

TRUSTS EXAM NOTES

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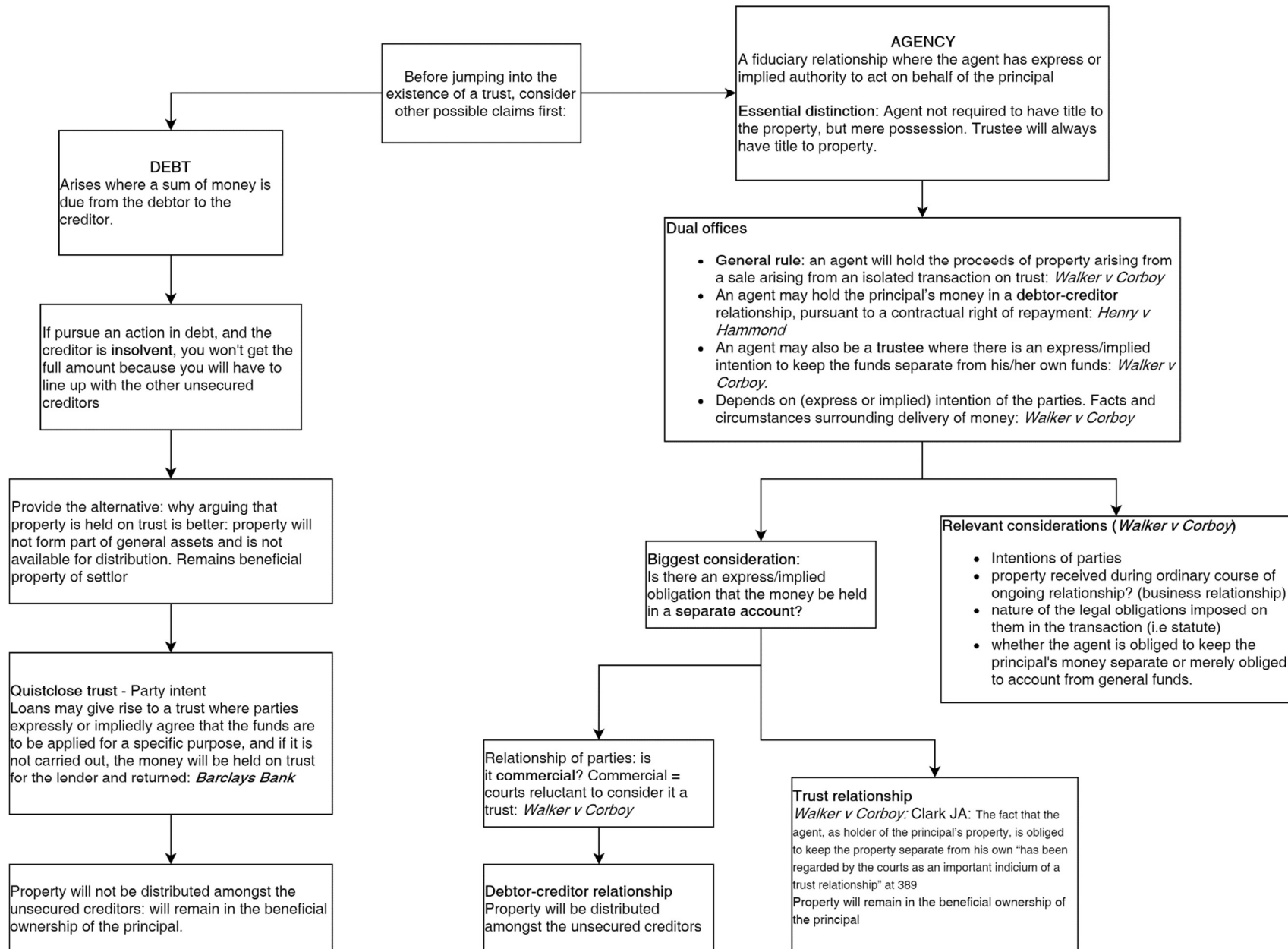
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NATURE OF TRUSTS: AGENCY AND DEBT RELATIONSHIPS

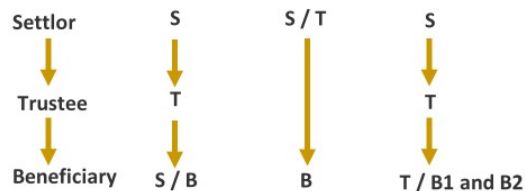


M1: NATURE OF TRUSTS

NATURE OF TRUSTS

A trust is an equitable arrangement which imposes a personal equitable obligation on a person ('trustee') to deal with property for the benefit of another person ('beneficiary').

- Fiduciary relationship exists b/w trustee and beneficiary in respect of the trust property
- A trust is not a legal entity w/a distinct legal personality like a company
- 'trust' = description of the obligation imposed on the trustee to hold property 'on trust' for the benefit of the beneficiaries
- **Settlor** = creator of trust, transfers property to trustee, who becomes the title holder/legal owner.
 - If trust created by will, settlor = testator/testatrix (female) of will
- **Trustee** = obliged to deal with property for benefit of beneficiary
- A settlor can also be a beneficiary or trustee but cannot be both at the same time if they are the *sole* trustee/benefic.
- Trust may arise by intention (express trust) or by operation of law (resulting and constructive trusts).



and constructive trusts).

Express trusts

- Settlor appoints a trustee to manage the trust property for the benefit of the beneficiaries.
- Created pursuant to the *intention* of the settlor: created on purpose and not imposed by a court.
- Gives effect to settlor's *positive* intention
- Can be express without being expressed by words/writing: can be implied by conduct

Presumed (resulting) and Constructive trusts

- **Presumed trust:** Intention to create a trust is presumed by the court: gives effective to settlor's *negative* intention: no intent to make a trust
- **Constructive trust:** trustee is subject to a court declaration that the trustee holds certain property on trust for the beneficiary: intent not considered
 - Arises where 'courts conclude that it would be inequitable to permit the holder of the property to hold it for his own benefit. Such a trust arises independently of the intention of the parties': *Walker v Corboy* (Clarke JA at 389)

Cohen v Cohen (1929) 42 CLR 91, 100 (Dixon J):

'in the case of constructive trusts ...equity is fastened upon the trustee not because he intended to become the fiduciary of property but because of the character of his dealings and in spite of his intention to take the property for himself.'

ESSENTIAL ELEMENTS OF A TRUST

- All elements must be present for a trust to exist:
 1. A trustee in whom legal or equitable title to property is vested; (generally trustee will have legal title, but sometimes equitable title can)
 2. Trust property;
 3. A beneficiary (*cestui que trust*) for whose benefit the property is held or a valid charitable purpose.
 4. An equitable obligation binding the trustee to deal with the trust property for the benefit of the beneficiary.
- Remember these additional requirements must be satisfied:
 - Three uncertainties (intention, subject matter, object)
 - Title + illegality

1. Trustee

- Any person can be a trustee, including a corporation: *Trustees Act 1962* (WA) s 6.
- Legal owner of the property with an equitable obligation to deal with the trust property for the benefit of the beneficiary according to the trust provisions – owes fiduciary obligations to the beneficiary

Appointment of original trustees

- A person can become a trustee either expressly (under an express trust), by implication (under a resulting trust), or by operation of law (under a constructive trust).
- Court has general supervisory juris over a trust
- Trust cannot fail for want of trustee – court has power to replace trustee no matter the type of trust
- An appointed person as a trustee has to accept that responsibility expressly by executing a trust deed or by conduct that is inconsistent with the disclaimer
 - If sole trustee disclaims, trust property generally reverts in settlor until new appointment of trustee, or court can appoint a trustee in place
- No minimum or maximum of trustees
- Trustees of an express trust have to act unanimously, not by majority (unless its a charity)

Appointment of new trustees

- New trustees can be appointed either under:
 1. an express power contained in the trust instrument;
 2. under statutory power: *Trustees Act 1962* (WA) s7; or
 3. by the Court under its inherent jurisdiction or under *Trustees Act 1962* (WA) s77.
- **Instrument:** Power contained in instrument can be wider/narrower than statutory power
 - Involves a grant to some other person (appointer) of right to appoint/remove/replace new trustees in the certain prescribed circumstances
- **Statutory power:**
 - If no power to appoint trustees in the trust instrument, then trustee legislation proscribes the circumstances in which appointments can be made and the person who can make the appointment – see s 7
 - Cap of 4 trustees: s 7(2)
- **Court's jurisdiction**
 - See *Trustees Act 1962* (WA) s77.
- Original number of trustees need not be replaced unless the deed directs it to be so.

