

Topic Four: Statutory Writing Formalities

Note: if a question says ‘a valid will has been created’, then there is no need to go through the formality requirements

4.1 Testamentary trusts

- Must comply with formalities for making of will (*Wills Act 1958*)
- Will must be in writing, signed, attested by two or more witnesses (*S7 Wills Act*)
- Witnesses must attest and subscribe will in presence of testator (*S7 Wills Act*)
- Provisions for informal wills
- Note: these are **more onerous** requirements than an inter vivos trust

4.2 Inter vivos trusts

- Must comply with *S53 Property Law Act*

PROPERTY LAW ACT 1958 - SECT 53

Instruments required to be in writing

(1) Subject to the provisions hereinafter contained with respect to the creation of interest in land by parol—

(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;

- **Validity** requirement – if not complied with = no trust/void ab initio

(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;

- **Enforceability** requirement – if not complied with not invalid just non-enforceable

(c) a disposition of an **equitable interest** or trust **subsisting** at the time of the disposition must be in **writing signed by the person** disposing of the same, or by his agent thereunto lawfully authorized in writing or by will.

- **Validity** requirement – if not complied with = no trust/void ab initio

(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

Note: ‘parol’ means ‘orally’

	S53(1)(a)	S53(1)(b)	S53(1)(c)
When	Created or disposed BUT: not declaration of trust/trust by transfer (as they will be in ss(b), <i>DSS v James</i>)	Declaration of trust or trust by transfer	Disposition
Interest	Legal and equitable (<i>Adamson</i>)	Legal or equitable	Subsisting equitable interest NB: will not occur if legal and equitable title are split
Property	Land only	Land only	Any property Real or personal (<i>Grey v IRC</i>)
Writing	Created in writing	Manifested or proved by writing	Created in writing
Signature	Settlor or agent	Writing does not have to be settlor – Trustee in <i>Hogan</i> provided written evidence	Settlor or agent

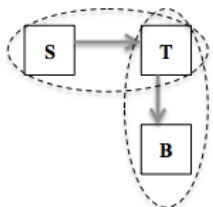
4.3 Application of s 53: Creation / Disposal of an Interest in -

- Legal (Land): s53(1)(a)
- Equitable (Land): s53(1)(a)
 - ‘Interest in land’ under s53(1)(a) includes both legal and equitable interests = includes trusts
 - Included equitable 1/3 interest in mining lease (*Amadson v Hayes*)
 - However, by implication of ss(b), ss (a) does not apply to trusts by declaration or transfer, per exception in *DSS v James*; *Hagan v Waterhouse*

4.4 Application of s 53: Declaration of a Trust

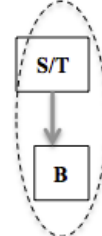
- Trust over personal property (i.e. non-land property) – no writing requirement (*Paul v Constance*)
 - This is not covered by s53, as it is not an ‘interest in land’ (ss(1))
- Land – Compare a transfer to a declaration
 - Diagrammatic explanations – a trust by transfer involves two transactions with an interest in land and each must be dealt with separately:

Trust by Transfer



- Transfer of legal title from S to T is a creation/disposition of an interest in land – must comply with s 53(1)(a)
- Declaration of trust for benefit of B raises ss 53(1)(a) and (b) but (b) prevails (*DSS v James*, p. 78C)

Trust by Declaration



- Declaration of a trust for benefit of B raises both s 53(1)(a) and (b) [per *Adamson* a trust is an equitable interest in land] but only (b) must be complied with (*DSS v James*, p. 78C) [only an enforceability requirement]

4.5 Disposition of a Subsisting equitable interest – s53(1)(c)

(a) Subsisting equitable real or personal property

- Applies to disposition of subsisting equitable, real or personal property (i.e. real property = land, personal property = all property except land/interest in it) (*PT v Maradona*; *Grey v IRC*)

‘Subsisting equitable interest’: (types of property/interests s53(1)(c) applies to)

- If settlor is disposing of a subsisting equitable interest s53(1)(c) applies. The assignment must be in writing and signed by S or his/her agent
- Note: applies to subsisting equitable interests in property, both real and personal
 - I.e. also applies to shares and chattels
 - Applies to disposition of a beneficial interest under mortgage (*PT v Maradona*)
 - Applies to attempted oral disposition of shares (*Grey v IRC*)

Issue – Is it a ‘Disposition’:

