

LAWS5103

EQUITY & TRUSTS

Exam Notes

- I. Nature of a Trust
- II. Certainty of Intention
- III. Certainty of Subject
- IV. Certainty of Object
- V. Charitable Trusts
- VI. Trusts for Purposes
- VII. Formalities
- VIII. Complete Constitution
- IX. Remedies for Breach of Trust
- X. Fiduciary Duties
- XI. Breach of Confidence

APPROACHING A TRUSTS QUESTION

- (1) CLASSIFY TRUST
 - (A) TRUST BY TRANSFER ($S \rightarrow T \rightarrow B$)
 - (B) DECLARATION OF TRUST ($S/T \rightarrow B$)
 - (C) WILL (VALIDLY EXECUTED)
- (2) IS THERE A VALID TRUST?
 - (A) CERTAINTIES
 - (I) INTENTION
 - (II) SUBJECT
 - (III) OBJECT
 - (B) FORMALITIES
 - (I) INTERVIVOS TRUST
 - (II) TESTAMENTARY TRUST
 - (C) COMPLETE CONSTITUTION
- (3) WILL THE TRUST BE VOID?
- (4) IF TRUST VALID, HAS IT BEEN BREACHED?
 - (A) REMEDIES OF BREACH

APPROACHING A FIDUCIARY QUESTION

- (1) IS THERE A FIDUCIARY DUTY?
- (2) WHAT IS THE SCOPE OF THE DUTY?
- (3) HAS IT BEEN BREACHED?
 - (A) NO CONFLICT RULE
 - (B) NO PROFIT RULE
- (4) IS THERE A VALID DEFENCE?
- (5) WHAT REMEDIES ARE AVAILABLE?

APPROACHING A CONFIDENCE QUESTION

- (1) IS THE INFORMATION CONFIDENTIAL
 - (A) COMMERCIAL
 - (B) PERSONAL
 - (C) GOVERNMENT
- (2) WHAT ARE THE CIRCUMSTANCES OF REPEAT?
- (3) HAS THERE BEEN A BREACH?
- (4) IS THERE A VALID DEFENCE?
- (5) WHAT REMEDIES ARE AVAILABLE?

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1. Nature of Trusts

ESSENTIAL ELEMENTS

• (1) TRUSTEE

- The person (individual or corporate) who holds a legal (or equitable) interest in the trust property for the benefit of another person(s) or for some purpose permitted by law
- **Mallott v Wilson**: a validly constituted trust will NOT fail for want of a trustee:
 - Once a trust has been created it cannot be revoked by the settlor, without an express power of revocation.

• (2) BENEFICIARY

- The person for whose benefit the trust property is held
- The beneficiary may be a person(s) or a purpose recognised by law
- The beneficiary owns equitable proprietary rights in the trust property and therefore has a range of personal/proprietary remedies available to it if the trustee defaults in performing its obligations
 - Personal remedies → remedies against the trustee, personally
 - Proprietary remedies → remedies against the trust property itself

• (3) TRUST PROPERTY

- The property vested in or held by the trustee.
 - All property is 'trust property' and can be subject to trusts
- Real → land and things attached to land (e.g. house)
- Personal → anything that is not real property (e.g. sofa)
- Tangible → property with physical substance (e.g. house, sofa)
- Intangible → property without physical qualities (e.g. share, patent copyright)

• (4) SETTLOR *Express Trusts Only*

- The person who creates the trust
- If the trust is created by will, the settlor is also the testator/testatrix of the will
- Once a trust is created, the settlor is essentially irrelevant to its operation – however the settlor's intention is important in determining whether or not a trust has been created

• (5) PERSONAL OBLIGATION

- The trustee has an equitable obligation to deal with the trust property for the exclusive benefit of the beneficiary
- This obligation is both personal (binding on the trustee) and proprietary (binding on the property itself) → it is fiduciary in nature

EXPRESS TRUSTS

- Trusts that arise pursuant to the settlor's intention
 - Which may be expressed through a trust document signed by the settlor or inferred through the settlor's words or conduct.

