

Anomalies in the recognition of the legal personality of trusts in South Africa

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ABSTRACT

Key words: trust, legal personality, assets and liabilities, anomalies, legal uncertainty

This study examines anomalies in the legal classification of trusts in South African law. Whereas the *Trust Property Control Act* 57 of 1988 and judicial decisions recognise trusts as mere arrangements in which trustees administer trust assets for beneficiaries, some pieces of legislation treat trusts as if they have legal personality. The central argument in this study is that statutes that recognize the legal personality of trusts create uncertainties. In this regard, the study considers the importance of theoretical clarity on the legal personality of trusts and how it could help to mitigate and possibly solve some practical problems which arise concerning uncertainties about the legal nature of trusts.

Theoretical problems emanate from the anomalies which arise because of the statutes which bestow trusts with legal personality, and which result in the imposition of company law doctrines such as the *Turquand* rule and the lifting of the corporate veil on trusts. The discussion in this study shows that there is a need for a more definitive legal position on whether trusts are legal persons and if not, whether legislative reforms are needed to confer trusts with legal personality. Since uncertainties about the legal nature of trusts are not peculiar to south Africa, this study also examines the legal position of trusts in Quebec and the rest of Canada. The comparative discussion demonstrates a possible correlation on the legal nature of trusts in these jurisdictions.

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LIST OF ABBREVIATIONS

Journals

PELJ	Potchefstroom Electronic Law Journal
SALC	South African Law Commission
SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

Statute

TPCA	<i>Trust Property Control Act</i>
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Chapter 1 Introduction

1.1 Background

Trusts are popular among estate planners. In South Africa, trusts are not creatures of statute. The courts developed the principles of trust as part of the continuing refinement of the law of trusts.¹ The *Trust Property Control Act* 57 of 1988 (hereinafter the *TPCA*) is the principal statute governing the administration of trusts. Since its enactment, the *TPCA* has remained static. It has not been amended for many years. It appears that the legislature has placed the responsibility to develop trust law on the courts, making the courts chief architects in the development of trusts.² According to the *TPCA*,

a 'trust' means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed...³

The definition further stipulates that the administration and disposition of the assets of trusts on behalf of beneficiaries must be done according to the trust deeds. The principle of legal personality bestows legal rights and duties such that an entity is treated as a fictitious person, enjoys separate legal existence, and has limited legal liability.⁴ As such, the *TPCA* does not recognise a trust as a legal entity but an arrangement based on a deed of trust⁵ or a testament in terms of the *Wills Act* 7 of 1953.⁶ A trust is not a legal person but an "accumulation of assets and liabilities."⁷ It is a *sui generis* institution.⁸ Whereas trustees own the assets of trusts in their official capacities, they have no beneficial interest in the assets.⁹ The *TPCA* confirms the common law position that trusts are not legal persons, except where legislation provides otherwise.¹⁰ The *Income Tax Act* 58 of 1962 defines a trust as a separate legal person for the purposes of income tax and capital gains tax. The *Value Added*

¹ De Waal 2014 *Acta Juridica* 220.

² *Estate Kemp v McDonald's Trustee* 1915 AD 491.

³ S 1 of the *TPCA*.

⁴ Boberg *The Law of Persons and the Family Through the Cases* 1-2.

⁵ A trust's constitutional document is a trust deed which sets out the framework in which the trust must operate, including its powers and limitations.

⁶ Section 2(1) of the *Wills Act* prescribes formalities for a will to be valid when it is executed.

⁷ *Land and Agricultural Bank of South Africa v Parker* 2005 2 All SA 261 (SCA) para 10.

⁸ *Braun v Blann* 1984 2 SA 850 (A) at 866 C-D.

⁹ *Blann* 859 E-H.

¹⁰ *Parker* para 10.

Tax Act 89 of 1991 also provides for the registration of trusts as VAT vendors. These are examples of why statutes would refer to some trusts as persons. Arguably, it is convenient for the revenue collector to classify trusts as separate legal entities for the purposes of tax collection. Further examples of statutes that treat trusts as legal persons are the *National Credit Act* 34 of 2005, whose definition of a juristic person in section 1 includes a trust which has three or more trustees. The *Consumer Protection Act* 68 of 2008 defines trusts with turnovers of less than R2 million as consumers. The definitions of persons in some statutes also include trusts, as will be seen in this study.

The statutes mentioned in the preceding paragraph directly contradict the *TPCA*, which does not view trusts as separate legal entities. This study seeks to show that despite the *TPCA* and the common law, which do not bestow trusts with legal personality, anomalies arise when some statutes confer legal personality on trusts. The central argument in this study is that statutes that recognise trusts as separate legal persons create potential legal uncertainty because the *TPCA* and the common law do not confer legal personality on trusts.

1.2 Research question

The central question in this study is what are the challenges to legal certainty caused by anomalies in the statutory recognition of the legal personality of trusts in South Africa?

1.3 Aim and objectives of the study

This study investigates the anomalies that arise as a result of statutes that define trusts as separate legal entities, contrary to the common law and the *TPCA*. The study discusses the history of trusts and examines anomalies between the *TPCA* and other statutes which bestow legal personality on trusts. This study is undertaken to find solutions to the conundrum of legal uncertainty, which potentially arises from anomalies in the recognition of the legal personality of trusts. Whereas the *TPCA* is clear that a trust is not a legal person, there is a *prima facie* case for Parliament to relook at the *TPCA* with a focus on the legal nature of trusts. This will assist in shedding light on the potential uncertainties that come in when the *TPCA* states that a trust does not have a juristic personality, but some statutes state otherwise. To overcome

the anomalies, legal personality should be bestowed on trusts. Such a step will enhance the integrity and appeal of the trust and ensure certainty in the recognition of the legal personality of trusts. Also, the legislature can abolish the present piecemeal approach, which manifests when some statutes recognise trusts as legal persons for specific purposes.

1.4 Research methods

The study requires a systematic analysis of legal materials which deal with the legal recognition of trusts as separate entities which are vested with separate legal personality. As such, the doctrinal legal research method is relevant for the analysis of the primary and secondary sources which are examined in this study. For case law and legislation, the Juta and LexisNexis legal databases are used, while books and journals which are readily available are utilised. This work has a comparative aspect in that it also explores the position of trusts in Canada (in general) and the province of Quebec (in particular). Canadian law on trusts lends invaluable lessons for South Africa from a statutory and case law standpoint.

1.5 Structure of the study

This study has six chapters. The next chapter briefly discusses the general principles of legal personality and the legal nature of trusts in South Africa. Chapter 3 traces the origin of the trust concept in Germany and England. It also examines the incorporation of trusts into South African law. Chapter 4 critiques the anomalies between the *TPCA* and other statutes which confer trusts with separate legal personality. Chapter 5 discusses the legal personality of trusts in Canada (in general) and the province of Quebec (in particular). The last chapter concludes the study and makes recommendations.

Chapter 2 General Principles of Legal Personality

2.1 Introduction

The first chapter lays the foundation for the analysis of the legal personality of trusts by advancing the hypothesis that anomalies between the *TPCA* and some pieces of legislation on the legal nature of trusts cause difficulties and legal uncertainties. This chapter examines the concept of legal personality to contextualise the classification of trusts in South African law. The most salient principles discussed in this chapter include legal personality (in relation to natural persons and juristic persons), limited legal liability, the *Turquand* rule and the lifting of the corporate veil. These principles are analysed and applied to trusts, where applicable, through the *Parker* case in which the court dealt at length with their application on trusts.

2.2 Legal personality

The concept of legal personality refers to the capacity to hold rights and acquire duties in law.¹ It distinguishes between persons and things. Persons exercise rights and duties over things. Unlike things, persons can have relationships and special recognition in law. Things, on the other hand, do not have legal capacity.² They are not recognised as parties, but objects, to transactions. As such, things have no capacity to institute or defend legal proceedings. They cannot occupy positions in any capacity. There are two categories of legal persons: natural and juristic persons. The law determines when and how persons acquire legal capacity.³

2.2.1 Natural persons

Natural persons come into existence at birth when they are born alive.⁴ From birth, they assume legal capacity and utilise it according to their age and mental capacity.

¹ Davel and Jordaan *The Law of Persons* 3,7,12; Hutchison, Pretorius and Du Plessis *The Law of Contract in South Africa* 149.

² Heaton *The South African Law of Persons* 2.

³ Davel and Jordaan *The Law of Persons* 1.

Heaton *The South African Law of Persons* 3. The *Constitution of the Republic of South Africa, 1996* (the *Constitution* hereinafter) does not contain any express provision which grant legal personality to a foetus.

For instance, children under seven years (*infans*) have constrained legal capacity.⁵ While they are endowed with all the rights enshrined in the Bill of Rights, they cannot litigate in their own names.⁶ They must be represented by their parents when performing legal acts.⁷ Children above seven years of age also have limited legal capacity.⁸ When they enter into legal agreements, they must be represented by their parents or guardians. Once they attain majority status at the age of 18 years, children are liberated from all limitations to their legal capacity.⁹ They become majors and suffer no restrictions on their legal capacity. They are autonomous adults who can enter into transactions as they deem fit. However, this is not always the case because of various ailments and disabilities which compromise the legal capacity of individuals to perform legal acts. Mental illness and prodigality may limit the legal capacity of individuals. To mitigate such challenges, trusts are used to safeguard the interests of persons who suffer from limitations on their legal capacities.

Trusts provide financial protection to vulnerable dependants and beneficiaries and to persons who have special needs.¹⁰ Thus, trusts are established to protect the interests of certain persons.¹¹ Where a trust is not established, a court may appoint a curator to handle the affairs of the person who suffers from limited legal capacity. Trusts have also been used to protect the wishes of deceased persons.¹² The restrictions on legal capacity placed by the law on some natural persons do not apply to juristic persons.

2.2.2 *Juristic persons*

The term juristic person refers to an entity that, by its nature, acquires rights and duties.¹³ Juristic persons are fictitious persons established by natural persons. At

⁵ Boezaart 2013 *De Jure* 708; Hutchison, Pretorius and Du Plessis *The Law of Contract in South Africa* 149.

⁶ Boezaart 2011 *De Jure* 418.

⁷ Where parents or guardians are not available, the court will appoint a *curator ad litem* to safeguard the rights of the child. For a discussion, see *Ex parte Phillipson* 1954 1 SA 245 (E) at 246.

⁸ Boezaart 2013 *De Jure* 708.

⁹ S 28(3) of the *Constitution* provides that a child is any person under the age of 18 years.

¹⁰ Beachen 2013 *Without Prejudice* 50.

¹¹ Honoré "Trusts" 854.

¹² Honoré "Trusts" 854.

¹³ Becker *Disregarding the Separate Juristic Personality of a Company: An English Case Law Comparison* 5.

times, juristic persons are established by other juristic persons as vehicles for commercial ventures. Companies and close corporations are established under the *Companies Act* and the *Close Corporations Act* 69 of 1984, respectively. Although juristic persons are established by natural persons, they are independent persons in the eyes of the law. Their legal status carries the same weight as that of natural persons.¹⁴ Once established, juristic persons acquire their own rights and responsibilities. They may enter into agreements with other juristic persons and with natural persons.¹⁵ A juristic person is separate from the owners and is not viewed by the law in connection with those who established it.¹⁶ Boberg observes that,

The hands and mind of a company are those of its human directors and officers, but it makes its own contracts, holds property in its own right and pays its own income tax. Nor is its identity altered by changes in its membership: it continues in existence until wound up by order of courts. It is therefore said to enjoy perpetual succession.¹⁷

This means that when a juristic person incurs obligations, it does so for itself, not for its directors or shareholders.¹⁸ In *Salomon v Salomon*,¹⁹ the court held that once a company is legally incorporated, it must be treated like any other independent person with its own rights and liabilities.²⁰

Whether an entity is a natural or juristic person has important ramifications in law. The rights bestowed by the Bill of Rights by default on natural persons are subject to limitations, as stipulated in section 36 of the Constitution of the Republic of South Africa, 1996. However, the limitations clause places a stringent criterion for the limitation of rights. Although juristic persons also enjoy the rights accorded to natural persons by the Bill of Rights, some of the rights are not applicable to juristic persons. For instance, while both natural and juristic persons have the right to access to

¹⁴ Becker *Disregarding the Separate Juristic Personality of a Company: An English Case Law Comparison* 1.

¹⁵ S 19(1) of the *Companies Act* 71 of 2008.

¹⁶ *Salomon v Salomon* [1897] AC 22 (HL) para 30 (hereinafter *Salomon*).

¹⁷ Boberg *The Law of Persons and the Family Through the Cases* 5.

¹⁸ Section 19(2) of the *Companies Act*.

¹⁹ *Salomon* para 30.

²⁰ *Salomon* para 31.

courts,²¹ only natural persons enjoy the right to life.²² This distinction flows from the notorious fact that natural persons are biological organisms that are destined to cease to exist, while the 'lives' of juristic persons depends on the wishes of natural persons who control them.

Trusts lie in a grey area between natural and juristic persons. They do not squarely fall under the classification of natural or juristic persons. This puts them in no man's land. Although some pieces of legislation treat trusts as juristic persons, such classification is only for the objectives of each statute and does not purport to confer trusts with juristic personality. The courts have consistently stated that trusts are not juristic persons.²³ This means that trusts do not enjoy the privileges accorded to juristic persons. However, this is not the end of the debate on the legal nature of trusts.

2.3 Limited legal liability

The legal capacity of an entity is important for the determination of whether the entity can perform juristic acts; and, if so, which ones. It is also crucial for ascertaining how the entity can perform legal acts and the extent to which it can do so. This concept is found in the "proper plaintiff rule" set in *Foss v Harbottle*,²⁴ in which the court held that where a juristic person like a company is involved in a legal dispute, its directors initiate or defend the legal proceedings on behalf of the juristic person, not in their personal capacities.²⁵ In *Dadoo v Krugersdorp Municipal Council*,²⁶ the court confirmed that a company is a separate legal entity that is distinct from its shareholders. This case is the equivalent of the English cases of *Harbottle* and *Solomon*. In *Dadoo*, the court considered the existence of the corporate veil, confirmed the separate legal

²¹ S 34 of the Constitution. See also *Bernstein v Bester* 1996 ZACC 2 paras 69, 85; *First National Bank of SA Limited T/A Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 44-45; *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19 para 61.

²² See Serfontein 2015 *PELJ* 1816 for a discussion.

²³ See, for instance, *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 3 SA 833 (A) at 840F-G; *Commissioner for Inland Revenue v Friedman* [1993] 1 All SA 306 (A) para 10 and *Parker* para 10; *WT v KT* [2015] ZASCA 9 para 26. See also Marumoagae 2017 *Obiter* 35 for a discussion.

