

Agency

In agency situations, the time from which an agent ceases acting for the assignor and start acting for the assignee is determined by taking into account all the circumstances of the transaction. [*Marchesi v Apostolou*]
 If the assignor still has step to complete, or intends to take further action to effectuate transfer, which requires possession of the documents, then transfer is incomplete in equity. [*Marchesi v Apostolou*]
 *is the gift beyond recall → then acting for the beneficiary.

<i>Paul v Constance</i>	<p>FACTS: C said “The money is as much yours as mine” on several occasions and some joint funds were deposited into it. Mr C died without a will and at law his wife (who he had separated from but not divorced) was entitled to all the money in the account.</p> <p>HELD: The bank account was on trust for C even though there was no will, written things were not complied with.</p>
<i>Jones v Lock</i>	<p>FACTS: Facts: father J placed a cheque in his name for £900 in the baby’s hands and in the presence of his wife & nurse said ‘Look you here, I give this to baby’. The baby passed away.</p> <p>Held: No effective gift, the cheque needs to be endorsed and that was not done (no name).</p>
<i>Milroy v Lord</i>	<p>Facts: Here, clear that Mr Medley intended to create a trust by transfer over shares in favour of his niece. Lord was to be the trustee.</p> <p>Held: Had Lord received title to property? This is necessary for a gift on trust . Mr Medley had not done enough. The court won’t interpret the failed trust by transfer as a trust by declaration, as Mr Medley did not intend to take on the trustee’s responsibilities himself. Mr Medley had not done enough, but what did it mean to say that “he must have done everything which according to the nature of the property would make the settlement binding on him?”</p>
<i>Corin v Patton</i>	<p>Facts: Property: legal (TS) land. Mr and Mrs P were JT over land. Mrs P tried to sever JT by transferring ½ to C. Mr C executes deed declaring trust in favour of Mrs P as beneficiary. Mrs P’s transfer of land in registrable form.</p> <p>Held: Mason CJ & McHugh J: Preferred Griffiths CJ’s view from Anning: gift is complete when the donor has done all that is necessary for her alone to do to complete the gift – this puts it beyond the donor’s recall</p>
<i>Marchesi v Apostolou</i>	<p>Facts: documents were in hands of solicitors who were acting for both parties. Where solicitor acts for both parties, s/he does not hold transfer documents on behalf of the transferee until given transferor’s authority to treat them as transferee’s property.</p> <p>Held: Insufficient evidence of authority to hold for the transferee and there needs to be authority given by transferor to show that it now belongs to the transferee and the agent is holding it for them.</p>
<i>Norman v FCT</i>	<p>Facts: taxpayer attempted to assign to his wife dividends on shares not yet declared; and interest to accrue on a loan he had made (assigning only part)– no consideration given.</p> <p>Held: Assignment failed, as this was future property. The shares are not yet declared so he does not have a contractual right to receive yet.</p>

A transferred property to T, after a week says it is for C.

- A transfers to T, it is a resulting trust
- A week later, C is directing T to hold trust for C. Howard-Smith (facts of *Gry v IRC*).
- Direction to the trustee – need to be immediately binding. If it is → then it is a disposition, therefore, requires s53(1)(c).

Trustee Duties

Trustee powers from equitable principles, trust deed, statute

Duty to Comply with Trust Deed

Trustee must carry out terms of trust as set out in deed [*Green v Wilden*]:

1. When investing the trust fund, trust deed and statute to be complied with
2. When distributing trust fund assets, must comply with trust deed → most important

“It is the duty of a trustee to adhere to the terms of the relevant trust deed. 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.”

Duty to Get in Trust Assets

Incoming trustee must take steps to perfect title, reconstitute the trust property if it is lost, pursue former trustee for breach, or else new trustee will be liable for BoT (*Perpetual*). An example of this is that an incoming trustee will need to pursue action to recover losses from a prior trustee if it becomes aware of breaches by the prior trustee [*Perpetual Trustee*].

Duty not to Mix Trust Assets

Trust assets must be separate from personal assets/other trusts, unless deed allows it [*ASC v AS Nom*]. This is not a breach (used for getting trustee removed), but it is required to set up proper behaviour and have clear accounts/not spend trust money.

**ASC v
Nom**

FACTS: T mixed assets of several trusts in same bank account (superannuation trusts).
HELD: T company was removed for not exercising this duty properly.