- (1) **BENEFIT**
 - **Public** → trusts intended to benefit one or more persons
 - **Private** → trusts set up for purposes recognised as charitable in law
- (2) **CLASS OF BENEFICIARY**
 - **Fixed** → clearly ascertainable beneficiary or class of beneficiaries
 - Trust sets out the beneficiaries' entitlements to the trust property
 - Trustee must give fixed shares to fixed persons
 - Beneficiary has an equitable proprietary interest in the trust property
 - e.g. "I give \$1m to my trustee on trust for my children, X and Y, in equal shares"
 - **Discretionary** → beneficiary or class of beneficiaries only has an interest in the trust property at the discretion of the trustee
 - Trustee has absolute discretion as how to apply the income/capital of the trust property
 - Beneficiary has a mere expectancy - no vested interest in trust property until the trustee elects to exercise discretion in their favour.
 - e.g. "I give \$1m to my trustee on trust for X and Y as and in such amounts as my trustee shall select"
- (3) **CREATION**
 - **Inter Vivos** → trust created during the settlor's lifetime
 - Comes into effect after signing OR on date specified in trust instrument
 - **Testamentary** → trusts created by the will of the testator/testatrix (settlor)
 - Comes into effect on the testator/testatrix's death
- (4) **TRUSTEE OBLIGATIONS**
 - **Bare** → trustee is obliged to hold the property for beneficiaries until they required it be transferred to them. Trustee has no other obligations.
 - **Simple** → trustee has positive, active duties to perform

NON-EXPRESS TRUSTS

- Trusts that arise by the operation of law.
 - Do NOT depend on the intention of the settlor
- (1) **AUTOMATIC RESULTING**
 - When the trust property belongs to no one, the law presumes that the trustee has a beneficial interest in the property → automatically reverts back to trustee
- (2) **PRESUMED RESULTING**
 - If X buys property solely with their own funds but puts the property in the name of Y, the law presumes an intention by X to retain some sort of beneficial interest in the property
- (3) **CONSTRUCTIVE**

- Imposed by Court on a person where it would be a fraud for them to assert a beneficial ownership, or not to account for a gain or compensate for a loss
- Can still be imposed irrespective of the parties' intentions

METHOD OF CREATING EXPRESS TRUSTS

- **(1) INTER VIVOS TRUSTS** (S / T → B)
 - **By Declaration** → settlor declares themselves to hold the property on trust for a beneficiary or charitable purpose
 - **By Transfer** → settlor transfers the property to a trustee with a direction to hold it for a beneficiary or charitable purpose
- **(2) FOR TESTAMENTARY TRUSTS** (S → T → B)
 - Simply created by the terms of a will
 - Requires complete constitution

2. Certainty of Intention

OVERVIEW

- For express private trusts, the settlor must manifest an intention to create a trust
 - NOTE there's NO need to establish intention for resulting or constructive trusts.
- **Jacobs**: this depends on whether the language or conduct shows a sufficiently clear intention to create a trust
- **Herdegen**: burden → the person alleging that a trust was created must show that they intended to create a trust

FACTORS TO CONSIDER

• (1) LANGUAGE

- Formal or technical words are NOT required.
 - **Re Armstrong**: George opened two accounts containing £1500 on a fixed deposit for 2 years. Told bank manager that he wanted to create a fund to benefit his two sons, William and Bernard. Intended that he would be entitled to the interest on the accounts and that sons would get the principal once investments matured. Receipt noted "George Armstrong re William Armstrong" and "George Armstrong re Bernard Armstrong". When George died issue was whether the accounts formed part of his estate or not. Court held there was intention by George to create a trust.
 - No requirement for the settlor to use formal 'trusts' language provided there is an intention to create a trust.
 - This intention was manifested through the receipts AND discussion between George and bank manager.
 - **Paul v Constance**: C and P were de facto partners - C had not divorced his wife yet they 'lived to all appearances as man & wife'. C received a work injury compensation payment. They went to the bank together to open an account - the bank manager put the account in C's name even though they intended it to be a joint account (both C and P had access to the funds). C said to P: "the money is as much yours as mine". C and P used the account to deposit their bingo winnings - some were his, some were hers. There was only one withdrawal from the account (which was divided equally between C and P). After C died, his estranged wife claimed that she was entitled to the money in the account. Court held that C intended to hold the money on trust for himself and P and therefore was not part of his legal estate.
 - Do not need any particular form of words to create a trust. Look holistically at ALL the circumstances:
 - Settlor's personal characteristics → P was described by the courts as 'unsophisticated'
 - Nature of relationship → de facto partnership, but they lived together
 - Express declaration → 'as much yours as mine'