²⁴ *Foss v Harbottle* (1843) 67 ER 189.

²⁵ *Foss v Harbottle* at 461.

²⁶ *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

personality of companies and stated that when it is registered, a company becomes a legal person that is separate from its directors and shareholders.

Whereas companies exist independently from their shareholders, trusts, on the other hand, are *sui generis* institutions.²⁷ Legal proceedings which involve trusts are initiated and defended by the trustees in their representative capacities as trustees.²⁸ Thus, trusts cannot initiate and defend legal proceedings in their own names but should do so through the names of their trustees acting in their official capacities. When it comes to liability for debts, trustees are not liable for the debts of trusts.²⁹ However, trustees could be personally liable for some or all of the losses suffered by the trusts when claimants prove that the trustees did not act with the necessary care, diligence and skill reasonably expected of persons who manage the affairs of others.³⁰

Trusts ensure limited liability because trustees are liable only to the extent of the value of the trust assets, except when the trustees are guilty of breach of trust.³¹ Since trusts are not juristic persons, one can conclude that the concept of limited legal liability is not compatible with the legal nature of trusts. Limited legal liability is one of the most profound and revered advantages of legal personality conferred by the law on the founders, directors, and managers of juristic persons.³² Limited legal liability entails that a company, duly formed in terms of the *Companies Act* or other relevant statute, is liable for its debts and other legal obligations.³³ This protects the natural persons behind the company. When misfortune strikes a company and renders the company insolvent, the shareholders and directors of the company are not personally liable for the debts of the company.³⁴ However, limited legal liability is not absolute.

²⁷ *Blann* at 866C-D.

²⁸ Theron du Plessis Chartered Accounts (SA) "Trust Guide" 4.

²⁹ Prestron *Trustee's Accountability* 55.

³⁰ See s 9 (1) of the *TCPA*.

³¹ Zimmermann and Visser *Southern Cross: Civil Law and Common Law in South Africa* 871.

³² S 19(1) of the *Companies Act*.

³³ Sher 2006 *Quarterly Law Review for People in Business* 52; s 20 of the *Companies Act*.

³⁴ *Webb & Co Ltd v Northern Rifles* 1908 TS 462.

2.4 Piercing the corporate veil

The legal personality of an entity does not always protect the natural persons behind the entity from incurring liability for the obligations of the entity. For example, although partnerships are treated as legal persons with separate identities at law, they are not endowed with legal personality.³⁵ Separate legal personality and separate identities of partnerships are only relevant to the partners in good times. When hard times fall, all the partners incur liability for the full debts of the partnership. Such debts can be satisfied through the personal estates of the erstwhile partners.³⁶

The piercing of the corporate veil is an exception to the separate legal personality of a juristic person. It entails an objective exercise in which the court disregards the separate legal personality of the juristic person when it considers that it is in the interests of justice to do so.³⁷ The *Close Corporations Act* and the *Companies Act* reflect this position. In terms of section 20(9) of the *Companies Act*, the corporate veil of a company may be pierced when there has been 'unconscionable abuse of its corporate personality'.³⁸ Also, the judiciary is empowered to disregard separate juristic personality when it is found that an act by the close corporation, or any act on its behalf, constituted a gross abuse of juristic personality.³⁹ Apparently, both provisions are the legislative equivalent of the English common law and have the same purpose, albeit for different juristic persons. In South Africa, the corporate veil can be pierced at common law and in legislation.

Circumstances may arise when a person controls two companies and structures his affairs in such a way that he evades fulfilling a legal obligation to another person. In such situations, the court may be asked to pierce the corporate veil to stop the abuse. The judicial view is that when a company is abused for improper, dishonest and

³⁵ Boberg *The Law of Persons and the Family Through the Cases* 5.

³⁶ See s 13 of the *Insolvency Act* 24 of 1936.

³⁷ Larkin 1989 *South African Mercantile Law Journal* 277.

³⁸ The phrase is not defined in relevant legislation. In *Ex Parte Gore* 2013 2 All SA 437 (WCC) para 34 (hereinafter *Ex Parte Gore*) the court asserted that "unconscionable abuse and conduct in relation to the formation and use of companies that is diverse enough to cover all the descriptive terms such as sham, device, stratagem and conceivably much more." See also Cassim 2012 *De Rebus* (in general).

³⁹ S 65 the *Close Corporations Act*.

fraudulent ends, the court will pierce the veil.⁴⁰ This can only be done if there are unusual circumstances that warrant this drastic step.⁴¹ The court will examine all the circumstances of the matter and the conduct of the natural persons who act as agents of the juristic person to determine whether those agents are culpable for the abuse of separate legal personality through fraud and whether they are personally liable.⁴² This is an exercise that requires the consideration of substance over form. The doctrine protects third parties against abuse of the principle of limited legal liability.

Terms such as piercing the corporate veil, lifting or pulling aside the corporate veil, and going behind the trust all describe the same judicial action.⁴³ The courts suggest that when trusts are used as veneers, the veneers should be pierced in the interest of creditors.⁴⁴ This is despite the understanding that courts are entitled to treat trusts as separate entities.⁴⁵ Van der Linde recommends that for uniformity, South African courts should consider using the term 'piercing the veneer of the trust'.⁴⁶ In recent years, the courts pierced the veil on trusts in instances where trusts were abused and where there was no separation of enjoyment and ownership of the assets of the trusts.

Although the courts have been steadfast in refraining from assigning legal personality on trusts, they have pierced the corporate veil on trusts when addressing instances of abuse.⁴⁷ There are many examples of situations where the courts invoked the doctrine of piercing the corporate veil to curb the abuse of trusts.⁴⁸ In justifying the application of piercing the corporate veil as a remedy for the abuse of trusts, courts say that in appropriate cases, they must protect the trusts from abuse such as fraud.⁴⁹ The grounds described by the courts about trusts that are used as veneers are similar to those that apply to juristic persons. However, it is crucial to recall that trusts are bereft

⁴⁰ See *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 2 All SA 543 (A).

⁴¹ *Botha v Van Niekerk* 1983 3 SA 513 (W).

⁴² *Cape Pacific* para 28.

⁴³ *Parker* para 18. See also Van der Linde 2012 *THRHR* 376; *Jordaan v Jordaan* 2001 (3) SA 288 (C) para 34; *First National Bank v Britz* [2011] ZAGPPHC 119 para 37.

⁴⁴ *Parker* para 37.

⁴⁵ *First National Bank v Britz* para 69.

⁴⁶ Van der Linde 2012 *THRHR* 371.

⁴⁷ See, for instance *Jordaan v Jordaan* paras 20-34.

⁴⁸ See for instance *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA), *Nedbank v Thorpe* (2008) JOL 22675 (N).

⁴⁹ *Parker* para 37.

of legal personality, which is a requisite for piercing the veil. When trustees hide dishonest conduct behind trusts, they use the trusts as veils. The veils must be pieced to expose the trusts. In that way, personal liability is attributed to the trustees who misuse trusts. It is clear that trusts have separate existence that can be disregarded when the purposes of their establishment are abused for nefarious purposes.

However, when the courts pierce the veil on trusts, they overlook that the doctrine of piercing the corporate veil is incompatible with trusts because trusts are not legal entities. Cameron and others⁵⁰ say that it is wrong to impose company law doctrines on trusts, which have no legal personality. They argue that doctrines such as the *Turquand* should not be imposed on entities that are not companies because persons who deal with trusts understand that trusts are not companies. When anomalies pertaining to the legal personality of trust arise, it is questionable whether the courts should continue to utilise company law doctrines, which are not compatible with the legal nature of trusts, to resolve legal questions on trusts. In *WT v KT*,⁵¹ the court observed that piercing the veil of a trust is a transplant from company law. However, the court did not concern itself with the compatibility of the doctrine with trust law. This prompted Stephens⁵² to ask whether trusts have veils that can be lifted.

Notwithstanding, the legal theory underlying trusts suggests that trusts have veils that separate them from their trustees. The interests of third parties require the piercing of such veils in appropriate circumstances. However, the question remains whether the perceived separate legal personality of trusts should only be recognised when the trusts are abused. Although the courts have abundantly made it clear that trusts are not juristic persons,⁵³ it is inescapable to realise that piercing the veneer of trusts results in recognising that, to some extent, trusts enjoy a status that could be described along the lines of legal personality. The pertinent question remains whether the separate legal personality of trusts should only be recognised when there is an abuse of the trusts or whether there are other considerations that necessitate bestowing separate legal personality on trusts. This question can be answered after

⁵⁰ Cameron and De Waal *Honoré's South African Law of Trusts* 95.

⁵¹ *WT v KT* para 31.

⁵² Stephens *When to Cry, "Sham"* 37.

⁵³ See, for instance, *Raath v Nel* 2012 ZASCA 86 para 13.

considering the *Turquand* rule, another principle that protects third parties from the nefarious acts of persons who operate behind legal veils such as the corporate veil.

2.5 The *Turquand* rule

The *Turquand* rule is a critical part of company law, established in *Royal British Bank v Turquand*.⁵⁴ It was imported into South Africa as part of English common law, which formed a substantial part of mercantile law and adjectival law in the colonial era. In *Turquand*, the court held that third parties could assume that company directors have the authority to enter into transactions on behalf of companies. This protects third parties from internal irregularities committed by the directors. Section 54 of the *Close Corporations Act* protects the interests of third parties who deal with the corporations when unaware that the members who acted for the close corporations did not have the authority to represent the close corporations. The close corporations are bound by the acts of their agents even if no authority had been conferred on the agents by the corporations. The exception is when the third parties knew, or reasonably ought to have known, of the absence of authority.

The *Companies Act* resembles the legislative codification of the *Turquand* rule.⁵⁵ It provides that a person dealing with a company in good faith is entitled to presume that the directors have complied with the rules of the company and its memorandum of incorporation. The exception is when it is shown that in the circumstances, a person reasonably ought to have known of the failure of the directors to comply with the company's rules and memorandum of incorporation.⁵⁶ Thus, a company will consequently be bound by the contract even when there is no compliance with matters of internal management. The consequences flow from the doctrine of constructive notice, which says that persons transacting with a company are taken to have knowledge about limitations on the directors or officers of the company.

⁵⁴ *Royal British Bank v Turquand* (1856) 119 ER 886.

⁵⁵ See s 20(7).

⁵⁶ Section 20 (7) of the *Companies Act*.

The doctrine of constructive notice presumes that a person who contracts with a company has knowledge of the company's articles of association.⁵⁷ This doctrine is founded on the right of every member of the public to access the memorandum of incorporation lodged with the Registrar of Companies.⁵⁸ However, when it comes to trusts, the public does not have the legal right to automatic access to trust deeds.⁵⁹ Thus, it is not easily possible for third parties to know whether the trustees have acted within the rules of the trusts.

Section 18 of the *TPCA* provides that the Master may give copies of trust deeds to outsiders who have sufficient interest in the trust instruments. This provision is despite that, unlike in the case of companies and close corporations, there is no central register for trusts.⁶⁰ This adds to uncertainties on the legal personality of trusts because the *Turquand* rule is reserved for entities that are clothed with juristic personality. Geach and Yeats⁶¹ submit that the complexity of applying the *Turquand* rule to trusts is the uncertainty about which conduct could be classified as an act of management of the trust. The courts do not easily comment on the *Turquand* rule in matters on trusts and often say that the need to address the issue has not arisen.⁶² This could be a clever judicial avoidance of the contentious issue. In *Vrystaat Mielies*,⁶³ the court supported the contention that the *Turquand* rule applies to trusts. The court relied on *Man Truck & Bus SA Ltd v Victor*,⁶⁴ in which it was accepted that applying the *Turquand* rule to trusts was necessary to prevent the trustee of a business trust from relying on non-compliance with the requirement to procure the necessary authorisation from his co-trustees.

The decision in *Man's Truck* illustrates the danger of translocating legal doctrines from one area of law to another.⁶⁵ Du Toit⁶⁶ argues that the applicability of the *Turquand*

⁵⁷ Geach and Yeats *Trusts: Law and Practice* 67.

⁵⁸ Geach and Yeats *Trusts: Law and Practice* 67.

⁵⁹ Geach and Yeats *Trusts: Law and Practice* 69.

⁶⁰ S 18 of the *TPCA*.

⁶¹ Geach and Yeats *Trusts: Law and Practice* 68.

⁶² See, for instance, *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) para 9.

⁶³ *Vrystaat Mielies (Edms) BPK v Nieuwoudt No* 2003 2 SA 266 (O).

⁶⁴ *Man Truck & Bus SA Ltd v Victor* 2001 2 SA 562 (NC).

⁶⁵ Cameron and De Waal *Honoré's South African Law of Trusts* 95.

⁶⁶ Du Toit 2004 *TSAR* 155.

rule is not dependant on the entity having its own legal personality since the *Turquand* rule operates as an equitable remedy in the modern law of association and that its application should be extended to trusts. The author emphasises that the abuse of trusts has driven the courts to resort to seemingly inappropriate remedies such as the *Turquand* rule to curb the abuse.⁶⁷ Evidently, this averment raises the question of the legal permissibility of such 'inappropriate' remedies and their impact on public confidence in the judiciary. In *Parker*,⁶⁸ the court stated that the *Turquand* rule might have a useful role in protecting outsiders who transact with trusts in good faith. However, the court could not apply the rule to the *Parker* case because the Land and Agricultural Bank had not contented that it has transacted with the trustees on the assumption that they were authorised by one of the trustees to procure the loans.⁶⁹

De Waal⁷⁰ submits that the theory on the legal personality of trusts is controversial. Whereas the courts say that trusts have no juristic personality, this basic principle has been undermined by several anomalies, which include the application of the *Turquand* rule. One of the problems with the application of the *Turquand* rule to trusts is that trusts do not enjoy legal personality, except as far as legislation provides otherwise. Although the *Turquand* rule has the advantage of protecting third parties, its application is rendered theoretically difficult because the principle underlying the *Turquand* rule - that the memorandum and articles of a company are public documents - is not self-evident in the case of trust deeds. There is no central register of trust deeds, as in the case of companies and close corporations.

Although courts say that the *Turquand* rule should apply to the law of trusts as a protective measure to third parties who conduct business with trusts,⁷¹ they have found it unnecessary to confirm whether the *Turquand* rule could be applied to trusts. In *Niewewoudt*, the court was sceptical about the applicability of the *Turquand* rule to trusts and doubted whether members of the public could simply be deemed to have

⁶⁷ See Du Toit 2013 *TSAR* 15 for a discussion.

⁶⁸ *Parker* para 18.

⁶⁹ *Parker* para 18.

⁷⁰ De Waal 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 100.