Legislation relevant to Death, Retirement and Removal of Trustees

- The death of a trustee: see *Trustees Act 1962* (WA) ss 7 and 45;
 - Death: surviving trustees will continue to perform powers as trustees
 - Sole trustee dies or last surviving trustee dies, lots of administrative issues before a new trustee can be appointed
- retirement of trustees: see *Trustees Act 1962* (WA) s9;
 - S.9(2) where only one other trustee, retiring trustee can only be discharged with written consent of the remaining trustee.
- removal of trustees: see *Trustees Act 1962* (WA) s77.

2. Trust Property

- Property that may be the subject of a trust is defined in the *Trustees Act 1962* (WA) s 6:

property includes real and personal property and any estate, share, and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not.
- The trustee's title to the property is impressed with the interest of the beneficiaries (equitable interest).
- Sub-trust – interest of a beneficiary may itself be the subject of a trust and hold the equitable interest.

3. Beneficiaries

- A trust must have individual beneficiaries unless it is a charitable trust (ie for charitable purposes) – this is known as the 'beneficiary principle': see *Morice v Bishop of Durham* (1804) 32 ER 656.
 - Charity: individuals can benefit from the trust but they are not beneficiaries
- The trustee cannot be the only beneficiary; involves a merger between legal and equitable interests: see eg *DCLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 463 per Aickin J.
- Separation of legal and equitable interests in prop is essential for a trust to exist
- Beneficiary under some legal incapacity is not a reason for a trust be invalid, can even include unborn children

4. Equitable obligation

- A trustee has an equitable obligation to deal with trust property for the benefit of the beneficiaries.
- Equitable obligation binding on the trustee and attaches to the property.
 - Both obligations must be present
- Beneficiary has a range of personal/proprietary remedies should the trustee default
 - i.e order directing trustee to perform trust or even removing the trustee
 - Sometimes those remedies are inadequate, where trustee is insolvent
 - Beneficiary can assert a right to the property

DIFFERENT CATEGORIES OF EXPRESS TRUSTS

Express trusts are divisible according to:

1. Degree of detail: **executed or executory**

- **Executed:** Where settlor's conveyances defined exactly the interests of the beneficiaries and has set up all terms of trust in complete and final form
- **Executory:** settlor has merely expressed general intention as to how prop is to be held w/out going into details

2. When they come into operation: **intervivos or post-mortem**

- **Intervivos:** created by deed to take effect during life-time of settlor
- **Testamentary:** created by will takes effect after death of settlor
- **Vested/contingent** equitable interest of beneficiaries
 - **Vested** = property given to 'x' now
 - **Contingent** = property given to 'x' after a certain event

3. The nature of beneficiaries/objects: **public/charitable or private**

- **Private:** trusts for private individuals
- **Charitable:** "a trust for purposes recognised as charitable in the law" not for individuals – charitable purposes, requires an element of public benefit

4. The nature of a trustee's duties: **bare or active**

- **Simple** trust: exists where trustees have no duties to perform other than transfer of trust property when requested
 - Trustee holds property without any interest in it
 - Trustee only exists by reason of office and legal title of trustee, without any further duty, except to transfer the property when demanded or directed by the beneficiary.
- **Active:** trustees have active duties to perform which are expressly imposed by person creating the trust

5. The nature of beneficiaries' interests: **fixed or discretionary.**

- **Fixed:** construction of trusts instrument prescribes the share of the trust property that each beneficiary is to receive
- **Discretionary:** trustee has discretion as to the ascertainment of beneficiaries and/or their entitlement to capital and income

Fixed trusts

- Expressly prescribes a share of trust property to each beneficiary
- Beneficiaries have a separate, fixed interest in the capital of the trust property
 - can enforce both the administration and distribution of the trust in accordance to its provisions
 - this is an **equitable proprietary interest**
- Is imperative: must be carried out according to its terms by the trustee, prop is vested in the person w/obligation to act in relation to the prop
 - No discretion as to how the trust property is to be distr.
- The proprietary interest of a beneficiary is not carved out of the trustee's legal interest.
 - Beneficiary has separate prop interests from the trustee. Trust property is impressed with the obligations which the beneficiary is entitled to enforce against the trustee; *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 474.

