

TOPIC SIX: TRUSTS

WHAT IS A TRUST

- Trust is the separation of legal and equitable title
- Trust is not a juristic person like a corporation
- Trust is the separation of legal and equitable title
- Trust is an equitable obligation, binding a person, called a trustee, to deal with property (called trust property), owned by them as a separate fund, distinct from his own private property, for the benefit of persons (beneficiaries/cestui que trust) - *(Underhill and Hayton: Law of Trusts and Trustees, 17th ed at 1.1)*

ELEMENTS OF A TRUST

Four essential elements:

1. Trustee: person or corporation. Trust will not fail for want of a trustee – reappointment provisions exist. Court of equity will restrain a person in whom trust property is vested from dealing with that property other than in accordance with the trust.

2. Trust Property: Property which is capable of being held on trust. Must be vested in the trustee. Must be identifiable; terms must be clear and ascertainable. Must be presently existing and not conditional; if there is a pre-condition, it must be satisfied. Can be real/personal and corporeal or incorporeal.

3. Must be a beneficiary or a charitable purpose: (Beneficiary Principle) There must be a beneficiary or a charitable purpose because there must be someone who can enforce the trust. Attorney-General will enforce charitable trusts. A trust may be created without communication to beneficiary and beneficiary does not have to be born or even selected from a designated class – but must exist OR purpose defined as a charity.

Note: What constitutes a ‘charity’ has now been outlined in legislation

4. The trustee must be under a personal obligation which attaches to the trust property: The personal obligation of the trustee towards the trust property is the core characteristic of the trust. It attaches to the trustee in personam but is also annexed to the property and confers upon the beneficiary an equitable interest in the trust property. The trustee must look after the trust property for the benefit of the beneficiary.

Further requirements:

- Settlor must intend to create a trust (as oppose to a different type of legal relationship) and to separate legal and equitable title
 - Intention can be manifested through writing/deed/conduct
 - Relevant for constructive trusts
- Trust property must be vested in the trustee. If the express trust is by transfer this means compliance with legal requirements for transferring ownership of the trust property over to the trustee
- Settlor will usually disappear but may reserve powers to direct trustees in the exercise of their discretion
- Beneficiaries under an express trust must be defined – whether individually or via a defined class
 - Must be defined clearly enough for a court to identify whether a person is inside or outside of the class, and therefore entitled to enforce the benefit, e.g. ‘all people who did well in Deakin law school’ not specific or definable, language is obscure and unclear which leads to uncertainty
- If the trust supports a purpose rather than beneficiaries the purpose must come within the definition of a charity (**beneficiary principle**)
- Trustee holds fiduciary duties and additional trustee duties
- Once express trust created it cannot be dissolved even if trustee refuses to take office

HISTORY OF THE TRUST

- Derived from the Roman *fideicommissum*
 - Legacy could pass to a person who could be trusted to honour moral obligation which was used by priests to evade restrictions on inheritance
- Also used as a temporary device by departing Crusaders who wanted their property protected
- Feudal system of land ownership – Crown as ultimate beneficial owner
- The *feoffee to uses* was the trustee and in medieval England, the trust was originally known as the *feoffment to uses* and this derived from the Franciscan friars.
 - The *cestui que use* was the beneficiary
 - ‘To A and his heirs for the use of B and his heirs’
- By 1450 a large percentage of English land was held by trust as it had three primary benefits:
 - (i) Avoidance of feudal dues
 - (ii) Avoidance of restrictions on inheritance under feudal principles (primogeniture)
 - (iii) Easier to convey land via instructions to *feoffee to uses* than via livery of *seisin* under common law

- The popularity of the use meant that royal revenue was significantly reduced
- Henry VIII in conjunction with Sir Thomas Cromwell eventually devised legislation to deal with this known as the Statute of Uses 1535.
 - ‘The Statute of Uses was forced upon an extremely unwilling Parliament by an extremely strong-willed king.’ (Maitland)
 - The Statute of Uses converted the *cestui qui use* into a legal title holder thereby effectively treating the beneficiary as a legal interest holder - Execute all uses by transferring legal title from *feoffee to cestui que use*
 - This effectively resulted in the creation of different means of avoiding the Statute (‘use upon a use’)
 - The Statute of Uses was capable of being avoided via the creation of the use upon the use. For example, to A to the use of B to the use of C converted the title of B into a legal title but retained the title of C as equitable.
 - The use upon the use was the early version of what came to be regarded as the modern ‘trust’.
 - The impact of the Statute of Uses was further reduced with the abolition of feudal tenures in 1645.
 - Trusts, by that stage, had become one of the primary sources of work within the Chancery jurisdiction.
 - **Imperial Acts Application Act 1980** (Vic) s 5

