hold the property on resulting trust for the residuary beneficiaries. The argument here is that in the case of a half secret trust the purpose and effect of the declaration are purely evidential, namely, to indicate who has legal title and the fact that this person is not to take beneficially. The trust arises when the secret trustee accepts the role, it is therefore inappropriate to speak of the trust being *declared* on the face of the will.

Ottoway v Norman[43] supports the constructive trust view. A fully secret trust of land was held valid despite the only evidence of the trust being parol evidence. The trust was classified as a constructive trust and not as an express trust so as to take the trust outside the scope of the Statute of Frauds.[44]

In New Zealand the Court of Appeal decision in *re Karsten (Deceased)*[45] following *re Rees*[46] held that a secret trustee cannot take beneficially under the secret trust. In *re Karsten*[47] the testatrix made a will giving her estate to Esther Ellen Edwards to be distributed as she has "direction from me". Before the will was executed the testatrix told Esther Edwards how she wanted her estate distributed, and Esther Edwards agreed to give effect to these wishes. These wishes were later written down. A valid half secret trust was found to exist, the secret trustee took the property as trustee and could take no part of it beneficially. Parol evidence was not admissible to prove that the testatrix had intended part of the estate (some shares and a motor vehicle) to go to Esther Edwards.[48] Given that a trustee for an express trust can be a beneficiary it could be argued that re Karsten supports the view that secret trusts are constructive trusts. The Court of Appeal did not have to address the question of whether secret trusts were express or constructive, but dicta can be found to support the constructive trust argument. North J,[49] for example, quotes Viscount Sumner in *Blackwell v Blackwell* who said:[50]

> The legatees are acting with perfect honesty, seek no advantage to themselves, and only desire, if the Court will permit them, to do what in other circumstances the Court would have fastened it on their conscience to perform.

42 *Re Rees* [1950] Ch 204.
43 [1971] 3 All ER 1325.
44 In terms of New Zealand legislation to put it into s. 49A(4) rather than a 49A(2) Property Law Act 1952 category.
45 Op cit, note 3.
46 [1949] Ch 541.
47 Op cit, note 3.
48 Following *In Re Rees, Williams v Hopkins* [1950] Ch 204; [1949] 2 All ER 1003.
49 Op cit, note 3, at 479.
50 Op cit, note 5.

This can be taken to mean that secret trusts are constructive trusts.[51]

Express and Constructive

It has been suggested that following *Re Baillie*[52] and *Ottoway v Norman*[53] half secret trusts are express and fully secret trusts are constructive.[54] As there is evidence of the trust in a half secret it seems appropriate to classify such trusts as express. The testator desiring to set up a trust makes the trust express and therefore subject to the requirements necessary to establish such a trust. If the trust is fully secret this does not apply and hence it can be classified as constructive.[55]

Secret Trusts of Land

There is no difficulty with secret trusts involving land if such trusts are constructive, because the need for some note or memorandum of writing does not apply to constructive trusts.[56] If fully secret trusts are express it can still be argued that there is not a problem with the Property Law Act 1952. The argument here goes that if a court denied the trust in this case there would be a fraud on the testator because the secret trustee would take beneficially.[57] If the court admits evidence of the trust it gives the go-by not only to the Wills Act but also, in New Zealand to s. 49A Property Law Act 1952. The object of these two pieces of legislation was however to prevent fraud, so neither may be used as an instrument of fraud and the lack of writing is not fatal.[58]

If half secret trusts are express then it can be argued that compliance with the legislation is necessary. In this situation there is no possibility of the half secret trustee taking beneficially, so there can be no fraud and no justification for giving the go-by to the legislation. The consequence is that the secret trustee holds for the residual beneficiary or intestate successor(s) if there is no note or memorandum of writing. It has been pointed out[59] that this has the curious result in the case of an honest trustee of a fully secret express trust if such a trustee admits that he or she is holding the subject matter on a secret trust but cannot point to the writing required by legislation. He or she will find him or herself confronted by opposing claims from the beneficiaries of the secret trust and from the residual beneficiary or beneficiaries or intestate successor(s) of the testator. His or her admittance of the trust places the secret beneficiaries in a less strong position than they would have been had their secret trustee remained silent.

