

## LAW4170 TRUSTS – SUMMARY NOTES & SCRIPT

when the three certainties are present and the statutory formalities and constitution are satisfied



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## DUTIES AND POWERS OF TRUSTEES

A trust is a mechanism for managing, preserving, realizing and distributing assets. Since the trustee holds the property on behalf of others, they are subject to positive duties and fiduciary obligations. Where these duties are breached, the trustee may be liable to reconstitute the trust.

### CUSTODIAL DUTIES

#### DUTY TO COMPLY WITH THE TRUST DEED

**RED FLAG:** Distributing to/misappropriating property for someone not mentioned in the trust deed, investing in a purpose prohibited by deed

[Insert party] will argue that [trustee] has breached their custodial duty to comply with the trust deed by [insert facts]. Per [Green v Wilden](#), this duty requires carrying out the trust instrument in strict conformity with its terms. Accordingly, the trustee must be familiar with the trust deed and their obligations ([Turner](#)).

**Note:** per s2(3) [Trustees Act \(TA\)](#), the trust deed may vary any other duties and power of the trustees, except for those core duties that are fundamental to the trust ([Green v Wilden](#)). This includes the duty to adhere to the terms of the trust, the duty to perform the trust honestly and in good faith for the benefit of the beneficiaries, and the duty to keep and render accounts.

#### DUTY TO DISTRIBUTE

As part of the obligations of complying with the trust deed, the trustee must ensure that distributions from the fund are only made to people who are entitled to distribution. Distribution to a person other than those entitled under the deed will be a breach of duty unless the trustee has followed the procedures established in [s33 TA](#). [Insert party] will argue that [trustee] has breached their duty to distribute in accordance with the trust deed by distributing to [insert party].

**s33 Trustees Act:** Where a trustee cannot locate everyone entitled to distribution, they may:

- (1) Give notice in a daily newspaper of their intention to make distribution, requiring any person to send particulars of claim within time not less than 2 months.
- (2) ...
- (3) At the expiration of time, the trustee may distribute property to persons entitled, having regard only to claims made under subsection (1).
- (4) This section applies regardless of anything in the trust instrument.

OTF, [trustee] did/did not comply with the requirements under s33. Unless he/she is otherwise entitled to rely on a defence, he/she will therefore be in breach.

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## EXCEPTIONS

### **Always mention: Sanction by the court**

Per *Re New*, the court has inherent jurisdiction to sanction departures from the trust instrument if there are circumstances unforeseen by the settlor, an emergency has arisen and consent of all the beneficiaries is impossible. Further, the court has expediency jurisdiction under s63(1) TA to sanction departure from the terms of the trust where the disposition or purchase is beneficial to the trust as a whole.

Accordingly, [trustee] will not be liable for the breach if he/she can satisfy the court that the deviation was necessary or beneficial (*Green v Wilden*). However, this is unlikely to be satisfied, as the he/she had the right to approach the court for directions under *Order 54 of the Supreme Court Rules* but failed to do so (*Macedonian Church*). Ultimately, [trustee] will/will not be in breach. However, since the breach has led to no loss, it will only be nominal **OR** Accordingly, [trustee] is/is not likely to be liable for a loss of [insert loss, if relevant].

### **If relevant: Direction from beneficiaries**

Where all the beneficiaries are sui juris, they may unanimously direct trustees to depart from the strict terms of the trust. Where this has occurred, the trustee will not be liable for breach of the trust deed and will incur no liability. OTF, this has/has not occurred, as [insert facts]. Ultimately, [trustee] will/will not be in breach. However, since the breach has led to no loss, it will only be nominal **OR** Accordingly, [trustee] is/is not likely to be liable for a loss of [insert loss, if relevant].

### **If relevant: Distribution is impossible/illegal**

Where the terms of the trust instrument are incapable of being carried out or illegal, the duty to distribute will not apply. Ultimately, [trustee] will/will not be in breach. However, since the breach has led to no loss, it will only be nominal **OR** Accordingly, [trustee] is/is not likely to be liable for a loss of [insert loss, if relevant].

