

Topic Four – Formalities

Testamentary Trusts

Since the will has been validly executed, it will have complied with necessary statutory requirements under *Wills Act* and formalities is not an issue. **(s 55(a))**

Inter Vivos Trusts

Inter vivos trust must meet the formality requirements under **s 53 PLA**.

Definitions

- 'Creation' – bringing into existence a new interest (i.e granting lease, creating trust)
- 'Disposition'
 - Movement of existing interest from 1 holder to another: **Maradona per Gibbs J**
 - Includes any form of assurance, disclaimer or release of property.
 - Equitable interest in trust prop vested in another: **Grey per Viscount Simonds**

1. Characterising the Trust

Trust by Transfer

- Creation/disposal – Settlor → Trustee → Beneficiary

Trust by Declaration

- Settlor/Trustee → Beneficiary

2. S 53

s 53(1)(a) - Land

No interest in land can be created or disposed of except by *writing signed by the person creating or conveying the same*, or by his agent thereunto lawfully authorised in writing, or by will or by operation of the law.

- Type of Transaction: Creation or disposition
- Type of Property: Interests in Land
- Interest: Legal and equitable **(Adamson, cf. Menzies J)**
- Requirements in writing: Creation
- Signature: Settlor or agent
 - *Read down in favour of (b) for declaration of trusts (DSS v James)*
 - If not complied with, *trust is void*.

s 53(1)(b) - Land

A declaration of trusts respecting any land or any interests therein must be *manifested and proved by some writing signed* by some person who is able to declare such trust or by his will.

- Type of Transaction: Declaration of trusts (declaration and transfer)
- Type of Property: Interests in Land
- Interest: Legal and equitable **(Adamson, cf. Menzies J)**
- Requirements in writing: Evidenced at some point later.
 - Can read combination of documents, even informal.
 - Date of creation is not material. **(James per Lee J)**
- Signature: Settlor or trustee **(Hagan)**
 - If not complied with, *trust is unenforceable* but is valid.

s 53(1)(c) – Equitable Interests

A disposition of an equitable interest or trust subsisting at the time of the disposition must be in *writing signed by the person disposing of the same*, or by his agent thereunto lawfully authorised in writing or by will.

- Type of Transaction: Disposition of equitable interest
- Type of Property: Real & personal property (**Maradona per Gibbs J**)
- Interest: Equitable interest (**Adamson, cf. Menzies J**)
- Requirement in Writing: Creation
- Signature: Settlor or agent
- Three methods of voluntary disposition (**Howard Smith per Dixon J**)
 1. Existing equitable owner *declares sub-trust*
 - Consider if 53(1) (b) applies?
 - ❖ **Howard Smith**: Dixon J (obiter) apply 53(1)(c) regardless
 - (a) May also apply (if land); same requirements
 - ❖ **Grey**: Depends role initial B plays: active, will be creation (b)
 - If active (a), will be read done per **DSS v James**
 - 2. Existing equitable owner *manifests an immediate intention to give the interest away*
 - Constitution?
 - 3. Existing equitable owner gives *final direction to trustee to hold the interest for someone else*
 - Final direction or revocable mandate?
 - ❖ A final direction is one 'clear, unequivocal and irrevocable' (**Howard-Smith per Dixon J**).
 - ❖ Need a written declaration signed; per **s 53(1)(c) (Gray)** cf. Consideration paid; no writing may still be valid. (**Halloran**)
- If not complied with, *trust is void*.

Overlap

- Declaration of trust over land caught by **(a)** and **(b)**;
 - **(b)** Prevails over **(a)** (**DSS v James**)
- Declaration of sub-trust in interest in land caught by **(a)**, **(b)** and **(c)**;
- Assignment of equitable mortgage over land can be caught by **(a)** and **(c)**

Other Examples

- Transfer of land is covered under **(a)**
- Declaration of trust over personal property no requirements
- Granting an equitable mortgage over land covered by **(a)**
- Granting an equitable mortgage over shares no requirements
- Assigning an equitable mortgage over shares covered by **(c)**

Exceptions

- Constructive or resulting trusts (**s 53(2)**)
- Dispositions by will (**s 55(a)**)
- Oral leases under three years (**s 54 PLA**)