⁷¹ See, for example, *Man Truck & Bus SA Ltd v Victor*.

knowledge of the contents of the trust deeds, which are essentially private documents.⁷² In *Parker*, Cameron JA remarked that the *Turquand* rule could be useful in safeguarding the interests of parties who deal with trusts.⁷³

The uncertainty on the application of the *Turquand* rule to trusts is one of the challenges to legal certainty regarding trusts. More questions arose after *Parker* in which the respondent, Mr Parker, had established a trust in 1992 with himself, his wife and the family attorney as trustees. The trust deed put the Parkers and their descendants as beneficiaries. The family attorney resigned as a trustee in 1996 and was not replaced despite a provision in the trust deed that 'there will always be a minimum of three trustees in office'. It took the Parkers two years to inform the Master about the attorney's resignation as a trustee. The trust owed certain sums of money to the appellant, the Land and Agricultural Bank. In 2000, the bank sought the sequestration of the trust and Mr Parker. However, the Parkers argued that they did not have the power to bind the trust into legal agreements, which resulted in the debt because they had not complied with the stipulations of the trust deed, which required at least three trustees. Instead, the bank had provided the trustees' loans under the mistaken impression that they were entitled to procure the loans regardless of the third trustee's authorisation.⁷⁴

The salient question in *Parker* was whether a trust could be bound by a joint decision of trustees who do not make a quorum. The court held that the absence of the third trustee from the decision-making process, which saw the procurement of the loan, directly affected the validity of the trust's suretyship and position as a co-principal debtor. It meant that the trust lacked the minimum number of trustees to enter into a valid transaction. As such, the trust was not bound.⁷⁵ Clause 1 of the trust deed required a least three trustees to act together.⁷⁶

⁷² *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) para 9.

⁷³ *Parker* para 15

⁷⁴ *Parker* para 18.

⁷⁵ *Parker* para 13.

⁷⁶ *Parker* paras 6, 11.

Unfortunately, *Parker* did not provide the opportunity for consideration of the application of the *Turquand* rule to trusts. However, the court remarked that the *Turquand* rule could help safeguard the interests of outsiders who transact with trusts.⁷⁷ *Parker* confirmed that a sub-minimum number of trustees acting any time could not bind a trust.⁷⁸ While trusts can exist legally even if they do not have the requisite number of trustees, they lack legal capacity. The trustees cannot act on their behalf when entering into transactions that bind the trusts.⁷⁹ If they do so, the trusts are not bound. This means that when it comes to trusts, the *Turquand* rule does not apply. The day-to-day administration of trusts can be carried out by any number of trustees. When the trustees contract with third parties, they must meet a quorum stated in the trust deed.⁸⁰ As the court observed in *Parker*, the trust obligation exists only when there is a trustee to fulfil that obligation.⁸¹ When all trustees are no longer available to render their duties to the trust, the Master and the court may appoint a trustee.⁸²

Although the application of the *Turquand* rule to trusts may be a necessary development in the law to safeguard the interests of third parties, the position is not clear whether the *Turquand* rule applies to trusts purely on a legal developmental basis and which principles should guide such legal development. It may be worthwhile to look at Schreiner JA's caveat in *Crookes v Watson*,⁸³ in which he remarked that the legal development of the trust concept should not be limited by its association with areas of law whose application to the concept cannot be historically justified. In *Peterson v Claassen*,⁸⁴ the court said that the reason for establishing trusts does not entail that the relationship should be only be treated according to contract law. Similarly, issues about trustees and the fiduciary relationship between them and beneficiaries are not only governed by the principles of the law of contract. The result

⁷⁷ *Parker* para 15.

⁷⁸ *Parker* para 10.

⁷⁹ *Parker* para 10-11.

⁸⁰ See Cameron and De Waal *Honoré's South African Law of Trusts* 262.

⁸¹ *Parker* para 10.

⁸² S 7(1) of the *Companies Act*.

⁸³ *Crookes v Watson* 1956 1 SA 277 (A).

⁸⁴ *Peterson v Claassen* 2006 5 SA 191 (C).

is that all matters related to the constitution of an *inter vivos* trust (such as its creation, amendment and termination and the rights acquired by its beneficiaries) continue to be governed by the *stipulatio alteri*.⁸⁵ Other matters, such as the office of trusteeship and the latter's fiduciary duty are governed by the *TPCA*, not the law of contract, and common law.⁸⁶

2.6 The pros and cons of managing assets through trusts

2.6.1 Safe preservation of assets

Trusts are useful for protecting the assets of beneficiaries from squander.⁸⁷ The fact that trustees account to the Master protects the assets through regulated custodianship.⁸⁸ Trusts are particularly advantageous when the different beneficiaries disagree on the management and control of those assets. In the case of minors and other persons who cannot manage their own affairs, trusts are useful in safeguarding the assets and the interests of those persons through the services, knowledge and skills of the trustees.

2.6.2 Desirability over corporations and partnerships

Some of the characteristics of trusts are desirable in business as compared to companies and partnerships. For many years, trusts have been used as business vehicles.⁸⁹ However, the benefits of business trusts over companies and close corporations have not been acknowledged and fully exploited. If this was done, it would have been seen that trusts can be used in the realisation of estates, management of pension funds, protection of debenture holders, and as shields from state interference. Nel⁹⁰ says that trusts are suitable and beneficial vehicles for doing business because they are flexible, have transferrable assets which are separately owned, and are not heavily regulated. This summary of the benefits of using trusts

⁸⁵ Du Toit, Van der Linde and Smith *Fundamentals of South African Trust Law* 29.

⁸⁶ Du Toit, Van der Linde and Smith *Fundamentals of South African Trust Law* 29.

⁸⁷ TdP Chartered Accounts (SA) "Trust Guide" 13.

⁸⁸ See ss 6 and 7 of the *TCPA*.

⁸⁹ Nel 2014 *CILSA* 297.

⁹⁰ Nel 2014 *Obiter* 300.

for business purposes is a tacit acknowledgement of the benefits of managing assets through trusts.

2.6.3 Flexibility

One of the virtues of trusts is that they are flexible. This is an advantage, considering that the creation and operation of trusts relatively lack formality. Trusts are all-purpose institutions.⁹¹ Their inclusion in the list of juristic persons in statutes allows them to continue developing without attempts to equalise them with companies. This allows trusts to position themselves as flexible legal vehicles that could be applied in many fields. Legal personality could potentially reduce the flexibility of the trusts by attracting more regulation.

2.6.4 Limited liability

The assets of trusts are separate from the assets of the trustees and beneficiaries. This confers trustees and beneficiaries with a form of limited liability which protects their personal assets from the creditors of trusts.⁹² When trustees engage in litigation on behalf of trusts, they do so in their representative capacities. However, limited liability does not apply where trustees made personal undertakings as co-principal debtors. If trusts do not have enough assets to cover liabilities, the creditors are left without recourse.⁹³ On the other side, trustees risk personal liability when they breach their duty of due care, diligence and skill required by section 9 of the *TPCA*. Their liability may extend to delictual claims.⁹⁴ This type of legal exposure may hinder trustees from taking risky business ventures which give companies high returns.⁹⁵

2.6.5 Lesser administration costs

The costs of running trusts are less than those incurred in the administration of companies and close corporations. For instances, trusts are not obligated to engage the services of auditors, publish their financial statements, and pay annual fees as

⁹¹ *Parker* 23.

⁹² Auld 2013 *De Rebus* 20.

⁹³ See *Van Zyl v Kaye* 2014 4 SA 452 (WCC).

⁹⁴ Auld 2013 *De Rebus* 20.

⁹⁵ Auld 2013 *De Rebus* 20.

companies do to the Registrar of Companies. However, there is no consensus on this analysis. Swenson, Maritz and Boschoff⁹⁶ argue that a trust is difficult to establish and costly to administer.

2.6.6 Simpler taxation

It is less complex to file tax returns for trusts than it is for companies and close corporations.⁹⁷ However, the administration and taxation requirements of trusts entail that they must submit financial statements and tax returns.⁹⁸ This is massive administrative work that needs auditors and other qualified persons when large sums of money and a variety of transactions are involved.

2.6.7 Easier establishment and dissolution

The creation and dissolution of trusts are made easier and cheaper by their lack of legal personality.⁹⁹ The lack of legal personality dispenses with most formalities and costs faced by companies under the *Companies Act*.¹⁰⁰ In comparison to dissolving a company or a close corporation, it is easier and cheaper to dissolve a trust.¹⁰¹

2.7 Disadvantages of managing assets through trusts

2.7.1 Legal uncertainty

Attempts by the legislature to bestow legal personality on trusts for certain purposes may close the gap between trust theory and practice. Thus, it becomes necessary to consider whether Parliament should bestow trusts with legal personality. Trusts may also acquire legal personality naturally through the evolution of law. The bestowal of trusts with legal personality would make them more commercially attractive. Businesspeople want certainty about the entities with which they are dealing. The application (or non-application) of the *Turquand* rule to trusts is a cause of uncertainty.

⁹⁶ TdP Chartered Accounts (SA) "Trust Guide" 13.

⁹⁷ Toolkit 2016 <http://southafrica.smetoolkit.org/sa/en/content/en/5256/A-business-trust-as-a-legal-entity>.

⁹⁸ TdP Chartered Accounts (SA) "Trust Guide" 13.

⁹⁹ *Parker* para 23.

¹⁰⁰ For a discussion, see Hayton Modern International Developments in Trust Law 151-161.

¹⁰¹ Toolkit 2016 <http://southafrica.smetoolkit.org/sa/en/content/en/5256/A-business-trust-as-a-legal-entity>.

The analysis in this chapter shows that there is no judicial consistency on whether the *Turquand* rule could find application to trusts.¹⁰² However, there is no obvious reason for not applying the *Turquand* rule to trusts, as it has been applied to other non-corporate entities, like municipalities.¹⁰³ Also, the close resemblance between trusts and companies cannot be ignored.¹⁰⁴

2.7.2 *Obscurity*

Jooste¹⁰⁵ submits that limited regulation, the absence of administrative control, difficulties in accessing trust documents, lack of personal liability of trustees must be considered when determining whether trusts offer sufficient control. The Master avails trust deeds to persons who request them when convinced that such persons have legally sound interest in the trusts. The fact that it is often difficult to identify individual trustees can frustrate those who are deal with trusts. The absence of automatic public access to trust deeds and the lack of a centralised database of trust deeds is a disadvantage to businesspeople.

2.7.3 *Loss of control*

It is possible for the founders of trusts to lose control of the assets of the trusts when different persons act as trustees and administer and control the trust assets in a manner that is against the wishes of the founders.

2.8 *Conclusion*

This chapter provides a general perspective on the concept of legal personality in South African with a specific focus on trusts. The first part of the chapter analyses legal personality with regards to the distinction between natural and juristic persons to illustrate that trusts lie in no man's land between the two. Having established that trusts lie in a grey area between natural or juristic persons, the second part of the chapter examines the principle of limited liability, the corporate veil and the *Turquand* rule to demonstrate that trusts do not enjoy limited liability.

¹⁰² Nel *The Business Trust and its Role as an Entity in the Financial Environment* 115.

¹⁰³ *Potchefstroom se stadsraad v kotze* 1960 3 SA 616 (A).

¹⁰⁴ Nel *The Business Trust and its Role as an Entity in the Financial Environment* 218.

¹⁰⁵ Jooste 2005 *SALJ* 62.

This chapter also discusses *Parker*, one of the most relevant precedents on the possible relevance of the *Turquand* rule to trusts. Although the courts have held that trusts are not juristic persons, this position has been undermined by the invocation of company law doctrines such as piercing the corporate veil on matters concerning trusts. This approach undermines the foundation of the trust concept, leading to anomalies that gave rise to this study. The last part of the discussion in this chapter shows that trusts are unique creations of law and special vehicles for managing assets and liabilities by trustees on behalf of beneficiaries. Trusts are not legal persons for the simple that they are arrangements. The advantages and disadvantages of managing assets through trusts are compared in this chapter. Parliament can bestow trusts with legal personality through legislation. The discussion also shows that although trusts are not legal persons, some of their features make them desirable for the management of assets. The next chapter analyses the historical development of the trust concept and its incorporation into South Africa.

Chapter 3 Overview of the Legal Historical Development of Trusts

3.1 Introduction

The preceding chapter analysed the general principles of the law relating to legal personality and applied them to trusts. This chapter examines the importation of the concept of trusts to contextualise how the law of trusts found its way into South Africa. An analysis of the history of trusts is central to this study, as it potentially holds the answer to the question of whether it is legally desirable to treat trusts as legal persons. After examining the origin of the law of trusts in Germanic and English law, as well as how it rooted itself into South African law, this chapter further analyses several matters related to trusts, including the different types of trusts.

3.2 The origin of trusts

3.2.1 The Germanic Treuhand

The *Treuhand* is the earliest identified arrangement that resembles trusts. It developed in the transfer of property by inheritance and is credited to Germanic tribes that did not legally recognise testaments as binding methods of disposition.¹ Testate succession was contrary to their divine belief, hence the ownership of property vested in families.² Du Toit best explains the *Treuhand* as follows:

The *Treuhand* developed as an exception to the strict Germanic rules of succession. The exception was contained in the *Lex Salica*, a codification of the legal rules of the *Salian Franks*. Title 46 of the *Lex Salica* allowed property to be transferred to an intermediary, which transfer was accompanied by instruction as to the disposal of the property in favour of nominated beneficiaries after the transfer's death.³

The *Treuhand* acquired ownership of the property but did not enjoy the benefits of the property. The *Treuhand* also took an oath to transfer the property to beneficiaries.⁴ The most remarkable feature of the *Treuhand* is that an intermediary did not have a beneficial interest in the property.⁵ However, the *Treuhand* did not

¹ Du Toit *South African Trust Law Principles and Practice* 15.

² Olivier, Strydom and Van der Berg *Trust Law and Practice* 1-7.

³ Du Toit *South African Trust Law Principles and Practice* 12.

⁴ Du Toit *South African Trust Law Principles and Practice* 12.

⁵ Du Toit *South African Trust Law Principles and Practice* 15.

survive the arrival of the law of testate succession. Currently, the *Treuhand* remains in English law, albeit to a limited extent.

