

# LAW5010

## PRINCIPLES OF TRUSTS

EXAM NOTES

*TRIMESTER THREE 2018*

<b>TOPIC 1: INTRODUCTION TO TRUSTS .....</b>	<b>4</b>
1.1    INTRODUCTORY PRINCIPLES.....	4
1.2    CLASSIFICATION OF TRUSTS .....	5
1.3    ESSENTIAL ELEMENTS OF A TRUST.....	5
<b>TOPIC 2: CREATION OF TRUSTS.....</b>	<b>6</b>
2.1    CREATION OF A TRUST .....	6
2.2    TYPES OF TRUST INTERESTS .....	6
<b>TOPIC 3: CERTAINTY OF INTENTION .....</b>	<b>7</b>
3.1    REQUIREMENT FOR CERTAINTY OF INTENTION .....	7
3.2    ELEMENTS.....	7
<b>TOPIC 4: CERTAINTY OF OBJECT.....</b>	<b>9</b>
4.1    REQUIREMENT FOR CERTAINTY OF OBJECT .....	9
4.2    TYPES OF TRUSTS.....	9
4.3    CLASSIFYING POWERS OF APPOINTMENT .....	10
4.4    STANDING (LOCUS STANDI) .....	10
4.5    TEST FOR CERTAINTY .....	11
<b>TOPIC 5: CERTAINTY OF SUBJECT MATTER.....</b>	<b>13</b>
5.1    REQUIREMENT FOR CERTAINTY OF SUBJECT MATTER .....	13
<b>TOPIC 6: CONSTITUTION OF TRUSTS .....</b>	<b>14</b>
6.1    CONSTITUTION OF THE TRUST .....	14
6.2    TRANSFER OF PRESENT LEGAL PROPERTY .....	14
6.3    PRESENT EQUITABLE PROPERTY .....	17
<b>TOPIC 7: FORMALITIES .....</b>	<b>18</b>
7.1    INTRODUCTORY PRINCIPLES.....	18
7.2    REQUIREMENTS FOR TESTAMENTARY TRUSTS .....	18
7.3    REQUIREMENTS FOR INTER VIVOS TRUSTS.....	18
7.4    EXAMPLES OF APPLICATION .....	21
<b>TOPIC 8: FAILED CREATION OF A TRUST .....</b>	<b>22</b>
8.1    CONSEQUENCES OF FAILED CREATION .....	22
<b>TOPIC 9: CHARITABLE TRUSTS .....</b>	<b>23</b>
9.1    INTRODUCTORY PRINCIPLES.....	23
9.2    PUBLIC BENEFIT .....	23

## TABLE OF CONTENTS

---

9.3	CHARITABLE PURPOSE .....	24
9.4	DOCTRINE OF CY-PRES.....	26
<b>TOPIC 10: QUISTCLOSE TRUSTS .....</b>		<b>27</b>
10.1	PURPOSE OF QUISTCLOSE TRUSTS.....	27
10.2	THE DEBATE BETWEEN AN EXPRESS TRUST OR RESULTING TRUST .....	28
<b>TOPIC 11: TRUSTEE'S POWERS.....</b>		<b>29</b>
11.1	INTRODUCTORY PRINCIPLES.....	29
11.2	TRUSTEE'S DISCRETION .....	29
11.3	RIGHT TO REVIEW .....	30
<b>TOPIC 12: TRUSTEE'S DUTIES.....</b>		<b>31</b>
12.1	INTRODUCTORY PRINCIPLES.....	31
12.2	DUTY TO INVEST .....	32
12.3	EQUITABLE DUTIES.....	35
12.4	EXCLUSION OF LIABILITY (DEFENCES) .....	38
<b>TOPIC 13: TRUSTEE'S RIGHTS .....</b>		<b>40</b>
13.1	RIGHT OF INDEMNITY .....	40
13.2	DIRECTORS OF CORPORATE TRUSTEES.....	42
13.3	RIGHT TO APPROACH THE COURT .....	42
<b>TOPIC 14: BENEFICIARY'S RIGHTS .....</b>		<b>43</b>
14.1	INTRODUCTORY PRINCIPLES.....	43
14.2	THE RIGHT TO CALL FOR TRUST PROPERTY AND TERMINATE THE TRUST .....	43
14.3	RIGHT TO SEEK REMOVAL OF A TRUSTEE .....	44
<b>TOPIC 15: REMEDIES FOR BREACH OF TRUST .....</b>		<b>45</b>
15.1	INTRODUCTORY PRINCIPLES.....	45
15.2	PERSONAL REMEDIES.....	45
15.3	PROPRIETARY REMEDIES AND TRACING .....	46

