

Topic 6: Trustees' duties

Duties upon commencement of the trust:

- **Duty to adhere to the terms of the trust:**

- [T's] Failure to adhere to the trust deed is a breach (*Green*), the [trustee deed- Provision] is supreme and can alternate equitable + statutory duties s.2(3) *Trustee Act*.

- **Duty to 'get in' the trust asset:**

- Upon appointment, [T] must ensure all trust assets is **within their control** (*Permanent Trustees*) including recovering from breaches by prior trustees or else they would be in breach of their duties.

- **Duty to suing old trustee for breaches:**

- If [new trustee] becomes aware of breach by [old trustee], new trustee is under a duty to seek recovery from old trustee. The action is to compensate the trust for loss, not the individual beneficiaries (*Permanent Trustees*).
 - **ANALOGY:** Similar to *Permanent Trustee*, [B] sold on their interest, [B] is not entitled to any compensation even though the breach occurred when [B] held an interest.

- **Duty to keep trust asset separate (also a fiduciary duty)**

- [T] cannot mix their own assets with Trust assets/ with other trust assets, this duty allows for proper management of trust (*ASC v Nominees*).

ASC v AS Nominees:	Failure to keep asset separate. Trustee was also responsible for other trusts. He mixed different trust assets together.	In breach of the duty to not mix trust assets . Trustees should not mix different trust assets together.
<i>Cannot mix trust assets</i>		

Discretionary duties- before the exercise of power:

Trustee duty mere power:

- As [trustee] holds a mere power, it has additional duties than the ones listed or a donee imposed on them. If [T] does exercise the power, then must keep within the limits of power; and act in good faith (*Karger*).
- Further, [T] is required to (*McPhail*)
 - Consider periodically whether or not to exercise power (*McPhail*) as it is a mere power.
 - Consider range of objects of power and requests from persons within ambit of power; and
 - Consider appropriateness of individual appointments.

Trustee duty trust power (discretionary trust):

- [T] must:
 - Consider at appropriate intervals whether to exercise power (*McPhail*)
 - Consider range of objects of power and requests from persons within ambit of power (*McPhail*)
 - Duty to distribute after making wider and more systematic survey than trustee with mere power (*McPhail*)

Management trustee Duties:

With the following duties, we have to apply the *Speight* test every time we assess whether the Trustee has acted in Breach of trust.

- STATE: [Trustee] has a duty to conduct the business of the trust in the same manner as an ordinary prudent man of business in its **day-to-day-management** (*Speight* per Jessel MR). Although a trustee is not an insurer of losses under a trust (*Speight*)
- There is still a non-professional/professional standard:
 - **Non-professional:** According to how the ordinary prudent man of business would conduct their own affairs (*Speight*)
 - **Professional:** according to the ordinary prudent person who is investing for someone for whom they felt obliged to provide (*Barlett*)

Speight v Gaunt (1883)	Trustee appointed broker to sell shares- broker misappropriated funds- trustee sued for breach of trust.	Trustee not held liable as it was generally acceptable for businesses to appoint a broker, this was the standard of care of a reasonable prudent business person. However, trustees also have a duty to supervise and monitor the agent.
<i>Agency and standard of care for management duties</i>	Issue: would an ordinary prudent person of business appointed a broker in the same circumstances to manage the affairs?	

Fiduciary Duties:

- The Trustee beneficiary relationship is paradigm fiduciary category (*Hospital Products* per *Mason J*) → [T] cannot be in a position where significant possibility of conflict will arise.

Self-dealing rule- trustee purchases trust property & conflict rule:

- [T] cannot purchase trust property (asset) from the trust (*Clay*) as they **cannot act in a position of real + significant possibility of conflict between duty and interest** (*Boardman*) → APPLY
 - SDR rule also **applies** if trust property is purchased by trustee’s nominee e.g. wife.
- **Exception:** Court have discretion to authorize trustee to:
 - Purchasing property if obviously **beneficial to beneficiaries** (*Holder v Holder*)
 - Permit conflict in expectational circumstances, where it would be impractical for anyone else to decide (e.g. trustee was both beneficiary and trustee)
 - **Re Drexel:** trustee has done all pre-negotiating, every class of member had agreed to the scheme, trustee not the only one benefiting and if conflict not authorized it could cause delay and deed was silent on the issue
- **Remedy:** a sale would be in breach of the SDR, liable for transaction to be **voidable** (*Clay*)

<p>Clay v Clay (2001)</p> <p><i>Self-dealing rule</i></p>	<p>Father died, estate was left on trust for children who attained 25 years of age. Executors sold family home to mother for market value, children brought proceedings.</p>	<p>A surviving parent is a guardian of any children. But doesn’t render guardian as trustee. Mother wasn’t holding any property on trust as guardian. Sale by trustee of trust property to herself is voidable by any beneficiary, regardless if honest and fair the transaction and even if sale is for a higher price than market value. Self-dealing rule expressed more stringent than fair-dealing rule (practical differences?)</p>
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Fair-dealing rule – trustee purchases a beneficiary’s interest:

- [T] may only purchase [Beneficiaries’] interest of [Trust property] if [T] can show that:
 - No advantage was taken as trustee (*Clay*)
 - Full disclosure made to all beneficiaries (*Clay*)
 - Transaction is fair and honest (*Clay*)
- **Remedy:** a sale in breach of FDR, liable for transaction to be voidable.