3.2.2 *The English trust*

Certain features of the *Treuhand* survived its demise. The features are recognisable in the legal institution of Use. Use is the predecessor of trusts. The concept of Use commenced in feudal times after the arrival of William in England from Normandy in 1066.⁶ The reason for the establishment of the Use was to safeguard the interests of landowners during elongated absences on military duty in crusades in medieval England between the 11th and 13th centuries.⁷ The practice developed by placing a fixed property under the name and care of a trusted person (called the *feoffee*) to be held for the benefit of another. Some of its features are found in contemporary law on trusts. Ownership was transferred by the *feoffer* to the *feoffee* in an arrangement called the *Cestui que use*. The property was restored to the crusader on his return. If the crusader did not return, the property was passed to his family. The next important development was the *Statute of Uses*,⁸ passed by Henry VIII in 1535. The statute effectively outlawed the Use in issues regarding land ownership.⁹ The advantages of the Use precipitated its demise.¹⁰ It was exploited for the avoidance of payment of feudal dues and liabilities.¹¹ Nevertheless, it remerged in the 17th and 18th Centuries as a trust.¹²

3.2.3 *Incorporation of trusts into South African law*

South Africa trust law derives from several sources, namely, English law, Roman-Dutch common law, legislation, and judicial precedents.¹³ The introduction of trusts in South African law is attributed to the English who brought it in the 19th Century through colonialism.¹⁴ When the English defeated Dutch settlers in the two South African Wars,

⁶ Du Toit *South African Trust Law Principles and Practice* 15.

⁷ Cameron and De Waal *Honoré's South African Law of Trusts* 25.

⁸ 27 Hen 8 c 10.

⁹ King, Van Vuren and Van der Westerhuizen *Estate Planning and Fiduciary Services Guide* 350.

¹⁰ The *Statute of Uses* was repealed by the *Law of Property Act* 15 Geo 5 c 20.

¹¹ King, Van Vuren and Van der Westerhuizen *Estate Planning and Fiduciary Services Guide* 247.

¹² Oguttu *Curbing Offshore Tax Avoidance: The Case of South African Companies and Trusts* 309.

¹³ Olivier, Strydom and Van der Berg *Trust Law and Practice* 19.

¹⁴ Nel 2014 *CILSA* 299.

they also established their system of law.¹⁵ Although the South African substantive law is mostly Roman-Dutch common law, the English brought procedural law and installed their mercantile law.¹⁶

The English are credited with coming up with the idea of trusts.¹⁷ The introduction of trusts in South Africa occurred through legal importation and the use of the words trust and trustee in wills, deeds of gifts, ante-nuptial contracts and land transfers. This occurred for about a century. The courts decided to give legal effect to uniquely South African trusts since no legislation regulated trusts. In 1833, the first decision on trusts was handed down in *Twentyman v Hewitt*.¹⁸ Thereafter, trusts developed through custom, judicial decisions, and eventually, legislation.¹⁹

In *Estate Kemp*, the Appellate Division had the opportunity to give answers to some of the questions which had been left open for a long time on trusts. The court was deciding on a trust created by a will. The court said that although South African law had adopted the terms trust and trustee, the English law of trusts formed no part of South African law at the time.²⁰ However, the court observed that the use of trusts had become firmly rooted in South African legal practice and that it was impossible to eradicate them. The court decided to accommodate and give effect to the testamentary disposition expressed in the trust. After *Estate Kemp*, the difficulty remained on how to appropriately accommodate testamentary trusts in South African law. It became apparent that the basic structure of trusts in South African law was analogous to the legal position of the parties to a *fideicommissum*.²¹ The temptation to identify trusts with the *fideicommissum* arose from the search for a plausible ground for the enforcement of trusts in a legal system in which they lacked a common law and statutory basis.²²

¹⁵ Olivier, Strydom and Van der Berg *Trust Law and Practice* 15.

¹⁶ See Moseneke *All Rise: A Judicial Memoir* 5 on the sources of South African law.

¹⁷ According to Professor Maitland, the greatest achievement in English jurisprudence is the development of the idea of trust - Maitland *Selected Essays* 129.

¹⁸ *Twentyman v Hewitt* 1833 1 Menz 156.

¹⁹ *Blann* at 859.

²⁰ *Estate Kemp* at 499.

²¹ *Estate Kemp* at 499.

²² De Waal 2000 *SALJ* 556.

Unfortunately, the reconfiguration of trusts distorted the theory and terminology of trusts for many years. In *Braun v Blann*,²³ the court declined to follow the decision in *Estate Kemp*. It held that testamentary trusts should be regarded as *sui generis* because the identification of trusts with the *fideicommissum* was historically and jurisprudentially inaccurate.²⁴ It was accepted that the courts had developed a unique African law of trusts by adapting the trust idea to the principles of South African law. Concerning testamentary trusts, the courts were faced with the task of giving effect to the legal nature of *inter vivos* trusts. *Crookes v Watson*²⁵ established the legal principles of *inter vivos* trusts. In that case, the court said that trusts are contracts that contain stipulations in favour of beneficiaries, who, upon acceptance, acquire indefensible rights under such trusts. Therefore, the creation and revocation of trusts are regulated by the law of contract. However, trusts are not mere contracts.²⁶

3.3 The trust

A trust is an arrangement by which one person - the trustee - obtains ownership and control of assets for the benefit of another - the beneficiary.²⁷ The trust is created through a legal instrument – the trust deed. To this end,

. . . a trust creates a relationship between parties in the form of an obligation regarding specific assets, and in favour of beneficiaries.²⁸

Trustees administer trusts on behalf of beneficiaries. The ownership and control of trust assets by the trustees is on behalf of the beneficiaries.²⁹ One of the essential elements of trust law is the functional separation between control of trust assets and their enjoyment. Kloppers and Kloppers³⁰ discuss several characteristics of trusts. They argue that the definition of trust is vague and that the term is used for several

²³ *Blann* at 859.

²⁴ *Blann* at 859.

²⁵ *Crookes v Watson* 1956 1 SA 277 (A).

²⁶ Cameron and De Waal *Honoré's South African Law of Trusts* 419.

²⁷ S 1 of the *TCPA*. See also s 1 of the *Income Tax Act* 58 of 1962 which defines a trust as a "fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person."

²⁸ Nel 2014 *CILSA* 299.

²⁹ *Parker* para 19.

³⁰ Kloppers 2018 *LitNet Akademies* (abstract).

concepts. This is because trusts are created for a variety of purposes. As such, the trust concept is not a one size fits all approach. It varies according to a particular purpose. This creates anomalies as far as the legal nature of trusts is concerned. Since trusts are not legal entities, they cannot own assets in their names.³¹ Trusts are mere "accumulation[s] of assets and liabilities".³² Also, trusts do not have *locus standi*. They cannot be named as parties to legal proceedings and cannot institute or defend actions in their names.³³ They must be represented by the trustees in their official capacities.³⁴

In *Standard Bank v Swanepoel*, the respondent acquired overdraft facilities for the trust from the bank. When the trust defaulted in its payment, the bank issued summons against it. An exception was raised on the basis that trusts are not legal persons and cannot be parties to contracts as they lack legal capacity. The court upheld the exception. However, the exception was dismissed on appeal when the court held that the naming of a trust as a party to a contract does not invalidate the contract when it is shown that the trustees acted on behalf of the trust in entering into the contract.³⁵ The appeal decision reaffirms the position in *Parker* that a trust can be bound to a contract if the trustees validly entered into a contract on its behalf.³⁶

Trustees own the assets of trusts and administer them jointly.³⁷ The separation of control and enjoyment of trust assets ensures that no sole trustee can be the sole beneficiary of a trust, for that would blur the lines and affect the integrity of the trust.³⁸ Trustees have no beneficial interests in the trust assets unless they are listed as beneficiaries in the trust deed.³⁹ Section 9 of the *TPCA* creates fiduciary obligations due to the duty of the trustees to manage trust assets for the benefit of other persons. It requires trustees to conduct the affairs of trusts with all due care, diligence, and

³¹ Pearse Trust 2017 <http://www.pearse-trust.ie/blog/bid/100844/Legal-Capacity-Of-Trusts-A-Must-Read-For-Trust-Practitioners>.

³² *Parker* para 10.

³³ Theron du Plessis Chartered Accounts (SA) "Trust Guide" 4.

³⁴ *Swanepoel v Standard Bank of South Africa Limited, In Re; Standard Bank of South Africa Limited v Swanepoel* [2013] ZAGPPHC 411.

³⁵ *Standard Bank v Swanepoel* [2015] ZASCA 71.

³⁶ *Parker* paras 9-10.

³⁷ *Nieuwoudt v Vrystaat Mielies* (Edms) Bpk para 16-17.

³⁸ See *Parker* para 19.

³⁹ *Estate Kemp* at 508.

skill expected of persons who handle the assets of others. This requirement ensures that trustees act diligently.⁴⁰ If they fail in this obligation, trustees can be held personally liable for delictual claims.⁴¹ Trusts are handy for many purposes. They can be used in wills to safeguard assets on behalf of children.⁴² They can also be used in contracts, including matrimonial agreements such as the ante-nuptial contract.⁴³ Besides, trusts are widely used to protect weak members of society and absent persons.⁴⁴ In all their forms, trusts entail a fiduciary obligation to hold property on behalf of others and administer it to the benefit of those persons.⁴⁵ Trusts are also used for charitable causes.⁴⁶

3.4 Formation of trusts

There are several requirements for the formation of a valid trust. The person who establishes a trust must have the intention to create a trust.⁴⁷ The intention must be lawful and the objectives of the trust must be clearly outlined. The founder of the trust must vest its control in the trustees for the benefit of identified beneficiaries. At times, the founder's directives on how the trust must be administered are contained in the 'letter of wishes', although this document is not binding on the trustees.⁴⁸ Without a single beneficiary, there can be no valid trust. The founder's intention to form a trust must be translated in writing in the form of a trust instrument. Thereafter, the property must be transferred to the trust.⁴⁹ Trustees must be appointed to administer the trust on behalf of the beneficiaries. The trustees must procure the authority of the Master to assume their official positions.⁵⁰ The trust deed is the most important document concerning the existence and validity of a trust. A trust deed creates a living trust, whereas a will creates a testamentary trust. These trust instruments specify the aims

⁴⁰ Sher 2006 Quarterly Law Review for People in Business 65.

⁴¹ Auld 2013 *De Rebus* 20.

⁴² Honoré "Trusts" 854 fn 39.

⁴³ Nel 2014 *CILSA* 299.

⁴⁴ Honoré "Trusts" 854 fn 39.

⁴⁵ Bogert The Law of Trusts 1.

⁴⁶ Bogert The Law of Trusts 1.

⁴⁷ Theron du Plessis Chartered Accounts (SA) "Trust Guide" 3.

⁴⁸ Theron du Plessis Chartered Accounts (SA) "Trust Guide" 6.

⁴⁹ Theron du Plessis Chartered Accounts (SA) "Trust Guide" 3.

⁵⁰ S 6(1) of the *TCPA*.

and objectives of the trusts, the identities of the beneficiaries, the rights and duties of trustees, and other matters concerning the administration and duration of the trusts.⁵¹ These provisions differ on the type of trust in question.

3.5 Types of trusts

Four criteria are used when classifying trusts. These are the motive for creation, source of assets; whether the trust deed allows the trustees discretion, and whether trusts property rights vests in the trustees or the beneficiaries.⁵² South Africa recognises three types of trusts. These are ownership trusts, *bewind* trusts and curatorship trusts. These are divided into two categories.

3.5.1 Inter vivos and testamentary trusts

Inter vivos trusts are created during the lifetime of their founders.⁵³ The founders donate assets to the trusts. They can list themselves as co-beneficiaries and appoint themselves as trustees. *Inter vivos* trusts include charity trusts, empowerment trusts, and business trusts.⁵⁴ On the other hand, testamentary trusts are created by wills and only come into being when the testators are deceased, the deceased estates have been wound up and the assets earmarked for the trusts have been transferred to the trusts.⁵⁵ The formation of testamentary trusts depends on the validity of wills that create them. These trusts are useful for safeguarding the assets of minors until they reach majority or until specified events occur. They may be discretionary or vested.⁵⁶

3.5.2 Ownership, bewind and curatorship trusts

Ownership trusts hold assets on behalf of beneficiaries.⁵⁷ The trust deeds set out the rights of the beneficiaries. The assets of these trusts are owned by the trustees who have no beneficial interests in the assets. The beneficiaries do not own the trust assets but have a beneficial interest. *Bewind* trusts, on the other hand, are created through

⁵¹ Theron du Plessis Chartered Accounts (SA) "Trust Guide" 6.

⁵² Olivier, Strydom and Van der Berg *Trust Law and Practice* 4.

⁵³ Hahlo 1961 *SALJ* 198; Jones 2008 *Personal Finance Newsletter* 9.

⁵⁴ TdP Chartered Accounts (SA) "Trust Guide" 7.

⁵⁵ De Waal 2000 *SALJ* 555. See also *Estate Kemp*.

⁵⁶ TdP Chartered Accounts (SA) "Trust Guide" 7.

⁵⁷ De Waal 2000 *SALJ* 561.

bequests by the founders.⁵⁸ The beneficiaries own the assets, although the administration of the assets vests in the trustees.⁵⁹ Curatorship trusts are created for beneficiaries who do not have the legal capacity to manage their own affairs - such as minors.⁶⁰ The ownership of the assets of curatorship trusts vests with the beneficiaries, although their administration is done by the trustees.⁶¹

3.5.3 Discretionary and vested trusts

Trusts are described as discretionary or vested according to the rights they give to beneficiaries. In a vested trust, the trust instrument identifies the beneficiaries and how their benefits should be allocated.⁶² The trustees have no discretion to determine beneficiaries. On the other hand, a discretionary trust gives the trustees the right to nominate beneficiaries from a group of people and to determine when and how those beneficiaries should benefit from the trust.⁶³ The right of a beneficiary under a discretionary trust does not form part of the estate of the beneficiary when the beneficiary is deceased.

3.6 Conclusion

In this chapter, the origin of the trust concept from its Germanic and English roots is examined. The chapter also discusses the incorporation of the trust concept into South African law and its historical development. The chapter shows that institutions such as the *fideicommissum* and the *stipulation alteri* were important vehicles for the reception of trusts into South African law, although it is clear that trusts should no longer be explained in terms of these principles. The historical analysis enhances an understanding of the origin and development of the trust concept. It potentially holds the key to the question of whether trusts should be endowed with the privileges of limited legal liability within the broader context of legal personality.

⁵⁸ De Waal 2000 *SALJ* 561; Jones 2008 Personal Finance Newsletter 9.

⁵⁹ Jones 2008 Personal Finance Newsletter 9.

⁶⁰ Jones 2008 Personal Finance Newsletter 9.

⁶¹ Jones 2008 Personal Finance Newsletter 9.

⁶² Jones 2008 Personal Finance Newsletter 9.

⁶³ Jones 2008 Personal Finance Newsletter 9.

The discussion in this chapter shows that trusts are unique creations of law and special ways of managing assets and liabilities by designated individuals (trustees) on behalf of others (beneficiaries). As such, an arrangement cannot enjoy legal personality and cannot be perceived as a legal person. The discussion on the formation of trusts, the types of trusts and the benefits of trusts show that although trusts are not legal persons, some of their features make them desirable for the management of assets. The following chapter critiques the anomalies in the *TPCA* and other legislation on the classification of trusts as entities with separate legal personalities.

