Beneficial interests in company shares: voting rights — I

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In this article — the second part of which will be printed in the next issue of V.U.W.L.R. — Garnet Crowhen reviews a number of common transactions in respect of company shares, where the member whose name is entered on the register is not the absolute owner of the shares, in the light of the cases and the legislation to determine the current law. Most of the authorities on the topic are not recent though the voting rights of the holder of the beneficial interest in shares was raised in an incidental way in the unreported judgment of Casey J. in Cumulative Finance Company Ltd. *v.* Robertson *which is noted in [1979] N.Z. Recent Law 213 and [1979] N.Z. Current Law 58.*

I. INTRODUCTION

In the ordinary course of events the member who is entered on the company's register as the holder of shares and whose voting and other related rights are prescribed by the articles of association will be the beneficial as well as the legal owner of them. This paper is concerned with the less common phenomenon of the separation of the beneficial interest from the legal ownership of the shares and, inter alia, the rights of the holder of such beneficial interest on the one hand and the registered proprietor on the other to control the exercise of the voting power attached to those shares.

The long standing rule of company law that beneficial interests or rights in its shares are of no concern to a company is embodied in section 125 of the Companies Act 1955 which provides: "No notice of any trust, expressed, implied, or constructive shall be entered on the register or be receivable by the Registrar."

Of particular relevance to the subject matter of this paper is the principle that, from the company's point of view, the register is the only evidence of a member's right to vote at a company meeting. It is he, and he alone, who is entitled to exercise the right to vote irrespective of the nature of his own personal interest in the shares of which he is the registered proprietor.

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The principal object of this paper is to review the appropriate statutory provisions and common law authorities with a view to determining the current state of New Zealand law in respect of the rights of the holder of the beneficial interest in the company share in regard to the voting rights attached to it. In particular consideration will be given to the beneficial interests arising out of the following four categories of fiduciary relationship which have been recognised by the courts:

(a) The testamentary and intervivos trusts of shares;
(b) The bankruptcy of the registered shareholder;
(c) The legal and equitable mortgages of shares;
(d) The unregistered share transfer.

II. THE NATURE OF THE RIGHTS UPHELD BY THE COURTS

In examining and analysing the legislation and authorities relating to the rights as to voting, or their control, vested in the holder of the beneficial interest each of those four categories of fiduciary relationship will be considered in turn.

A. Trusts

In the case of the intervivos settlement the shares will be transferred to the trustee who will be entered on the company's share register as the legal owner.

In the case of the personal representative of a deceased shareholder the company's articles of association will generally make specific provision for that representative to apply for transmission of the shares and for entry of his name in place of the deceased.[1] Where transmission is effected and the personal representative is entered on the register he will thenceforth be personally liable on those shares although he retains a right of indemnity against the estate to the extent of the assets for the time being comprised therein.[2] Section 85 (2) of the Companies Act 1955, which has no counterpart in the English company law legislation, permits a personal representative to avoid such a result by providing:

> (2) Where the registered holder of any share dies or becomes bankrupt his personal representative or the assignee of his estate, as the case may be, shall, upon the production of such evidence as may from time to time be properly required by the directors in that behalf, be entitled to the same dividends and other advantages, and to the same rights (whether in relation to meetings of the company, or to the voting, or otherwise), as the registered holder would have been entitled to if he had not died or become bankrupt; . . .

This section does no more than establish the personal representative's right, inter alia, to vote and does nothing to resolve the issue between personal representative and beneficiary as to who is to control the exercise of that right.

It is submitted that it is valid for the purposes of this paper to draw a distinction between the bare trust on the one hand and the special trust on the other. The bare trust (which may also be described as the simple trust) is one in which the trustee is the repository of the trust property with no active duties to perform. For example if A by will bequeaths shares to B in trust for C, B is a bare trustee as the only duty which he has to perform is to convey the legal

1 E.g. see Articles 28-31 Table A, Third Schedule, Companies Act 1955.
2 Garrow *Law of Trusts and Trustees* (4th ed., Wellington, 1972) 388.

title to the shares to C. The special trust is one in which the trustee is appointed to carry out a scheme particularly pointed out by the settlor or testator and is called upon to exert himself actively in its execution. For example if A by will bequeaths shares to B in trust to pay the income arising from them to C for life and thereafter for D, B is an active trustee in respect of a special trust.

1. *The bare trust*

It is further submitted that the authorities support the proposition that in the case of the bare trust the beneficiary has some measure of control over the exercise by the trustee shareholder of the voting rights on the trust shares.

Statements to this effect are to be found in two English cases involving settlements. In *Kirby* v. *Wilkins*[3] a company had been established to purchase the business of a partnership. Later when it was discovered that the partners had been overpaid they voluntarily transferred a number of the shares in the company that they had received as consideration to the chairman of the company's board of directors upon trust to use or sell them for the benefit of the company. The dispute before the court related to the terms of the trust; that is, whether the shares were held in trust for the company itself or alternatively for the benefit of the shareholders generally. An important question raised in the course of argument[4] related to the manner in which the voting power might be exercised by the chairman because the plaintiff shareholders sought to prevent him from voting on the basis that he held the shares as trustee for them. Romer J. dealt with the issue of control in the following manner:[5]

> It is then said, however, that in any case the defendant ought not to have exercised his voting power in respect of the shares without the direction of the company. I do not think that that contention is sound. Where a shareholder holds shares as a bare trustee for a third person, he is no doubt obliged to exercise his voting power in the way that the cestui que trust desires, but unless and until the cestui que trust has indicated his wish as to the way in which the voting power should be exercised, there is no reason why the nominee should not exercise the voting power vested in him as a trustee. He holds that voting power upon trust, but, unless and until the cestui que trust intervenes, he must exercise it according to his discretion in the best interests of his cestui que trust. Now here I do not know that the company ever actually intervened, either through its board of directors, or by means of the general meeting of its shareholders in the sense of giving any direction to Mr. Wilkins as to how he should vote in respect of these shares, and that being so, unless and until he received any such direction, he was in my opinion justified in voting in respect of them as his conscience dictated in the interests of the company.

