

# 8 – RIGHTS OF TRUSTEES

## 8.1. TRUSTEES RIGHT OF INDEMNITY

**STEP 1 – SAY:** Given a trust is not a legal person, the trustee(s) are personally liable for expenses incurred in the administration of the trust. [X] and [Y] are therefore jointly and severally liable to pay the relevant expense.

**STEP 2 – SAY:** However, trustees have a right to be indemnified for expenses/liabilities incurred in the management of the trust from trust property (s 36(2)). Note, there is also a possibility where the trust deed confers a ROI.

- Trustee may pay expenses directly out of the trust fund or reimburse him/herself out of the trust for expenses incurred about the execution of the trust or powers

### STEP 3 – PROPERLY INCURRED

**SAY:** A T/ee has a ROI if the expenses or liabilities in carrying out the trust are 'properly or reasonably incurred'. The properly incurred test was rejected in *Gatsios*, but *Nolan* supported it and held that **properly incurred** means **not improperly incurred**. If [X] has breached a strict duty, then per *Nolan*, this is likely to prevent the expense being considered 'properly incurred'.

- Properly incurred
  - During exercise of strict duties
    - Keep and render accounts – Fiduciary duties
    - Investment power – Adhering to terms of the trust
  - Expenses incurred in the administration of the trust
  - T is acting slightly negligent (honest mistake), provided no bad faith or outside of power (*Gatsios*)
  - T's legal cost of defending a breach of trust action (*Hayman*)
  - Court ordered damages against trustees are properly incurred (*Re Raybould*)
- Improperly incurred =
  - Breach of strict duties

However, the [T's] will argue that according to the Vic CoA, the ROI will not be lost merely by virtue of honest mistake. Further, the court in *Gatsios* said that occasional breaches of the TPA are incidental aspects of ordinary commercial life.

### STEP 4 – EFFECT OF ROI – TRUSTEE

- ROI acts as an equitable charge or lien over trust property.
  - That is, beneficiaries cannot call for distribution until lien/charge is discharged (*Octavo; Buckle*);
  - Lien comes into existence when ROI arises (*Buckle*).
- [X] and [Y] may therefore have a right of indemnity from trust property for the [\$X] expense, which will take precedence/priority over beneficiaries' interests (*Octavo*).

### STEP 5 – EFFECT OF ROI – 3P (CREDITORS) IF TRUSTEE IS INSOLVEMENT

**SAY:** As the trustee is insolvent, the creditors can subrogate the trustee's ROI by standing in the trustee's shoes and enforcing the trustee's charge over the trust assets (*Octavo*).

- Right of subrogation = right to step into the shoes of another party and sue in their name. Creditor sues in name of Ts

**STEP 6 –** Are there enough assets in the fund to cover ROI? If YES, then trustee (and creditor) can obtain. If NO, step 7 →

### STEP 7 – RECOVERY FROM BENEFICIARIES

**SAY:** If total value of ROI equals or exceeds value of trust assets, trustee entitled to entire interest in trust assets. Here, beneficiaries may be personally liable to indemnify trustee for the amount or ROI exceeding the value of trust assets (*Hardoon*).

- Where there are no trust assets left for ROI, T may have a personal right to recover against beneficiaries
  - This right of indemnity may be excluded by deed *Brooking J* in *RWG*.

#### 7.1. If single beneficiary – T can claim from a single beneficiary provided that (*Hardoon*)

- B is **sui juris** – Legal age and full mental capacity
- B is **absolutely entitled** – fixed interest trust

**SAY:** Since [B] is the only beneficiary and is sui juris / absolutely entitled, then [T] has personal right to be indemnified by that beneficiary (*Hardoon*).

#### 7.2. If multiple beneficiary (all sui juris)

**SAY:** Since there are a number of beneficiaries who are all adults, absolutely entitled between them, and have the same interest in the property, the T has personal ROI against beneficiaries in proportion to their shares in the beneficial interest (*Broomhead*).

**Bankruptcy:** Where a B is insolvent, the other Bs are not liable to contribute more than their initial proportion (*Broomhead*).

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### 7.3. If multiple beneficiary (not all sui juris)

**SAY:** This situation is a variation on the facts in *Broomhead*, where all B's were sui juris. Here, since there are multiple who are not all sui juris, therefore [T] must wait until [B] is of age, and then pursue them in proportion to their beneficial interest (in the meantime incur this) (*Broomhead*).

**Bankruptcy:** Where a B is insolvent, the other Bs are not liable to contribute more than their initial proportion (*Broomhead*).

**If sub-trust –** Where one beneficiary is holding interest on sub-trust for minors, beneficiary still liable to indemnify trustee but cannot pass liability on to minors (*Broomhead*)

### 7.4. If life tenant situation (i.e. where life tenant dies → “held on trust for X for life, and thereafter to Y”) –

**SAY:** In *Hardoon*, Lord Lindley suggested that life tenants may not be personally liable, as they are not absolutely entitled. In *Balkin*, however, the ROI was extended to remaindermen when the life tenant was deceased. As X has passed away, the reasoning in *Balkin* may be applied here.

### STEP 8 – DIRECTORS' LIABILITY UNDER STATUTE

As per s 197, in certain cases, corporate directors can be made personally liable to discharge trustee's liability.

- (a) Inability of the corporation to **discharge its liabilities** (unable to pay its debts); AND
- (b) Is not **entitled to be indemnified** out of trust assets because of either:
  - (i) **Breach of trust** by corporation; or
  - (ii) Corporation acting **outside of its powers**; or
  - (iii) Clause **excluding trustee's right of indemnity**.

*Broomhead* – Beneficiaries of unit trust were J (42%) AI (10%) AO (24%) and G & L who held 24% jointly, all sui juris and absolutely entitled.

## 8.2. RIGHT TO APPROACH THE COURT

**SAY:** X has a right to seek, per S 54.02 and 54.03 SCR, directions from the court (which can use to minimise any further damage).

**Order 54 SCR** states that a trustee can approach court to settle questions, including (non-exclusive list) questions:

- (a) Arising in the administration of an estate or execution of a trust;
- (b) As to the composition of a class of objects;; or
- (c) As to the rights of creditors against an estate or a beneficiary under a trust;
- (d) Re orders for accounts, sales/purchases by trustee, directing acts to be done in performance of trust

*Macedonian Orthodox Church case* – T sought Court's advice whether it was justified in spending trust funds defending litigation. **HELD:** Desirable that T seeks advice first. Can still approach Court in adversarial proceedings