Chapter 4 Anomalies between the *TPCA* and other Legislation on the Legal Personality of Trusts

4.1 Introduction

The previous chapters have laid the foundation for the proposition that the legal nature of trusts, in the context of whether trusts have legal personality, is not settled but uncertain and controversial. The principal statute on trusts - the *TPCA* - does not bestow legal personality on trusts.¹ While in some instances, other legislation considers trusts as legal persons, case law does not recognise trusts as such. The courts recognise that trustees can represent trusts in legal proceedings.² The general judicial position is that trusts are *sui generis*.³ While the assets of trusts and their liabilities form separate entities for specific reasons (such as taxation), they lack legal personality.⁴ Trusts are often regarded as legal persons, although at common law, they are regarded as mere collections of assets and liabilities.⁵ Some statutes treat trusts as if they have legal personality. In the light of the foregoing, this chapter analyses, on the one hand, the anomalies between the *TPCA* and other legislation that define trusts as legal entities, and on the other, case law which recognises and classifies trusts as entities with separate legal personality.

4.2 The Trust Property Control Act

The *TPCA* was enacted after the recommendations of the South African Law Commission. The Commission recommended a minimised statutory regulation of trusts. As such, the law on trusts is not codified.⁶ The codification of trust law would have unnecessarily stood in the way of the development of trust law and "would result in an undesirable rigidity"⁷ of trust law. Trusts are popular because they are versatile. Their development has mainly been through judicial decisions. Presumptively, the

¹ *Commissioner for Inland Revenue v Friedman* 1993 1 SA 353 (A).

² *Zinn v Westminster Bank* 1936 AD 89 at 98.

³ *WT v KT* para 26.

⁴ *Thorpe v Trittenwein* [2006] 4 All SA 129 (SCA) para 9.

⁵ Geach and Yeats *Trusts: Law and Practice* 14.

⁵ De Waal 2000 *THRHR* 365.

⁶ *Wunsh* 1988 *De Rebus* 547.

⁷ South African Law Commission "Report on the Review of Trusts Project 9" para 1.10.

codification of trust law will frustrate its natural development. This recommendation was an emphasis on the need for flexibility of trusts. The Commission opposed far-reaching statutory changes to trusts. It argued that trusts developed sporadically.⁸ Statutorily, trusts are not legal entities but mere arrangements of assets and liabilities through deeds of trust. Concerning the legal personality of trusts, the Law Commission recommended that trusts should not be vested with legal personality.⁹

The Law Commission opined that extensive statutory amendments were not necessary to vest juristic personality on trusts. However, the absence of legal personality does not lead to significant practical challenges.¹⁰ The Commission's approach was similar to the position of the Appellate Division, which held that trusts are not legal persons.¹¹ De Waal¹² asks whether the status of trusts as potential juristic persons could be overlooked in contemporary times. Nel¹³ queries whether the lack of legal personality on trusts reflects reality. The use of trusts in contemporary times has nudged Parliament to give trusts juristic personality for specific purposes.

Section 12 of the *TPCA* differentiates the personal assets of trustees from the assets of trusts. It stipulates that trust property does not include the estates of the trustees unless the trustees are beneficiaries of the trusts, in which case the trustees will be entitled to the assets. This definition puts trusts close to legal personality. De Waal¹⁴ says that section 12 confirms that trustees are responsible for two estates – their estates and the estates of the trusts. The two estates are separate. Trustees must hold trust property in a manner that distinguishes it from their estates.¹⁵ Botha¹⁶ says that since trust assets do not form part of the private assets of the trustees, the beneficiaries also do not have ownership of the trust assets. The conclusion is inescapable that the "trust" itself has some legal standing and that separateness of

⁸ South African Law Commission "Report on the Review of Trusts Project 9" para 23-32.

⁹ *Wunsh* 1988 *De Rebus* 547.

¹⁰ South African Law Commission "Report on the Review of Trusts Project 9" para 81.

¹¹ *Wunsh* 1988 *De Rebus* 547.

¹² De Waal 1993 *THRHR* 1.

¹³ Nel *The Business Trust and its Role as an Entity in the Financial Environment* 117.

¹⁴ De Waal 2000 *SALJ* 561.

¹⁵ *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* [2006] ZASCA 132 576G.

¹⁶ Botha and Rossini *The South African Financial Planning Handbook* 827.

trust estates must be recognised.¹⁷ Despite the common law position and judicial precedents, trusts are often treated as legal entities in practice.¹⁸

These anomalies have attracted debate in judicial and academic circles. When a sole trustee leaves their position as a trustee, he/she renounces control of the property of the trust.¹⁹ When this happens, it is unclear on whom ownership of the property of the trust will vest. Clothing a trust with legal personality would end this conundrum. Several anomalies have arisen on the sequestration of trusts, the taxation of trusts, and trusts which are beneficiaries of testamentary bequests. The separate registration practices in connection with immovable property have also caused some problems. Initially, the Law Commission considered that trusts should be bestowed with separate legal personality.²⁰ It changed its position and pointed out that the development of trust law has been sporadic in judicial precedents and that the law of trusts continues to adapt from English law.²¹ The legal personality of trusts and taxation were some of the areas on which the Law Commission did not pertinently take a stance. The Commission opined that trust law should not be changed drastically and that its flexibility and multifarious purposes contribute to its popularity. Relevant legislation giving rise to anomalies in the recognition of the legal personality of trust are explored below.

4.3 The contradictory position in other legislation

4.3.1 The Income Tax Act

Entities are taxed if they are defined as persons in legislation.²² Jooste²³ argues that trusts are persons for income tax purposes if they are included in the definition of persons who must be taxed and if they are defined as such in the Interpretation Act.²⁴ For a considerable time, this posed a legal complication, as it was trite that at common

¹⁷ Botha and Rossini *The South African Financial Planning Handbook* 827.

¹⁸ Olivier, Strydom and Van der Berg *Trust Law and Practice* 61.

¹⁹ De Waal 1993 *JCRDL* 7-8.

²⁰ South African Law Commission "Report on the Review of Trusts Project 9" para 82.

²¹ South African Law Commission "Report on the Review of Trusts Project 9" para 1.10.

²² Jooste *Income Tax Reporter* 126.

²³ Jooste *Income Tax Reporter* 128-129.

²⁴ *Interpretation Act* 33 of 1957.

law, trusts are not juristic persons and that they cannot be treated as if they had legal personality. Since trusts were not juristic persons, they were not subject to taxation. The revenue collector only had the legal authority to tax persons.

In *Friedman v CIR*,²⁵ the court held that income retained in a trust is not taxable because a trust is not a legal person. The court said that trustees are representative taxpayers for all undistributed income in possession of the trust. The court relied on an earlier precedent in which it was held that

...neither our authorities nor our courts have recognised it as a *persona* or entity... it is trite law that the assets and liabilities in a trust vest in the trustee.²⁶

The court held that a trust is not a company and that one cannot say that the statutory definition of person in section 1 of the *Income Tax*, which included a deceased estate, could be extended to trusts.²⁷ The basis of the court's approach was that in common law, a trust is an arrangement of assets and liabilities. The *Friedman* case led to the amendment of the definition of 'person' in section 1 of the *Income Tax Act*.²⁸ The revised provision includes trusts in the list of legal persons. The classification of trusts as persons implies that trusts attain legal personality for income tax purposes and that they are distinct from their beneficiaries and are liable to taxation.²⁹ This heightens the anomaly surrounding the precise legal nature of trusts. Section 1 of the *Income Tax* stipulates that a trust is a trust fund that consists of cash or other assets administered and controlled by a fiduciary, where such person is appointed under a deed of trust or under a will of the deceased.³⁰ The definition conspicuously includes assets but excludes liabilities.³¹ This contradicts the common law position that a trust is an accumulation of assets and liabilities. If one inquires what prompted Parliament to include trusts in the definition of persons, one finds that a trust is an entity whose

²⁵ *Friedman v CIR: Philip Frame Will Trust* 1991 2 SA 340 (W).

²⁶ *Friedman* para 11.

²⁷ *Friedman* para 11.

²⁸ *Income Tax Act* 58 of 1962.

²⁹ Geach and Yeats *Trusts: Law and Practice* 2007 at 234.

³⁰ S 1 of the *Income Tax Act* 58 of 1962.

³¹ DuPlessis 2009 *South African Mercantile Law Journal* at 324.

assets and liabilities vest in its trustees only for the purposes of control and administration.

The liability of trusts to taxation is informed by their residence.³² If a trust is a resident in South Africa, it will be taxed on all of its income, whether the income is derived in South Africa or from other states. A trust is a resident if it is established in South Africa or if it is managed in the Republic.³³ De Koker³⁴ submits that to determine in which country a trust is effectively managed, one looks at where the trustees reside or meet to handle matters of the trust. In *Nathan's Estate v CIR*,³⁵ the court said a trust was resident in Natal because the trustees were residents in that province and the trust fund was administered from that province.

The definition of trusts in the *Income Tax Act* requires refinement to eliminate anomalies. For purposes of legal certainty, the statute could be amended to adopt the definition of trusts which is found in the common law. The classification of trusts as persons implies that trusts are legal entities that are independent of their trustees. However, this is not the position of the *TPCA*, which denotes that trusts are arrangements of assets and liabilities. The taxation of trusts departs from the theoretical view that trusts are not legal persons.

4.3.2 The Insolvency Act

The *Insolvency Act* 24 of 1936 employs trustees in the administration of liquidation accounts of insolvent estates.³⁶ It regards trusts as debtors for the purposes of insolvency.³⁷ This means that a trust which has fallen into debt may not be liquidated but could be sequestrated.³⁸ This is important since only natural persons may be sequestrated and only juristic persons may be liquidated. There is a view that trustees are subjects of trusts and that they are vested with trust assets in their representative

³² Victor and King *Estate Planning & Fiduciary Services Guide* 241.

³³ De Koker and Williams *Silke on South African Income Tax* at 14,43.

³⁴ De Koker and Williams *Silke on South African Income Tax* at 14,43.

³⁵ *Nathan's Estate v CIR* 1948 3 SA 866 (N).

³⁶ See the definitions of account and trustee in s 2 of the *Act*.

³⁷ *Magnum Financial Holdings v Summerly* 1984 (1) SA 160 (WLD) at 163.

³⁸ See in general, Pace and Van der Westhuizen *Wills and Trusts*.

capacities. If this approach is followed when a trust is insolvent, it will not make legal sense to sequester a trustee in his official capacity as a representative of the trust because a trustee does not own the assets of the trust in his/her personal capacity.

It follows that if trusts are sequestered and not liquidated, they could be rehabilitated like all persons who are rehabilitated.³⁹ Since trusts do not have separate legal personality, it is debatable whether it is correct to rehabilitate them. Victor and King⁴⁰ deal with the question of whether trusts are legal persons. They say that the courts have steadily refrained from clothing trusts with legal personality and that this has caused several problems for the legislature over the years.⁴¹ The authors conclude that trusts acquire quasi-legal personality in certain situations such as sequestration and taxation for income tax. This implies some form of legal personality. Section 11 of the *TPCA* provides that trust property is clearly identifiable as trust property and that it cannot vest in the insolvent estates of the trustees.

When a trustee is sequestered, the assets of the trust cannot be attached. This means that the assets of the trust are separate estate from that of the deceased or insolvent trustee. The statutory separation and protection of the trustee's estates will only apply if the trust is duly registered with the Master in accordance with the *TCPA* and the trustee's appointment is approved.⁴² Fortunately, some other statutes stipulate that trusts are juristic persons. These will now be examined.

4.3.3 *The National Credit Act*

The *National Credit Act* 34 of 2005 defines a trust as, *inter alia*, a juristic person.⁴³ Section 1 of the Act provides that a trust is a juristic person if it has three or more individual trustees.⁴⁴ This means that for the purposes of the National Credit Act, a trust with less than three trustees is not considered as a juristic person. Section 1 further recognises a trust as a juristic person if the trustee is a juristic person. Thus, if a trust has less than three trustees but one of the trustees is a juristic person, that

³⁹ Olivier, Strydom and Van der Berg *Trust Law and Practice* 49.

⁴⁰ Victor and King *Estate Planning and Fiduciary Services Guide* 358.

⁴¹ Victor and King *Estate Planning and Fiduciary Services Guide* 358.

⁴² Victor and King *Estate Planning & Fiduciary Services Guide* 359.

⁴³ S 1(d) of the *National Credit Act* 34 of 2005.

⁴⁴ S 1(d)(a) of the *National Credit Act* 34 of 2005.

trust is considered as a juristic person by the Act. Once a trust meets these conditions, it may be registered as a credit provider in its capacity as a juristic person. The bestowal of legal personality for a specific objective undermines the long-established principle that a trust is not a legal person. The precise legal nature of trusts is still shrouded in uncertainty.⁴⁵

4.3.4 *The Consumer Protection Act*

The *Consumer Protection Act* 68 of 2008 echoes the provisions of the *National Credit Act*. It defines a juristic person as, *inter alia*, a trust established in terms of the *TCPA*. It says that trust which has an annual turnover of R2 million or less is a consumer and that it can benefit from the protection afforded by the Act.

4.3.5 *The Firearms Control Act*

Section 1 of the *Firearms Control Act*⁴⁶ defines a juristic person as, *inter alia*, a trust. This means that a trust can procure and hold firearms in its own name as regulated by the Act. The addition of a trust as one of the juristic persons listed by this Act was achieved by the *Firearms Arms Control Amendment Act*.⁴⁷ The amendment altered the definition of a juristic person to encompass a trust. For a trust to qualify as a juristic person under this Act, the trust deed must have a clear objective whose achievement depends on the possession of firearms and ammunition.⁴⁸

4.3.6 *The Deeds Registries Act*

Section 102 of the *Deeds Registries Act*⁴⁹ defines a person as, *inter alia*, a trust. This section was inserted by an amendment following a judgement in which the court dealt with the transfer of property to a trust.⁵⁰ The court held that a trust is not a legal person and that trustees are not functionaries or agents of the trust. As such, the

⁴⁵ *Absa Bank Limited v The Trustees for the Time Being of the Johan Rademan Family Trust* [2014] ZAWCHC 158 para 12.

⁴⁶ *Firearms Control Act* 60 of 2000.

⁴⁷ *Firearms Control Amendment Act* 28 of 2006.

⁴⁸ Section 7 of the *Firearms Control Amendment Act* 28 of 2006.

⁴⁹ *Deeds Registries Act* 47 of 1937.

