

LAW4170 TRUSTS EXAM NOTES

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CERTAINTY OF SUBJECT MATTER

- The subject matter of a trust must be certain if the trust is to be enforceable

(a) Trust property must be presently existing property

- The trust property must constitute legally recognized property; and the settlor must have present property rights
- Can be virtually any type of property (real or personal, tangible or intangible, legal or equitable)
 - Except for property that is inalienable (e.g. some statutory licences)

Future property

- Assignments of future property cannot be the subject matter of a voluntary trust
 - If consideration is given, the agreement will be enforced by equity
- Future property =
 - Property not yet in existence; or
 - Property in existence but not presently owned by the person purporting to give it away

Present property	Future property
<ul style="list-style-type: none"> • Remainder interests (not a mere expectancy) <ul style="list-style-type: none"> ◦ E.g. I leave my property to my wife for life with remainder to my children • Contingent or defeasible interests <ul style="list-style-type: none"> ◦ E.g. “I leave my property on trust for my wife, provided she does not remarry” or “such of my children who attain the age of 25 years” • Taker in default has a present proprietary interest but this is subject to divestment • Equitable property rights of a beneficiary under a FIT • Declared dividends (present debt from the company to the shareholder) • Interest from a fixed term loan • Transfer of a proportion of a contractual right to receive income, as distinct from the income itself, not yet received (<i>Shepherd</i>) <ul style="list-style-type: none"> ◦ Assignment of the ‘tree’ not the ‘fruit’ (<i>Kitto J</i>) 	<p>Mere expectancies:</p> <ul style="list-style-type: none"> • An interest under the will of a living person • Expectation of presumptive next of kin of a living person who may die intestate • The rights of a person as an object under a discretionary trust are an expectancy only (<i>Kennon</i>) • Undeclared dividends (<i>Norman</i>) • Interest on a portion of a loan, which could be repaid at any time; contract could be unilaterally terminated (<i>Norman</i> majority) • First £500 income from life estate (<i>Williams</i>)

(b) Trust must be over certain subject matter

- The nature and amount of property must be ascertainable/clearly defined
- NOT

- Providing knickers for boys in a particular area and not otherwise supported by charity (*Re Gwyon*)
- Gifts to provide workers with contributions towards holiday expenses (*Re Drummond*)

PUBLIC BENEFIT: no need to prove that trusts for relief of poverty benefit the public or a section of public (*Dingle*)

2. Advancement of education

- Must advance education or dissemination of knowledge (*Re Hopkins* cf *Re Shaw*)
 - Knowledge as an end itself is not enough (*Re Shaw*)
- Court will make a qualitative judgment on whether the purpose will advance education and will use expert advice if necessary (*Sharp v A-G* cf *Re Pinion*)
- Covers a broad range of educational purposes: formal education at all levels, physical education, music and arts, vocational, social and cultural learning
 - E.g. a trust for ‘the teaching, promotion and encouragement in Ireland of self control, elocution, oratory, deportment, the arts of personal contact, of social intercourse and the other arts of public, private, professional and business life’ (*Re Shaw’s Will Trust*)
- Things for advancement of education: prizes, scholarships, educational facilities, libraries, paying for teachers, establishing schools etc.

Examples of valid educational trusts	Invalid examples
<ul style="list-style-type: none"> • Re Hopkins per Wilberforce J: trust for finding the Bacon-Shakespeare manuscript – this was a spread of learning • Sharp v A-G: artist left his home to be retained and used as a place where people could be educated concerning his works and other artistic works. Held: testimonials from leading figures in the Australian art scene points to the merit and public benefit of preserving Wirian and its contents. Merit of the opportunity was ‘obvious’ 	<ul style="list-style-type: none"> • Re Shaw per Harman J: to investigate and encourage the use of a new English alphabet – no element of teaching or education; ‘research and propaganda’ tended to the increase of public knowledge by aiming to persuade the public that the adoption of the new script would be a ‘good thing’ • Re Pinion: artist’s studio left to national trust to be maintained as a museum. Expert evidence suggested the contents were of negligible artistic merit – worthless, ‘atrociously bad’, ‘third rate’, just a ‘mass of junk’. Held: no educative value at all.

PUBLIC BENEFIT: where trusts are for the advancement of education, a trust is presumed to be for the public benefit, yet this can be negated (*Re Shaw*)

- Exception: fully informed consent of beneficiaries or for charitable trusts, all trustees must consent

Conflicts rule

- *Under the conflicts rule, trustees must avoid situations involving a significant possibility of conflict between (Deane J, Chan):*
 - Interest and duty (e.g. *Boardman*)
 - Duty and duty (e.g. *Farrington*)
- Duty to keep trust assets separate also relevant here

Self-dealing rule

- The self-dealing rule, an aspect of the conflicts rule, prohibits the trustee from purchasing trust property (*Clay*)
 - This transaction is voidable by the beneficiaries as of right, regardless of whether it was honest and fair, or whether the sale exceeded market value (*Clay*)
- Extends to leases and loans
- EXCEPTIONS: generally not permitted unless –
 - With court consent (usually where the sale would be of obvious benefit to the beneficiaries);
 - Express authorisation in the trust instrument; or
 - With the assent of all beneficiaries (of full age and capacity)
 - If trustee entered into contract before becoming trustee
 - BUT trustees may be caught even after property ceases to be trust property (*Keech*)

Fair-dealing rule

- Under this rule, sale by a beneficiary to a trustee of a beneficial interest in a trust won't be automatically void but may be set aside unless trustee can show that (*Clay v Clay*):
 - No advantage was taken of the position as trustee;
 - Full disclosure was made to the beneficiary; and
 - Transaction was fair and honest
- If trustee meets these burdens, interest acquired by trustee is placed beyond any claim by beneficiary (*Clay*)

Remedies

- Account of profits
- Equitable compensation
- CT (*Keech; Chan* – held lease on CT for beneficiary/partnership)
- Rescission may be appropriate
- Injunction to stop on-sale
- May be grounds for seeking removal of trustee

facie best served by the trustees seeking to obtain maximum returns on their investments

- Investments should be made solely based on well-established financial criteria
- EXCEPTIONS:
 - Where trustees are satisfied that charity's objects conflict with a certain kind of investment, they shouldn't make the investment even if this results in financial detriment
 - E.g. cancer charities investing in tobacco
 - Where particular investments might hamper the charities work by discouraging donors or potential recipients
 - Can accommodate certain viewpoints if satisfied that this wouldn't involve a risk of significant financial detriment
 - Trust deed may allow/require such action

Harries v Church Commissioners (1992) (UK)

- **Facts:** a large trust fund was used to support the clergy of the Anglican church. Ps argued that trustees must have regard to the object of promoting the Christian faith and that the investment policy was too focused on financial (rather than Christian moral) considerations
- **Nicholls V-C:** disagreed with Ps – trust was established for the purpose of generating money to be applied in support of a charity's aims (needed money to advance religion)

Super funds and best interests

- Trustees don't have a duty to act in the best interests of the employer company when making decisions – they owe their loyalty exclusively to employee beneficiaries (*Asea Brown*)
- BUT trust deed can be altered to meet the employer's interests (*Asea Brown*)

Duty to invest in non-speculative investments (s 7(2)(b) TA)

- Speculation not allowed under the 'line by line' analysis – each investment had to independently satisfy the prudence requirement
- BUT despite s 7(2)(b) TA, some degree of speculation is arguably allowed by the current TA
 - Compare with s 8 TA
 - Underpinned by Modern Portfolio Theory (MPT): a portfolio that contains safe *and* risky investments might arguably be balanced and justified
 - Portfolio *judged as a whole* might be prudent per MPT – on this basis some degree of speculation is allowed
- Note: the fact that the legislature approved of MPT but still put in s 7(2)(b) says that some investments are TOO inherently hazardous to have, regardless of an otherwise diversified portfolio
- Maybe also supported by MPT – speculative investments might not expose to only market risk

Duty to act impartially (preserved by s 7(2)(c) TA)

- *The trustee must act impartially between:*
 - *Individual beneficiaries; AND*
 - *Different classes of beneficiaries*