## TOPIC 3: CERTAINTY OF INTENTION

---

### 3.1 REQUIREMENT FOR CERTAINTY OF INTENTION

The settlor must have intended to create a trust of his/her property, as opposed to making a gift or loan – the onus of proof is on the party wishing to enforce the trust (*Byrnes*)

In other words, you must be able to ascertain the settlor's certain intention to impose on the titleholder of the property, an obligation to hold that property for the benefit of another

There are no particular words required but rather an analysis of the circumstances

Lack of intention to create an express trust is fatal to that trust, regardless of method the trust was created (*Korda v Australian Executor*)

### 3.2 ELEMENTS

#### 3.2.1 IMMEDIATE INTENTION

1. Is the intention to create the trust immediate? (*Harpur v Levy*)

-The settlor must have a present intention to create a trust

-A voluntary promise to create a future trust is not sufficient unless there is consideration

#### 3.2.2 REVOCATION OF THE TRUST

2. Has the settlor expressly allowed for revocation of the trust? (*Mallot v Wilson*)

-If they have not allowed for revocation, disposal of the beneficiary interest is final and cannot be reversed or revoked by the settlor

-This applies even if there is a subsequent deed

#### 3.2.3 MANIFESTATION OF INTENTION

3. In the circumstances of the case and on the true construction of what is said and written, was a sufficient intention to create a true trust manifested by the settlor? (*Tito v Waddell*)

<u>Created in writing</u>	<u>Created orally</u>
-Where the express trust is written, clear and unambiguous, the settlor's intention is objectively manifested by those words (there is nothing clearer than by way of deed) ( <i>Byrnes</i> )	-Where the trust is created orally, the settlor's intention is objectively manifested, but the circumstances of the case must also be looked at ( <i>Byrnes; Paul v Constance</i> )
-Where the words are ambiguous, informal, inexplicit or vague, the intention is still objectively manifest, but also look at the circumstances of the case ( <i>Byrnes; Re Armstrong; Chang v Tijong</i> )	-This includes looking at the words, actions, language, relationship and character of all parties involved ( <i>Byrnes; Paul v Constance affirmed by the High Court in Korda</i> )
-Any document, such as a will, will be construed as a whole, and the circumstances and context of the matter are relevant ( <i>Cobcroft v Bruce</i> )	

## TOPIC 6: CONSTITUTION OF TRUSTS

---

### 6.2.5 CHATELS (CHOSE IN POSSESSION)

For the transfer of chattels to be a valid legal assignment:

1. A deed is required; or

2. Delivery of possession with the intention to transfer the right

-The onus of proof is on the defendant

-Both elements must coincide in either order (*Re Stoneham; Thomas v Times Book Co*)

Note:

-If this fails, consider whether the assignment would be recognised in equity

### 6.2.6 PART CHOSE IN ACTION

If there is no entire assignment, *section 134 PLA* cannot apply to enforce a non-absolute gift at law

However an assignment may be recognised in equity if there is a manifestation of intention to assign immediately and irrevocably (*Norman; Shepherd*), and it is delivered to the assignee (*Windeyer J in Norman*)

The best way to manifest the intention is by way of deed (*Norman*)

