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## **Fundamental features and elements of trusts**

### **PART 1 – THE NATURE AND CLASSIFICATION OF TRUSTS**

- The essence of a trust is that one person (trustee) holds property for the benefit of others (beneficiaries)
- Because equity recognises the interest of the beneficiaries the trust is said to split the ownership of the property ie. The trustee has the legal title and the beneficiaries have an equitable interest
- The trust is only enforceable in equity
- The trustee has a fiduciary duty to exercise their legal control over the property in the manner required to give effect to the trust for the benefit of the beneficiaries

- Any legal or equitable property can be the subject of the trust

### The essential elements of a trust

There are four essential elements that make up a valid trust:

- a) A trustee in whom legal or equitable title to property is vested;
- b) trust property;
- c) a beneficiary (or cestui que trust) for whose benefit the property is held or object (a valid charitable purpose);
- d) an equitable obligation binding the trustee to deal with the trust property for the benefit of the beneficiary.
- e) It is necessary that all four elements be present for there to be a trust.

### The trustee

- The property must vest in one or more persons up to a maximum of 4 (s11 Trusts Act)
- The trustee can be anyone with the legal capacity to hold property – commonly a company will be used
- The trustee of an express trust will usually be appointed by a settlor (or testator in the case of a will)
- A trust created by will can survive even if no trustee appointed as the personal representatives of the deceased can hold the property until trustee appointed appropriately. However other trusts may fail if trustee cannot be identified
- Once trust has been completely constituted it will not fail for want of a trustee

There may of course be more than one trustee. *The Trusts Act 1973*, s 11 provides that trusts may not have more than four trustees. (This limit does not apply to charitable trusts.) There is no minimum number of trustees required by the *Trusts Act* on the initial setting up of the trust, so there may be only one appointed. There is a minimum required where new trustees are appointed to replace old ones under s 12 of the *Trusts Act*.

Usually, with express trusts, trustees will be appointed by the settlor or testator. A trust created by will, will not fail even if no trustees are named because the personal representatives will hold the property as constructive trustees until others can be appointed. However, where a trust is purported to be created inter vivos by the transfer or conveyance of property to trustees who are not named or identified or are already dead, the trust will fail.

However, once completely constituted, a trust will not fail for want of a trustee. Anyone in whom trust property is vested, except a *bona fide* purchaser for value without notice of the trust, will be trustee of that property.

### Trust property

There can be no valid trust without some property that is the subject matter of the trust and over which the trustee has control. The title of the trustee may be legal or equitable, real or personal, tangible or intangible. For a definition of trust property, see s 5 *Trusts Act 1973*.

### Beneficiary or object

- A valid trust needs to have a beneficiary

- An exception to this are charitable trusts where the object is a charitable purpose rather than particular individuals
- A trustee can also be a beneficiary but not the only beneficiary otherwise the legal and equitable interests merge

To be a valid trust there must be a beneficiary or beneficiaries. This is known as the beneficiary principle. Without a beneficiary there will simply be no trust. The trustee may also be a beneficiary, but he or she cannot be the only beneficiary.

Charitable trusts are an exception to this rule. They are trusts for a charitable purpose and it is this purpose which takes the place of individual beneficiaries. While individuals may benefit from a charitable trust, they are not the beneficiaries.

Another possible anomalous exception to the beneficiary principle is trusts for purposes which are not charitable, and which have no human beneficiary, but which have nevertheless, in some cases, been held valid although unenforceable. Examples of these kinds of trusts are trusts for the erection and maintenance of tombs for the maintenance of particular animals. Whether or not these trusts are likely to be held valid in Australia is doubtful.

### **Equitable obligation**

The trustee must have a personal obligation to deal with the trust property for the benefit of the beneficiaries. This obligation is both a personal one binding the trustee, and one which binds the property itself.

### **Functions of trusts**

Some of the uses of trusts are as follows:

#### **a. Family purposes**

- enjoyment of property without the burden of managing it
- creation of successive interests
- protection of property from wastrels
- private provision of benefits on death
- flexibility for future provision of benefits
- asset planning, asset protection and tax minimisation

#### **b. Commercial purposes**

- private trading trusts may be used as an alternative to proprietary companies for taxation purposes
- unit trusts are employed for public investment
- loan situations where a “claimant priority trust” may protect a lender by attracting a priority over other creditors
- industrial relations practice, superannuation trusts and trusts for the purchase of shares as incentives to employees

#### **c. Socially useful purposes**

- charitable trusts
- pension trusts

## The classification of trusts

It may be important in a particular context to know what category a trust fits into, for example:

- Some trusts must be in writing or evidenced by writing, others do not.
- Methods of interpretation employed by the courts vary according to whether the trust is executory or executed.
- Charitable trusts are treated differently in many respects from private trusts.