B. TRUST POWERS

Nature

- Donee of power is under an obligation to exercise the power

Court intervention

- A court will intervene to force the exercise of a trust power but won't exercise the power itself (e.g. *Chang*)
 - Objects can go to court to get the donee to exercise their discretion but cannot insist that a declaration be made in their favour
- Objects have standing to complain of improper exercise of discretion

C. PROPER EXERCISE OF TRUSTEES' DISCRETIONS

- The court examines whether the discretion was exercised but not how it was exercised (*Karger*)

Test

- The exercise of a discretion will not be examined or reviewed by the court as long as (*Karger* per McGarvie J):
 - (a) The discretion is exercised by the trustee in good faith;
 - (b) Upon real and genuine consideration; and
 - (c) In accordance with the purposes for which the discretion was conferred

(a) In good faith

- Equates to acting honestly
- Honest blundering, carelessness or even gross negligence do not of themselves amount to bad faith (very high threshold) (*Karger*)

(b) Upon real and genuine consideration

- Not if trustee considered the wrong question or didn't really apply his/her mind to the question
 - E.g. *Klug*: mother didn't exercise a power in favour of her daughter because she married a Frenchman → no exercise of discretion
- Court will consider whether a discretion has been exercised irresponsibly, capriciously or wantonly (*Karger*)
- Need 'sufficiently extensive' gaps and errors (not defined in *Karger*)
- This is a very low threshold (*Dunstone*): satisfied by a process of discussion and negotiation to reach a decision
 - They may not have known the article number, but were aware that the deed governed their activities and any decision would be made by them as trustees

(c) For the purposes for which the power was conferred

- Burden of proof on person alleging improper purpose: court will assume proper exercise

(a) Is the ROI excluded in the deed?

- Whether this is possible depends on the jurisdiction. In Vic, seems possible
- **VSC:** s 2(3) *TA* allows statutory provisions to be overridden by an express term in the trust instrument.
- *Brooking J* in *RWG* held that as a matter of statutory interpretation (Act doesn't say otherwise of Qld legislation), the statutory ROI could be altered or excluded by the trust instrument
 - 'If a trustee is willing to accept office where the trust instrument ousts his indemnity, I do not see why he should not be free to do so' (no reason in case-law)
 - BUT this was a 'tentative' opinion
- **NSWSC:** Santow J stated that the ROI arose as a necessary incident to the office of trustee, was integral to the institution of the trust, and was for the benefit of the trust and its creditors, whether or not the creditors were aware that they were dealing with a trust (*Jonco Holdings*)

(b) Is the conduct for which the expense is claimed within the protection of indemnity?

- Traditional position: expenses must be reasonably and properly incurred
 - Under this approach, the court assumes that the expense was properly incurred and the onus is on [beneficiary] to prove otherwise
- BUT this has been doubted in Vic (*Nolan*) and NSW (*Gatsios*)

***Nolan* (VSCA per Ormiston JA) (2003)**

- Properly incurred means 'not improperly incurred', referring to the circumstances of the duty the trustee was seeking to perform in incurring the expense
- Distinguish between
 - Duties that require strict compliance: duty to keep and render accounts, fiduciary obligations, investment power and duty to adhere to the terms of the trust
 - Failure to comply → expense/liability NOT properly incurred
 - Day-to-day functions of trust management that require the trustee exercise ordinary standards of prudence
 - Failure to comply → not automatically improperly incurred (unless incurred in bad faith, outside power etc.)
 - Reasonableness not 'overzealously enforced' – impacts upon quantum of the amount claimed by the trustee (ask how much a prudent trustee would spend)
- Expense technically incurred in breach of trust (e.g. 'mere slip' in negligently re-mortgaging trust property) can still be subject of ROI; lack of prudence shouldn't prevent this

***Gatsios* (NSWCA) (2002)**

- Suggested there is no requirement for expense to be 'properly incurred' in trust administration, and that right would be available unless trustee acted outside powers, in breach of duty, criminally or fraudulently
- E.g. damages for misleading and deceptive conduct could be subject to ROI