Similarly in *Re Castiglione's Will Trusts. Hunter* v. *Mackenzie*,[6] where it was held that although a company could not hold its own shares which had been bequeathed to it by will, since it could not be a member of itself, there was nothing to prevent it from directing the shares to be vested in a trustee who would hold them on its behalf as beneficiary, Dankwerts J. said:[7]

3 [1929] 2 Ch. 444.
4 Ibid. 446.
5 Ibid. 454.
6 [1958] Ch. 549.
7 Ibid. 558.

> I must say that the company could direct a proper nominee to hold these shares for the company or as it should direct, and, therefore, the beneficial interest will be enjoyed by the company as in *Kirby* v. *Wilkins,* so that the vote can be cast by the nominee at the meetings of the company as the company shall direct.

A testamentary trust was examined in this context in *Re Sandeman's Will Trusts, Sandeman* v. *Hayne*[8] where two sons of a named beneficiary became absolutely entitled to a half share of the deceased's residuary estate upon the death of their father. At this point the trustees held that moiety upon bare trust for the sons. Included in the residuary estate was a shareholding which as a complete parcel carried a voting power sufficient to control an ordinary resolution at a meeting of the company. The two sons demanded that the trustees divide the estate, including the shareholding, and transfer the same to them but the trustees resisted, being of the opinion that it was to the benefit of the trust fund as a whole that the voting power should be kept intact. Clauson J. experienced little difficulty in finding for the prima facie right of the plaintiffs, in the circumstances, to have the shares transferred to them. He then continued:[9]

> It is suggested that I am entitled to ignore that right for this reason. It is said that, if these shares are left in the hands of the trustees, the effect of that will be that the trustees can have control of the company, as against the holders of the remaining shares, in connection with any resolution which they may think desirable to have passed at a general meeting. That is perfectly true; but it is to be remembered that the trustees can do that only having regard to the interests of their beneficiaries. If you have two sets of beneficiaries equally concerned in the trust, and those two sets of beneficiaries take differing views as to the course which the trustees ought to take, the court will certainly see that those trustees, before exercising their power of voting, pay due regard to the wishes of those two sets of beneficiaries. It is foolish to say that the trustees, having shares in their name, have anything in the nature of an independent right to deal with the voting power of the shares.

Taken in its widest sense, and independently of the facts of the case, that statement would suggest that all trustees are in that position and subject to the control of the beneficiaries. The better, and more acceptable, view is that it must be read in the factual context in which it was made and that therefore it is restricted to cases of bare trusts.

Two Canadian cases afford some support for the writer's submission that the beneficiary under a bare trust possesses some measure of control. The first, *Elliot* v. *Hatzic Prairie Ltd.*,[10] a decision of the Supreme Court of British Columbia, suggests that the beneficiary possesses actual voting rights rather than simply a right to control the trustee's use of those rights. It appears from the judgment of Murphy J. that one of the defendant directors, for whom shares were held in trust as to an undivided one half interest, became aware that a combination of a majority of the shares adverse to him had taken place and that a meeting had been called with a view to ousting him from control. To avoid this he arranged for the registered holders of the trust shares to attend the meeting and vote in his favour thus gaining control of the meeting and securing his position.

8 [1937] 1 All E.R. 368.
9 Ibid. 372.
10 (1912) 6 D.L.R. 9.

The plaintiff was the beneficial owner of the other undivided half interest in the shares and in this action sought an interim injunction to restrain the company and the defendant directors from acting on the resolution passed at the company meeting with the aid of the voting power attached to the trust shares. In the process of deciding that an interlocutory injunction should issue Murphy J. said:[11]

> It is true that the directors or the company are not here attempting to prevent the plaintiff from voting on his shares, but they are . . . by allowing trust shares to be voted on against the wish of the cestui que trust, knowingly and designedly making the exercise of such voting power utterly useless.

At its extreme that statement suggests that the beneficiary had some right to vote on the shares. The practical problem of how he was to do so in circumstances where his wishes conflicted with those of the beneficial owner of the other undivided half share, whose directions had in fact been followed, is not spelt out in the judgment. However, even at its weakest point, the statement clearly implies that the wishes of the beneficiary should ordinarily be complied with and to this extent it supports the notion of beneficial control.

In *Re Firstbrook Boxes Ltd.*,[12] a voting trust had been established to facilitate the incorporation of a new company and the acquisition by it of the concern of another company which was in liquidation. The trust was to subsist for six months after all shares in the new company had been issued in exchange for the holdings in the old company. A trustee corporation acquired all of the new shares upon trust, becoming the shareholder on the record. The question then arose whether the trustee could vote in respect of those shares in all respects as if it were an ordinary shareholder. In answering this in the negative the Court of Appeal added further support to the concept of beneficial control.

Two further cases, which deal incidentally with this issue in the context of English revenue legislation, are considered to be relevant, although the decisions themselves are not of any special interest. In *J. Bibby and Sons Ltd.* v. *Inland Revenue Commissioners*[13] the Court of Appeal was asked to determine the liability of a company to excess profits tax under the Finance (No. 2) Act 1939. In terms of the legislation that liability would be governed by ascertaining the controlling interest of the directors. The Court of Appeal concluded that "controlling interest" for the purposes of the legislation meant the extent to which the shareholder directors had voting power to control the company's decisions. The directors owned certain shares absolutely but others were held in their capacity as trustees of a marriage settlement. Of significance for present purposes are two matters decided by the Court of Appeal:

(a) All shares held by the directors whether beneficially or as trustees were to be taken into consideration in determining the question of control.