Conflict of interest

- Fiduciary must not place themselves in position involving a real, sensible possibility of conflict (*Boardman*) between:
 - Duty to act as fiduciary and their own interest (interest-duty) (*Boardman*); and
 - Duties they owe to 2+ persons (*Farrington w/ solicitor* telling to invest in another client).
 - Seen usually when they seek to purchase a beneficiary interest or trust property
- Duty to not make secret profit from fiduciary position

Self-dealing rule – a sale by trustee of trust property to himself is *voidable* (valid until challenged) by any beneficiary as of right, regardless of how honest and fair transaction was and even if sale was for more than market value (*Clay*).

- Can be permitted in deed and also applies to someone so close to trustee from buying it too (*Clay*).
- Trustee can go to court for authorization of purchase
- Informed consent – sui juris beneficiary agree to trustee buying the property
- Less stringency in English case, and transaction can be justified [*Holder*]

Fair-dealing rule – Where trustee purchases a beneficiary’s interest the transaction is initially valid. If challenged, it is set aside unless trustee can show no advantage taken of their position as trustee, full disclosure was made, and transaction was fair and honest. Trustee need to show:

- No advantage taken of position as trustee;
- Full disclosure has been made to beneficiary;
- Transaction is fair and honest.

Duty to Act Gratuitously

While frequently overridden in trust deed, equity prohibits a trustee from getting paid for their services as trustee [*Williams*]. It also prevents trustee profiting from the trust [*Drexel*]

[*Green v Wilden*]: “Trustees may receive remuneration where this is expressly or impliedly provided for in the instrument of trust or where there is a special agreement between the trustees and the beneficiaries that the trustees shall be paid for their services. The courts are wary about upholding such agreements and will refuse to enforce them where there appears to be the slightest sign of unfairness or undue pressure.”

- If no provision in deed, trustee may apply to court under s 77 for such ‘commission’ (*not exceeding 5% of capital*) for his pains and troubles as is just and reasonable. Must be going above and beyond.
 - Need to go to court for permission
- Charging clause – trustee gets authorization to charge for their professional services, solicitor for example. Needs to be present in the deed → explicit instructions from settlor to charge.

<p>Williams v Barton</p>	<p>FACTS: Involved a trustee who was a clerk who worked for a trust of stock brokers. Trustee wanted to get a valuation of the shares held by the trust and stockbrokers were appropriate people to refer the work to, to get the evaluation. He gave it to the company he worked at and got a commission (got paid extra because of this referral). So even though he did not do the work, he got extra pay. HELD: Court held he is in breach of gratuitous rule. He received more money as a consequence of the referral. The money received is held on CT and becomes part of the trust.</p>
<p>Re Drexel Burnham Lambert case</p>	<p>FACTS: Employer had gone into liquidation, so trustee had to distribute the funds. The way it was structured, there were defined benefits (certain amount payable to beneficiaries), the employer had folded the fund but it had more money than they had to give. In this, the trustee had a discretion to distribute the money among the different class of employees. The conflict was that trustees were also employees of the firm. Any decision they took to distribute the surplus, might benefit them. They had a distribution proposal with each class of employees who had a lawyer to advise them HELD: Escape roots BEFORE the proposal was made</p> <ul style="list-style-type: none"> • The trustees could have surrendered their discretion to the funds • Trustees could have said they were in position of conflict so new trustees should be appointed • If court engages above, you go back to square one, all the money for legal fee will be spent again, there will be more delay and will cost so much money to the trust <p>NOW – due to the proposal this will be upheld.</p> <ul style="list-style-type: none"> • They authorized the conflict, in the circumstances, it was better to authorize this and the scheme it is built upon – every class had advice, and no one opposed the proposal • there was nothing that seemed that trustee was benefiting themselves and refusal will cause delay and expense without a beneficial effect.

Duty to Act Personally

- Prohibits delegation (without authority in deed) although there are statutory exceptions.
- Prevents trustee from fettering their discretion.
- Prevents trustee from acting under dictation.
- Limits what can be performed by an agent.
- More than one trustee – they must act unanimously, and decisions must be made by everyone

Agents: Per s 28, trustees may employ and pay an agent to do any act required in execution of trust and will not be responsible for their default if employed in good faith.

- Would an ordinary prudent businessperson would engage an agent in the circumstances (standard for all management duties). [*Speight*]
- Trustee must also supervise the agent in the proper performance of their functions (Speight) → can be liable for the loss

Re Hays Settlement	<p>FACTS: T had a hybrid power of appointment, they were allowed to add extra people into the fund except a certain class of people. Rather than exercising their decision, they created a new trust (because they did not understand the task).</p> <p>HELD: incorrect delegation – cannot make a new trust. Cannot fetter decision to the future.</p>
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Delegation and appointing an agent

Per s 30(1), where trustee has never resided in Vic, is absent from Vic or about to depart, he may by PoA delegate the execution of his trust powers while he is out of Vic either alone or jointly with another, provided the replacement is not a co-trustee but can be a trustee company (who is a co-trustee).