Discretionary trusts

- Trustees have a discretion as to how the trust property should be distributed amongst chosen beneficiaries
- The beneficiaries of a discretionary trust have no interest or enforceable claim in the trust property unless and until the trustees elect to exercise a discretion in their favour.
 - Potential beneficiaries of a discretionary trust are better described to as 'objects' of the discretionary trust.

- Only have a right of 'mere expectation' that the trustee will exercise their discretion in the beneficiary's favour: *Pearson v Inland Revenue Commissioners* [1981] AC 753.
 - Cannot force a trustee to select them
- Rights of potential beneficiaries under a discretionary trust are restricted to the right to be considered and to compel the trustee to properly administer the trust fund: *Gartside v Inland Revenue Commissioners* [1968] AC 553.
 - They are also entitled to information about the trust.
- Only when the trustee's discretion is exercised in discretionary beneficiary's favour does the beneficiary receive proprietary interest: *Queensland Trustees Ltd v Commissioner of Stamp Duties (Qld)* (1952) 88 CLR 54.

TRUSTS VS OTHER RELATIONSHIPS

Fiduciary relationships

"A person is not necessarily a trustee...by reason merely of the fact that he owes fiduciary duties to others": *Erwin v Shannon's Brick, Tile & Pottery Co Ltd* (1938) SR (NSW) 555 at 563 per Sir Fredrick Jordan as approved in *Clay v Clay* (2001) 202 CLR 410 at [35].

- The fiduciary relationship describes persons who act on behalf of or in the interest of or with the confidence of another.
- The trust is a fiduciary relationship of the highest order.
- A fiduciary relationship extends beyond a trustee eg company director.
- Essential distinction: A fiduciary does not necessarily have property vested in them. A trustee does.

Bailment

- Arises when a bailor transfers possession to personal property to a bailee for the bailee's own use or to perform some work for the bailor
- Bailment:
 - Bailee has no title to the property held under the bailment relationship
 - Bailee holds property for another
 - Bailee can only hold personal property
 - Bailee can recover goods from a third party not bona fide
 - Bailee and trustee owe some duty of care in respect of the property held
 - A mere contract of bailment does not create a trust
 - Although Bailee has special interest in property Bailee's interest does not amount to title
 - Bailee holds property on the condition to redeliver it to the bailor after some task is done
- Trust
 - Trustee must have title to the trust property
 - If owner transfers ownership = trust or a gift, not a bailment.
 - Trust applies to both real and personal property
 - Beneficiary can claim against a trust property transferred to a third party by a trustee in breach of trust (unless transferee is bona fide purchaser)

Agency

- Agency = relationship b/w agent and principal, who gives agent authority to affect principal's legal relations w/third parties. Whether it is a trustor agency depends on the intention of the parties at the time of the creation of the relationship.
 - Is there an express agreement? If not, consider circumstances of case to see what intention the law would impute on the parties.

- Essential distinction: An agent is not required to hold title to the property of the principal during the agency, but mere possession. A trustee must hold the legal title to trust property.
- **General rule:** an agent will hold the proceeds of property arising from a sale arising from an isolated transaction on trust. But whether the general rule applies falls to be determined upon a consideration of the facts surrounding the delivery of the property. – Clarke JA *Walker v Corboy* (1990) 19 NSWLR 382 at 390
 - An agent may hold the principal's money in a debtor-creditor relationship, pursuant to a contractual right of repayment: *Henry v Hammond*
 - An agent may also be a trustee where there is an express/implied intention to keep the funds separate from his/her own funds: *Walker v Corboy*.
- Whether the agent is holding property on trust or as debt falls to be determined upon a consideration of the facts surrounding the delivery of the property. – Clarke JA *Walker v Corboy* (1990) 19 NSWLR 382 at 390
 - i.e: if agent req to keep funds separate from his own 'has been regarded by the courts as an important indicium of a trust relationship': *Walker v Corboy* (Clarke JA) at 389
 - However, initial non-separation of funds is not fatal to the existence of a trust: *Walker v Corboy* (Meagher JA at 398)
 - *Henry v Hammond* [1913] 2 KB 515, 521 Channell J:
If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee ... but merely a debtor.
- Agency:
 - Agent does not need to be vested w/property of the principal
 - Agent acts within express/ostensible authority of principal
 - An agent is not bound personally when acting for a disclosed principal: *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319
 - a principal may revoke an agent's authority at will
- Trust:
 - Trustee holds legal title to trust property
 - Trustee must follow directions specified in the trust instrument and is not ordinarily subject to directions of beneficiary
 - Trustee contracts as principal and cannot bind beneficiaries unless trustee enters a contract
 - once a trust is completely constituted, a settlor cannot revoke or vary it unless he or she expressly reserves the right to do so in the original trust deed: *Mallott v Wilson* [1903] 2 Ch 494.
- Similarities:
 - Both act for benefit of another: agent acts for interest of principal, like a trustee, who acts for benefit of the beneficiary
 - Both act in fiduciary capacity