(b) The only possible exception to that rule was the case of a bare trustee. Lord Greene M.R. delivering the combined judgment of the court said:[14]

11 Ibid. 10.
12 [1936] O.R. 15.
13 [1944] 1 All E.R. 548.
14 Ibid. 550.

> The case of a bare trustee is not, of course, before us. But it seems to us that, in such a case, the control would naturally be said to be in the beneficial owner and not in the trustee; so that, if the shares carried more than half the voting power and the beneficial owner was a director, he would properly be described as having a controlling interest in the company.

Later in his judgment he reiterated the special case of the bare trustee in this context.[15]

The decision in *Bibby's Case* was distinguished in *Inland Revenue Commissioners* v. *Silverts Ltd.*[16] but Romer J. did not go so far as to elevate the bare trustee exception alluded to by the Court of Appeal to the status of a general principle of law. The case fell to be determined under the provisions of a different revenue statute but the central issue was again the extent of corporate control enjoyed by the directors. The shares in question were vested in a bank as custodian trustee which was required by virtue of the appropriate legislation to concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them. There were two managing trustees both of whom were directors of the company. It was argued before the court that the bank was a bare trustee of the shares for the two directors and that it was merely a medium through which they might operate the control afforded by the trust holding. Romer J. refrained from deciding whether the bank was strictly a bare trustee — but nevertheless concluded that the custodian trustee had no independent will of its own in relation to the trust control, being bound to operate in accordance with the managing trustees' directions. He concluded, therefore, that for the purposes of the statute the company was one in which the directors had a controlling interest.

2. *Evaluation of the rules relating to bare trusts*

All of the above cases cited in support of the proposition, advanced at the outset, that in the case of a bare trust the beneficiary has some measure of control are susceptible to a number of criticisms.

The first objection is that all of the statements relied upon as supporting that proposition are obiter dicta. In *Kirby* v. *Wilkins*[17] Romer J. acknowledged later in his judgment that his extensive statement in respect of the exercise by a bare trustee of the voting rights vested in him was obiter. He noted that the purpose of the action was to obtain a declaration that the chairman of directors held the shares on trust for the individual shareholders and for an injunction to restrain him from voting except as they directed; and because he refused to accept that the shareholders were the beneficiaries of the trust the action was dismissed. The statement in *Re Castiglione's Will Trusts, Hunter* v. *Mackenzie*[18] was not only obiter but also suffered from the added misfortune of brevity. The question of voting rights was only incidental to the prevailing

15 Ibid. 552.
16 [1950] 2 All E.R. 271.
17 Supra n. 3, 454.
18 Supra n.6.

purpose of the action in *Re Sandeman's Will Trusts, Sandeman* v. *Hayne*[19] which was to obtain the division and distribution of one half of the residuary estate and in *Elliot* v. *Hatzic Prairie Ltd.*[20] Murphy J. defined the sole question in issue as being the proof of the existence of a trust for the plaintiff. Consistent with this, the balance of his judgment was almost exclusively concerned with matters of proof and evidence. The Court in *Re Firstbrook Boxes Ltd.*[21] was primarily concerned with the correct construction of the instrument creating the voting trust and the possibility, and scope, of any implied authority. In the first of the two English revenue cases cited in support, the Master of the Rolls, in delivering the judgment of the Court of Appeal, prefaced his description of the position of a bare trustee by stating that the question was not in fact before the court. The authority of his comments is further weakened by the fact that they were taken up by all but one of the members of the House of Lords, when the case reached them on appeal,[22] and they deliberately refrained from expressing any opinion on them, preferring to leave that particular matter open for later discussion in the event of it coming directly before the court. In the second of the revenue cases Romer J., as we have seen, found it unnecessary for the purposes of his decision to deal definitively with this question.

Secondly, neither of the Canadian cases is entirely satisfactory in any event. *Elliott* v. *Hatzic Prairie Ltd.* involved a bare trust. It is not entirely clear, but it appears from the judgment that the defendant's beneficial interest arose at the time the shares were issued to the signatories of the company's memorandum of association. On the other hand it appears that the plaintiff's beneficial interest may have arisen out of the purchase by him of an undivided half interest in the shares the transfer for which at the time of the proceedings remained unregistered. Furthermore it was an interlocutory application. Whether one adopts the "prima facie case" test expounded by the House of Lords in *J. T. Stratford & Son Ltd.* v. *Lindley*[23] or the subsequent standard of a "serious question to be tried" formulated by Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*[24] it is generally accepted that the consideration of the merits of a substantive claim is something less than complete on an interlocutory application. Lastly, the judgment finally turned on the principle that a person who procures the commission of an act which he knows to be a breach of trust cannot be permitted to profit thereby. *Re Firstbrook Boxes Ltd.* is also far from conclusive because the trustee corporation sought to exercise the voting power vested in it to terminate the new company's undertaking and the Court of Appeal found that the trust instrument did not confer such authority nor could it be implied as being within the contemplation of the intended shareholders.

The final objection relates to the two English revenue cases, both of which were concerned with the construction of particular provisions of revenue statutes

19 Supra n.8.
20 Supra n.10.
21 Supra n.12.
22 *Inland Revenue Commissioners* v. *J. Bibby and Sons Ltd* [1945] 1 All E.R. 667.
23 [1965] A.C. 269.
24 [1975] 1 All E.R. 504.

and not with voting rights per se. Moreover, *Silvert's Case* has the added weakness that it is susceptible to restrictive subsequent application to cases involving custodian and managing trustees where the duties of the former are as limited in scope as those defined in the appropriate English legislation.