⁵⁰ The amendment followed the court judgements in *Mkangeli v Joubert* [2002] ZASCA 13 and *Joubert v Van Rensburg* 2001 1 SA 753 (WLD).

court reasoned, a trust cannot own property in its own name. It said that ownership of trust property vests in the trustees as in their individual capacities, not as office bearers.⁵¹ The court *a quo* held that the practice of registering trust property in the name of trustees was contrary to the Deeds Registry, as it led to legal uncertainty regarding the ownership of the property as the names of the individuals are not mentioned.⁵² On appeal, the court order was reversed. The appeal court held that ownership of trust property depends on the wording of the trust deed and that although the trustees in question were technically not the owners of the trust property, they were in charge of the trust property.⁵³ De Waal⁵⁴ submits that the registration of the trust property in the name of the trust assumes that the trust has a legal personality and is an entity that is independent of its trustees.

4.3.7 *The Companies Act*

The *Companies Act* stipulates that a juristic person includes "a trust, irrespective of whether or not it was established within or outside the Republic". Section 2(2) provides that a juristic person such as a trust controls another person or business if it can influence and control the majority votes of the trustees or the appointment of the trustees. However, the legal personality of trusts defined by the *Companies Act* is limited. It does not mean that trusts will now be liquidated like companies, as they are still subject to sequestration.⁵⁵ This is so in that Chapter 14 of the *Companies Act* only provides for the winding up and dissolution of companies. Since trusts are not defined as companies, they are sequestrated. Cameron and others⁵⁶ argue that if legislation confers trusts with legal personality, trusts may institute and defend legal proceedings in their names, subject to the fact that the trustees will represent the trust in the proceedings.⁵⁷ Thus, an action relating to trust affairs, such as damage to the trust property, must be brought by the trustees in their official capacity.⁵⁸ It is not clear whether references to a person in the *Companies Act* include trusts. The

⁵¹ *Joubert* case para 9.

⁵² *Joubert* para 10.

⁵³ *Mkangeli v Joubert* para 9.

⁵⁴ De Waal 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 100.

⁵⁵ *Melville v Busane* [2012] 1 All SA 675 (ECP) para 14-16.

⁵⁶ Cameron and De Waal *Honoré's South African Law of Trusts* 419.

⁵⁷ *Investec Bank v Lefkoiitz* [1996] ZASCA 136.

⁵⁸ *Shahmahomed v Hendriks* 1920 AD 151.

legislative intention in this regard is uncertain. The implication of the provision on the future development of trusts is also uncertain. If it is not for this recognition, trusts will not qualify as juristic persons because they are not registered according to the *Companies Act*.

4.4 The judicial position

4.4.1 Trusts are not legal persons

As alluded to earlier, trust law developed through cases, unlike company law, whose development has mainly been through legislation.⁵⁹ A review of the case law shows a strong affirmation of the long-held judicial view that trusts do not have legal personality.⁶⁰ The courts have emphasised the principle that ownership and control of trust assets are separate from enjoyment. The idea is that trustees exercise ownership and control of trust assets for the beneficiaries.⁶¹ Although trustees can also be beneficiaries, they cannot be the sole beneficiaries as that will defeat the trust concept.⁶² Once appointed, trustees have fiduciary duties to the beneficiaries and must always act in their best interests.

4.4.2 A trust is sui generis

The legal nature of trusts lies in between companies, close corporations, and partnerships.⁶³ This is due to the representation of desirable aspects of all these entities in trusts.⁶⁴ In *Badenhorst v Badenhorst*,⁶⁵ the court held that trusts special kinds of legal institution. This is so in that the trustees own the assets of trusts but have no beneficial interest in those assets.⁶⁶ The *sui generis* nature of trusts is captured in the definition of a trust as:

⁵⁹ Wood-Bodley 2011 *SALJ* 233.

⁶⁰ See, for instance, *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 3 SA 833 (A) at 840F-G; *Commissioner for Inland Revenue v Friedman* 1993 1 SA 353 (AD) para 10 and *Parker* para 10. See also *Lupacchini v Minister of Safety and Security* 2010 6 SA 457 (SCA) para 1.

⁶¹ See the historical discussion in *Parker* para 19.

⁶² *Parker* para 19.

⁶³ Nel 2014 *Obiter* 300.

⁶⁴ For a further discussion, see Sitkoff 2005 *University of Illinois Law Review* 31.

⁶⁵ *Badenhorst v Badenhorst* 2006 2 SA 255 (SCA) para 9.

⁶⁶ *Blann* at 859E-H.

... a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or for the furtherance of a charitable or other cause.⁶⁷

Thus, trusts are not legal persons. They are also not natural persons. They are institutions of their own special kind, created by law and by the courts for expediency purposes.

4.4.3 A trust is an accumulation of assets and liabilities

Although the trust estate is a separate entity, it does not have a legal personality, for it is merely "an accumulation of assets and liabilities".⁶⁸ Trusts are not legal persons in the same sense as companies and other juristic persons.⁶⁹ The estates of trusts vest in the trustees, whose obligation is to administer them through the prescripts of the trust deeds.⁷⁰ Trust deeds are important in defining the capacity of trusts. The *Parker* case was a perfect opportunity for the court to decide on the legal personality of trusts. However, the court was reluctant to clarify this point. Notwithstanding, it affirmed that trusts are legal persons only for the purposes of specific legislation which makes such provision.⁷¹

They derive legal capacity from the capacity-defining condition in the trust deeds, i.e. the stipulations on the minimum number of trustees.⁷² If the number of trustees falls below the minimum, the trust ceases to possess a legal capacity. The implications for the lack of capacity of a trust are far-reaching in relation to the authority of the trustees to contract as agents of the trust. Before discussing these implications, it is necessary to examine the difference between legal capacity and authority. While legal capacity entails the acquisition of rights and duties in law as a separate entity capable of entering into transactions and initiating and defending legal processes, legal authority refers to the competence of the legal person's agent to enter into such transactions. In circumstances where the trust has an inadequate number of trustees

⁶⁷ *Lupacchini v Minister of Safety and Security* para 1.

⁶⁸ *Parker* para 10.

⁶⁹ *WT v KT* para 26.

⁷⁰ *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 3 SA 833 (A) at 840G-H.

⁷¹ *Parker* para 10.

⁷² *Parker* para 11.

holding office at the relevant time, the trust has no legal capacity. It then follows that the trustees have no authority to enter into agreements as agents of the trust, for their principal does not have legal capacity.⁷³ Any transaction entered into by an agent without authorisation by the principal is void in law.

A situation in which a sub-minimum of trustees cannot bind the trust is similar to that of the directors of a company acting *ultra vires*.⁷⁴ In company law, the capacity of a company to enter into legal agreements is dependent on the objective clause in its memorandum of association.⁷⁵ This clause sets out the business of the company by stipulating the company's area of trade. These objects may be express or implied. If the company acts outside its objects, such acts are void as it is *ultra vires*. *Ultra vires* act voids the transaction into which the company entered. It does not matter whether the company consented to engage in that act or not. The directors of a company cannot bind the company to an agreement that is *ultra vires*.

4.4.4 The Parker case

This is one of the most significant judicial pronouncements on the law of trusts in South Africa. It advanced trust law in a novel way that had not even been contemplated by the parties. The court said that for a trust to possess legal capacity, it must have the necessary number of trustees as laid out in the trust deed. If this is not the case, then the trust lacks legal capacity and cannot enter into transactions. If the trustees contract as agents of the trust in such a situation, the ensuing contract is a nullity.⁷⁶ The facts were that the respondents were trustees of a family trust. The trust instrument required a minimum number of three trustees. However, the Parkers did not strictly adhere to this stipulation. They took large loans from the appellant and bound the trust as a surety and co-principal debtor for the payment of the debts. The

⁷³ PricewaterhouseCoopers 2006
https://www.saica.co.za/integritax/2006/1366_A_landmark_decision_in_South_African_trust_law.htm.

⁷⁴ See *Ashbury Carriage Iron Company v Riche* 1817 LR 7HL 653 for a discussion of the *ultra vires* doctrine.

⁷⁵ Section 66 (1) of the *Companies Act* 71 of 2008.

⁷⁶ PricewaterhouseCoopers 2006
https://www.saica.co.za/integritax/2006/1366_A_landmark_decision_in_South_African_trust_law.htm.

business for which the loans were taken did not go well. The bank sequestrated the trustees. The trust argued that it was not bound to the agreement because at the time the loan was taken, it did not have legal capacity because it lacked the requisite number of trustees.

The court held that a trust is not a legal person but a mere accumulation of assets and liabilities administered for the benefit of third parties.⁷⁷ It reasoned that since a trust does not have legal capacity, it must be administered strictly according to the prescripts of the trust deed and that it may only act through its trustees, duly appointed and constituted. The court further held that a trust could not be bound into transactions that fall beyond the purpose of the trust stipulated in the trust deed.⁷⁸ In the present case, the court said that the trust lacked the legal capacity to act as it was not properly represented by the requisite minimum of trustees. This reasoning followed the precedent set in *Nieuwoudt* in which the court held that trustees must act jointly for their action to bind the trust, unless there is a provision in the trust deed that allows them not to act as a quorum.⁷⁹ This rule emanates from the joint ownership of trust property by the trustees.⁸⁰ The court also held that the trust was not properly before the court since the trustee who had signed the appeal papers had been declared insolvent. The trust deed stipulated that insolvency was a ground for the immediate termination of trusteeship.⁸¹ As such, the trust had no minimum trustees to authorise the appeal. For that reason, the appeal was refused. The trustees who had signed the trust as surety and co-principal debtors to the amounts loaned from the bank were held personally liable for the loans.

4.5 The consequences of the anomalies on the legal personality of trusts

Trusts are highly unregulated in South Africa, leading to their popularity.⁸² The lack of regulation has led many trustees into believing that they may do as they please in

⁷⁷ *Parker* para 10.

⁷⁸ *Parker* para 10.

⁷⁹ *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) para 16.

⁸⁰ *Parker* para 15.

⁸¹ *Parker* para 5.

⁸² Geach and Yeats *Trusts: Law and Practice* 4.

running the affairs of trusts.⁸³ This results in the abuse of trusts. The *Parker* case dealt with, to some extent, the potential abuse of trusts in instances where the trustees are also the sole beneficiaries of the trust. It opens trusts to abuse by the trustees who are also beneficiaries.⁸⁴

Abuse of trusts results when trustees are sole beneficiaries of the trusts. In that capacity, the trustees cannot exercise objectivity in running the affairs of the trusts. Their subjective acts result from their beneficial interest in the trusts.⁸⁵ To close this weak point, the appellate court suggested that the Master must ensure that there is an independent trustee to guarantee the separation between trustee and beneficiary.⁸⁶ The independent trustee does not need to be one of the professionals who have exercised trusteeship in past cases, such as attorneys and accountants.

Another angle through which trusts can be abused is the evasion of creditors by the trustees. In some cases, creditors have found themselves claiming against individual trustees of discretionary trusts with significant assets but without assets in their individual capacity.⁸⁷ The creditors then have to go through the arduous task of trying to convince the courts to "go behind the trust" to declare trust assets as assets of the trustees in their personal capacities.⁸⁸ The courts are not readily convinced to do so and have consistently refused. In *Van Zyl v Kaye*,⁸⁹ the trustee of a family trust lived in premises owned by the trust and paid all mortgage bonds on behalf of the trust. The trust was a family trust in which Mr Kaye and his wife and descendants were beneficiaries. When Mr Kaye fell into arrears with his creditors, the court refused to declare the trust a sham and held that if it did so, trusts would be unjustly held liable for transactions concluded by trustees in their personal capacities outside the trust

⁸³ Geach and Yeats *Trusts: Law and Practice* 4.

⁸⁴ *Parker* para 19.

⁸⁵ On 06 March 2017, the Chief Master issued a directive which requires the Master to consider appointing an independent trustee where the trust is registered for the first time and it emerged from the trust deed that the trust is a family business trust.

⁸⁶ *Parker* para 35.

⁸⁷ Rhodie 2015 *Without Prejudice* 55.

⁸⁸ Rhodie 2015 *Without Prejudice* 55.

⁸⁹ *Van Zyl v Kaye* 2014 4 SA 452 (WCC).

arrangements. The abuse of trusts in this way calls for innovation in protecting trusts and creditors from abuse.

4.6 Conclusion

It is seen in this chapter that some pieces of legislation contradict the *TPCA* by treating trusts as entities with legal personality. However, this is not the same in case law where the courts have consistently emphasised that trusts are not legal persons. The discrepancies in the legal personality of trusts make trusts susceptible to abuse. However, it does not create practical difficulties since trusts do not have a legal personality outside of the statutes which confer them such personality. The assets and liabilities of trusts are vested in the trustees. The next chapter examines the legal personality of trusts in Quebec and the rest of Canada.

Chapter 5 Legal Personality of Trusts in Canada

5.1 Introduction

The previous chapter examined the anomalies between the *TCPA* and other pieces of legislation on the legal nature of trusts in South Africa. While the preceding chapters detailed the concept of legal personality and how it hardly fits into trusts, it is imperative to look at how other jurisdictions treat trusts in relation to legal personality. This could assist in understanding how trust law could be reformed to emulate best practices. It is trite that South African law is a mixture of Roman-Dutch common law, English common law and comparative constitutional law from jurisdictions such as the USA, Germany, India and Canada.⁹⁰ Therefore, examining how one of these jurisdictions treats trusts in relation to legal personality will contribute to this study. In this spirit, this chapter discusses the legal personality of trusts in Canada in general and Quebec in particular. The chapter seeks to determine the similarities and differences in the legal personality of trusts in Canada and South Africa with a view to taking some learning points which could be used in reforming trust law in South Africa.

5.2 The history of trusts in Canada

Canada was colonised by the English, who, as they did in all their colonies, transplanted English legal doctrines. The concept of trust was one of many transplanted legal doctrines and principles. In the early 19th Century, English settlers in Canada used trusts.⁹¹ When trust law arrived in Canada, it was subsequently modified in line with legal developments in English legislation and jurisprudence.⁹² It appears that when the trust arrived in Canada, it had a peculiar character that placed it half-way between juristic personality and agency.⁹³ The position of the trust in Canada should be understood in the context that the Federal Canadian government is a party to the Hague Convention on the Law Applicable to Trusts.⁹⁴ Hence, several

⁹⁰ Hahlo 1996 Virginia Law Review 12.

⁹¹ Waters *Water's Law of Trusts in Canada* 1.

⁹² Waters *Law of Trusts in Canada* 6.

⁹³ Waters *Law of Trusts in Canada* 6.