Walker v Corboy (1990) 19 NSWLR 382

Facts:

- Fruit and vegetable growers sold their produce through a farm produce seller licensed under the Farm Product Act 1983, which acted as their agent.
 - Commercial relationship = frequent trading, usually involving v small amounts of \$\$\$
 - Growers forwarded consignment notes, some detailed, some simple and informal
 - None referred to a trust
- That company went into liquidation holding as part of its general funds the proceeds of sale of such produce.

- The growers claimed the moneys were held by the seller in trust for them and were not simply an unsecured debt.
- The trial judge upheld this claim and the receivers of the seller appealed against that decision.

Issue: whether an agent who sold farm produce at market for a number of principals held the proceeds of the sales specifically for each principal.

Held:

In the absence of any contrary express or imputed intention of the parties, neither in equity nor under the Farm Produce Act 1983 will an agent for sale of farm produce be a trustee for each of his principals of the proceeds of sale flowing from complex and multiple transactions; the proper relationship between them is that of debtor and creditor.

- Legislation did not require proceeds of sale to be kept in a separate account: statute contemplated a remedy in debt only.
- Also industry-wide practice that sale proceeds were mixed with general funds

Principles:

Clarke JA

- The fact that the agent, as holder of the principal's property, is obliged to keep the property separate from his own "has been regarded by the courts as an important indicium of a trust relationship" at 389
- Commercial relationships:
 - the general rule is that an agent will hold the proceeds of property delivered to him for sale on trust.
 - Whether the general rule applies falls to be determined upon a consideration of the facts surrounding the delivery of the property.
 - Courts reluctant to introduce trusts to commercial transactions
 - The authorities demonstrate that although a trust is readily imposed on proceeds arising from an isolated transaction the position may not be the same where property is received in the ordinary course of an ongoing trading relationship. (at 389)

Account of profits/losses

- Court may make an agent a constructive trustee in respect of unauthorised profits secured in breach of fiduciary duty, or make agent account for profits, or compensate principal for losses sustained by the principal due to the fiduciary breach

Dual office

- A person can be both agent and trustee where the trust doc empowers the settlor or beneficiaries to direct the trustee concerning matters of trust administration normally within the trustee's direction: *R v Hopkins* (1915) 20 CLR 446 at 475-6 Isaacs and Gavan Duffy JJ.
- This 'dual office' can also arise where parties agree/understand that the agent will keep his/her property separate from property obtained on behalf of principal.

Debtor and creditor

- Relationship of debt arises where a sum of money is due from the debtor to the creditor.
 - Distinction b/w debt and trust important in case of insolvency of a trustee – intention of parties
 - Trust: beneficiary can follow the money and recover it b/c its not the property of the insolvent entity – it is trust property: cannot be

divided amongst creditors: *Henry v Hammond* (1913) 2 KB 515 at 521, Channell J

- Payment into a separate bank account is a useful indication of an intention to create a trust: see eg *Cohen v Cohen* (1929) 42 CLR 91.
 - Conversely if a payee is entitled to mix the money with his own and hand over an equivalent amount on demand, s/he will generally be a debtor: see eg *Walker v Corboy* (1990) 19 NSWLR 382.