None of those criticisms is insuperable. Notwithstanding the shortcomings of the above authorities it is submitted that in the absence of any authority to the contrary the following principles in respect of bare trusts may be deduced therefrom.

(a) The trustee must comply with the directions of his beneficiary. Irrespective of the suggestion of the Supreme Court of British Columbia in *Elliot* v. *Hatzic Prairie Ltd.* that the beneficiary possesses actual voting rights it is suggested that the better view (and one which is consistent with section 125 of the Companies Act 1955) is that the beneficiary can not vote himself but may require his trustee to vote in a particular manner.

(b) Until the beneficiary's right of control is exercised and directions given, the trustee may vote at his discretion in what he considers to be the best interests of his beneficiary.[25]

(c) The above are rules of general rather than invariable application. Clauson J. in *Re Sandeman's Will Trusts, Sandeman* v. *Hayne,* immediately after his statement of general principle, conceded that there might be circumstances — "they would have to be very special" — which would justify the Court in refusing to give effect to the beneficial holder's rights.[26] It is unclear just what "rights" he had in mind, that is, whether he was referring to the rights of the plaintiffs to have their shares transferred to them or their right to control the voting power attached to the shares. To the extent that his comments comprehend the right to control the voting power (and in the context of his subsequent comments such a view seems proper) they create an undefined area of exception to the general rule.

(d) Where specific provision is made in the trust instrument for the mode of exercise of the trustee's voting power then it seems that that will be conclusive notwithstanding that it may conflict with the general rules above. If any authority is required for this it is suggested that it may be found in *Re Firstbrook Boxes Ltd.* and in the cases dealing with voting agreements.[27]

(e) Where there are multiple beneficial interests and conflicting wishes or directions it is suggested that the trustee in exercising the voting rights on the trust shares must proceed as in the case of a special trust where there are competing interests. This issue was raised in, but was not determined by, the judgment in *Elliot* v. *Hatzic Prairie Ltd.,* and was referred to by Clauson J. in *Re Sandeman's Will Trusts, Sandeman* v. *Hayne.*

25 *Kirby* v. *Wilkins* supra n.3.
26 Supra n.8, at 373.
27 E.g. *Greenwell* v. *Porter* [1902] 1 Ch. 530; *Puddephatt* v. *Leith* [1916] 1 Ch. 200; *Greenhalgh* v. *Mallard* [1943] 2 All E.R. 234 — the latter illustrates that the precise extent of any rights so conferred will depend strictly upon the construction of the empowering instrument.

3. *The special trust*

The rights of the beneficiaries under a special trust in respect of company shares were reviewed by the English Court of Appeal in 1951 in *Butt* v. *Kelson*.[28] The voting power of the company in question was vested by the articles of association in the ordinary shareholders, and the testamentary trustees held all but 752 of the 22,852 ordinary shares which had been issued. Those shares represented part of the deceased's residuary estate which was directed to be held upon trust, inter alia, for successive interests in the form of limited duration annuities and other life interests. The dispute before the court related to the right of one of the beneficiaries to call upon the trustees to use their powers as directors, which office they held by virtue of the estate shareholding, to permit him to inspect all of the books and documents relating to the company's affairs and in their possession as directors. The trustees had refused to accede to the beneficiary's demands but it was accepted by the court that they were prepared to give to him all of the information to which he would have been entitled had he been registered as a shareholder in his own right.

The general question of the extent to which a beneficiary might control the trustee's voting power in respect of shares arose indirectly in the following manner. The plaintiff argued that so long as the trustees held a majority of the shares they had power by resolution to make the directors disclose all documents to the shareholders and that therefore a beneficiary in such a trust had the prima facie right to have the documents made available for inspection. The focal point of this argument was the assertion that the beneficiaries could enforce this right by requiring the trustees as shareholders to move, and vote in favour of, the necessary resolutions.

Romer L.J., who delivered the first and only substantive judgment of the court, said:[29]

> What I think is the true way of looking at the matter is that which was presented to this court by [counsel for the defendants] that is that the beneficiaries are entitled to be treated as though they were the registered shareholders in respect of trust shares, with the advantages and disadvantages (for example, restrictions imposed by the articles) which are involved in that position, and that they can compel the trustee directors if necessary to use their votes as the beneficiaries, or as the court, if the beneficiaries themselves are not in agreement, think proper, even to the extent of altering the articles of association if the trust shares carry votes sufficient for that purpose.

He then proceeded to use this as the basis of his judgment that, subject to the satisfaction of specified criteria[30]

> . . . the directors should give inspection, not because they can be compelled to do so as directors, but as a short circuit, if one may so describe it, to an order compelling them to use their voting power so as to bring about what the plaintiff desires to achieve.

Such a clear and explicit statement of general principles, in unqualified terms would, in the ordinary course of events, be gratefully received by all concerned.

28 [1952] 1 Ch. 197.
29 Ibid. 207.
30 Idem.

Certainly, to the extent to which it may be taken as extending to the bare trust for a single beneficiary or for a unanimous group of beneficiaries, it is suggested, that it is consistent with the scope and intent of the general rules enumerated above. To the extent to which that statement purports to declare a general principle comprehending all forms of trust, it is the writer's view that the following features of the case detract from and weaken its authority.

(i) The statement was obiter dictum. The case concerned the right of inspection of the company's documents.

(ii) It is important to remember that not only were successive interests involved but also some, at least, of those interests were contingent.[31]

(iii) The plaintiff was merely an annuitant, a life tenant, and contingent legatee; Romer L.J. seems to have failed to take account of the other competing beneficial interests under the will.

(iv) Having regard to the description of the defendant's argument by Romer L.J., it is clear that it was common ground between the parties that beneficiaries generally could compel trustee shareholders to vote in accordance with their wishes.

(v) The trustees' shareholding gave them a controlling interest in the company.