- Word given ordinary natural meaning; disposition if effect of the transaction is to move beneficial ownership from one person to another; movement in ownership (*Grey v IRC*)
- Three methods of voluntary disposition exist: (per Dixon J in *Howard-Smith*)
 - (i) Declaration of a sub-trust – see below whether s53(1)(c) applies
 - Unresolved issue: is it a disposition of a subsisting equitable interest – s53(1)(c) applying, or it is a creation of a new interest – s53(1)(b) applying?
 - (ii) Manifested intention to immediately assign (transfer) – s53(1)(c) applies
 - This is a simple, assignment to transfer.
 - B has EI, under a RT, assigns to J
 - Must be a direction, no mere authority/permission that revocable until acted upon
 - Must be donor’s expression of intention (c.f. T dealing with trust property under authorization as occurred in – not sufficient, per *Howard-Smith*)
 - (iii) Final direction, non-revocable mandate to hold an interest for another – s53(1)(c) applies
 - E.g. I direct my T to hold my equitable interest in personalty for another, right now (must be adult + absolutely entitled)
 - Words to T to ‘request’ beneficial interest be held on trust, did not amount to **irrevocable disposition** of interest on the facts *Howard-Smith*
 - If disposition is by direction amounting to **‘irrevocable disposition’**, sufficient
 - E.g. A says ‘I want you to hold my shares on trust; I’ll tell you the beneficiaries next week’ and transfers today to the T: until next week beneficial title is still with A; a RT for A; then next week says it is for beneficiary ‘C’ = disposition = immediately binding
- Note: s53(1)(b) (enforceability requirement) does not apply as it is not related to land
 - If not complied with, trust will be invalid

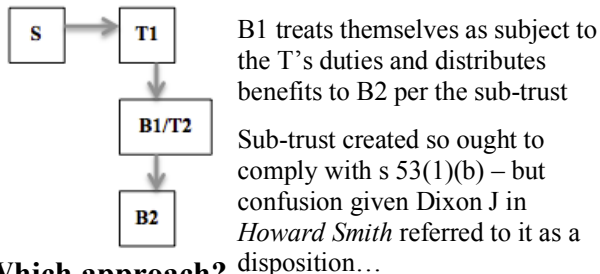
(b) Added requirement for subsisting equitable interest in land

- Where settlor (S) disposes of a subsisting equitable interest in land both s53(1)(a) & (c) apply. The requirements are the same so no issue/conflict arises (*Adamson v Hayes*; affirmed in *Maradona*)

4.6 Sub-trust over land – does s53(1)(c) and/or (b) apply?

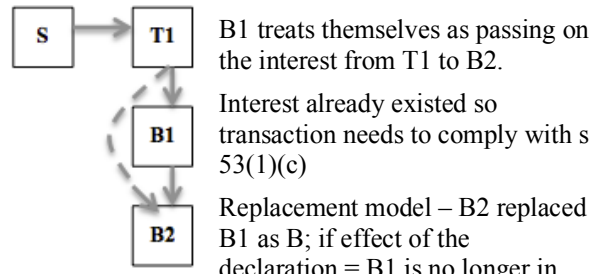
- I.e. does it amount to a ‘disposition’?
- Where a B purports to declare a sub-trust over her/his interest in land an overlap between ss(b) and (c) requirements may arise
 - Is the sub-trust a disposition of an existing interest – s53(1)(c) [T is mere conduit], or
 - Declaration of a new interest – s53(1)(b)? [First B acting as new T]
- Which applies depends on how the B characterizes the outcome

Creation of new interest (sub-trust model)



B1 treats themselves as subject to the T's duties and distributes benefits to B2 per the sub-trust
 Sub-trust created so ought to comply with s 53(1)(b) – but confusion given Dixon J in *Howard Smith* referred to it as a disposition...

Disposition of existing interest (replacement model)



B1 treats themselves as passing on the interest from T1 to B2.
 Interest already existed so transaction needs to comply with s 53(1)(c)
 Replacement model – B2 replaced B1 as B; if effect of the declaration = B1 is no longer in the pic; B2 replaces B1's rights as B – a disposition (*Grey v IRC*, UK); s 53(1)(c) applies

Which approach?

- E.g. Trustee T, beneficiary B. B says ‘I hereby declare my interest in trust A to be held by myself for my daughter J’. Is this a true disposition?

UK approach:

- Depends on whether B will be an active trustee or not? Per Lord Upjohn
 - If B is to be active trustee – s53(1)(b) will apply
 - If B is not to be active trustee – s53(1)(c) will apply
 - Note: this would need to be proved by evidence of B's intention etc.

