LAW3107 TRUSTS EXAM NOTES

INTRODUCTION

HISTORY & NATURE OF TRUSTS

- Trusts = An obligation on the holder of an interest in property to hold at least a party of the property for the benefit of another – Registrar, Accident Compensation Tribunal v Commissioner of Taxation
    - It is also an obligation to deal with property in a particular way – Re William; William v William
- There is a required separation between the legal and equitable interests – Hardoon v Belilios

ELEMENTS OF A TRUST

- Trust Property (Subject Matter)
    - Can only exist if it has property capable of being the subject of a trust – The Public Curator of QLD v The Union Trustee Co of Australia Ltd
    - Any type of property can be the subject of a trust (unless there is a policy against it) – Comptroller of Stamps (Vic) v Howard-Smith
    - The trust property must be identified – Herdegan v Federal Commissioner of Taxation
    - You cannot create a trust with future property – it can go into a trust, but it cannot be the only property of a trust
- Roles (of Offices)
    - Settlor/Testator
        - The person who creates the trust
            - It is usually created intentionally
        - Settlor = Creates the trust during their life
        - Testator = Sets up the trust in their will, it does not exist while they are alive
    - Trustee
        - They make the decisions in the trust
        - They 'own' the property – they must at least jointly own all of the property or a good portion of the trust property
        - There is an obligation to look after the beneficiaries
    - Beneficiary
        - Person who receives the beneficial ownership of the property
        - A beneficiary can also be the settlor and trustee of the trust, BUT that beneficiary cannot be the sole beneficiary (In re Cook; Beck v Grant)
        - Whilst the beneficiary is a vital office in the creating and ongoing existence of a trust, it does not require that the beneficiary know that they are a beneficiary (Middleton v Pollack; ex parte Elliott)
- Complete Constitution

Mixed Roles

- A settlor can also be a trustee and/or beneficiary under the same trust – but one person can not be the only person who holds all the roles – Goodright v Well

CREATING A TRUST

- It can be created by either a:
    - Declaration of the Settlor
        - Generally express trusts – Where the settlor intended and set out to create a trust
        - The Settlor declares that property that they hold will be held for the benefit of the Beneficiaries
        - The title to the property is not passed, but the benefit is
    - Transfer of Property;
        - Did not intend to create a trust, but kind of ended up with an accidental trust
            -
    - Direction of the Settlor; or
        - Where a Settlor does not hold the legal title but has an interest that is controlled by another and the Settlor wishes to create a trust over that property, the Settlor can direct the controller of that interest to hold that interest not for them but for some other Beneficiary
    - Court Order
        - If there is an unexpected, unintentional, inadvertent trust, the court may recognise it and make it concrete
        - E.g. constructive trust

TYPES OF TRUSTS

1. Express Trusts:
    a. Fixed Trusts;
    b. Discretionary Trusts:
        i. Exhaustive Discretionary Trusts; and
        ii. Non-Exhaustive Discretionary Trusts.
    c. Private Trusts:
        i. Family Trusts;
        ii. Trading Trusts;
        iii. Investment Trusts;
        iv. Family Trusts; and
        v. Unit Trusts.
    d. Public Trusts:
        i. Charitable Trusts; and
        ii. Purpose Trusts.
2. Resulting Trusts:

    a. Automatic Resulting Trusts; and
    b. Presumed Resulting Trusts.
3. Constructive Trusts:
    a. Bare Trusts;
    b. Common Intention Constructive Trusts;
    c. Secret Trusts; and
    d. Half-Secret Trusts.

IMPLIED TRUSTS

- May not have called it a trust, but it was a trust (was just set up 'impliedly' and not 'expressly')

EXPRESS TRUSTS

- An Express Trust is a trust that is intentionally created by the parties, by declaration, direction or transfer
    - The Settlor creates the trust intending to create a trust

<u>FIXED TRUST</u>

- Defined in its terms/rules what the benefit for each beneficiary will be
- Fixed Trusts are Trusts that provide a "fixed" or specified benefit to particular Beneficiaries
- There is no power granted to the Trustee to vary the use of the Trust Property

<u>DISCRETIONARY TRUST</u>

- A Discretionary Trust is a Trust where the Trustee has the power to choose the Beneficiaries, or to determine which beneficiaries will get the benefit of the Trust Property (Chief Commissioner of Stamp Duty (NSW) v Buckle)
- 2 types, can be:
    - Exhaustive; or
        - An Exhaustive Discretionary Trust is a Trust whose rules require the Trustee to distribute the income to the Trust to the Beneficiary in each period
        - It cannot accumulate the income to increase the capital of the Trust
    - Non-Exhaustive
        - A Trust whose rules allow the Trustee to accumulate the income of the Trust to increase the capital of the Trust is a Non-Exhaustive Discretionary Trust (Re Richstar Enterprises Pty Ltd; ASIC v Cary (No 6))
- The difference between the two is whether, in a given year, the trustee is required to pay out the trust income
- The discretion can take various forms, and be over various things. The Trustee can have discretion to choose:
    - Who the beneficiaries are (a power of appointment);
        - Where the Trustees can choose the Beneficiaries they are free to choose anyone but themselves (General power)
        - Alternatively the Trustees may have a power to choose Beneficiaries, but only from a class of persons (Special power)
        - Finally where the power is to choose anyone except a person from a class (Hybrid power)
    - What benefit will be paid to the beneficiaries?
        - Trust Property can be, or can include, or can generate income
        - The Trust Document may provide a power to the Trustee to choose to pay out either the Trust Property (of whatever form) and/or the income that is generated by the Trust Property (Federal Commissioner of Taxation v Vegners)

