

LLB353 The Law of Trusts

Week One

- A trust occurs where one holds property as it's legal owner (the trustee) for the benefit of others (the beneficiaries).
- With trusts the ownership and management of the property is distinguished from the enjoyment of property.
- With trusts there is dual ownership of property: legal ownership being vested in the trustee and equitable (beneficial) ownership stays with beneficiary.

Historical background

- History of Trust can be traced back to the Anglo-Saxon concept of "use", which was derived from the Roman law of *fideicommissum*.
- Under the concept land could be held *ad usum* (to the use of) someone else or other.
- Common Law allowed conveyance of land to person X - the 'feoffee to use' (i.e. modern trustee) to the use of Y – the 'cestui que use' (i.e. modern beneficiary).
- Under Common Law the feoffee had legal ownership, but 'cestui que use' did not have any recognised interest in the land. The 'cestui que use' did not have any form of interest or remedy and just had to live in expectation that the feoffee would hold the land to their use.
- i.e. the **original owner** would transfer their legal ownership to the **feoffee to use** who becomes the new legal owner. The **feoffee** then holds the property 'to the use of' the **cestui que use**.
- The feoffee was a mere passive recipient of the land and was not intended to benefit from the transaction.
- Feoffee passive duty was to allow 'cestui que use' to take profits of the land. This duty was not enforceable in Common Law.
- On some occasions the feoffee had an active duty imposed e.g. to reconvey the land to another person or back to original owner. This was enforceable in Common Law.
- By the 15th century Equity intervened and enforced the original owner's equitable rights, forcing the feoffee to act in accordance with the terms of his promise.
- The concept of 'use' came to be abused with unscrupulous owners using it for tax evasion. (Under the laws at the time, the original owner of the land could avoid payment of taxes by transferring legal ownership of property to the use of a third party).
- In 1535 the *Statute of Uses* was passed and recognised the beneficial owner ('cestui que use') as being the 'real owner' of the property for tax purposes.
- However, lawyers tried to sidestep the *Statute of Uses* by creating a 'use upon a use' (double use) e.g. transfer land to X 'to the use' of Y 'to the use' of Z.
- The Statute only recognised the first use, so the second use remained untaxed i.e. use upon use had not been recognised.
- Common Law courts ruled the second use as being repugnant to the first use and therefore void - *Jane Tyrell's Case* (1557) Dyer 155.

- Eventually the Court of Chancery did recognise and enforce the second use and called it a 'trust' to distinguish it from first use i.e. device was to X 'to the use' of Y on *trust* for Z. Y was called a trustee who held legal title for Z a beneficiary/ cestui que use.
- Through 18th – 19th Century trust became more formally defined and the term 'trust' was distinguished from other legal relationships.

Nature of trusts

Definition

The term trust has not been authoritatively defined. But has been described by scholars:

'A trust is an obligation enforceable in equity which rests on a person (the trustee) as owner of some specific property (the trust property) to deal with that property for the benefit of another person (the beneficiary) or for the advancement of certain purposes.'

(Ford and Lee, *Principles of the Law of Trusts* (2nd edn, LBC, 1990) para [101]).

'A trust exists when the holder of a legal or equitable interest in certain property is bound by an obligation ... enforceable in equity to hold that interest not for his own exclusive benefit but for the benefit ... of another person / persons ... or for some other object or purpose permitted by law.'

(Meagher and Gummow, *Jacobs Law of Trusts in Australia* (6th edn Butterworths 1997) para 101).

Elements of a trust

Trustee(s) - The person holding the legal title to the property

- There must be at least one trustee.
- Trustee is the person in whom legal ownership of the trust property is vested.
- Trustee may be a natural person or a corporation.
- Trustee is obliged to deal with the trust property in accordance with the terms of the trust.
- It is a fiduciary relationship so the Trustee has fiduciary duties imposed upon them which are enforceable in the Courts of Equity.
- A trust will not fail simply because person creating a trust failed to appoint a trustee, or in the case of trust by will, if the trustee has died before testator. In such cases person whom property is vested for the time being will be regarded trustee unless she/he is a bona fide purchaser for value without notice.