⁹⁴ The Hague Convention on the Law Applicable to Trusts and on their Recognition (1985) (the Hague Convention hereinafter).

provinces in Canada aligned their legislation with the Hague Convention.⁹⁵ The Hague Convention defines a trust as an arrangement or a relationship in which the trustees hold property and administer it for the benefit of someone else or to further a particular purpose.⁹⁶ This definition is adopted in Canadian legislation. Waters⁹⁷ identifies the essential elements of the trusts in Canada and emphasises that a fiduciary relationship between the persons who act as trustees and the beneficiaries creates a trust. Since a trust is a relationship, it is not recognised by the common law as a legal person in Canada.⁹⁸ The trustees control the assets of the trust for the beneficiaries.⁹⁹ Therefore, the trustees must act in the best interests of the beneficiaries at all times.

Trustees have a legally recognised interest in the assets of the trusts that they administer, while the beneficiaries derive fruits from the assets.¹⁰⁰ When the trustees hold trust property, they do so separately from their personal estates. Waters further points out that trust property is always identifiable either as land, chattels, or funds.¹⁰¹ Before a trust is established, specific items must be set aside and earmarked for transfer to the trust. Therefore, a trust cannot be established without any assets, since there will be nothing for the beneficiaries. Trustees must control and manage the property for the beneficiaries. Notably, the assets of the trust belong to the trust, even if they are registered in the trustee's name without mention of the trust.¹⁰²

Miller¹⁰³ submits that trusts offer most of the relevant advantages of the corporate form without their inapt features. For instance, the division of legal and equitable ownership of trust property emulates the separation of ownership and control of corporate property, permitting the delegation of control of the property to expert management.¹⁰⁴ For this reason, the trust property is not affected by the insolvency

⁹⁵ Waters *Water's Law of Trusts in Canada* 14.

⁹⁶ Abrie and Graham *Estates & Financial Planning* 27-28.

⁹⁷ Waters *Water's Law of Trusts in Canada* 1-3.

⁹⁸ Frostiak *Taxation of Trusts and Estate: A Practitioner's Guide* 3.

⁹⁹ Waters *Water's Law of Trusts in Canada* 1-3.

¹⁰⁰ Waters *Water's Law of Trusts in Canada* 2.

¹⁰¹ Waters *Law of Trusts in Canada* 67.

¹⁰² Waters *Law of Trusts in Canada* 67.

¹⁰³ Miller 2010 *Queen's LJ* 445.

¹⁰⁴ Miller 2010 *Queen's LJ* 445.

of one or more trustees. As such, the creditors of trustees have no legal claim to the assets of trusts, which are held by the trustees in separate estates.¹⁰⁵ If trustees wrongfully mix trust assets with their own assets, the trust property remains beyond the creditor's reach until such property is no longer identifiable.¹⁰⁶ As the case in the management of corporations, the management of trust property is subject to fiduciary structures which guard against carelessness and disloyalty. Miller¹⁰⁷ further submits that the failure of the trust to compete meaningfully with corporations begs explanation. His view is that the trust should have been more competitive since it offers many of the valued characteristics of the corporate form, plus the added advantage of greater flexibility. However, Sitkoff¹⁰⁸ argues that the commercial appeal of trusts has been diminished by inadequacies in the law governing business trusts.

In Canada, trusts are established under ordinary trust law principles. Matters of entity status, structure, governance and remedies have been left to a body of law developed for private donative trusts.¹⁰⁹ Yet, most business trusts bear little resemblance to donative trusts in practice, function and composition. These differences have led to uncertainty about the application of ordinary trust law principles in commercial contexts.¹¹⁰ Sitkoff¹¹¹ explains that some courts have deemed business trusts invalid on the ground that they are not private donative trusts and constitute an unlawful evasion of corporate law. Sitkoff¹¹² further points out that several ordinary trust law principles may be inapt and obstruct the commercial functionality of trusts. There is also doubt about whether ordinary trust law can appropriately balance and protect the interests of constituents and stakeholders in business trusts.¹¹³ In this regard, the main concerns are about the lack of clear limited liability of trusts and uncertainties about the protection for trustees and beneficiaries.¹¹⁴

¹⁰⁵ Waters *Water's Law of Trusts in Canada* 3.

¹⁰⁶ Waters *Law of Trusts in Canada* 67.

¹⁰⁷ Miller 2010 *Queen's LJ* 450.

¹⁰⁸ Miller 2010 *Queen's LJ* 452.

¹⁰⁹ Miller 2010 *Queen's LJ* 452.

¹¹⁰ Miller 2010 *Queen's LJ* 445.

¹¹¹ Sitkoff 2005 *University of Illinois Law Review* 36.

¹¹² Sitkoff 2005 *University of Illinois Law Review* 36.

¹¹³ Miller 2010 *Queen's LJ* 454.

¹¹⁴ Miller 2010 *Queen's LJ* 454.

Canadian law considers limited liability as an important advantage of the corporate form over the trust. The granting of limited liability protection for trustees is central to the commercial attractiveness of trusts.¹¹⁵ Trustees need protection from exposure to liability by indemnification from the loss of trust property when such losses are incurred in good faith in the administration of the trusts.¹¹⁶ The protection of trustees from liability approximates the protection enjoyed by managers and shareholders of corporations. However, such an approximation is imperfect when it comes to trusts.¹¹⁷ Limited liability is historically linked to the legal personality of the corporation and is considered to follow logically from an entity's legal personality.¹¹⁸ Businesses that are purely the product of private individual initiative, such as trusts, offer organisational flexibility at the price of legal personality and limited liability.¹¹⁹

5.3 Trustees and fiduciary duties

One of the pertinent questions on trust law in Canada is: to whom do the trustees owe their fiduciary obligations? This question was addressed in *Locking v McCowan*.¹²⁰ The dispute arose after three properties owned by Laura Philip and her company, Holyrood Holdings, were vended into the real estate investment trust (the transaction) at the behest of Ronald McCowan, who was the Chief Executive Officer of the real estate investment trust at the time.¹²¹ McCowan failed to disclose that he had a close business and personal relationship with Ms Philip, who had a *de facto* ownership interest in the properties.¹²² As soon as McCowan's conflict of interest was exposed, the transaction was set aside. The fall-out triggered a free-fall of the unit price of the real estate investment trust by more than 30%.¹²³ The plaintiff held a unit in the real

¹¹⁵ Miller 2010 *Queen's LJ* 460.

¹¹⁶ Miller 2010 *Queen's LJ* 461.

¹¹⁷ Miller 2010 *Queen's LJ* 461.

¹¹⁸ Miller 2010 *Queen's LJ* 461.

¹¹⁹ Miller 2010 *Queen's LJ* 461.

¹²⁰ *Locking v McCowan* 2015 ONSC 4435.

¹²¹ *Locking v McCowan* para 2.

¹²² *Locking v McCowan* para 2.

¹²³ *Locking v McCowan* para 2.

estate investment trust and claimed for the losses suffered as a result of the drop in the unit price.¹²⁴

The plaintiff alleged that the Chief Executive Officer and the trustees violated their fiduciary duties to the unitholders. The real estate investment trust's declaration of trust provided that the trustees had to carry out their duties with the standard of care similar to those imposed on directors in corporate law.¹²⁵ The declaration was informed by the thinking that the trust was carrying on a business and that the trustees had to be held to the standard of directors of corporations. They had to be treated like corporate directors and not like the executors of an estate.

Belobaba J, who presided over the matter, referred to a leading Canadian authority on the fiduciary duties of corporate directors in which it was held that the directors of a corporation have a fiduciary duty to the corporation and that the duty is not owed to the shareholders.¹²⁶ He said that since the fiduciary obligations of trustees are the same as that of directors, the trustees of the real estate investment trust owed their fiduciary duties to the real estate investment trust. He said that the fiduciary obligation was not to the unitholders.¹²⁷ Thus, no breach of trust had been committed in the present case.

The court used the principles of corporate law on fiduciary obligations to decide a matter on trusts. However, there is a problem with trying to apply the general principles of corporate law to trusts because trusts and corporations are different. In the South African context, Cameron and others¹²⁸ warn about the dangers of translocating corporate law principles to the law of trusts without due consideration of the fact that, unlike trusts, corporations are legal entities in their own right. The main characteristic of the corporations is independence from their members.

¹²⁴ *Locking v McCowan* para 1.

¹²⁵ *Locking v McCowan* para 28.

¹²⁶ *BCE Inc v 1976 Debentureholders* para 82.

¹²⁷ *Locking v McCowan* para 28. *BCE Inc v 1976 Debentureholders* para 82.

¹²⁸ Cameron and De Waal *Honoré's South African Law of Trusts* 95.

A declaration that trustees have a fiduciary duty to the trust complicates things because a trust is not an entity but merely a relationship in which the trustee acts for the benefit of the beneficiary. The correct legal position is expressed by Waters, who argues that

. . .the hallmark of a trust is the fiduciary obligation which the trust creates between the trustee and the beneficiary.¹²⁹

It has been noted that trustees do everything for the benefit of the beneficiaries.¹³⁰ Unlike shareholders and directors, trustees and beneficiaries have a direct relationship. There is no legal entity (such a corporation) that links them. As a result, an attempt to argue that trustees owe their duties to trusts is not compatible with the legal nature of trusts. It is a misunderstanding of the difference between trusts and corporations.¹³¹ Trusts are bereft of legal personality, unlike corporations. Trust law ought to differ from company law for the simple reason that trusts are different from corporations, in as much as apples are different from oranges - even if both have a similar shape. The application of corporate law principles to the duties of trustees omits the difference in the legal nature of these entities. If company law doctrines applied to trusts, trustees would owe duties to non-legal entities since there will be no legal person to whom the trustees could owe such a duty.

5.4 The taxation of trusts

The issue of income taxation profoundly raises the issue of whether trusts have a legal personality in Canada. Income tax is levied on natural and corporate persons, although the rates of tax differ between the two.¹³² Natural persons and juristic persons are the only legal persons known to incur tax obligations, as they are the only entities in the common law system capable of having legal rights and duties.¹³³ Although trusts are not legal persons but mere arrangements between the trustees and beneficiaries, they are often treated as bearers of tax obligations in a manner similar to corporations.¹³⁴

¹²⁹ Waters *Law of Trusts in Canada* 12.

¹³⁰ Waters *Law of Trusts in Canada* 12.

¹³¹ *Locking v McCowan* para 27-28.

¹³² Miller 2010 *Queen's LJ* 463.

¹³³ Miller 2010 *Queen's LJ* 463.

¹³⁴ Miller 2010 *Queen's LJ* 464.

Waters¹³⁵ submits that several methods are open to the taxing authority for the purposes of levying tax upon the income and capital gains arising from trust property. He argues that the revenue collector may tax trusts like any other persons and artificially view the trust beneficiaries as if they were shareholders.¹³⁶ Notwithstanding, Waters¹³⁷ reiterates that trusts are not juristic persons. Hence, when income tax is levied on a trust, such is done for the convenience of the revenue collector and not as a tacit bestowal of legal personality on trusts.

The *Federal Income Tax Act*¹³⁸ regulates the taxation of trusts.¹³⁹ Since Canadian tax legislation deems a trust as a person for taxation purposes,¹⁴⁰ the revenue collector taxes the annual income of trusts in the same way it taxes other individuals.¹⁴¹ The position is similar to South Africa, where trusts are taxpayers, despite that they are not recognised as persons in terms of the common law and some legislation.¹⁴² The *Federal Income Tax Act* does not contain a compressive definition of a trust. It stipulates that:

A trust is deemed not to include an arrangement under which the trust can reasonably be considered to act as an agent for all the beneficiaries under the trust with respect to all dealings with all the trust's property unless the trust is described [as a trust].¹⁴³

The legal requirements for a trust must be met before the trust is deemed to be a person for taxation purposes.¹⁴⁴ In *Peter Sommer v Her Majesty the Queen*,¹⁴⁵ the Tax Court in Canada had to decide whether an Austrian private foundation was a trust for income tax purposes. The court listed the elements that must be present for an entity to be called a trust in Canada for tax purposes.¹⁴⁶ Tax residence is the main basis for

¹³⁵ Waters *Law of Trusts in Canada* 461.

¹³⁶ Miller 2010 *Queen's LJ* 461.

¹³⁷ Waters *Water's Law of Trusts in Canada* 3.

¹³⁸ *Income Tax Act RSC* (R.S.C., 1985, c. 1 (5th Supp.)).

¹³⁹ S 104(2) *Income Tax Act RSC* 1985.

¹⁴⁰ S 104(2) *Income Tax Act RSC* 1985.

¹⁴¹ Hogg, Magee and Li *Principles of Canadian Income Tax Law* 540.

¹⁴² See section 1 of the *Income Tax Act* 58 of 1962.

¹⁴³ Section 104 of the *Income Tax Act RSC* 1985.

¹⁴⁴ Danano *Switzerland's Direct and International Taxation of Private Express Trusts with Particular References to US, Canadian and New Zealand Trust Taxation* 80.

¹⁴⁵ *Peter Sommer v Her Majesty the Queen* 2011 TCC 212.

¹⁴⁶ *Peter Sommer v Her Majesty the Queen* para 60.

the imposition of income tax in Canada.¹⁴⁷ However, tax legislation does not include any provisions dealing with the residence of trusts for taxation purposes. As such, the determination of whether an entity is a trust or not is a question of fact. When it is established that the entity in question is a trust, it is treated as a person for purposes of income tax.¹⁴⁸ Unless the context indicates otherwise, references to trusts in the *Income Tax Act* encompass the trustees.¹⁴⁹ These provisions suggest that the residence of trusts is determined by ascertaining the residence of the trustees.¹⁵⁰ In the Province of Quebec, which is discussed below, a trust is subject to income tax in its own right, provided that it is a resident or deemed to be resident in Quebec.

5.5 The trust in Quebec

5.5.1 Background

The history of Quebec dates to the French colonisation of Canada before the arrival of the English. In subsequent clashes, the English prevailed and took over the colony.¹⁵¹ The *Constitution Act* 1857 created a federal government under which it established provincial governments. The federal government has extensive legislative powers to impose taxes, while the provinces levy direct taxation on income earned in their territories as well as income earned by their residents in other jurisdictions.¹⁵² Today, the law of trusts falls under the legislative competence of the provinces.¹⁵³ Canada's colonial history shaped things in such a way that private law in Quebec is founded in French civil law. Hence, it is not the same as in other provinces, which are based on English common law.¹⁵⁴ Quebec provides an excellent opportunity for the Canadian trust lawyer in other parts of the country to look at the trust from another

¹⁴⁷ Krishna *The Fundamentals of Income Tax Law* 85.

¹⁴⁸ Section 104 (2) *Income Tax Act* RSC 1985.

¹⁴⁹ Section 104 (1) *Income Tax Act* RSC 1985.

¹⁵⁰ The two leading cases on this are *Fundy Settlement v Canada* [2012 SCC 14] and *Garron Family Trust v The Queen* 2009 TCC 450.