(vi) The trustees were also directors and the proceedings related to the duty of the trustees in that capacity.[32]

(vii) It completely ignores, and prima facie conflicts with, a previous line of authority leading up to the judgment of Vaisey J. in *Re Brockbank, Ward* v. *Bates*[33] which is cited in a number of the standard texts[34] as authority for the proposition that beneficiaries can not control the exercise by the trustees of their fiduciary powers and discretions even in circumstances where they may by agreement put an end to the trust altogether. That conflict was seized upon by Upjohn J. in *Re Wichelow (deceased), Bradshaw and Others* v. *Orpen and Others*[35] as partial justification for refusing to grant relief in interlocutory proceedings to the beneficiaries who sought an order directing the trustees to vote in a particular manner at a forthcoming company meeting or alternatively to appoint one of their number proxy for that purpose.

With respect, it is submitted that, because of those unsatisfactory features, and having regard to other judicial formulations, the statements of Romer L.J. in *Butt* v. *Kelson*[36] cannot be supported as a general principle applicable to all cases of special trust. There are difficulties inherent in the very nature of such

31 I.e. the plaintiff was to become entitled to pecuniary legacies fourteen and twenty years respectively after the death of the deceased.

32 Underhill *Law Relating to Trusts and Trustees* (13th ed., London, 1979) 607 suggests that this case may be explained as an instance where the trustee-directors had conflicting duties, to their beneficiaries, and to the other shareholders and should be restricted to trustee shareholders who are also directors.

33 [1948] 1 Ch. 206.

34 E.g. Underhill op. cit 556 and 607.

35 [1953] 2 All E.R. 1558.

36 Supra n.28.

trusts, and the sectarian interests of the different classes of beneficiaries which may be created thereby which suggest that that unqualified statement of principle is too wide. Unfortunately no subsequent statement of greater clarity or of equal authority has been found. Nor has *Butt* v. *Kelson* been expressly overruled or disapproved. For this reason it is considered necessary to revert to first principles of trustee law before attempting to isolate any general rules as to the voting rights of the cestui que trust under a special trust.

Two such principles are relevant here: First, a trustee must be impartial in the execution of the trusts reposed in him, having due regard to the interests of all beneficiaries. Clearly he must not exercise his powers in respect of the trust property for the purpose of conferring an advantage upon one beneficiary at the expense of another.[37] The corollary of this duty imposed upon the trustee is, of course, the right of the beneficiaries to have the trusts administered impartially which, it is suggested, is not necessarily consistent with their own individual self-interest. Secondly, although the trustee is under a duty to adhere strictly to the terms of the trust,[38] the cestuis que trust, all being sui juris and representing the totality of the beneficial interests (whether concurrent or successive), may by unanimous agreement vary or put an end to the trust.[39]

(a) The trustee's duty of impartiality:

(i) New Zealand.

In Re Bell (deceased) Perpetual Trustees Estate and Agency Company of New Zealand Limited and Another v. *Bell and Others*[40] is an example of the application of the first basic principle to the exercise by a trustee shareholder of the voting rights attaching to the trust shares. The reported judgment of Ostler J., which is concerned with the respective rights of the income and capital beneficiaries to a debenture which was paid up out of profits standing to the credit of the company's reserve fund that had been capitalised, is not entirely relevant. What is important is the action taken by the trustee shareholders when the company decided to alter its articles of association to permit the distribution of the reserve fund other than by way of dividend which in the hands of the trustees would have accrued to the benefit of the life-tenant. Being mindful of the duty they owed to all the beneficiaries they applied to the court for directions as to how they should vote on the special resolution. All of the parties interested were represented and heard in argument at the hearing of that preliminary application in respect of which Kennedy J. delivered a reserved judgment. In the course of that judgment he held that there was no imperative duty on the part of the trustees to vote for or against the amendment. So long as they exercised their discretion to do one or the other bone fide and in the best interests of the beneficiaries as a whole, they would fulfil their duty as trustees. But the judge added the following warning:[41]

37 Underhill op. cit. 424; Garrow op. cit. 257-258.

38 Underhill op. cit. 382; Garrow op. cit. 254-257.

39 Underhill op. cit. 601; Garrow op. cit. 408; *Saunders* v. *Vautier* (1841) Cr. & Pl. 240.

40 [1940] N.Z.L.R. 15.

41 Ibid. 17.

> I may say for their guidance that if the only circumstance to commend the alteration were the fact that it promised to deprive the life tenant of income which he would otherwise have received and to render that income available for all beneficiaries, the duty of impartiality would be discharged by voting against the amendment.

Notwithstanding the absence of any direct comment on the rights of the beneficiaries, that reserved judgment is helpful by reason of the irresistible inference that in the circumstances of that estate the trustees could discharge their duty of impartiality without regard to, and unfettered by the directions of the beneficiaries; *a fortiori* the beneficiaries cannot have had any power of control over the exercise of the voting rights by the trustees in the sense of directing the trustees how to vote. Certainly the wishes and directions of the respective beneficiaries might form an important and integral part of the trustees' decision to vote in a particular manner but it is clear from the later judgment of Ostler J.[42] that motives completely unrelated thereto might be sufficient to discharge that duty.

(ii) Australia.

Although there are no other New Zealand cases bearing directly upon the subject a number of Australian decisions offer some further guidance. In *Hill and Others* v. *Permanent Trustee Company Limited and Others,*[43] the sequel to the Privy Council's exposition of the rules as to capital and income in respect of payments received by way of disposition of company profits,[44] it was argued that the only duty of a trustee when voting is to use his vote as an ordinary prudent owner of shares would use it. In the course of his judgment, which turned on his finding of a mistake of law upon which the trustee's voting had been exercised, Harvey C.J. agreed saying:[45]

> It is not disputed that the duty of voting as a shareholder of the company in respect of shares held as a trustee is a duty in the nature of a trust, in the exercise of which the trustee must so far as possible maintain a strict impartiality between tenant for life and remaindermen.