Per s 30(2), original trustee is still liable for acts and defaults of their delegate as if he himself were trustee – so make careful selection!!

Per 28(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a barrister and solicitor, banker, stockbroker, or other person, to transact any business or to do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

Must be a step in the decision making process, or a mechanistic part of process. NOT decision making.

Per 36(1), trustee is liable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person (AGENT) unless the defaults of another happens through his own wilful default. → **TEST of wilful default**

Speight v Gaunt	<p>FACTS: Trustee used a stockbroker (agent) who misappropriated the trust property. Held it was okay to use stockbroker. Need to look at, if it is appropriate in the ordinary course to apply that task (need to be appropriate agent and ordinary course to apply an agent in business)</p> <p>HELD: It is acceptable for a trustee to use an agent to carry out certain administrative duties, or to inform the trustee in an area where the agent has special knowledge. Agent is not making a decision on their behalf but rather just implementing it.</p> <p>Need to ask – Would a RP been able to tell the stockbroker was embezzling the funds – no so trustee is not liable.</p>
Dalrymple v Melville	<p>FACTS: Two trustees, Melville and Blackmore, B was a solicitor. The trustees decided to sell some shares and to sell them, need to fill share transfer form and give it to stockbroker who were to pay money to trustee. B said to M “can you sign these blank share transfer forms” and he signed for the sale (does not say who it going to). B took the share himself and misappropriated the money. They needed to give money to beneficiaries, B said “sign the blank bearer cheque” and said he will use it to get cheques for beneficiaries but stole the trust funds. B got replaced by D. M had doubts and expressed to B while signing the share transfer.</p> <p>HELD: that M was in WF, he had conscious knowledge that he was not exercising duties properly, or recklessness as to whether exercising duties properly. Demonstrated by asking B what he thought about M. he realized he was not performing at appropriate standard and was putting the trust at risk.</p> <p>‘Wilful’ default = conscious knowledge that not exercising duties properly OR recklessness as to whether exercising duties properly</p>

- Fettering Discretion: cannot fetter trustee discretion by binding themselves to making decisions in the future (**Re Hay** where trustees created new trust to set up mechanism for appointment of a gift at a later time) or in a predetermined fashion (**Mulligan**).
- Dictation: PT acted under dictation of Mrs Mulligan in only investing in income investments (**Mulligan**), and trustee should not follow beneficiaries’ orders to get new professional trustee as that too is dictation (**Brockbank**).

STEPS:

1. Outside of VIC? → can he delegate (go through **s30**)
2. Employing an agent? → go through 28, is agent used usually for this matter (are they employed in good faith), if agent broke a duty is T liable? Go through **s36(1)** ‘wilful default’ test and **Dalrymple** OR **Gaunt’s** reasonability test

Cannot fetter discretion/act under dictation (Act personally duty)

Trustee should make their own decision and not be ordered to do what others want. T cannot follow orders from beneficiaries or their co-trustee.

Re Mulligan (NZ)	<p>FACTS: Co Trustees were life tenant and trustee company. In 1965, the trust property was a house worth \$108k. for 25 years funds were invested in only income investments, and by 1990 the trust ppty was worth \$220k. Mrs Mulligan was adamant as co-trustee that no funds to be invested in share market. For many years the investments favoured the widow. Trustee company let her control the decision making and never tried hard enough to convince her.</p> <p>HELD: T company acted under dictation for this period of time. They should have gone to the court when they saw these difficulties arise. Therefore BoT</p>
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Duty to act in interests for all beneficiaries

Per s 7(2)(a), there is a duty to exercise trust powers in best interests of all present and future beneficiaries of the trust, subject to the trust deed and the exclusions in it.

- Their best interests comprises their best 'financial interests' (**Cowan/Harries**)
- Cannot make ethical investments unless return is as good as non-ethical ones (**Cowan**).
- Yet if all beneficiaries are adults with strong opinions on certain issues, may be inappropriate for them to have certain class of investments, so can take in moral/ethical considerations there. But this is very rare (**Cowan**).
- In charity context, the trust is best served by trustee seeking to obtain maximum return from investments, so charity can operate (**Harries**).
- Yet if investment in a particular type of business would conflict with the objects of the charity, should not invest even if it results in significant financial detriment to charity – gambling does not offend Church like tobacco shares for a cancer charity does, so it was fine (**Harries**).