51 Against this, however, is dicta that can be seen as supportive of the express trust argument. North J, for example just before quoting Viscount Sumner emphasises communication of the secret trust and acquiescence by the secret trustee, which emphasis usually is put forward by supporters of the express trust view.

52 Op cit, note 24.

53 Op cit, note 43.

54 Cope, op cit, note 33, at 524.

55 It has been argued that it is contrary to principle to distinguish between half and fully secret trusts. Oakley, *Constructive Trusts* (2nd edn 1987) at 130 and see Sheridan, op cit, note 10, at 324.

56 Section 49A(4) Property Law Act 1952.

57 Perrins, op cit, note 1, at 256.

58 *Rochefoucauld v Boustead* [1897] 1 Ch 196 supports this view as does Pettit, op cit, note 23, at 65.

59 See Oakley, op cit, note 23, at 129 et seq. Oakley considers both fully secret trusts and half secret trusts are express and should have to comply with the Statute of Frauds 1677. He does however admit that there is no general agreement to this question. Oakley, ibid, at 130.

There is no general agreement as to whether a secret trust should be classified as an express or constructive trust. The case law is inconclusive and academic opinion divided.

Brown v Pourau

The Facts

Sophy Douglas was a traditional Maori kuia or elderly woman. She died in 1977 aged 77. At the time of her death she owned and lived on a ten acre block of land on the East Coast of the North Island. She had inherited this land from her grandfather, and it had been his wish that the property remain in the family. Sophy lived on this land, married and had 12 children. In her will she left the property to her eldest child, Emma. Emma died in 1986, leaving the property in turn to her only son, Mark. Mark considered selling the property to the local golf club.

The Douglas family believed that it had been Sophy's intention that the land remain in the family, and they did not want what they considered to be their spiritual and ancestral home alienated. As plaintiffs they alleged that Sophy did not have testamentary capacity when she made her will. Alternatively it was contended that a secret trust "for the family" existed and that rather than being the sole beneficiary under the will Emma was in fact a secret trustee holding the property on trust "for the family".

When Sophy made her will she was elderly and ill, and she died soon after. Emma became the registered proprietor of the property. Two years later, in 1979 Emma gave instructions to her solicitor for a will to be drafted whereby the property was to be put in trust "for the family". This will was never executed. It was clearly established that the property was very special to the Douglas family. Hammond J accepted[60] that certain key institutions in Maori culture were associated with the property by the family. The children had been born on the property and their pito of afterbirth buried on the land. Second there was a number of tangihanga held on the property. Expert evidence stated that this ceremony not only drew family members together, with the purpose of easing sorrow but in a marae context it re-established links with a particular piece of land. Third, the plaintiffs viewed the property as their turangawaewae or place to stand; again evidence of the importance of the particular land to the family. An application had also been lodged to have the land made into a papakainga for all the family. The Judge who heard the application described it as an exercise to prevent alienation of land and to retain it as "some sort of family home for holiday purposes". Judge Cull considered the family could achieve their wishes by an ordinary express trust and so the application was unsuccessful.[61]

Emma made a new will in 1982 leaving all her property on trust for her children. As it transpired she only had the one adopted son, Mark. Whilst

60 Op cit, note 2, at 355.

61 On the issue of testamentary capacity Hammond J rejected the view that Sophy was blind when she executed the will. A file note, made at the time of the will's execution by Sophy's Solicitor, stated that the will had been explained "in full" to Sophy. Sophy was special, she was a kuia or elder and as such she was revered; in European terms she was also a Maori spiritualist, and at times entered into a trance-like state (a state of Wairangi) and communicated with spirits. She had documented these experiences. She believed a Maori curse was upon her. Hammond J held that this was no evidence of any mental illness in European terms and consequently Sophy had testamentary capacity at the time she made her will.

Emma and her family lived in the South Island some of Sophy's other children continued to live on the land until the 1980's when, on the death of one of her siblings Emma decided to let it. The property fell into disrepair and so the family got together to discuss setting up a trust to care for the property. Emma died and Mark's proposal to sell the land, caused the litigation.

In *Brown v Pourau* his Honour stated that a fully secret trust of land is valid independent of any requirement of written evidence,[62] citing *Stickland v Aldridge*[63] and *Ottoway v Norman*[64] as authority. The Judge continues by saying:[65]

> Whether these English authorities are entirely compatible with contemporary New Zealand jurisprudence on remedies is open to question. Essentially, English legal theory and practice on remedies is monistic. That is, right and remedy are perceived to be congruent. But in the United States, and increasingly in Canada and New Zealand, our Courts proceed on a dualistic basis. The Court first inquires as to the obligation the Court is asked to uphold; it then (and only then) makes a context-specific evaluation of that remedy which will best support or advance that obligation. On that footing, the problem of secret trusts can best be understood by saying that the obligation — recognised by Courts of the highest authority since the very earliest days of Chancery — is best supported by a constructive trust of a forward-looking variety. And, with respect, it should no longer be necessary, as to the obligation, to have to resort to the old "fraud" explanation. The Court supports the intended trust, by means of the constructive trust (as a remedy).

This paragraph suggests that fully secret trusts are remedial constructive trusts. Constructive trusts whether orthodox or remedial are imposed by operation of law without reference to the testator's wishes or intentions. His Honour continues by stating that he found another issue troublesome and that concerned the law if the Court were to find that "the necessary elements for a secret trust were established but for instance, the terms of the trust were uncertain.[66] This together with the statement above that "the Court supports the intended trust, by means of the constructive trust (as a remedy)" suggests that Hammond J views secret trusts as express. Unless it can be established that the testator intended the secret trustee to hold the property on trust, ie intended a trust, then no question of constructive trust could arise. If there is no certainty of intention to create a trust then it cannot be inequitable for the allegedly secret trustee to take the property absolutely. The very reason for finding a constructive trust (orthodox or remedial) is lacking, there is no secret trustee or fiduciary acting in breach of his or her duty, to warrant the imposition of a constructive trust. This means that no matter how one classifies secret trusts certainty of intention is necessary. In other terminology the first requirement in *Blackwell v Blackwell* must be satisfied.

A possible explanation of *Brown v Pourau* is to view all secret trusts at least initially as express trusts and thus subject them to the three certainties. If such a trust failed the certainty of intention to create a trust requirement it would mean that there was insufficient proof on a balance of probabilities that the testator had wished for such a trust. The allegedly secret benefici-

62 Op cit, note 2, at 368.
63 (1804) 9 Ves 516.
64 Op cit, note 43.
65 Op cit, note 2, at 368.
66 Ibid.

aries could not take and that would be the end of the matter. The same would apply if the second certainty failed. If there is no certainty of subject matter again no trust, secret or otherwise, could arise. It is with certainty of objects or beneficiaries that a difference occurs. If the express secret trust fails then if it is in circumstances where it would cause a demonstrably inequitable conclusion equity could step in and impose a constructive trust. This could be either an orthodox constructive trust or a remedial constructive trust. In a case such as *Beckbessinger*,[67] although the testator's residue went to his brother, clearly not what the testator intended or wished, the result is not sufficiently inequitable to warrant the imposition of a constructive trust. (This would apply equally if the case turned on incorporation by reference or half secret trusts.) In the case of *Brown v Pourau* it could be argued that the imposition of a constructive trust could have been justified. The circumstances are quite different. In *Beckbessinger*[68] the brother obtained a windfall. As it could not be established what charities or organisations the testator had intended to benefit no particular charity felt deprived. In *Brown v Pourau* the immediate members of the family must have felt devastated that their ancestral home had gone for ever. This, had certainty of intention to create a trust been established, would justify equity's intervention and the imposition of a constructive trust. The Court when considering imposing a constructive trust could have come to the conclusion that the property was to be held on trust for the family. The uncertainty which Hammond J found with regards the phrase "for the family" in the context of the three certainties would not be so problematic in the context of constructive trusts, especially if the Court was applying a remedial constructive trust. The view could be taken that Mark, Emma's son, was unjustly enriched or that he had received a $100,000 windfall.