## FIDUCIARY DUTIES

### DUTY TO AVOID CONFLICTS

**RED FLAGS:** Mixing of trust assets with trustee's personal assets, trustee taking an opportunity (e.g. lease) in their personal capacity that came to them in their capacity as trustee (Keech; Chan)

The critical feature of a trust is that the trustee is holding property for the benefit of another. The trustee has a fiduciary duty to conduct the trust as a prudent person looking after another's property. Accordingly, they must not place themselves in a position involving a real, sensible possibility of conflict between their duty to act as a fiduciary and their own interest (Boardman) or their duty to act as a fiduciary to multiple people (Farrington). [Insert party] will argue that [trustee] has breached their fiduciary duty to avoid conflicts by [insert breach].

### MIXING TRUST ASSETS

**RED FLAG:** Personal bank account

The duty to avoid conflicts includes the duty to keep trust assets separate (ASC). Where the trustee is trustee of multiple trusts, each trust's assets must be maintained separately unless the terms of the trust permit mixing. [Insert party] will argue that [trustee] has breached their duty to avoid conflicts by mixing trust assets with their personal property, as [insert facts].

On balance, a real and sensible possibility of conflict will/will not be made out (Boardman). [Trustee] will/will not be in breach. However, since the breach has led to no loss, it will only be nominal **OR** Accordingly, [trustee] is/is not likely to be liable for a loss of [insert loss, if relevant].

### SELF-DEALING RULE

**RED FLAGS:** Purchase of trust property by the trustee, trustee's family/friends

The duty to avoid conflicts includes the self-dealing rule. Accordingly, the trustee is not permitted to purchase trust property unless it is allowed by the trust instrument and approved by the court. Per Clay, it is irrelevant whether the sale was honest or at/above market value. While there is no absolute bar against a family member of a trustee purchasing trust property, this is unlikely to be permitted for policy reasons, as it would encourage trustees to circumvent the general rule.

OTF, [trustee] has/has not breached the self-dealing rule by [insert facts]. Accordingly, the transaction will be voidable at the option of the beneficiaries.

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## FAIR-DEALING RULE

**RED FLAGS:** Purchase of a beneficiary's interest by the trustee

The duty to avoid conflicts includes the fair-dealing rule. While a sale by a beneficiary to a trustee of a beneficial interest in the trust is not forbidden, equity will oversee the transaction to ensure that the trustee does not take advantage of their position. Accordingly, the trustee must show that they have made full disclosure to the beneficiary and the transaction is fair, honest and at arms-length.

OTF, [trustee] has/has not breached the fair-dealing rule, as [insert facts]. Accordingly, the transaction will/will not be subject to rescission.

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## DUTY TO AVOID PROFITS/ACT GRATUITOUSLY

**RED FLAGS:** Trustee buying/paying off something with trust assets, personally pocketing money

The trustee's fiduciary duties also forbid them from making a profit at the expense of the beneficiaries ([Williams](#)). A trustee must not appropriate trust property for their personal benefit, nor may they exploit a business opportunity when the benefits should have gone to the beneficiaries.

[Insert party] will argue that [trustee] is in breach of the profits rule because [insert facts]. Prima facie, the profits rule has/has not been breached, and [trustee] will be liable a loss of [insert loss].

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## EXCEPTIONS

However, [trustee] will argue that they ought to be excused for their breach on the basis of:

### 1. s77 Trustees Act

Under this section, the trustee may apply to the court for a commission (not exceeding 5% of the capital of the trust fund) for his pains and troubles, as is just and reasonable. However, the court is unlikely to grant compensation unless the work required in the administration of the trust was substantial. On balance, the court will/will not grant compensation, as [insert facts].

**Note:** Consider the time and effort expended by the trustee, as well as the capacity of the trust fund to pay

### 2. An express term in the trust instrument

Per [s2\(3\) Trustees Act \(TA\)](#), the trust deed may vary any other duties and power of trustees. [Trustee] will argue that, per clause [insert clause], he/she was permitted to [insert action]. Per [Green v Wilden](#), the trustee may therefore profit, unless there is any sign of unfairness or undue pressure. On balance, the trustee will/will