¹⁵¹ Tjaden 2005 <http://www.nyulawglobal.org/globalex/Canada1.htm> 10.

¹⁵² Arnold " "Canada" in H Ault and B Arnold (eds) *Comparative Income Taxation: A Structural Analysis* " 23.

¹⁵³ Waters *Water's Law of Trusts in Canada* 2.

¹⁵⁴ Tjaden 2005 <http://www.nyulawglobal.org/globalex/Canada1.htm> 10.

angle.¹⁵⁵ Quebec has a mixed legal system. It applies civil law in matters of provincial and legislation and common law in federal matters.¹⁵⁶

Since the English brought the trust to Canada, it is possible that the trust introduced in Quebec was the English trust.¹⁵⁷ The Civil Law Code¹⁵⁸ did not mention trusts. Hence, legislation was necessary to cure the legal gap. At present, Quebec tax law does not define a trust. The *Taxation Act* merely provides that,

. . . a trust, wherever it is created, or a succession, in this Title referred to as a trust, also includes the trustee or other legal representative having ownership or control of the trust property.¹⁵⁹

The enactment of this statute followed a judgment of the Privy Council, which held that in Lower Canada, a trust was not provided in law.¹⁶⁰ The amendment of the First Civil Code included the trust in the law of Quebec. The applicable provisions of the First Civil Code were replaced by several provisions in the Civil Code of Quebec.¹⁶¹ These provisions are discussed below as far as they relate to issues related to the contentious issue of the legal personality of trusts.

5.5.2 *Legal personality and the Quebec trust*

The Civil Code of Quebec describes the trust in the following terms:

. . . a trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.¹⁶² And the trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.¹⁶³

¹⁵⁵ Waters *Law of Trusts in Canada* 14.

¹⁵⁶ Tjaden 2005 <http://www.nyulawglobal.org/globalex/Canada1.htm> 2.

¹⁵⁷ Cumyn "The Québec Trust: A Civilian Institution with English Law Roots" in J Milo and M Smits (eds) *Trusts in Mixed Legal Systems* 73.

¹⁵⁸ *Civil Code of Lower Canada* 29 Vict. ch. 41 (1865).

¹⁵⁹ *Taxation Act RSQ* 1-3.

¹⁶⁰ Cumyn "The Québec Trust: A Civilian Institution with English Law Roots" in J Milo and M Smits (eds) *Trusts in Mixed Legal Systems* 74.

¹⁶¹ *Civil Code of Quebec S.Q.* 1991 c. 64.

¹⁶² *Civil Code of Quebec S.Q.* 1991 Ch 64 Article 1260.

¹⁶³ *Civil Code of Quebec S.Q.* 1991 Ch 64 Article 1261.

The Civil Code of Quebec stipulates that a trust is separate from the trustees and that the beneficiaries do not have real rights.¹⁶⁴ As such, a trust is a separate entity that is not a legal person but which lies somewhere between juristic persons and natural persons and which, notwithstanding its position, bears rights and incurs legal obligations.¹⁶⁵ This places the trust in no man's land.¹⁶⁶

The Quebec trust may be regarded as the owner of trust assets and may enter into contracts and incur debts in its name.¹⁶⁷ The Civil Code makes it impossible to argue that the trust patrimony does not belong to anyone. In other words, one cannot argue that the trust assets have no owner.¹⁶⁸ It seems that this issue has not yet been resolved by any court decision or legislation as far it could be reasonably ascertained during the preparation of this work. Before the enactment of the provisions regarding trusts in the Civil Code, the courts held that the notion of dual ownership did not form part of the law of Quebec.¹⁶⁹ The courts said that while the Quebec trust could operate like the common law trust, it is by no means to be interpreted or governed by the rules and precedents of the common law.¹⁷⁰ This is understood in the context that the Civil Code says that a settlor has a duty to transfer assets to the trust.¹⁷¹

Since the trustee is not the owner of the trust, the Civil Code provides that the trustee is charged with seeing to the appropriation of the property and the administration of the trust patrimony.¹⁷² The trustee has executive powers to act in respect of the property but does so as an apparent owner who has no full title.¹⁷³ In the patrimonial system, the position of the trustee comes near to the position of the director of a corporation. This makes it possible to describe the trust as a juristic person with limited powers. Inevitably, one can argue that the trust patrimony is distinct and belongs to

¹⁶⁴ *Trustee Delegation Act* 1999, article 1261.

¹⁶⁵ Waters *Waters Law of Trusts in Canada* 28.

¹⁶⁶ See also Article 1261 of the Civil Code.

¹⁶⁷ Cumyn "The Québec Trust: A Civilian Institution with English Law Roots" in J Milo and M Smits (eds) *Trusts in Mixed Legal Systems* 76.

¹⁶⁸ Waters *Waters Law of Trusts in Canada* 2.

¹⁶⁹ *Royal Trust Co v Tucker* [1982] 1 S.C.R. 250.

¹⁷⁰ *Curran v Davis* [1933] SCR 283 301. *Laliberte v Larue* 1931 7 SCR.

¹⁷¹ *Civil Code of Quebec SQ* 1991 Ch 64 Article 1260.

¹⁷² See De Waal 2001 *Stellenbosch Law Review* 63-80.

¹⁷³ See *Curran v Davis* at 294.

no one. Thus, the Quebec trust patrimony, unlike the South African trust patrimony, does not belong to the trustee. The impossibility of attributing a full right of ownership in the trust property to either the settlor, the trustee or the beneficiary led to an interpretation that isolates the property and identifies a separate entity as its owner.¹⁷⁴ This solution has taken a variety of forms which can be traced to the personification of the trust as a legal person.¹⁷⁵

The Quebec trust owns property under the exclusive and absolute management of the trustees who accordingly have full administrative powers.¹⁷⁶ One of the characteristics of the common law trust is that trust property constitutes a separate estate that is owned and administered by the trustee(s). The separate trust estate in the common law helps to explain why a trust does not fail for the want of a trustee. Crucially, it explains why creditors of the trustees have no claim on the trust. It is trite law that the dual ownership concept is a key feature of the common law trust.

A trust is established when the property of the trust is transferred to the trustee for administration and control for the benefit of the beneficiary.¹⁷⁷ However, a distinction between beneficial ownership and legal ownership does not exist in Quebec civil law. If one views the trust property as a separate patrimony of the trustee, that would be tantamount to personifying the trust.¹⁷⁸ The trustee controls the trust property while the beneficiary enjoys the property and its fruits. However, this departs from the principle that trust property belongs to no one.¹⁷⁹ This situation is comparable with the separation of management and ownership in the corporate. Although the ownership of trust property is not clear in Quebec law, there is no doubt that a trust is a legal entity.

Waters¹⁸⁰ submits that the only solution open to the civilian is to designate the trust as a legal personality when dealing with it so that the trust owns the property and the

¹⁷⁴ Caron 1980 *McGill Law Journal* 430.

¹⁷⁵ Caron 1980 *McGill Law Journal* 430.

¹⁷⁶ Caron 1980 *McGill Law Journal* 431.

¹⁷⁷ Cameron and De Waal *Honore's South African Law of Trusts* 1.

¹⁷⁸ Caron 1980 *McGill Law Journal* 439.

¹⁷⁹ Article 1261 of the *Trustee Delegation Act* 1999.

¹⁸⁰ Waters *Law of Trusts in Canada* 16.

trustee and the beneficiary have respective rights within the penumbra of that personality and its ownership. But this solution goes beyond the trust, which in common law is an entity short of legal personality but more than an agency. In civil law, giving a trust legal personhood is the natural point of departure. The most considerable difficulty arising from the concept of fiduciary ownership relates to the legal position of the trust. The notion of legal personality solves most of the major difficulties, such as to whom does ownership in the trust property vest - in this case, on the trust rather than in the trustee.¹⁸¹ Consequently, there is no problem if a sole trustee leaves a position of being a trustee or in case of substitution of trustees.¹⁸² This has the advantage of making the trustee an administrator who can be replaced without disturbing the stability of the trust. The split ownership of the common law and the legal person trust proposed in the civil law both rely upon legal fictions.¹⁸³

The principle that a trustee cannot benefit from trust property does not remove the fact that trust property is segregated from the trustee and that it is necessary to declare that trust property is a separate patrimony in the trustee.¹⁸⁴ This means that the fiduciary office was developed on the legal persona of the individual trustee has a dual personality - that of his own person and the other as a trustee.¹⁸⁵ The legal fiction of a separate legal personality operates to personalise the trustee who has fiduciary ownership of the trust property.¹⁸⁶ Bestowing a trust with legal personality achieves the same result.¹⁸⁷ The only difference is a mechanical one in that the trustee, rather than the trust, is bestowed with a legal personality. Judging by the operation of the Quebec trust, the best solution is legislative reform to ensure the certainty of the legal nature of the trust.

There is hope that the new Quebec Civil Code will determine clearly the owner of the rights involved.¹⁸⁸ For this purpose, propositions have been put forward on the

¹⁸¹ Caron 1980 *McGill Law Journal* 438.

¹⁸² Caron 1980 *McGill Law Journal* 439.

¹⁸³ Caron 1980 *McGill Law Journal* 439.

¹⁸⁴ Caron 1980 *McGill Law Journal* 439.

¹⁸⁵ Caron 1980 *McGill Law Journal* 439.

¹⁸⁶ Caron 1980 *McGill Law Journal* 423.

¹⁸⁷ Caron 1980 *McGill Law Journal* 432.

¹⁸⁸ Caron 1980 *McGill Law Journal* 432.

ownership of trust assets by the trustees and the recognition of trust as a legal person.¹⁸⁹ The choice of a legal definition of the trust lies between two options - trustee ownership and trust ownership.¹⁹⁰ Recognising a trust as a legal person has the advantages of continuity and flexibility.¹⁹¹ It is apparent that to call a trust a legal person alongside natural persons and juristic persons is a radical change for the common law trust. However, it makes very little difference whether the property vests in the trust or the trustee because the settlor relinquishes ownership and possession of the trust property in favour of the trustee who administers the trust property for the benefit of the beneficiaries.¹⁹²

5.6 Conclusion

The largest part of Canada adopted English law, which came with the English conception of the trust. At the time of the legal transplant, trust law had been well-developed in England. However, things were different in Quebec when legislation was introduced to govern trusts based on civil law principles. Thus, the Quebec trust is governed by statute. It developed separately from the law of trust in the rest of Canada. The situation can be compared to South Africa, which adopted the English law of trusts but subsequently developed a uniquely South African understanding of trust law.¹⁹³ South African courts refuse to acknowledge the juristic personality of trusts, notwithstanding some manoeuvres by the legislature to bestow trusts with legal personality for specific purposes such as taxation. Trusts are also treated in the same manner under Canadian law in which they are not recognised as juristic persons except when statutes provide otherwise. The next chapter wraps up the study by presenting the findings and conclusion.

¹⁸⁹ Caron 1980 *McGill Law Journal* 432.

¹⁹⁰ Caron 1980 *McGill Law Journal* 432.

¹⁹¹ Caron 1980 *McGill Law Journal* 439.

¹⁹² Caron 1980 *McGill Law Journal* 439.

¹⁹³ *Blann* at 859.

Chapter 6 Conclusion and Recommendations

This study investigated anomalies in the recognition of the legal personality of trusts in South Africa. The concept of legal personality, as well as the historical context within which the trust concept was adopted into the South African legal system, have been examined. Theoretical problems emanating from anomalies as a result of statutes that confer separate legal personality on trusts and the use of company law doctrines such as the *Turquand* rule in practical situations such as the abuse of trusts have been investigated. The purpose of investigating the anomalies was to demonstrate that the legal personality of trusts is shrouded in uncertainty and that there is a need for a more definitive position in law on whether a trust is a legal person; if not, whether legislative reform requires its conferment with legal personality.

The uncertainty about the legal personality of trusts manifests due to statutes that define trusts as separate legal entities in specific contexts, which, *inter alia*, include taxation, sequestration, registration of immovable property, and the application of company law doctrines. The anomalies reflect uncertainty on the legal nature of trusts. The analysis shows that South African courts do not perceive trusts as legal persons but that in practical terms, trusts incur liabilities, could be sequestrated, operate business ventures, and are taxed by the revenue collector. The lack of certainty on the legal nature of trusts is not a uniquely South African challenge, as seen from the comparative analysis on Canadian and Quebec trusts in this study. The purpose of the comparative discussion was to demonstrate a possible correlation between the legal personality of trusts in these two jurisdictions. The discussion shows that a trust is not a legal person. A similar position has been adopted by both jurisdictions, which emphasise the common law position that a trust is not a legal person unless defined as such in terms of certain statutes for specific purposes.

As the study progressed, it became apparent that a crucial question needed to be answered on whether theoretical clarity on the legal personality of trust is indeed necessary; and if so, how such clarity could help to mitigate and possibly solve some

practical problems which arise concerning the uncertainties about the legal personality of trusts. The refinement of trust law is crucial, particularly at this time due to the abuse of trusts which puts the integrity of the trusts into question and undermines their application in business environments.

It is the view of the candidate that an approach that continually turns a blind eye to theoretical issues on the legal personality of trusts runs the risk of undermining the integrity of the trust institution and that it could lead to more anomalies and incoherence. Scholars have already pointed out that the current position in trust law obliges one to support the notion that the legal personality of trusts or the office of the trustee should be recognised. There is no consistency and unanimity about the exact legal personality of trusts. As such, the courts will continue to use the *stare decisis* principle when handling trust disputes and that the legislature can come into play and fill the legal gap in trust theory and practice before the uncertainties pose untenable problems. It seems that in trust law, this approach has become a solution for addressing problems that arise because of uncertainty regarding the precise legal nature of trusts. The legislature seems reluctant to confer separate legal personality on trusts. Therefore, it is imperative for the legislature to consider changing the status quo and bestow legal personality on trusts. In this way, trusts will be separate legal entities and will no longer be associated with anomalies which make them unattractive for some legal ventures.

When trusts are legislatively reformed through universal bestowal of legal personality, they will be the owners of properties in their own names and will be able to enter into legal transactions in such a way that their trustees no longer have to be holding the assets of trusts in ambience. The principles of ownership over the trust property by the trustees without beneficial interests will fall away. The trusts, as legal persons, will have continuity and will be firmly bound to the trust idea under the stewardship of trustees. There will be a solution to the question about what happens when a single trustee dies or vacates the office. The solution will be simple: the trusts will continue to exist in perpetuity as they will have a separate existence. Whether the legislature will use its power to refine and rectify the anomalous situation which shrouds the legal nature of

trusts will be seen. What is clear is that the need for legal certainty on trusts cannot be ignored.

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