Again the only real assistance from this case must be inferred, as in *Re Bell*[46], from the emphasis placed upon impartiality — something which could not be achieved if some only of the beneficiaries under successive trusts could control the trustee's use of the voting rights. Similarly in *Bakewell* v. *Holme*[47] the rights of the cestuis que trust in respect of voting arose incidentally in the course of a decision concerned primarily with the destination of dividends paid out of capital profits. In answer to the argument of the remaindermen that the trustees in voting had an overriding duty not to disturb the rights of their beneficiaries Roper J. asked:[48]

> Are trustees of settled shares bound to oppose the distribution of the company's capital profits as dividends?

42 Ibid. 20.
43 (1933) 33 S.R. (N.S.W.) 527.
44 [1930] A.C. 720.
45 Supra n.43, 539.
46 Supra n.40.
47 (1943) S.R. (N.S.W.) 150.
48 Ibid. 156.

In response to the query he said:

> I think that the answer to the general question which I have propounded must be in the negative and that the real position is that such a trustee must consider the life tenants as well as the remaindermen, and in the absence of special circumstances such as existed in *Hill's* case should not oppose the declaration of a dividend from capital profits unless such profits should be more properly from the company's point of view be capitalized, or unless the company is likely in the near future to go into liquidation with the result that the profits will be distributed as capital. To adopt the other course, appears to me to seek to ignore the fact that the trust assets are company shares.

In the circumstances, he held that the trustees had not voted improperly by using their position as trustees and directors to obtain a benefit for themselves as life tenants because it had not been shown that an independent trustee would have opposed the distribution as dividend or for that matter that any such opposition would have been successful. On the further question raised as to future dividends from the same source he declined to define the trustees' obligations in respect of voting. That question, the learned judge said,[49] involved a consideration of all the circumstances existing when the dividends are declared.

The competing interests of life tenants and remaindermen were again evident in *Re Campbell (Dec'd.); Rowe and Another* v. *McMaster and Others*[50] in a factual situation similar to that considered by the New Zealand Supreme Court in *Re Bell.*[51] The deceased was the major shareholder in a private limited liability company which at the time of her death held substantial undistributed profits. The executors, who subsequently issued themselves one share each and became directors of the company, sought the court's directions in respect of those undistributed profits asking, inter alia, whether as trustees they were under any duty to exercise their powers as directors of, or their position as shareholders in, the company to declare a dividend which would accrue to the benefit of the life tenants as income of the estate, rather than going to form part of the corpus. Helsham J. concluded:[52]

> If there is a choice of destination with respect to this sum, then the trustees' general approach to the exercise of their discretion as trustees must be along the lines referred to in *Hill* v. *Permanent Trustee Co. Ltd.* . . . , where Harvey C.J. in Eq. said 'It is not disputed that the duty of voting as a shareholder of the company in respect of shares held as a trustee is a duty in the nature of a trust, in the exercise of which the trustee must so far as possible maintain a strict impartiality between tenant for life and remaindermen'. And in order to perform that duty regard must be had to all the circumstances, including the trust instrument. *See Bakewell* v. *Holme* . . .

After reviewing the circumstances of the company and the estate Helsham J. asserted that the life tenants were not entitled to have any dividend declared unless the trustee shareholders considered that the declaration of dividends was the proper course to follow in pursuance of their duties as trustees, again raising the inference, supported by his later statement that "The decision must be that

49 Ibid. 157.
50 [1973] 2 N.S.W. L.R. 146.
51 Supra n.40.
52 Ibid. 156.

of the trustees, having regard to the trust instrument and all the circumstances",[53] that the beneficiaries could not control the way in which the trustees used their votes. That, however, was not the end of the matter, for the judge then proceeded to offer guidance to the trustees on the facts presented to the court indicating that the trustees were entitled, in that case, to exercise their powers to ensure that the payment passed to the corpus of the estate.

(b) The beneficiaries' power to extinguish or vary the trust:

The second of the basic principles of trustee law referred to above formed the basis of the beneficiaries' interlocutory application in *Re Wichelow (deceased), Bradshaw and Others* v. *Orpen and Others*[54] but was not subjected to any definitive statement as to the scope of its application to voting rights arising under special trusts.

Three parcels of shares had been left by a testatrix on trust for each of her three daughters for life with remainder to their respective children. The trustees had refused to comply with the unanimous directions of the existing life tenants and remaindermen who then instituted these proceedings. Upjohn J. defined the question of law to be decided as:[55]

> The plaintiffs say "We are all the persons entitled to the beneficial interest in these trust shares. We are, therefore, entitled to direct the trustees how they are to vote at the forthcoming meeting of the company"; and they rely on [the passage in the judgment of Romer L.J. in *Butt* v. *Kelson* cited above.] The plaintiffs further say that they are all the persons entitled to these shares, because although there is the theoretical possibility of further issue being born, that, they say, is plainly impossible in the case of the first two plaintiffs, who are aged sixty-one and fifty-eight respectively, and with regard to the third plaintiff, who is fifty-two, her last born daughter was born over twenty-one years ago.

The issue was determined on the second head alone, it being held that because of the age of the youngest life tenant it could not be said that in law all of the beneficiaries were before the court. Speaking of the trustees, against whom he was not prepared to impute bad faith, Upjohn J. said:[56]

> They have not had a direction from all persons beneficially entitled, because it cannot be said in law that the persons concerned are past the age of child-bearing.

There was, therefore, still a legal possibility of future remaindermen who were not represented before the court.