### 6.2.7 FAILED LEGAL ASSIGNMENT (EQUITABLE ASSIGNMENT)

If the legal assignment fails, for a gift of legal property to be validly assigned in equity, three factors must be considered:

1. The donor must have done everything that was necessary to be done alone (*Milroy v Lord*)

-For land, registration of the transfer is required (*Issacs J in Anning v Anning*)

-Requires the donor to do everything in his power (*Higgings J in Anning v Anning*)

-Requires the donor to do everything necessary for him to do (*Griffith CJ in Anning; see also Norman*)

2. The donor must fully equip the donee so that they are able to complete the gift themselves (*Re Rose*)

3. The instrument of transfer must be signed by the titleholder or power of attorney (*Anning*)

Current High Court Test *per* *Corin v Patton*

Has to donor done everything that was necessary to be done alone? (*Mason & McHugh JJ in Corin v Patton*)

-This may also require that the gift be placed beyond the recall of the donor (*Deane J in Corin v Patton*)

-Deane J's consideration is likely concerned with when an agent is involved; consider at what state the donor cannot call the agent and stop the transfer

Note:

-When a solicitor is acting for donor and donee, consider the extent of the agent's authority as given by the donor; in *Marchesi v Apostolou* it was held that the donor had not done all they needed to do as they wished to pay the stamp duty themselves – The solicitor was thus still action for the donor and the gift was not yet beyond recall

## TOPIC 7: FORMALITIES

### 7.3.1 CREATION/DISPOSITION OF INTERESTS IN LAND PER SECTION 53(1)(A)

---

*Section 53(1)(a)* No interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorized in writing, or by will, or by operation of law

---

The elements required to satisfy *section 53(1)(a)* requirements include:

1. Must be land

-Includes any legal or equitable interest in land (*Adamson v Hayes*)

2. Covers both creation or disposition

-‘Created’ refers to the creation of a new equitable interest in a beneficiary

-‘Disposed’ occurs when there is a transfer of an existing interest from one holder to another (PT v Maradona)

3. Requires writing and signature

-By the person creating or conveying the interest in land; or

-By an agent who has been lawfully authorised in writing to do so

Note:

Writing is mandatory at the time of the transaction – failure to comply means the trust is invalid and unenforceable

### 7.3.2 DECLARATION OF TRUSTS PER SECTION 53(1)(B)

---

*Section 53(1)(b)* A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will

---

The elements required to satisfy *section 53(1)(b)* requirements include:

1. Must be land

-Includes any legal or equitable interest in land (*Adamson v Hayes*)

2. Covers declarations (not applicable to trusts by transfer)

-Can be a declaration for any land

-Can be a declaration for any interest in land (both legal and equitable) *per Adamson v Hayes*

3. Requires manifestation of an intention which is proven by some writing and signed by the settlor (not an agent)

-Manifestation requires the three certainties and the essential terms of the trust to be clear

-The trust does not need to be created in writing to be valid

-Written evidence is required at some stage in any form, including informally (*DSS v James; Hagan v Waterhouse*)

-Can be contained in multiple documents even if only one is signed (*DSS v James; Chang v Tijong*)

-The document must contain the terms of the trust (*DSS v James*)

Note:

-Even if a declaration is not in writing, the trust is enforceable but invalid

-If the trust is reduced to writing at a later date, it is valid and enforceable (*Kennon v Spry*)

-Manifestation must be that of the settlor, not an agent

## TOPIC 12: TRUSTEE'S DUTIES

---

### 12.1 INTRODUCTORY PRINCIPLES

A trustee has legal title to the property, which they hold for the benefit of someone else

Thus their obligations are linked to this holding of property, requiring them to preserve the property and account to the beneficiaries for the property

The sources of a trustee's duties include:

1. Trust deed/instrument – Paramount to all other sources *per section 2(3) Trustee Act*
2. Equitable principles (*sections 7 and 8 Trustee Act*)
3. *Trustee Act 1958 (Vic)*

#### 12.1.1 ON ASSUMING TRUSTEESHIP

On assuming the trusteeship, the trustee must comply with the terms of the trust and complete the following:

1. Must be familiar with the terms of the deed
2. Must sort out any issues of invalidity and work out their obligations
3. Must 'get in' the property, meaning they must secure the property, or risk liability to compensate (*Caffrey v Darby*)
4. If a new trustee becomes aware of a breach by an old trustee, the new trustee is under a duty to seek recovery from the old trustee (*Permanent Trustee v Perpetual Trustee*)
5. Must keep trust assets separate from non-trust assets (*ASC v AS Nominees*)
6. Must invest trust funds (*sections 4, 12F and 63 Trustee Act*)

Note:

-The trustee has the power, but not a duty to insure the trust property (they must insure if a prudent person acting for themselves would insure)

#### 12.1.2 DUTY TO COMPLY WITH THE TRUST DEED

The most important duty of the trustee is the duty to adhere and carry out the terms of the trust deed unless otherwise authorised (*Green v Wilden*)

The trust deed is supreme to statutory or other duties and can alter any of the statutory or equitable duties the trustee owes (*Green v Wilden; section 2(3) Trustee Act*)

Departing from the Trust Deed Accepted:

1. Where the law requires it via statute or an order from the court
2. Where all sui juris (of age) beneficiaries who are absolutely entitled unanimously agree to a departure by the trustee
3. Where the court permits/directs departure (*section 63 Trustee Act*)
4. Where the trustee has acted honestly and reasonably, and ought to be fairly excused (*section 67 Trustee Act*)

## TOPIC 12: TRUSTEE'S DUTIES

---

### 12.2 DUTY TO INVEST

On assuming the trusteeship, the trustee has a duty to invest the trust funds and 'put to work' the property from the trust (*Byrnes v Kendle*)

When examining the duty to invest, each of the below considerations must be taken into account

#### 12.2.1 TRUSTEES POWER TO INVEST – SECTION 5

The trustee can only invest property in investments authorised by the trust deed, legislation or the Court

---

*Section 5* A trustee may, unless expressly prohibited by the instrument creating the trust:

- (a) Invest trust funds in any form of investment; and
  - (b) At any time, vary an investment
- 

Note: 'Investment' has a broad meaning referring to the production of income and/or capital growth (*Perpetual Trustee Co v Cheyne*)

#### 12.2.2 STANDARD OF PRUDENCE – SECTION 6(1)

The standard of prudence that a trustee must employ is outlined in *section 6(1) Trustee Act*

If the trustee is a professional trustee or investor, they will be held to the standard of a prudent person in their profession, acting for others *per section 6(1)(a)*

If the trustee is a non-professional trustee, they will be held to the standard of an ordinary prudent person, acting for others *per section 6(1)(b)*

---

*Section 6(1)* Subject to the instrument creating the trust, a trustee must, in exercising a power of investment:

- (a) If the trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
  - (b) If the trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons
- 

Note: In the case of more than one trustee, if there is both professional and non-professional trustees, they will all be held to the higher standard outlined in *section 6(1)(a)*

#### 12.2.3 DUTY TO COMPLY WITH THE TRUST INSTRUMENT – SECTION 6(2)

Trustees must comply with the requirements of the trust instrument, including if it requires approval or consent from the beneficiaries

---

*Section 6(2)* A trustee must exercise a power of investment in accordance with any provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of any consent or approval with respect to trust investments

---



## TOPIC 13: TRUSTEE'S RIGHTS

---

### 13.1.2 EFFECT OF PROPERLY INCURRED EXPENSES

When an expense is properly incurred, the right of indemnity is engaged and creates a proprietary charge or lien over trust assets, which takes precedence over the beneficiaries' interests (*Octavo Investments v Knight; Commissioner of Stamps v Buckle*)

#### Note:

- Beneficiaries may be unable to wind up the trust under the rule in *Saunders v Vautier* while the right of indemnification is outstanding
- It is unclear what the beneficiary's interest is for tax purposes while the right of indemnification remains outstanding