<u>PRIVATE TRUSTS</u>

- A Private Trust is a Trust that provides a benefit a person or group of particular people
- They are generally Express Trusts, though Resulting Trusts and Constructive Trusts usually fall into this class
- Family Trust
    - A Family Trust is not really a kind of Trust at all
    - It is a Trust created to hold family resources for the benefit of family members
    - Such a Trust is actually either an Express Trust or a Charitable Trust
    - More commonly it is a discretionary trust
- Unit Trust
    - Unit Trusts are trusts used as an investment or tax management system
    - Often also discretionary trusts

<u>PUBLIC TRUSTS</u>

- Charitable trust
    - A Trust can also be validly created for the benefit of a purpose
    - Most of the purposes that have been recognised are charitable: a Charitable Trust
- They are Public Trusts in that the enforcement and supervision of the trust falls not on the Beneficiaries (because there are none) but on the Attorney-General (Num-Hoi, Pon Yu, Soon-Due Society Inc)
- Also they confer their benefits on the public generally, rather than on a particular class of people

RESULTING TRUSTS

- Basically trusts that happen when people do not intend for them to happen or a transaction where the court presumes it is a trust
- A Resulting Trust is a Trust that is created by implication following from the way that a particular transaction occurs e.g. purchase of property
- Equity presumes that people intend to own the property in proportion with their contribution to the price
- 2 types:
    - Automatic; or
    - Presumptive

CONSTRUCTIVE TRUSTS

- A remedial trust i.e. where court sees a wrong and cures it by constructive trust
- The better view is that it is a Trust ordered by court in response to a claim of an equitable wron
  - It is generally, a Bare Trust, used to force a wrongdoer to disgorge property fraudulently obtained to the injured party
- An order made by the court to correct something which has previously happened

<u>BARE TRUSTS</u>

- Any trust, however created, which obliges the trustee to provide the trust property to the beneficiaries on demand
- A Bare Trust is any Trust, Express, Resulting or Constructive, that imposes only anobligation to hold the property until the Beneficiary calls for the property (Thorpe v Bristile Ltd)
- Can be created in various ways:
  - Intention of the settlor in creating the trust; or
  - Can happen because of the nature of the circumstances giving rise to the trust:
    - Assignment of future property;
    - The price paid for real property before the transfer of the title (Stern v McArthur)

<u>FULLY SECRET TRUSTS</u>

- Bad ideas, but may be encountered
- Where a person has property and wants to leave it in there will but does not want anyone to know before their death they can use a Secret Trust.

TRUSTS COMPARED TO…

FIDUCIARIES

- Trustees are always fiduciaries, BUT most fiduciaries are not trustees - Mills v Mills
- However - the following can, either by their nature or very easily, become trustees:
  - Receivers - *Nugent v Nugent*
  - Partners - *Kingsmill v Lyne*
  - Promoter of a Company - *Ominium Electric Palace Ltd v Baines*
  - Liquidators - *Knowles v Scott*

BAILMENT

- Created by giving legal possession to a person for a purpose
- Property must be tangible, and a chattel
- BUT, a bailee has legal possession, NOT legal ownership

AGENCY

- A fiduciary obligation created in equity, that often facilitates the transit of goods
- The agent may possess the principal's goods, but generally does not have any title to the goods - *Cave v MacKenzie*
- Agency and Money
  - An agent who holds a principal's money, holds the money as a trustee, unless there is an express arrangement, or the arrangements show another intention - *Burdick v Garrick*

DEBT

- Debtor = A person who owed a debt in law/equity
  - They do not hold the debt to be applied for the creditor - Fitzgerald v Fitzgerald
- *Barclays Bank Ltd v Quistclose Investments Ltd*
  - RR was in acute financial trouble - They declared a divided for some of its shares and entered an agreement with Q to fund the dividend
  - Q paid the money into a special account with B
  - RR went into liquidator
  - B tried to use the money to set-off RR's other debts
  - Issues:
    - Was RR a trustee of the money?
    - Was the money now RR's asset and Q merely a creditor?
    - Was RR a trustee of the money for Q as a beneficiary?
  - Held:
    - Money was borrowed for a specific purpose pursuant to a contract that was frustrated
    - One of the cases where there could be a resulting trust - it wasn't intended to be one, but it was made one
- Romalpa Clauses
  - AKA retention of title clauses
  - A clause that provides for the retention of property
  - Generally dependent for their effect on the express wording on the clause - *Aluminium Industries Vassen BV v Romalpa Aluminium Ltd*

COMPANIES

- Share a common origin
- Whilst modelled on a trust, they are not a trust
- Share(d):
  - Fiduciary obligations on the managers
  - Limits on the proper use of the resources
- Can create a trust, be a settlor of a trust
- Companies are not generally trustees - *Bowman v Secular Society Ltd*