That same basic principle with which Upjohn J. found it unnecessary to grapple presents itself as a possible justification for the decision of the Queensland Supreme Court in *Re McTiernan*.[57] The court was there concerned with successive interests in realty rather than company shares; but that is not fatal because the case remains as an illustration of the approach of the court to a similar, but not quite identical, fact situation. The life tenant was aged sixty-one years and her two adult children were the contingent remaindermen. Because of medical

53 Ibid. 157.
54 Supra n.35.
55 Ibid. 1560.
56 Ibid. 1561.
57 [1954] Q.W.N. 29 — a decision which unfortunately is only noted.

evidence submitted to prove that the life tenant was incapable of bearing further children Philip J. considered himself competent to direct that the trustees be at liberty to act in relation to the trust estate according to the directions of the three beneficiaries *in esse* rather than giving directions as to the proposed purchase and mortgaging of specific property.

These two decisions may be reconciled quite simply. By virtue of the medical evidence in the Australian case the court there was faced with a factual situation where there was no possibility of future beneficiaries and the trustees were directed in respect of the unanimous wishes of all possible beneficiaries.

The principle was also dealt with (but not in the context of company shares) in *Re Brockbank, Ward* v. *Bates*[58] where counsel for the beneficiaries argued that because the life tenant and remaindermen were together absolutely entitled to the estate and therefore by unanimous agreement could determine the trusts, the trustee was not entitled to exercise any discretion vested in him in opposition to their wishes.[59] The beneficiaries, who all had vested, although successive, interests, had directed the trustee to appoint a bank as successor to his co-trustee who intended to retire from office. He refused to concur in the making of that appointment so proceedings were brought by the beneficiaries for a direction to to trustees to do as they required.

The beneficiaries' argument was not received enthusiastically by Vaisey J. Although he accepted the argument that because of the nature of their collective interests the beneficiaries could direct the trustee to transfer the trust property either to themselves absolutely, or to any other person or persons upon trusts identical with or corresponding to the trusts of the testator's will, he was not prepared to extend that principle to the exercise by the trustee of his discretionary power to appoint new trustees. In his opinion, if that were so the power would cease to be discretionary:[60]

> It seems to me that the beneficiaries must choose between two alternatives. Either they must keep the trusts of the will on foot, in which case those trusts must continue to be executed by trustees duly appointed pursuant either to the original instrument or to the powers of s. 36 of the Trustee Act, 1925, and not by trustees arbitrarily selected by themselves; or they must, by mutual agreement, extinguish and put an end to the trusts . . .

with the consequence that any substituted settlement established by them would attract stamp duty and would probably lose the surviving spouse exemption from estate duty on the death of the life tenant.

4. *Evaluation of the rules relating to special trusts*

What then is the upshot of the authorities on special trusts? There is a prima facie conflict in a number of the judgments examined, and certain of the judicial statements (particularly those in *Butt* v. *Kelson*)[61] appear to be irreconcilable. It

58 Supra n.33.
59 Ibid. 207-208.
60 Ibid. 209.
61 Supra n.28.

is submitted, however, that the following propositions are supportable in the current state of New Zealand law:

(a) Where there is any competition between the interests of different classes of beneficiaries the duty of impartiality which is imposed upon the trustee will preclude the exercise by the beneficiaries, or any class of them, of control over the way in which the trustee exercises his vote.

Competing beneficial interests in this context comprehend not only successive interests but also concurrent interests where all potential beneficiaries are either not in existence or, being so, are not all of one mind.

That this is contrary to the obiter dictum of Romer L.J. in *Butt* v. *Kelson* is apparent. As already observed that case is anomalous, and, in the opinion of the writer, it can not on principle, and in light of the body of case law on the trustee's duty of impartiality, be accepted without reservation as good authority in all cases of special trust.

This proposition is in accord with the judicial statements in *Re Bell*[62] and the main line of the Australian authorities dealing with that duty of impartiality, which are to be preferred. Nevertheless those statements are themselves open to the criticism that they are concerned only with the distribution of company profits. That is true, but it is neither coincidental nor conclusive; it is simply because disputes are more likely to arise in the context of financial interest than in any other area. As *Hill and Others* v. *Permanent Trustee Company Limited and Others*[63], *Bakewell* v. *Holme*[64] and *Re Bell*[65] all involved voting by trustee shareholders on resolutions altering articles of association it is suggested that it may be reasonably expected that the court will apply the same reasoning by analogy to cases of competing beneficial interests where it is asked to define the respective rights and duties of beneficiaries and shareholder trustees in respect of some alternative use of the voting power.

That expectation is borne out by the judgment of Upjohn J. in *Re Whichelow (deceased), Bradshaw and Others* v. *Orpen and Others*[66] where the competing interests of possible unborn remaindermen were not represented before the court and where the relevant resolutions were related not to distribution of profits but to the removal from office and appointment of directors.

(b) Where there is no competition between the interests of different classes of beneficiaries[67] it appears that the beneficiaries are, legally, not in a different position.

Certainly the basic principle of trustee law relating to the power of unanimous and fully competent beneficiaries to extinguish or vary the trusts, as argued by

62 Supra n.40.
63 Supra n.43.
64 Supra n.47.
65 Supra n.40.
66 Supra n.35.
67 A situation which will arise in cases of concurrent or successive interests where all potential beneficiaries are in existence and are of one mind.

counsel for the beneficiaries in *Re Brockbank. Ward* v. *Bates,*[68] constitutes an attractive starting point for the formulation of an argument to the contrary. Furthermore such argument may be developed by examining certain important aspects of the decision of Vaisey J. in that case with a view to demonstrating that it does not support the broad proposition that beneficiaries can not in any case control the exercise by the trustees of their fiduciary powers and discretions even in circumstances where they may by agreement put an end to the trust altogether.

