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2.7 Charitable Purpose Trusts

- According to the 'beneficiary principle', a trust must be for persons (human being), or for a charitable purpose.
 - Exception:
 - Occasionally, the court allows an exception to a trust for caring for individual pets. (**Re Howard**), where servant (a person) receives the money holding on trust to provide maintenance for parrot.
- For a trust to be charitable purpose trust, the trust must have a charitable purpose within the **spirit and intendment of preamble to Statute of Charitable Uses**, and the public benefit requirement must be satisfied.
 - Relief of the aged, impotent & mariners;
 - Maintenance of schools of learning, and free scholars in universities;
 - Repair of bridges, ports, havens, causeways, churches, seabanks, and highways;
 - Education & preferment of orphans;
 - Relief, stock and maintenance of houses of correction;
 - Marriage of poor maids;
 - Support, aid & help of young tradesmen, handicraftsmen, and persons decayed;
 - Relief, or redemption, of prisoners or captives;
 - Aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.

Part 1: a Charitable Purpose

- The purpose of trust must fall under one of the *4 heads of charity*
- (1) Relief of poverty is a charitable purpose. Definition of "poverty" is very broad and does not mean abject poverty; it refers to persons who are subject to some degree of financial necessity. (**Downing**)
 - As in **Downing**, someone whose house needs improvement might be enough 'benefit persons whose lot needs improvement'.
 - Trust to pay pensions to the poor employees of the company who are aged or incapacitated. (**Dingle**)
 - Relief of poverty is conclusively presumed to satisfy the public benefit requirement. [NO need to separately satisfy (**Dingle**)
- (2) Advancement of Education is a charitable purpose.
- Merely increasing public knowledge is not sufficient; the teaching element (disseminating knowledge) must be present. (**Re Shaw**)
 - Examples of clearly charitable: universities, scholarships...
 - The research inquiring into possibilities and advantages of the 40-letter alphabet was not charitable, but a propaganda which is not educative enough in the sense of spreading knowledge (**Re Shaw**)
 - Pure scientific research was charitable, spread of knowledge may be implicit here (**Taylor**)
 - The high literature in Britain of finding Shakespeare manuscripts was charitable. (**Re Hopkins**)
- (3) Advancement of Religion is a charitable purpose
 - Q1: what does religion mean? [determining whether it is religion]
 - HC in **Church of the New Faith** had divergent views on what constitutes religion.
 - (1) Applying **Mason ACJ and Brennan J's** approach, two criteria must be satisfied:
 - (a) the belief in a supernatural being or principle; and
 - (b) [Ritual component that has Supernatural significance] The acceptance of canons of conduct in order to give effect to that belief; and the canons of conduct cannot offend ordinary law.
 - Assessment of utility/truthfulness/intellectual coherence is forbidden in court's inquiry
 - There can be no acceptable discrimination between institutions which take their character from religions which majority of community recognizes as religions and

institutions that take their character from religions which lack that general recognition

- (2) **Murphy J** (broadest one)
 - Anybody which claims to be a religion/see itself to be a religion is religion
 - But His honour did distinguish claims to be religious that are not serious but are only a hoax.
 - the truth or falsity/ utility/ intellectual coherence of religions is forbidden in court's inquiry; Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practises seem absurd, fraudulent, evil or novel, or because the group or institution is new
- (3) **Wilson and Deane JJ** set out a number of indicia of religion (but are not necessarily determinate)
 - 1) [supernatural element] if absent then unlikely to be a religion: Collection of ideas or practices involving a belief in the supernatural (beyond reality that is capable of perception)
 - 2) the ideas relate to inverted men's nature, and place in the universe and his relation to things supernatural,
 - 3) requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practises having supernatural significance
 - 4) constitutes an identifiable group or groups.
 - 5) The adherents see it as a religion [controversial one]
 - Assessment Not involving any element of the assessment of the utility, intellectual quality, truth or worth of it

○ Q2: What does it mean to 'advance' religion?