Aus approach:

- It is not important whether the B intends to be active or not, s53(1)(c) will always apply (Dixon J in *Howard-Smith*)

Conclusion:

- Note: to be safe, just put in writing and assume s53(1)(c) will apply

Topic Six: Duties and powers of Trustees

Overview

Three sources of Trustee duties

- (1) Trust deed: Excludes or modifies standard rules in the statute and equitable principles
 - Note: there are some circumstances where deed cannot be used to modify
- (2) Equitable principles: Profits and conflicts rule
 - This is the base level rule (as fiduciary) which is then supplemented by more onerous statutory requirements
- (3) Legislation: *Trustee Act 1958* (Vic)
 - Complements and further imposes duties on trustees

Trustees vs. other fiduciaries

- The standard for a trustee goes beyond that of which most fiduciaries are subject to, due to the fact that they manage trust property, and it is easier for them to misappropriate

6.1 Duties on Commencement

(a) Duty to comply with deed

- Obeying the trust deed is the most important duty (*Green v Wilden*)
 - ‘Other equitable rules are to be applied subject to any provisions contained in the trust instrument itself’
 - ‘Where the trustee deviates from the terms of the Trust Deed, he acts at the peril of failing to satisfy the Court that the deviation was necessary or beneficial.’ [466]
 - Saying trustee may be personally liable to breach of trust if she / he fails to comply with terms of trust deed
 - If trustee has deviated, they must show either:
 - It was necessary (i.e. can be excused); or
 - It was beneficial (i.e. didn't cause any loss)
- Distributions from the fund are only to be made to people who are entitled. The Trust Deed can override equitable principles as it is paramount (s 2(3); *Pikos Holdings*)
- Examples:
 - A is entitled to a life interest in Capital Asset A. The life tenancy of A will only be able to dispose of some of the capital asset (for their life interest) if it is allowed by the trust deed.
 - When a trustee invests funds, both statute and the deed must be complied with.
 - When distributing funds, compliance with the deed is of utmost importance
 - In a *Corin v Patton* situation: end up with the transfer not complete at law but complete in equity. First responsibility as trustee would be to follow through and make sure you have title put into your name as trustee.
 - *Kafry v Darby* (check spelling): trustees sold property on terms, purchaser was supposed to pay off a certain amount per annum until 850 pounds was reached. He didn't, only made two or three payments before he stopped paying then became a bankrupt. Trustees didn't take any steps in intervening years to pay amount due. Paid instalments on purchase price (missed some facts here). Result: they were required to pay back money themselves

(b) Duty to 'get in' the trust assets

- T must take control of the assets hold in the trust including recovering them from breaches of prior Ts (*Permanent Trustees v Perpetual Trustee*)
 - T must get control of the trust by following through and obtaining legal title
 - T must take control of the trust instrument and familiarize themselves with any terms of the trust, they must work out their obligations
 - If the new T fails to identify and rectify those breaches, s/he will be liable for the breach of trust
- Note: in *Perpetual*, where a 'unit trust' was created, issue with units being traded. Money recovered was distributed to current beneficiaries, even though it was misappropriated when some beneficiaries (who have now sold at loss) had ownership of unit(s) (old Bs)

(c) Duty to distribute – Duty to exercise a power or discretion

- Note: subtle difference whether the discretion is given to a fiduciary (slightly higher standard), or a non-fiduciary (must be in GF and for proper purposes), to satisfy their duty obligations.

(i) Duty to distribute/exercise the relevant Power:

→ Mere/bare power: Discretion to select Bs & amounts received by them (*McPhail*)

- T need only consider exercising the power
- T need only exercise the power in 'good faith' (should they choose to exercise it at all)
- T still under a fiduciary duty to consider whether/what way they should exercise their power
- Court intervention:
 - Court cannot normally compel the exercise of the power (no obligation to exercise)
 - Court will only intervene if the T exceeds their powers (e.g. distributes assets to individuals outside the settlor's intended class); or exercises powers capriciously

→ Trust power: Duty to select but distribution as to who/which quantities to give to whom

- The duties of a T under a power are to (Megarry VC) (*Re Hays Settlement*)
 - Obey the trust instrument and make no appointment outside it
 - Periodically consider whether or not to exercise it (*McPhail*)
 - Consider the range of objects
 - Consider the appropriateness of individual appointments
- Duties: per *McPhail*
 - T to make a survey of the range of objects or possible Bs as will enable them to carry out their fiduciary duty
 - BUT – A wider and more comprehensive range of inquiry is needed in the case of T powers c.f. mere powers

A Trustee who does not turn his or her mind to the question will have failed to exercise the duty (*Turner*)

- *Turner*: co-trustee appointed his relatives as trustees, who just signed where he told them to (never turned their minds). Appointments made and were successfully challenged.

Re Hays

- Facts: Ts restructured entire trust. They had power to create new Bs and remove old Bs. Did not have power to set up entirely new trust (discretion fettered by terms of deed)
- Held: read or understand the effect of the documents they were signing and what they were doing was not preceded by a decision. They merely signed when requested. Duty to 'consider' before appointing, this duty they did not do.

(ii) Further requirement under a Trust Power: (power to be properly exercised *Tempest*)

Karger v Paul: extent of exercise of discretion examination by court -

- The exercise of discretion won't be examined by the court as long as it was (*Karger v Paul*)

→ (1) *Exercised in good faith*:

- Acting honestly; honestly but negligently is sufficient

→ (2) *Based on real and genuine consideration*:

- Per *Karger v Paul*:
 - Not strictly enforced – mere awareness of a general discretion to exercise and knowledge that the existence of the discretion one way would have an effect on financial interests of another object
 - Did T's ask any questions? Were any inquiries made? Courts simply care if the process (or some process) is undertaken, not concern for quality of process/inquiry
 - No need to specifically ask Bs of their financial circumstances if enough information to make a decision without any material mistake – can be relaxed in inquiries; can still be for good faith
- Per *Dunstone v Irving*
 - Low threshold; T's lack of awareness of the true source of the discretion/trust power (cl. In the trust instrument) but nevertheless satisfied the requirement

→ (3) *In accordance with the purpose for which the discretion/power was conferred*:

- *Klug v Klug*:
 - Mother, one of the Ts, refused to exercise her discretion as her daughter married a Frenchman without her consent; was clearly for improper purpose (bad faith).
- *Curwen v Vanbreck*:
 - Mere adverse inference drawable from timing of the transactions without further evidence isn't enough to show improper purpose, need evidenced state of mind
 - If various purposes exist for the discretion exercise, to be improper, the improper purpose must have been the operative/actuating/motivating purpose:
 - 'Operating' = purpose without which appointment or decision would not have been made (i.e. causal effect) ('but for' effect)
 - I.e. Exercising power for operative purpose of preventing access to trust docs would be an improper purpose/use of power
 - On facts: trustee exercised discretion to exclude an object from the specified class.
- Note: person alleging improper purpose has burden of proof (*Curwen*)

Reasoning will be examined if the Ts choose to state their reasons for exercising the discretion but the use of that evidence is limited in the following way (*Karger*)

- Court to look at reasons solely for the purpose of examining whether the above (3) factors were made out
- Evidence not to be used to impugn independently that those inquiries/info/reasons fell short of what's appropriate/sufficient nor to hold Ts were wrong in the conclusion they made/were unjustified in exercising the discretion
- *Dunstone*: reasonableness of decision only looked at if Ts given reasons and only invalid if no reasonable T could've come to that conclusion, or reasons were invalid

(iii) Forming an opinion on a question of fact:

- This is for superannuation cases – assessing whether claimant B meets total permanent invalidity (TPI) criteria to receive distributions
- Requires application of modified *Karger v Paul* test (*Flegeltaub; Finch*) – the formation of opinion re a question of fact must be formed:
 - Batt JA in *Flegeltaub*: reserving judgment on whether a different test should apply
 - Not adopting admin law concepts of natural justice or failure to account for relevant factors; might do so in future (Batt JA suggests against it)
 - More active duties required under modified test – more in depth inquiries:
 - Due to SF context c.f. voluntary/private/charitable trusts; here Bs contribute funds to their super, employee contributions, legitimate expectations, etc.
 - Public significance + importance of super, statutory influence; Bs not objects

→ (1) ***Exercised in good faith***

- Refused to decide whether this required the Ts to give reasons for their decisions (*Flegeltaub*)

→ (2) Based on ***real and genuine consideration***

- Making bona fide inquiries/decision-making; BF decision cannot be reached unless some investigation is conducted which may involve making an inquiry from the claimant who is in the best position to provide the information (*Flegeltaub*)
- Requires properly formed consideration – duties of Ts to inform themselves is more intense c.f. normal *Karger* test (*Finch*); higher standard to comply with
- Court looks more closely at the view formed by the T; greater duty to make inquiries *Finch*

→ (3) In accordance with the purpose for which the discretion/power was conferred

- Per *Telstra Super*:
 - Formation of opinion whether B is disentitled to TPI due to an unreasonable failure to submit to treatment
 - Can challenge the opinion of court can infer a breach of duty – if no reasonable T could have reached the decision on the material before it ???
- Per *Finch v Telstra*:
 - Held that Telstra Ts did not make enough inquiries (re man having gender transformation surgery to become a woman then changing back to a man and not being able to work)
 - Sent back to Ts to make the decision properly
- Note: person alleging improper purpose has burden of proof (*Curwen*)

Applying modified test in other situations?

- No reason why, under a trust document, if a T is required to form an opinion about a question of fact, that this modified *Karger* test could not apply
- Formation of opinion is different from exercising a discretion; altered *Karger* test from *Finch* could apply