## Classification according to method of creation

### Express trusts

- The usual situation where there is a formally expressed intention to create the trust
- This intention is of a settlor (when alive) or a testator (trust created by will)
- Intention may have to be evidenced in writing in certain circumstances (covered in detail later) otherwise could be oral
- It may be however that the court will find the necessary intention by implication

Express trusts are trusts where the settlor or testator has expressed his or her intention to set up a trust:

*Austin v Keele [1987] 72 ALR 579.*

Subject to the requirements of writing which will be dealt with later, this intention may be expressed orally or in writing. In some case the courts may be prepared to imply the necessary intention.

### Resulting (presumed) trusts

Resulting Trusts arise because Equity **presumes** the trust was intended.

It is also sometimes referred to as an “implied trust” – But don’t confuse this type of trust with express trusts where the necessary intention is implied from wording, conduct or surrounding circumstances – Resulting trust exists by operation of law.

2 major categories

- Incomplete dispositions (eg Not all the beneficial interest can be disposed of; Failure of express trust; Surplus of assets; Loans on conditions that can’t be met as in *Quistclose* Trust)
- Purchase of property in the name of another

### Constructive trusts

- Arise by operation of law but unlike resulting trusts it is not a case of presuming or implying intention
- The intention of the parties is not a necessary element at all
- The courts will recognise a constructive trust when it would be inequitable for the legal owner to deny the claim of the plaintiff
- That claim might arise for a number of reasons:
  - Breach of a fiduciary duty eg abuse of position of legal owner of property when equitable duty owed to another
  - Breach of confidence
  - Estoppel
  - Common intention of parties in respect of property

- Unconscionability
- Restitution or Unjust Enrichment

#### *Is a Constructive Trust an institution or remedy??*

- That is, is Equity simply recognising a trust that should always have existed since the start of the relationship between the parties **or** Is Equity creating a trust at the time of the court action to provide an appropriate remedy between the parties??
- If an institution the trust has existed since the conduct of the parties created it (so could defeat interests of later creditors) – If a remedy it is only created by the court at the time of action and subject to discretion of court as to whether it is an appropriate remedy in the circumstances
- Perhaps better view is that it is a “remedial institution” – Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 – This way the court gets to determine the time when the trust commences which may be important when considering interests of parties to the action as well as third parties.

### **Sub-classifications of express trusts**

#### **Executed or executory trusts**

- Express trusts are either executed or executory depending upon the degree of detail provided to complete the trust
- Executed trusts are where the settlor has defined the interests of all parties and completed all necessary terms of the trust
- Executory trusts are those where the settlor has adequately indicated the necessary intention to create the trust but it lacks the detail of a formal document. The basic nature of the trust still has to be clear

Express trusts may be either executed or executory.

An *executed trust* is one where the settlor has been his or her own conveyance, ie., where he or she has defined exactly the interests of the beneficiaries and has in fact set out all the terms of his or her trust in complete and final form. Where a trust is executed, equity follows the law and where technical words are used they will be strictly construed. Words with legal meaning will be construed according to that legal meaning.

An executory trust is one where the settlor has merely expressed his or general intention as to the way the property is to be held without going into details preparing and signing a formal document:

*Sackville-West v Viscount Holmesdale [1870] LR 4HL 543 at 565-6, 571-3.*

However, even an executory trust must be sufficiently declared to indicate at least generally, what are the trusts upon which the property is to be held. If it does not go as far as that, it will fail:

*Re Flavel's Will Trusts [1969] 2 All ER 232.*

With an *executory trust*, the court will look to the whole instrument in an attempt to discover the true meaning of the settlor or testator and a formal settlement will be drafted to give effect to those intentions. Here, words will not necessarily be construed according to their technical or legal meanings; the focus is on giving effect to the intention of the settlor.

#### **Private or charitable trusts**

*Private trusts* are for private individuals.

*Charitable trusts* are not for individuals, but for purposes which are charitable in law. They also usually require an element of public benefit for their validity.