Re Kayford [1975] 1 All ER 604

Facts: Kayford Ltd conducted a mail order business.

- Customers either paid the full price for goods in advance or paid a deposit.
- The company could not meet orders and so, opened a separate customers' trust deposit account and paid into it the money received from customers for goods not yet delivered.
- The company went into liquidation and the liquidators sought a declaration as to the ownership of the sums of money paid into the account.

Held: The company held the money on trust for the customers.

- At 282 McGarry J said: "I feel no doubt that here a trust was created. From the outset the advice (which was accepted) was to establish a trust account at the bank. The whole purpose of what was done was to ensure that the moneys remained in the beneficial ownership of those who sent them, and a trust is the obvious means of achieving this".

Quistclose trusts

- Some loan arrangements may give rise to a trust – where money is advanced by one person to another with a mutual intention that it should be used exclusively for a special purpose, it is implied (in the absence of contrary intention) that if the purpose fails, the funds will be held on trust and be repaid to the lender: see *Barclays Bank v Quistclose Investments Ltd [1970] AC 567*
 - An e.g of an express, private trust
- In the absence of express evidence, the most significant factor in finding a mutual intention is an obligation to keep the funds in a separate account: *Cohen v Cohen*.
 - Not essential tho: *Cohen*
- If money is used for the agreed purpose, the lender can only have a contractual claim from the borrower – lender will become a creditor
 - Money has to be borrowed for some specific purpose which the lender is aware
 - There must be a further agreement as to what is to happen to the money if the purpose is not carried out

Barclays Bank v Quistclose Investments Ltd [1970] AC 567

Facts: Rolls Razor Ltd (RR Ltd) was indebted to Barclays Bank (BB).

- RR had declared dividends and so, needed to pay dividends to its shareholders.
- It borrowed money from Quistclose to pay the dividends under an arrangement where the loan was to be paid into a separate account with BB.
- RR informed BB that the account was to be used only to pay the dividend.
- Before the dividends were paid RR Ltd went into liquidation.
- Quistclose brought an action claiming that BB held the money on trust for it.

Held (on appeal):

- The money had been received by RR Ltd on trust to pay the dividend; that trust having failed, there was a resulting trust for Quistclose; and BB had

notice of the trust and therefore held the money as constructive trustee for Quistclose.

- Decision affirmed by House of Lords

Contract

- A contract differs from a trust in several ways including:
 1. A trust is based on intention not agreement – contracts may be varied by agreement whereas trusts can only be varied in accordance with the trust instrument or by the court.
 2. Consideration is requirement for all contracts but is not required for a trust. A trust is the equivalent of a common law gift.
 3. Contracts create personal rights between the parties whereas trusts can create proprietary interests in the beneficiaries.
 4. Remedies for breach of trust are different
- Doctrine of privity of contract – only a party to a contract can acquire rights and incur liabilities under it. For example, a contract under which X agrees with Y that X is to pay \$1000 to Z is enforceable by Y but not by Z: see eg *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43
 - Trust circumvents the restrictions imposed by privity of contract
- Contractual obligation does not carry a fiduciary duty with it
- Statutory alteration to privity of contract –
 - *Property Law Act 1969* (WA), s 11(2):
 - 2) ...where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but –
 - a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
 - b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
 - c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.

Trustee and executor/administrators

- Both owe fiduciary duties to beneficiaries and the essential elements of a trust are present in executorship.
- However, there are distinctions including:
 1. executor's duties stem from the obligation to wind up the estate while a trustee usually has an ongoing role;
 2. Executor has full ownership of the property (ie until the estate is fully administered, the residuary beneficiaries do not have a beneficial interest in any of the assets of the estate) whereas only legal ownership of trust property vests in the trustee.
 3. Trustees must act unanimously in disposing of trust property whereas one of several executors can bind the estate of the testator
 4. Executors may not retire or appoint successors to their place during the period of administration whereas the retirement and appointment of trustees is statutorily provided for.

DEFINING THE OBLIGATION TO A THIRD PARTY

What was the transferor's intention at the time of the disposition?

AMBIGUOUS LANGUAGE NOT STATING INTENT TO CREATE TRUST

LANGUAGE UNAMBIGUOUSLY REFERS TO A TRUST