Beneficiary(ies) - The person with an equitable interest in the property

- Person for whose benefit the trustee is holding the trust property.
- Or person who holds equitable interest in the property pursuant to the trust.
- Beneficiary (cestui que trust) may be a natural person, corporation or a class of person who may be unborn (unascertained) at the time of creating the trust.
- In the case of charitable trusts, the charity itself or charitable purpose is regarded as the beneficiary.
- A beneficiary of a trust can also serve as the trustee.

- A sole trustee cannot be the sole beneficiary. (There would be no duality of interest in the property). Likewise, a trust without a beneficiary is void.

Trust property - The subject matter of the trust

- There has to be property to form the subject matter of the trust
- Any form of property can be held on Trust unless law forbids it.
- Property may be:
 - Real or personal
 - Chose in possession (tangible property) or chose in action (intangible property e.g. right to recover debt, or right to sue for tort, also insurance policy, shares etc.)
 - Legal or equitable

Nb. With an express trust there has to be the creator of the trust (the settlor).

Characteristics of a Trust

- Dual ownership of trust property
 - Separation between legal and equitable ownership of the trust property.
- A fiduciary relationship between trustee and beneficiary
 - Trustee owes fiduciary obligations to the beneficiary i.e. they have a duty to serve exclusively for the interest of someone else.

Distinguishing a trust from other legal relationships

Trust v Bailment

- Bailment is when a specific chattel is transferred by its owner (bailor) into the possession of another person (bailee), for the bailee to use or perform some work for the bailor. e.g. when you take your car in for a service or to be repaired, valet service etc.
- With bailment there is **no transfer of title** just mere transfer of possession.
- Similarity - Both trustee and bailor have custody of property to which they are not beneficially entitled.

Trust v Agency

- An agency exists where one person (principal) authorises another (the agent) to enter into legal relations with 3rd parties on the principal's behalf.
- Similarity - Both are fiduciary relationships.
- Differences -
 - An agent only has possession of property – legal title stays with principal. Trustee holds legal ownership of the trust property.
 - A trustee contracts as a principal in administering a trust and generally **cannot bind beneficiaries**. Whereas an agent contracting within the scope of his authority binds the principal and a 3rd party, but the agent isn't privy to the contract.
 - Principal has a right to direct agent with respect to the agency, however, a beneficiary may not give directions to trustee on administration of the trust property.

Three Certainties

Determine how many trusts exist and cover each trust independently.

Certainty of Intention

The settlor must have intended to create a trust, as opposed to making a gift or a loan.

- a. Identify whether the settlor has conferred a benefit to the beneficiary.
- b. Identify whether there is a legally binding obligation to confer a benefit i.e. does the trustee have to follow instructions?
 - i. Look whether there are any precatory words (e.g. I would sure appreciate it if he would use them for the purposes as set out below) - it is presumed there is no legal obligation if precatory words are used UNLESS when the document/instrument is read as a whole it shows that a trust was intended then precatory words will not preclude this result (*Dean v Cole* [1921] 30 CLR 1).

If this fails, continue on and state assuming this has been fixed up.

If there are precatory words and the instrument read as a whole does not show that a trust was intended then it will be a gift (May be resulting trust but usually a gift)

Certainty of Subject

- a. Can we clearly identify the property? Usually not in contention, only really an issue in the case of a will where they have passed away and it is unclear what property the settlor was talking about.
- b. In a fixed trust – Identify the beneficiaries' benefit e.g. 50% to X and 50% to Y whereas 'half of the books in my library are to be held for the benefit and use of the Maycomb County Book Club' is not a clear instruction as to exactly who should get which books. Clarification is needed therefore there is no certainty of subject.

If this fails, continue on and state assuming this has been fixed up.

If the property cannot be clearly defined and therefore there is no certainty of subject then the trust would be unenforceable i.e. the beneficiary may seek specific performance but would be unsuccessful because the property is not clearly defined therefore the trustee cannot perform their duty.