(i) That case dealt with the power of appointing new trustees; a power which must be derived either from the trust instrument or from statutory provisions (in New Zealand section 43 of the Trustee Act 1954). In fact, in that case neither the will nor the codicil contained any express power of appointment so the court was dealing exclusively with the absolute discretionary power conferred by the statute.

(ii) The court was faced with previous decisions where interference, even by the court, with the exercise of the trustee's discretion to appoint new trustees was deprecated.[69] In this regard Vaisey J. commented:[70]

> If the Court, as a matter of practice and principle, refuses to interfere with the legal power of appointment of new trustees, it is, in my judgment, a fortiori not open to the beneficiaries to do so. As I have said, they can put an end to the trust if they like; nobody doubts that; but they are not entitled, in my judgment, to arrogate to themselves a power which the Court itself disclaims possessing, and to change trustees whenever they think fit at their whim or fancy . . . that seems to me to show a complete disregard of the true position. As I have said, as long as the trust subsists, the trust must be executed by persons duly, properly and regularly appointed to the office.

(iii) Vaisey J. was very much concerned with the probable cost to the estate in monetary terms of the beneficiaries' specific proposals; something with which the courts have shown themselves to be preoccupied in their general approach to the appointment of trustee corporations or professional trustees as new or substituted trustees.[71]

(iv) There were, in addition, considerations of additional duties payable if the beneficiaries exercised their power to extinguish the trust.

So, it may be suggested that the principles enunciated in *Re Brockbank, Ward* v. *Bates*[72] are not of general application but should be restricted to cases where the discretionary power of the trustee to appoint new trustees is in question.

The contrary argument so developed may be further fortified by the comments of Upjohn J. in *Re Wichelow (deceased) Bradshaw and Others* v. *Orpen and Others*[73] which imply that if all of the potential beneficiaries had directed the trustees then the result of that case might have been different.

68 Supra n.33.
69 *Re Gadd* (1883) 23 Ch. D. 134; *Re Higginbottom* [1892] 3 Ch. 132.
70 Supra n.33, 210.
71 E.g. see the Practice Note [1975] 2 N.Z.L.R. 93 and the two cases referred to there.
72 Supra n.33.
73 Supra n.35.

Butt v. *Kelson*[74] also may be prayed in aid. Although the statements made therein are clearly too wide in their pima facie application to all special trusts it is open to suggestion that they are appropriate in the more restricted area of unanimity of all beneficial interests. It is, however, necessary to acknowledge that the facts of that case, and the statements themselves, do not readily allow such a construction.

Lastly the judgment in *Re McTiernan*[75] affords prima facie support to that contrary argument.

It is submitted however that none of the above suggestions is sufficiently convincing to establish a case for the recognition by the court of any right in the beneficiaries to control the voting power of the trustee. The authority of *Re Brockbank, Ward* v. *Bates* and its restrictive construction of the beneficiaries' power to vary or extinguish the trust appears to be sufficiently strong to withstand such an attack.[76] Also it is significant that the court in *Re McTiernan* directed that the trustees were to be at liberty to act in accordance with the beneficiaries' direcions rather than imperatively ordering them to do so.[77]

Furthermore set against those suggestions is the court's reluctance, illustrated by *Re Beloved Wilkes Charity*[78] and *Tempest* v. *Lord Camoys,*[79] to interfere with any discretion conferred upon a trustee as to the execution of his trust provided it is exercised in good faith (a reticence extended by the Court of Appeal in *Re Londonderry's Settlement*[80] to a demand by a beneficiary for the production of documents which would disclose the reasons for the trustees' exercise of a discretionary power to appoint capital) and, significantly, the absence of any authoritative judicial statement supporting any right in the cestuis que trust to control the exercise by their trustee of any discretion vested in him.

Although the above interpretation of the authorities results in the beneficiaries under all forms of special trust being treated alike and fails to establish any right in those beneficiaries to direct the trustee how to exercise his voting rights in respect of trust shares it is submitted that in practice a trustee will nevertheless generally defer to the unanimous directions of all possible beneficiaries, because, with the possible exception of a breach of trust, any action so taken by him will for all practical purposes be unimpeachable. This much was recognised more than 100 years ago by the Court of Appeal in *Marsden* v. *Kent.*[81] In that

74 Supra n.28.
75 Supra n.57.
76 That is the approach taken by *Jacobs, Law of Trusts in Australia* (4th ed, Sydney, 1977) 462 where it is suggested that in view of Vaisey J's reasoning it must be doubtful whether beneficiaries can exercise control at all
77 That direction is consistent with Underhill, op. cit. n.32, 605 where it is stated that when morally it is certain that no more beneficiaries can come into existence the ocurt will not imperatively order the trustee to act in accordance with their directions but will give him liberty to do so.
78 [1851] 3 Mac. and G. 440.
79 (1882) 21 Ch. D. 571.
80 [1965] Ch. 918.
81 (1877) 5 Ch. D. 598.

case the beneficiaries sued the trustees for losses incurred on the deferred realisation of speculative bonds owned by the deceased. One of the five beneficiaries had repeatedly pressed for the prompt realisation of the investments whilst the remaining four beneficiaries did nothing. On the question of the trustees' exercise of the power of sale James L.J. summed up the positions as follows:[82]

> The legatees were *sui juris*, competent to direct what should be done about the property. One of them went to the executors to ask them to sell. The executors were not bound to act on his judgment; he should have called on the other legatees and asked them to join in an application to the executors to sell. If they had all concurred in such an application *the executors would, no doubt, have complied with it*, and if a majority had so applied it is *probable* that the executors would at once have sold.

Whilst acknowledging indirectly the absence of any compulsion on the trustees to comply with unanimous directions from the beneficiaries it is suggested that those statements represent judicial notice of the potential practical effect of such directions.

82 Ibid. 600; emphasis added.