SOCIAL AND COMMERCIAL CONTEXT OF TRUSTS

EXPRESS TRUSTS

- Settlor must intend to create a trust and to separate legal and equitable title (as opposed to a different albeit similar legal relationship)
- Intention can be manifested through writing/deed/conduct.
- Trust property must be vested in the trustee. If the express trust is by transfer this means compliance with legal requirements for transferring ownership of the trust property over to the trustee.
- Settlor will usually disappear but may reserve powers to direct trustees in the exercise of their discretion: see foreign trust examples
- Beneficiaries under an express trust must be defined – whether individually or via a defined class.
- If the trust supports a purpose rather than beneficiaries the purpose must come within the definition of a charity (beneficiary principle)
- Trustee holds fiduciary duties and additional trustee duties
- Once express trust created it cannot be dissolved even if trustee refuses to take office.

Types of express trusts:

Bare Trusts: simplest form; trustees to hold trust properties until such time as beneficiaries' demand - *Herdegen v Federal Commissioner of Taxation (1988) 84 ALR 271*

Charitable trusts: for charitable purposes; usually express created for particular purpose; unusual in having no beneficiaries

Commercial Trusts: Examples: corporate custodian trusts (hold securities); debenture trusts (trust is a security device for bondholders); subordination trusts (one creditor subordinated to another); securitisation trusts (trust assets available as security to investors); bills of lading trusts; client trust accounts.

Superannuation Trusts: Express trust with trustee/managers appoint to look after contributions by employees/employers during currency of employment. Vests upon retirement. Contributions are tax deductible.

Public Unit Trusts: Investment vehicles whereby trustee/manager appointed. Trustee has duty to obtain money. Manager deals with investments on behalf of unit holders. Unit holders may redeem units.

Trading Trusts: Trusts set up to run individual businesses. Trustee is the business company. May have few assets but usually have wide powers of investment to deal with business income. Preferable to corporations because not taxed in the same way re income tax and payroll tax.

Commercial Trusts: e.g. corporate custodian trusts, debenture trusts, subordination trusts, securitisation trusts, bills of lading trusts, client trust accounts

Family Trusts: Trusts are often used for the management of family assets. The trustee is a family member and the family are beneficiaries. Trust is usually discretionary (ie beneficiaries are appointed by trustee from the family class). Benefit is that income can be distributed to non-working spouse or children over 18

Fixed: each beneficiary has set quantum of interest in trust property. Beneficiaries have an equitable property interest

Discretionary: beneficiaries' entitlements are subject to the trustee's discretion

- Various discretions e.g. size of entitlement; beneficiary chosen from class
- The discretionary trust is the most common type of express trust

- Defined by the fact that the trustee has a discretion or power to deal with or distribute the beneficial interests in the trust estate.
- Discretion to select beneficiaries, to select benefits of income, to select capital (or both)
- Power to determine proportions of income/capital
- In a discretionary trust no beneficiary (object) has any interest in the trust property other than a chose in action (equitable) to be considered as a potential beneficiary.
- Discretionary trust utilised for unborn beneficiaries in a family context; to increase taxation benefits, to confer difficult discretionary matters relating to who/how much upon trustee corporations/boards.

Trust Power: the balance between the trustee's discretion and the trustee's duties.

RESULTING TRUST

Imposed where equity presumes a trust was intended but never properly constituted; express trust failed to eventuate for want of proper disposition; or volunteer has received legal title after another has provided purchase price.

CONSTRUCTIVE TRUST

Imposed regardless of parties' intentions; remedial function.

Touchstone: Unconscionable retention of benefit – ***Muschinski v Dodds (1985) 62 ALR 429.***

De facto couple intended to buy land together, install a prefab house to live in, and restore the cottage already on the land to use for an arts and craft business. Relationship was supposed to last but did not – she paid most of the money, he was going for the loan contributions but paid minimal amounts at the time the relationship broke down.