Duty to act gratuitously – profits rule

- Fiduciary [T] must **not** obtain an **unauthorized profit** from their position as trustee (*Williams v Barton*).
 - Trustee may make a benefit merely incidental or in their role as beneficiary rather than trustee (*Re Drexel*)
 - If profit was made, [T] will hold it on constructive trust for beneficiaries (*Williams*)
- **Exception:**
 - **Legislation:** Court has jurisdiction to grant payment although cap is 5% of total trust asset (*s.77 TA*)
 - **Trust deed:** may be remunerated where expressly/ impliedly provided for in the instrument of trust (*Green v Wilden*)
 - **Agreement:** There may be an agreement between the trustee + the beneficiaries that the trustee shall be paid for their services (*Green*)
 - Courts ‘wary about upholding such agreements’ – won’t enforce the agreement if ‘slightest sign of unfairness/ under pressure’.

<p>Williams v Barton</p> <p><i>Duty to act gratuitously</i></p>	<p>B was a trustee, but also a clerk for a stock brokers. Other trustees wanted to get valuation and stock broker to do so. B referred to another broker working in the same firm for the valuation. If he referred to own company he gets a commission.</p>	<p>B was in breach of the duty to act gratuitously-profits rule. B as trustee need to impartially chose a stock broking firm. His interest to company is to recommend business & get commission. As a consequence, there is a direct conflict. The money B got from commission he is now holding it on Constructive trust for beneficiaries.</p>
<p>Re Drexel Burnham Lambert</p> <p><i>Duty to act gratuitously and court having the</i></p>	<p>Trustees went to court to seek direction on whether they can act in a certain way. Employer gone into liquidation and trustees have to distribute funds. Fund structured in a defined benefit manner. The trust fund has more money then the distribute amount, T have</p>	<p>Trustee could surrender to court the discretion or trustee can retire from trustee obligations and appoint others to avoid being in a position of conflict. Here, Court was reluctant to do so and find a breach of trustee duties, as it was at a late stage and if a different decision was made to the one already</p>

<i>discretion to permit conflict</i>	discretion to distribute to employees. T was also employees, thus any way of distribution will benefit them. T engaged members and then made plans on how to distribute.	negotiated among all beneficiaries it would result in cost implications . Thus, court instead authorized conflict to avoid cost and delay as the trust deed was silent on this issue .
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Duty to act personally:

T must apply their own mind to the problem and must come to it with an open mind.

a) Trustee must not delegate exercise of discretion:

- [T] cannot delegate powers/ or discretion to others including trustee, unless expressly permitted to (*Re Hays*) s.30 TA.
 - S.30(1) Trustee Act:** permits delegation via **Power of attorney** when Trustee is **out of Victoria/about to depart/ never resided**, but trustee will **still be liable for actions of delegate**. Provided that the delegate is not a co-trustee unless it is a trustee company. Delegate is also subjected to same duties as trustee.

b) Dictation:

- [T] must not act under dictation of others, including the settlor/other co-trustees (*Mulligan*)/ beneficiaries (*Re Brockbank*)
 - Re Brockbank:** 2 trustees, 1 wanted to retire and beneficiaries wanted to replace retiring trustee. Was in breach as trustee cannot blindly follow orders of beneficiaries.
 - Re Mulligan:** Trustee company urged investment in shares, by wife refused and trustee company simply listened to wife's opinion.

c) Fetter discretion:

- [T] are under a duty to not to fetter their discretion by binding themselves to make a future decision → can't pre-determine how to exercise discretion in the future (can't predetermine how to distribute income in a discretionary trust) (*Mulligan*)
 - Mulligan:** M died leaving stuff to wife for life and then someone else. Professional trustee company obeyed to wife's wishes to invest in companies which generated income over capital.

d) Use of an agent:

- [T] can appoint agents to implement the decision which the trustee have made- but agents cannot make decisions (*Speight*) reflected in s.28(1) Trustee Act, **agents can be used if:**
 - 1) Employing the agent must be a course which could be taken by 'ordinary prudent man of business':
 - ASK:** correct agent? Agent competent for the task? (*Jessel MR*)
 - 2) Duty of prudence would require trustee to take sufficient care in agent's appointment & supervision:
 - ASK:** reasonable trustee supervision? (*Lindley LJ in Speight*)
- Exception:**
 - [T] is only liable for their own acts, and not for other agents or co-trustee, unless the act happens through their own **willful default** s.36(1) Trustee Act
 - Willful default:** 'conscious knowledge that not exercising duties properly or recklessness as to whether exercising duties properly' (*Dalrymple*) → ANAOLOGIZE
 - Dalrymple:** B was solicitor other trustee was M. M handed control over to B and signed blank cheques which allowed B to transfer shares to themselves. New trustee sued M as M had doubts of B's action and was willful default as had conscious knowledge that B was not exercising duties properly.

Speight v Gaunt (1883) <i>Management duties- standard</i>	Trustee appointed a broker to sell shares, broker instead misappropriated funds, and trustee sued for breach of trust. Would an ordinary prudent person of business appoint a broker in the same situation?	Trustee not held liable- it is normally acceptable for businesses to appoint a broker- this was the standard of care of a reasonable business person . This is related to the standard for ongoing management of business of trust .
Dalrymple v Melville (1932) <i>Employing an agent → Willful default, no defense</i>	M and B were trustees and executors. B was solicitor, M left B to carry on certain activities, giving him a blank signing sheet for share transfer forms . B misappropriated shares and some of the funds using these forms. M did not monitor or supervise B after leaving him with the documents.	There was willful default on M's part, s.36 could not protect him because of his lack of attention and was willful default, thus caused funds to be lost. This allow prevented him in relying on s.67 defence because he acted honestly, but not reasonably.

e) Duty to act unanimously: