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TOPIC 7: OPERATION OF EXPRESS TRUSTS

GENERAL PROCESS

1. Powers and duties of trustees
2. Rights and liabilities of trustees
3. Rights of beneficiaries

STRUCTURE

1. Powers and duties of trustees

- a. Distinction between powers and duties
 - i. **Trust powers:** acts which the trustee may or may not do as the trustee thinks fit
 - ii. **Trust duties:** acts which the trustee must do or refrain from either under the general law or terms of the trust deed.
- b. **Duty 1: to learn the terms of the trust**
 - i. The trustee has a duty to learn the terms of the trust and be aware of the nature and circumstances of the trust property and all documents affecting the trust property
- c. **Duty 2: to obey the terms of the trust**
 - i. A trustee's most important duty is to obey the terms of the trust – *Youyang v Minter Ellison*
 - ii. Trustee cannot change the terms of the trust without a power
 - iii. Unless the court has inherent equitable jurisdiction – *Chapman v Chapman*
 1. 4 situations that court may declare that a trustee can deviate from the terms of the trust if there is an emergency and variation is necessary to salvage the trust property.
 - a. Changes in the nature of investments for infants from personalty to realty
 - b. Investments in business transactions not authorised by a trust of settled land
 - c. Payment of maintenance out of income, even where there is a direction to accumulate income

- d. Compromises in favour of unborn children
- iv. Unless there is 'expedient'/advantageous dealings – *s81 Trustees Act (NSW)*
 - 2. *s81 Trustees Act* confers wide power on the courts to authorise departure from the terms of the trust where it is "expedient" or in the best interests of the majority of the beneficiaries to allow the trustee to engage in the conduct in question:
 - a. *s81* applied in ***Perpetual Trustee v Godsall*** :
 - i. Rath J: the term 'management and administration' was construed widely, it included everything that a trustee may need to do in practical or legal terms in respect of trust property. The term "expedient" should be read to mean expedient for the beneficiaries. The test is expediency in relation to the situation of management or administration as it exists at the time the court hear the application; and expedient is to be determined having regard to the interests of the beneficiaries concerned in the particular trust
 - ii. It is expedient to sell the property. The court should make the order

d. Duty 3: to keep accounts and give information

- i. beneficiaries are entitled to see accounts and other trust documents (e.g. profit and loss statements of investment companies), but that gives way to a trustee's right not to give the beneficiaries reasons for decisions – ***Re Londonderry's Settlement***
- ii. whether it is a trust document
 - 1. trust documents☑
 - a. documents in possession of trustees as trustees – ***Re Londonderry's***
 - b. contain information about the trust which beneficiaries are entitled to know – ***Re Londonderry's***
 - c. trust accounts
 - d. trust advice from lawyer about trust rights
 - 2. not trust documents☒
 - a. reasoning of trustees – ***Re Londonderry's***

- b. trust documents contain trustee reasoning – *Re Londonderry's*
- i. established trust document →
 - 1. state: it is unclear whether they are prima facie entitled to them
 - 2. originally thought beneficiaries had a proprietary interest in documents and therefore they were prima facie entitled to the documents
 - 3. however, the decision in *Schmidt* held the right stems from the court's inherent jurisdiction to ensure good administration
- e. Duty 4: to exercise due care and skill
 - i. Duties to be discharged with the same standard of care an ordinary prudent man of business conducting their own affairs – *Re Speight*
 - 1. The trustee was able to show the trustee had done all the checking work that an ordinary prudent businessman would have done in choosing the stockbroker (agent) → no liability/obligation
- f. Duty 5: to exercise power of investment in the best interests of present and future beneficiaries of the trusts
 - i. The trustees must act in the best interests of the beneficiaries
 - ii. In most cases, the best interests of the beneficiaries means the beneficiaries' best "financial interests" – *Cowan v Scargill*
 - 1. Cannot be any political investment
 - iii. The investment need not be consistent with the purpose of the trust – *Harries*
 - 1. Such considerations could be allowed provided they did not adversely affect the return.
 - 2. Trustees may also avoid investments that conflict with express aims of the charity.
 - iv. Statute
 - 1. Does not set out standard of care generally, but does set out standard of care when investing: s 14 *Trustee Act 1925 (NSW)* – sets out standard of care
 - 2. s 14: A trustee may, unless expressly forbidden by the instrument (if any) creating the trust:
 - a. (a) invest trust funds in any form of investment, and
 - b. (b) at any time vary any investment.

