

Topic 1 - Introduction & Classification

What is a trust?

- Obligation **enforceable in equity** which rests on the trustee as owner of some specific property (trust property) to deal with that property **for the benefit of the beneficiary** or for the **advancement of certain purposes**
- No one perfect definition
- Also need to consider the **whole relationship**
- *A trust exists when the owner of a legal/equitable interest in certain property is bound by an obligation, recognised by and enforced in equity, to hold that interest for the benefit of others, or for some purpose permitted by law (Jacob's Law of Trusts).*
- The word 'trust' refers to the duty or aggregate accumulation of obligations that rest upon a person described as trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called cestuis que trust, or beneficiaries, if there be any; if not for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest (Re Scott per Mayo J).

Terminology

- **Trustee (T)**
 - One or more persons who own trust property (legal or equitable ownership) & under equitable obligation to administer trust for benefit of beneficiary
- **Beneficiary (B)**
 - One or more persons for whom trust property held; equitable or beneficial owner (cestui que trust or 'object'); has equitable proprietary interest in trust property
- **Fiduciary Relationship**
 - Trustee has equitable duty to act in utmost good faith in interests of beneficiary
- **Trust *inter vivos* or settlement**
 - Trust created by a person to operate while the person is alive
 - Comes into existence when declared or transferred
 - **Settlor**: person who creates trust inter vivos; settlor can also be trustee (but not always)
- **Testamentary trust**
 - Trust created by will
 - Testator: person who creates testamentary trust

Essential elements

- **Legal (or equitable) title to property vested in trustee**
 - A trust must have a trustee
 - There can be one or more trustees (generally limit of 4)
 - Trustee can be natural person or corporation
 - Dual ownership of property – legal/equitable title vested in trustee and beneficial ownership vested in beneficiary
 - Trustee can be both legal and equitable owner but can't be the sole beneficiary and sole trustee (merger of legal and equitable ownership) (Re Cook)
 - Ownership must be split for there to be a trust
- **Trustee has equitable obligation (fiduciary obligation)**
 - Trustee has FO – to administer the trust property for benefit of beneficiaries
 - Trustee exists for benefit of the beneficiaries and for that alone – obligation is at centre of trust concept
 - All trusts are fiduciary relations, but not all fiduciary relations are trusts

- **The obligation relates to property (trust property)**
 - All forms of property may be held on trust (real/personal; corporeal/incorporeal; chose in possession/chose in action)
 - Trust property ('subject' or 'subject matter' of trust) must be identifiable and certain
 - Fiduciary obligation must relate to trust property
- **The obligation is annexed to property in that its breach attracts proprietary consequences**
 - Trustee has personal (in personam) obligations to beneficiary – beneficiary has personal remedies against trustee
 - Personal remedy may not be sufficient (insolvency/priorities)
 - Beneficiary may assert proprietary rights over (a) trust property; or (b) property into which trust property converted
 - Proprietary rights may be asserted against trustee or subsequent legal owners (except BFPfVWN)

Classification of trusts

Express

- Where creator has expressed intention to create trust either:
 - In trust instrument in writing
 - Inferred from surrounding circumstances
- Can be created by declaration of trust, or transfer of prop to T to hold for benefit of B
- May be inter vivos or testamentary; fixed or discretionary; public or private

Implied

- N.b. Resulting & constructive trusts do not depend on intention of creator

Resulting

- Law presumes intention to create a trust from circumstances, even though no express intention
- **Automatic resulting trust** – presumed by law to fill gap in beneficial ownership
 - Settlor transfers B/acre to T on trust to A for life
 - A has beneficial ownership (equitable life estate) but still not all of the beneficial ownership. Equitable remainder results back to the settlor – no intention on settlor's part that it would result back to them
 - Settlor transfers B/acre to T for A if attains age of 25 (A dies)
 - If doesn't reach age it goes back to settlor
- **Presumed resulting trust** – rebuttable presumption of intention where transferee does not contribute to cost of trust property

Constructive

- Trust imposed by operation of law (construed by the court) regardless of intention of parties – duties of trustee imposed where unconscionable to claim beneficial ownership
- **Institutional CT** = specifically enforceable agreement to assign property; trusts to complete imperfect gift; common intention constructive trusts; misapplication of property subject to fiduciary obligation; mutual wills. Established from time criteria for existence are established
- **Remedial CT** = courts establish as remedy. 'joint endeavour' constructive trusts; remedy arising from equitable estoppel

The difference between categories of trusts

- Resulting trusts are about presumed intention to retain equitable title
- Contrastive trusts are equity's response to unconscientious behaviour
- An express trust arises when a person sufficiently expresses an intention for a trust to be created. They are deliberately created.

Types of Express trusts

- Fundamental distinction exists between trusts that are for *persons* and trusts that are for *purposes*

Inter Vivos trusts

- Trusts by **transfer**
 - Settlor vests prop in T, subject to equitable obligation to hold prop for benefit of B
- Trusts by **declaration**

- Settlor owns prop and declares that will hold it on trust for B
- E.g. H says I want R to have my books and I want B to hold them for her benefit
 - No trust unless H transfers the legal title in books to B
 - H is settlor, B is trustee and R is beneficiary

Fixed/Discretionary trusts

- **Fixed** interest
 - Bs have fixed interests in income/capital of trust prop and can enforce both administration and distribution of trust prop
 - Proprietary right in prop, enforce. Can assign that right. Can trace
 - Bs are outlined when the trust is created and their interest is defined
- **Discretionary**
 - Ts have discretion to select who, in class of Bs, is to receive benefit (known as power of appointment) (doesn't have to be T that determines)
 - T has obligation to perform trust, but has discretion to choose among Bs = power coupled with duty/trust power (HC preferred term trust power in *Buckle*)
 - B can insist that trustee declare appoint beneficiaries etc. but don't have prop rights

Private/public trusts

- **Private**
 - To benefit private persons, irrespective of benefit conferred on public at large (non-charitable express trusts)
 - Corporation is a private person
 - No requirement that B be in existence at time trust created (e.g. unborn child)
 - May be valid trusts for class of persons, exact constitution unknown at time of creation
 - Purported private trust which has no B is void (no certainty of object)
- **Public/Charitable**
 - Trusts created for a purpose (e.g. charitable), not to benefit private individuals
 - Charitable trust is enforceable by A-G (but A-G isn't beneficiary)
 - Purpose trust with no private B may arise from legislation – trust for statutory purpose
 - Trust for 'non-charitable' purposes will usually fail for want of beneficiary to enforce
 - Have been upheld in certain limited cases
 - Upkeep of animals
 - Erection/maintenance of graves/monuments
 - Unincorporated associations

Trusts vs Other relationships

Trust vs Agency

- Similarities
 - Agent in fiduciary relation to principal; t/ee in fiduciary relation to beneficiary;
 - Agent must act for benefit of principal; t/ee must act for benefit of beneficiary
- Distinction
 - Trust property is vested in trustee
 - Agent only has possession of property usually, not title

Trust vs Debt

- Debt
 - Creditor limited to common law remedy of action on debt;
 - Unsecured creditor only personal right against debtor to be paid amount owing
- Trust
 - Payor may trace money into any property payee may have purchased with money
 - Beneficiary has equitable proprietary interest in trust property

Trust vs Contract

- Relationship between creator of trust and trustee is not necessarily contractual
- Contract requires agreement (offer/acceptance)
- Trust can arise from unilateral expression of settlor's intention (*Mallot v Wilson*)

- Settlor merely former owner of property and can't enforce trust (must be enforced by beneficiary)

Modern Functions of trusts

- Estate and tax planning
- Investment structures
- Trading trusts
- Superannuation trusts
- Benefitting people unable to manage property for themselves – infants/adults under incapacity (protective trusts)
- Charities

Creation of Express trusts

- Created by **trust instruments – express**
 - Testamentary trust = will
 - Inter vivos = trust deed

Consequences of creating an express trust

- Serious obligations are imposed on the trustee.
- Settlor loses all right and interest to the property unless:
 - They make themselves the trustee (in which case they keep the legal title);
 - They are a beneficiary (in which case they keep some of the equitable title); or
 - They expressly reserve a right to revoke the trust.'

Requirement for Express trust

- 3 certainties;
 - Certainty of intention;
 - Certainty of subject matter (property);
 - Certainty of object (beneficiaries/objects)
- Trust must be
 - Completely constituted (property must pass, applies to trust by transfer); or
 - Supported by valuable consideration
- Formalities – where legislation requires, trust must be created in writing or evidenced in writing (see s 53 PLA)
- Must be no 'latent flaw' – incapacity, illegality of purpose or some other vitiating factor