Hammond J took the view that if "an intended" trust is established and the beneficiaries are unascertainable, the secret trustee cannot take beneficially. If it had been established that Sophy intended a trust then given no certainty of objects Emma would have held the property on trust for the residual beneficiaries if there were any, and if there were none then for the persons entitled on an intestacy. Sophy's will left everything to Emma and so there were no residual beneficiaries. Applying section 77(1)(b) of the Administration Act 1969 Emma would hold the land on statutory trusts for Sophy's children.

If his Honour had found certainty of intention and no certainty of objects then on the facts of the case no inequitable conclusion would have resulted. Sophy's children, her family, would have benefited. With a different set of facts it might have been appropriate to have gone on and found a constructive trust. Support for this can be found in the English Court of Appeal case of *Bannister v Bannister*.[69] In this decision it appears to be assumed that an express trust being unenforceable for want of writing the Court will impose a constructive trust to carry out the terms of the express trust.

67 Op cit, note 27.
68 Ibid.
69 [1948] 2 All ER 122, at 136.

Proof of a Secret Trust

In England the Courts have considered the practical problems of proof of a secret trust. The debate has been whether the very high standard required for fraud is necessary; whether some intermediate standard is appropriate or whether the usual civil standard of proof, ie the balance of probability suffices. Megarry VC in *Re Snowden*[70] held that in the absence of fraud the ordinary civil standard applied. This judgment was followed in New Zealand by Ongley J in *Quinn v Dean*,[71] which is cited but not discussed by Hammond J in *Brown v Pourau*.

In *Quinn v Dean*, the testator, with only a relatively short time to live, made a will with the Public Trust Office. On a printed form used by the Public Trust was the question "How do you desire to dispose of your estate." The testator's response was "All to sister Lillian Valerie Dean." The testator's family argued that the sister held the estate as a secret trustee for all, bar one, of the testator's siblings.

Ongley J followed *Re Snowden*, and held that if fraud is involved then no secret trust should be found unless the standard of proof suffices for fraud. Ongley J concurred with the view expressed in Halsbury[72] that the effect of the authorities seems to be that if the intention to create a trust has been proved on the balance of probabilities proof of a higher standard is required if the existence of that trust would reveal that the trustee be fraudulent.

The plaintiff failed. Ongley J said:[73]

> To uphold the trust for which the plaintiffs contend would be to hold the defendant guilty of a fraud. Examining the evidence with due regard for the degree of probability appropriate to proof of an allegation of such seriousness I find that I am not brought to the conclusion that the defendants' denial of the imposition of a trust is fraudulent. The plaintiffs action must fail therefore.

In *Brown v Pourau* Hammond J decided that the English cases show that what is required is a close traverse of the evidence and the quality of that evidence before a plaintiff can hope to successfully establish a secret trust.[74] His Honour noted that corroboration is appropriate in all classes of claims against estates, and endorses a cautionary approach.

In *Re Snowden* it will be recalled the deceased left her estate to her brother. The question facing the court was whether or not the beneficial interest thus given to him has been subjected to a trust, and if so, what that trust was. Hammond J considered that Megarry VC had much fuller evidence before him than was before the court in *Brown v Pourau*. In *Re Snowden* Megarry VC concluded that there was no real evidence that the deceased "intended the sanction [in this case] to be the authority of a court of justice and not merely the conscience of her brother".[75] The result was that the brother was held to have had a mere moral or family obligation. In terms of the three certainties the case could be explained as failing the first of the three certainties necessary to create an express trust. Miss Foster

70 Op cit, note 16, at 537.
71 Op cit, note 3.
72 Halsbury 4th edn, para 572, fn 1.
73 Op cit, note 3, at 9.
74 Op cit, note 2, at 369.
75 Op cit, note 16, at 534.

the testator never intended to create a trust and so no trust secret or express arose.