3. Common law: ordinary prudent man of business acting for someone else
4. s 14A: as above, introduces different standard of care depending on expertise
5. s 14B:
 - a. duty to act in best interest of present and future beneficiaries
 - b. not speculative or hazardous investing
 - c. act impartially
 - d. take advice
6. s 14C: matters to be taken into consideration
 - a. long list; depends on the type of trust, beneficiaries, assets etc, length of investment, capital appreciation

2. Rights and liabilities of trustees

- a. right to reimbursement and indemnity
 - i. A trustee is entitled to reimbursement out of the trust property for all costs and expenses incurred in the execution of the trusts and powers
 - ii. A trustee is personally liable for debts incurred but is entitled to be indemnified for costs and expenses *properly* incurred whilst carrying on the trust business
 - iii. Inherent equitable right but reinforced by statute (*Trustee Act 1925 NSW* s 59(4)); may also be expressly conferred by a trust instrument
 - iv. "reasonable" expenses
 1. Meagher JA stated that it was not necessary to show an expense was both reasonable and proper. Expenses may be reimbursed provided conduct incurring the liability was not a breach of trust & conduct was not criminal or fraudulent – ***Gatsios Holdings***
 - v. Trustee entitled to be indemnified provided that damage caused to third-party was not caused by any reckless or improper working of the business by the trustees – ***Re Raybould***
 - vi. Trustee's right of indemnity from beneficiaries personally:
 1. 1 beneficiary: Right of a trustee to indemnity includes right to pursue the beneficiaries personally if they are sui juris (full legal capacity) and absolutely entitled to their beneficial interest – ***Hardoon v Belilios***
 2. More than 1 beneficiaries – ***JW Broomhead***

- vii. When beneficiary validly disclaims interest, beneficiary will not be liable to indemnify the trustee – **JW Broomhead**
- viii. The beneficiary's personal liability cannot be turned off unless there is a special agreement in the deed that says this e.g. said the trustee here cannot go to the beneficiary personally for any shortfall – **McLean**
 - 1. The court would not allow such clauses to be used as a cloak for fraud – **McLean**
- b. Liability of trustees
 - i. Establish breach of trust (look at duties above)
 - ii. Situation like trustee mistakenly/improperly spent the money (not following the trust)
 - breach of trust → the beneficiary can adopt the transaction or falsify it.
 - iii. Determine liability
 - 1. Falsification
 - a. Obligation of trustee is essentially one effecting restitution and must therefore put the trust in the position as if the breach did not occur – **Re Dawson**
 - b. If paying monetary compensation in lieu of restoring assets the value of the assets is assessed at time of restoration – **Re Dawson**
 - c. Not limited by principle of causation and remoteness – **Re Dawson**
 - d. Should ask: whether the loss would have happened if there had been no breach **Re Dawson**
 - e. Equitable compensation is assessed according to the duty breached. Thus, breaches of trust involving misapplication of the trust fund are remedied by restoration of the trust fund – **Youyang**
 - f. What loss was caused by breach? – **Target**
 - i. In order to get the award of damages:
 - ii. The D's wrongful act must cause the damage complained of
 - iii. The P is to be put in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation
 - iv. Determine whether the court would grant relief under s85(1)

1. Requirement: trustee acted honestly and reasonably, and ought fairly be excused – s85(2)

3. Rights of Beneficiaries

- a. The right to extinguish the trust
 - i. If a beneficiary or a group of beneficiary are **absolutely and indefeasibly** entitled to trust property, then they can terminate the trust and call for the conveyance of the legal title – **Saunders**
 - ii. Absolutely: no one else is entitled
 1. One way in which beneficiary might not be absolutely entitled is that the trustee has a lien – **CPT Custodian**
 - iii. Indefeasibly: not subject the condition e.g. power of appointment
 - iv. Sole beneficiary: must be sui juris
 - v. Several beneficiaries: need all of them to consent – **Manfred**
- b. Injunction to restrain trustee acting in breach of trust
 - i. Do not need to prove damages are inadequate