#### Amount of the Indemnity:

1. If it equals the value of the trust assets, the trustee is entitled to the entire trust interest
2. If it exceeds the value of the trust assets, the trustee can redeem the excess from the beneficiary

Note: Third party trust creditors are able to be subrogated to the trustee's right of indemnity, and sue for trust assets directly (*Re Raybould*)

#### Trustee Variables:

1. If the trustee becomes bankrupt, the right to assets passes to the bankruptcy trustee/liquidator
2. If the trustee dies, the right of indemnity forms part of their estate
3. If the trustee loses their office, any accrued right of indemnity

### 13.1.3 IF PROPERLY INCURRED EXPENSES ARE GREATER THAN TRUST ASSETS

If the trust assets are insufficient to indemnify the trustee, then the beneficiary may be personally liable to indemnify the trustee

The requirements as outlined in *Hardoon v Belilios*:

1. Beneficiary is sui juris (of age)
2. Beneficiary is absolutely entitled

#### 3. Beneficiary is either:

- A single beneficiary (*Hardoon*)
- Multiple beneficiaries, in which case they indemnify in proportion to their interests (*JW Broomhead*)

#### Minors

Minors are not personally liable to indemnify the trustee

#### Note:

- If the beneficiary has assigned their interest, the assignee must indemnify the trustee, but the trustee can still obtain indemnity from the original beneficiary (it is the trustee's option)
- Insolvency of multiple beneficiaries does not affect proportions of other beneficiaries (*Broomhead*)
- A person disclaiming retrospectively is free of the burden, but the person with whom they are jointly entitled should not now bear the full indemnity

## TOPIC 15: REMEDIES FOR BREACH OF TRUST

### 15.3.3 MIXING WITH THE FIDUCIARY'S OWN PROPERTY

An asset is mixed when the plaintiff's property has contributed in part only towards the acquisition of a new asset, and it need not be a physical mixing of the assets (*Foskett v McKeown*)

A plaintiff can trace into the hands of an innocent third party (a volunteer) who receives the asset as a gift (*Foskett*)

When payments are made into a mixed fund, the plaintiff is entitled to elect to claim either:

1. A constructive trust over their proportionate share of the asset (*Foskett*)
2. A personal remedy secured by an equitable lien (*Foskett*)

Note on Severance:

- If the mixed property is severable, the plaintiff can acquire the proportionate number of severable assets or take an equitable lien to secure a personal remedy (*Brady v Stapleton*)
- If the mixed property is not severable, the plaintiff can either obtain a lien to secure the money per *Foskett or Brady*, including any profits (*Scott*) OR they may seek a constructive trust over a proportionate share of the property purchased (*Scott; Foskett*)

### Example Scenarios

#### Scenario 1

If there is a mixture of shares which are then sold:

- The trustee is presumed to have transferred his or her own property first (*Brady v Stapleton, approving Re Hallett*)
- Remedy gives the plaintiff the option to elect between: *Brady v Stapleton*
  - Acquiring the proportionate number of severable assets
  - A personal remedy secured by an equitable lien over the assets

#### Scenario 2

If there is a misappropriation of trust funds, which are used to buy a house/property (or family dispute)

- An equitable lien may be capable of doing justice for the increase in the value of the house in the same proportion as the trust had contributed to the value of the purchase (*Scott v Scott*)
- This reconciles with *John Alexander*, which holds that a constructive trust ought not to be imposed if there are other orders capable of doing full justice

### 15.3.4 ENDING OF THE RIGHT TO TRACE

1. A bona fide purchaser for value without notice (*Foskett; Re Diplock*)

- As long as the purchaser is bona fide and is ignorant to the misappropriation, a claim for tracing will be defeated

2. Dissipation (*Re Diplock*)

- A dissipated asset ends the ability to trace
- May come in the form of a nil bank account balance or the discharge of an unsecured debt

Note:

- Even if tracing is not available, a personal remedy secured by a lien will still be available