Per s 5, trustee may use trust funds for any form of investment unless expressly prohibited in deed.

Cowan v Scargill	<p>FACTS: Dealt with pension fund for coal miners in the UK. The T could not decide on what investments to put the money in. Mixture of trustees that included Union appointed T that wanted to invest in investments that promote coal mining/do not undermine it. Other T did not want this limitation, so T were in disagreement.</p> <p>HELD: People who are beneficiaries don't care where the investments go. The purpose of this fund is to make payments to the beneficiaries, and this is served by a strategy that makes money. Best interest = best financial interest, to yield best return for beneficiaries judged in relation to the risk in investment in question.</p> <p>J said if you had a T where all beneficiaries are against such moral issues, then they might not want to have more money if this opposes this view. Or a trust deed can give primacy to other considerations.</p> <p>Look at, if you take away these investments, does it effect the trust (financially detrimental)?</p>
Harries v Church Commissioner	<p>FACTS: Trust was Church of England investment fund used to pay all the clergy's and their stipends. It needed a huge amount of money for its fixed costs. A lot of its property will be used to carry out the work of the church (eg buildings), not all assets of a trust is for investment purposes. T could not decide what to do, because they were making too much money and not considering social issues in investments (they still had an ethical investment strategy)</p> <p>HELD: Prima facie, purpose of the trust will be best served from getting best financial return (charity cant do anything if you don't have money). Best cases of charity required a choice of investment made solely on the basis of investment criteria. The investment strategy the Church had in place was adequate because it balanced investments + ethical issues.</p> <p>Rare cases: if investment conflicts with purpose of charity.</p>
Asea Brown Boveri	<p>Confirmed superfund is a trust for persons (employees)</p> <p>Obligation of trustee is to consider what is in the best interest of the beneficiaries, not the beneficiaries OR employer.</p>

Duty to get in assets

Trustee has obligation to ensure that all assets are under his/her/its control. If equitable title has passed, should proceed action to complete title to gain possession and legal title.

If there is an incoming trustee, the new trustee has obligation to determine breaches of trust by previous trustee, take action against them and gain compensation for the funds (**Perpetual Trustee**). 'Protective responsibility' that the assets are all there for a beneficiary (if they think to go to court, they should sue).

Breach of duty action can be taken by beneficiaries because incoming T might not agree to do so.

Duty to act prudently

Property not investment related

Trustees have a duty to act prudently when managing trust property. As the property is not investment related [FACTS], the trustee is held to a standard of an 'ordinary prudent business person'. (**Speight v Gaunt**)

- Use of trust assets depends on what is stated in trust deed.
- Not all assets are necessarily held for investment purpose [**Harries v Church Commissioners**]
 - Property can be for other purposes such as buildings to carry out functions
- **Speight v Gaunt; Learoyd v Whiteley**: "it is the duty of a trustee to conduct the business of the trust as an ordinary prudent business person would, if the person were minded making an investment for the benefit of others for whom he/she felt bound to provide."

Property held for investment



[1] The act gives a broad power to [TRUSTEE] to invest in funds in any form of investment and at any time vary their investment (**s5**). This power is subject to limitations in the deed, which [IS/IS NOT] the case per the facts. There is no definition of investment, so ordinary commercial definition is taken, which is something where T is anticipating return [STATE INVESTMENTS FROM FACTS].

- T to transfer trust property to a superannuation fund is not an investment because there is no exchange or reciprocity in it. T is not going to receive anything in return. [**Cheyne**]

Broad power is given to trustee per **s5**

A trustee may, unless expressly prohibited by the instrument creating the trust--

- invest trust funds in any form of investment; and
- at any time, vary an investment.

[2] Standard of care: The [TRUSTEE] will be held to a [PROFESSIONAL/PRUDENT] standard because [FACTS]. This can be altered by the trust deed, but per the facts [IT IS/ IT IS NOT]. (Continue if applicable) As there are more than one trustee, they are required to act unanimously (**Re Hay**), thus, they will both be either held to a higher standard or different standard, per their professional background if there is a conflict. The law remains unsettled, however, the analysis here will assume both to be held at a higher standard of care. (Normal/le person has defence under s67, acted reasonably and honestly).

per **s 6(1)**, unless deed alters this:

- If trustee's **profession/business/employment** includes acting as trustee or investing money on behalf of another, they must exercise the care and skill to the standard of prudent person engaged in that **profession/business/employment** would exercise in managing the affairs of another; or
- If trustee not engaged in such profession/business/employment, they must exercise care and skill that a prudent person would exercise in managing affairs of other persons.

The test does not mention a 'business person' but rather a professional standard or a prudent standard