In *Brown v Pourau* the secret trust failed not only the certainty of intention to create a trust requirement but also the third of the three certainties, certainty of objects. "For the family" was, in Hammond J's view too uncertain and vague.

His Honour considered that there were five probable ways of categorising what transpired between Sophy and Emma:[76]

1. A devise upon trust for defined beneficial owners.
2. A devise upon trust with a discretionary power as to the persons to whom the property was to be distributed.
3. A devise upon trust for some other purpose(s).
4. A devise absolutely to Emma with merely precatory words attached. The obligation attaching to the devisee would be then one of a family or moral obligation but not an obligation enforceable at law.
5. An absolute devise to Emma with no strings, moral or legal, attached.

Alternatives 1 and 3 seemed to be the two alleged. The statement of claim suggested that "the homestead property was to be held for the use and benefit "*of the family*" and that the property was in trust "for the plaintiff and those she represents."

On the facts Hammond J found:

1. As a matter "of broad probability" Sophy would not want the property to pass to one person with the consequence of the land eventually going to "outsiders".
2. Sophy spoke of choosing a trustee but only in general terms. His Honour said: "the land was somehow to be held by some persons (a trustee) 'for the family' whatever that means."
3. Emma did make periodic acknowledgments that the property was "for the family" and supported (an unsuccessful) application to the Maori Land Court for a papakainga. Hammond J felt this last factor "equally consistent with the recognition of a mere moral obligation on her part".
4. Emma's involvement in the establishment of the family trust was "somewhat equivocal" and her conduct "ambivalent". His Honour felt that Emma had been "badgered" from time to time by other family members.

Against these factors the Judge held:

1. The property had gathered history and mana for the family with the passing of time.
2. Witness' statements supported the view that Emma had said the property was hers.

76 Op cit, note 2, at 371.

3. Other evidence suggested that Emma was the absolute owner. His Honour cites a letter written at the inception of the family trust thanking Emma for her generosity in providing the homestead for the family.
4. Other courts of high authority have found it highly relevant that there is uncertainty as to the terms of a trust in a given case. That factor is certainly apparent here also.[77]
5. Sophy's will appointed Emma as executrix only. The solicitor's notes stated that he had explained that other children might dispute the will and that he had also explained in full the effect of will. He did not appear to know of a secret trust; it was not as if secrecy was necessary.

Hammond J's conclusion was that:

1. It was not established that there was an intention on the part of Sophy to create a secret trust.
2. There was no clear evidence that Emma accepted the position of trustee.

Thus, at best, Sophy impressed only a familial or moral obligation on Emma.

Fraud

The concept of fraud has traditionally been used to explain and justify secret trusts. Hodge writing in 1980 said:[78]

> ... not only is the principle that equity will not permit a statute to be used as an instrument of fraud capable of being used to support the enforcement of half-secret as well as fully secret trusts, but also that it is the only principle upon which the enforcement of both kinds of secret trusts can be justified.

It would be fraudulent to accept the position of trusteeship and then when the testator died, to deny the existence of the secret trust and take the property oneself. Ongley J in *Quinn v Dean* said that if the sister had accepted the trust and then denied its existence "... that is fraud on her part. She is knowingly seeking to take for herself as beneficial owner what rightfully belongs to others."[79]

In agreement with various English decisions[80] Ongley J held that the jurisdiction in cases of secret trust was founded altogether on personal fraud.[81]

> It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud.

77 Ibid, at 373.

78 Hodge, *Secret Trusts : The Fraud Theory Revisited* (1980) 44 Conv 341. See also Johnson, *Secret Trusts : A Look at the Basis, Method and Consequences of their Enforcement*, Estates and Trust Quarterly (1985-6) Vol 7 at 176. Maudsley, "Incompletely Constituted Trusts" (*Essays in Perspectives in Law* (ed) Pound (1963)) reproduced in Heyden, Gummow and Austin, *Cases and Materials on Equity and Trusts* (4th edn 1993) para 2705.