Court held that she made a contribution assuming the relationship would last, and that he would make contributions, neither of those things happened so it would be unconscionable if he retained the benefit of the property when she contributed most of it. Thus, a constructive trust was declared. There was no resulting trust because there was a common intention that the respondent should have an immediate and unconditional legal and beneficial one half interest in the property.

DISTINCTION BETWEEN TRUSTS AND OTHER SIMILAR LEGAL RELATIONSHIPS

CONTRACT

- Trust confers beneficial title upon beneficiary and vests ownership in the trustee. Confers in personam and in rem rights. Contract is purely in personam to the parties privy to the contract
- Arguably trust originates in contract via the trust agreement – but after this becomes a fiduciary concept which generates proprietary rights
- “The origin and nature of contracts and trust are, of course, quite different. There is however no dichotomy between the two. The contractual relationship provides one of the most common bases for the establishment or implication and for the definition of a trust” - ***Gosper v Sawyer (1985) 160 CLR 548 at 568-569 per Mason and Deane JJ***
 - The intention to create a trust can evolve from a contractual relationship but only where the contractual relationship reveals a clear focus upon a third party; where the contractual relationship involves obligations of trust and confidence that are consistent with fiduciary and trust responsibilities; and where the only way to achieve the objective is to give that third party a beneficial entitlement
- Contracts under seal (deeds)
 - Consideration: not required in trusts
- Third parties: can compel performance and seek relief
 - Contracts relating to third parties can, however, be interpreted as express trusts. This is because a trust can embody a contract about how property is to be deployed: (***see J.H. Lanbeing, ‘The Contractarian Basis of the Law of Trusts’ (1995) 105 Yale Law Journal 625.***)
- A trust can attach to the benefit of the whole contract or of the whole or part of some particular contractual obligation. In the case of a policy of liability insurance under which the insurer agrees to indemnify both a party to the contract and others, there is no reason in principle or in common sense why the party to the contract should not hold the benefit of the insurer’s promise to indemnify him on his own behalf and the benefit of the promise to indemnify others respectively upon trust for those others. Where the benefit of a contractual promise is held by the promisee as trustee for another, an action for enforcement of the promise or damages for its breach can be brought by the trustee. In such an action, the trustee can recover, on behalf of the beneficiary by reason of breach. If the trustee of the promise declines to institute such proceedings, the beneficiary can bring proceedings against the

promisor in his own name, joining the trustee as defendant” - ***Trident General Insurance Co Ltd v McNeice Bros Pty Ltd (1988) 165 CLR 107 at 147-148 per Deane J***

FIDUCIARY RELATIONSHIP

- Jacobs Law of Trusts makes it clear that whilst all trustees are fiduciaries not all fiduciaries are trustees.
- The trustee owes fiduciary duties to beneficiaries (as well as additional trustee duties) but bare existence of fiduciary duties does not mean that trust property has vested in the fiduciary.
- Trustee has fiduciary powers – duty to properly exercise significant property powers that connect to the trust however the existence of fiduciary powers does not necessarily indicate the existence of a trust.

CONDITIONAL DISPOSITION / GIFT

- Transfer of property subject to obligations to third parties: equitable charges
- Conditions may be attached to dispositions: unenforceable moral obligations, enforceable conditions precedent or subsequent, equitable personal obligations
 - e.g. Wife can have the land *if* she holds the property for the childrens’ benefit
 - CF condition precedent (wife must hold the personal belongings etc. to get the land)
 - Condition subsequent (wife gets the land, but forfeits it if she does not hold the personal belongings etc.)
 - The children can’t enforce anything BUT the wife has an economic incentive to hold the property in the manner requested
- Precatory words have no legal force compared with binding conditions
- Personal equitable obligation: ***Gill v Gill (1921) 21 SR 9NSW 400***
 - In some cases the court may see that what the testator intended was to attach a charge or a trust upon the property, in other cases it may conclude a personal liability alone is intended. The view take would depend partly on the language used to describe the obligation, partly on the nature of the property given to the obligee, and partly on the nature of the obligation. In cases where the obligation is merely personal in its nature, calling for the personal activity of the obligee it may be the court could not effectively or specific performance. I see no reason why, in such cases, the court should not mould the remedy so as to give a remedy by way of damages for the breach of quasi contract (at 407 per Harvey J)
- Question of construction
- Direct obligation on donee without third party proprietary interest: personal equitable obligation