79 Op cit, note 3, at 9.

80 *Ottoway v Norman*, op cit, note 26, *McCormick v Grogan* LR 4 HL 82, *Re Snowden*, op cit, note 16, at 535.

81 Op cit, note 3, at 9.

Ongley J quotes Megarry VC who noted in *Snowden*[82] that the law on the subject had not stood still and "that it is now clear that secret trusts may be established in cases where there is no possibility of fraud".[83]

Fraud comes into the matter in two ways. First it provides an historical explanation of the doctrine of secret trusts : the doctrine was evolved as a means of preventing fraud. That, however, does not mean that fraud is an essential ingredient for the application of the doctrine. The reason for the rule Megarry VC explained is not part of the rule itself. Second, there are some cases within the doctrine where fraud is indeed involved. If a person is a secret trustee then for that person to assert beneficial ownership is fraud on that person's part. Ongley J agreed.

In *Brown v Pourau* Hammond J said in the context of his discussion on constructive trusts that "it should no longer be necessary, as to the obligation, to have to resort to the old 'fraud' explanation. The Court supports the intended trust by means of the constructive trust (as a remedy)."[84] His Honour does not elaborate further on the concept of fraud. Following this decision it could be argued that in New Zealand 'fraud' provides an historical explanation of secret trusts. Whilst many of the old cases on secret trusts did involve fraud the more recent decisions especially the reported New Zealand cases do not. Miss Foster's brother died in *Re Snowden*, Emma too, died.[85] Neither had acted in a manner inconsistent with that of trustee. There was no evidence to suggest that had Mr Foster not died he would have failed to carry out his sister's wishes. In *re Walsh*[86] the Reverend M Keenan acted in an exemplary manner,[87] *and in re Karsten*,[88] the facts were never in dispute, Esther Ellen Edwards never acted in a way that could be criticised.

It is to be regretted that Hammond J did not elaborate on the subject of fraud.

Conclusion

Hammond J in *Brown v Pourau* prefaced his judgment on secret trusts by saying the area is, "one of notorious difficulty in law,"[89] and that whilst in many areas of the law, the theory on which the courts are proceeding is not of critical importance "in this area, unfortunately, it is".[90]

The English cases and academic opinion are not easy to reconcile. Some conclusions may however be reached following the New Zealand decisions.

Half secret trusts will fail in New Zealand unless communicated to the secret trustee at the time of signing the will or before. *Re Walsh* illustrates the unsatisfactory state of the law here. Had the Reverend Walsh simply said "All to the Reverend Keenan" then he could have communicated his wishes on his death bed and a valid fully secret trust would have existed.

82 Op cit, note 16, at 535.
83 Ibid.
84 Op cit, note 2, at 368.
85 In *Brown v Pourau*, op cit, note 2, at 352.
86 Re Walsh, op cit, note 3.
87 Unless his failure to chivvy his friend the Reverend Walsh into giving instructions can be taken as a fault.
88 Op cit, note 3.
89 Op cit, note 2, at 365.
90 Ibid, 368.

Secondly, there is a difference of opinion as to the basis of secret trusts in New Zealand. Support can be found for the view that fraud is the basis and justification for such trusts, but following *Brown v Pourau* perhaps fraud no longer plays a dominant role and merely provides an historical explanation for the existence of secret trusts. The New Zealand decisions justify a conclusion that all secret trusts are express trusts subject to the "three certainties" and that a remedial constructive trust can be used in circumstances which justify equity's intervention. The interesting question which remains is when will judges consider using this equitable remedy. *Brown v Pourau* suggests a cautionary approach to proof of secret trusts. In view of the expert witnesses evidence concerning burial of pito, the tangihangas, the papakainga application and the plaintiffs' views concerning the property as their turangawaewae it seems certain that the Douglas family did see the North Island property as unique and special. Sophy was a traditional Maori elder who clearly wanted the land to stay with the family. One might be forgiven for thinking that Sophy did intend what in European terms is called a trust and that given the trust's failure for certainty as to objects equity could have intervened and provided a remedy by use of a constructive trust. The court did not find a constructive trust and thus the family lost the land forever.