- The purposes themselves must be directly & immediately religious and involve the spread or strengthening of spiritual teaching; it is not enough that a secular activity is inspired by a religious motive. (**Dixon J in Lawlor**)
- ☒: particular means of propagating faith or belief; property devoted to religious purposes; aid or relief of clergy and ministers or teachers of religion
 - Which are all sufficiently directly related to religious/provide religious services
- ☒: contributions made to found a Catholic newspaper is not charitable. (**Roman Catholic**)

○ (4) Other Purposes Beneficial to the Community:

- 4th category Incl Things that benefit the community but does not fall under the three heads
 - E.g. disaster relief; animal protection
- ☒ **Example 1:** The council produced law reports and the profits of this council for law reporting went to the Queensland Supreme Court library was held to be charitable under the 4th head ***Incorporated Council of Law Reporting***
 - Is it within the spirit and intendment of the preamble?
 - In the preamble there is a **broad concept of Public Utility** (e.g. the repair of bridges, havens, highways, causeways, also internet highway in Canadian case)
 - Here, the sustenance of the law Is socially fundamental, and the production of law reports sustains the law. Therefore, it's within the spirit and intendment of the preamble.
- ☒ **Example 2 [political]:** an organisation with main purpose of advocating law reform, generating public debate (as important form of communication in society) about the effectiveness of foreign aid and social change/justice falls under the 4th head, as it contributes to public welfare. ***Aid/Watch***

Part 2: Public Benefit Requirement (2 stage test)

- Element 1: 'Benefit': *Gilmour; Crowther; Aid/Watch*
 - Must be affirmatively proved that there is public benefit – 'beneficial to the community'.
 - All trusts except those for the relief of poverty must satisfy the public benefit test *Dingle*
 - (1) Religious:
 - UK approach insisted that the prayers done by the nuns (with no contact with the public) did not benefit the public because they were done privately *Gilmour*
 - However, *Crowther* criticised that and held that prayers for particular people at mass (EVEN in this private space without any physical contact with the outside) is for the public benefit as they bring people comfort and peace from knowing that prayer is occurring.
 - (2) Political: (e.g. speech and law reform)
 - Re Can political purpose count as public benefit? Such as changing the law or promoting social change)
 - Old UK position: political purposes can never be charitable. It is not appropriate for court to suggest the purported change of law is for public benefit, when the court is very part of the system the law is within. The court cannot be asked to/ can't be seen be adopting a particular stance on the current system and whether it should change or not
 - HOWEVER, Political purposes, including the generation of public debate on law reforms or the effectiveness of foreign aid, will NOT necessarily make them not charitable, unless the "means or ends" to achieve the political object are unlawful (e.g. violent and illegal means). (*Aid/Watch*)
 - unlawful means or ends e.g. unlimited access to firearms (guns)
 - Political purposes like political office and advocacy for candidates may not be charitable.
- Element 2: 'Section of the Public' (*rather than private*) *Oppenheim; Dingle; Re Income Tax Acts*
 - A trust must benefit the community or a section of the community/public.
 - a section of the public can include groups formed around a common calling, religion, geographic area etc, as they don't bar/exclude entry to the group (*Re Income Tax Acts*)
 - But NOT a section of the public if: "it is an association which takes power to itself to admit or exclude members of the public according to some arbitrary test."
 - 1) The possible beneficiaries must not be numerically negligible (i.e. not too few), and
 - 2) [no nexus] the quality that distinguishes them from other members of the community must be a quality that does not depend on their relationship to a particular individual. (*Oppenheim*)
 - E.g. trust for the education of the children of employees and former employees of a company does not benefit a section of public, as the potential beneficiaries are all linked by their parents' common employment to particular employers, this makes them a private group.

3.2 Duties Relating to Investment (duties re T's exercise of power of investment)

- Steps:
 - First, look if there is term in trust deed itself that covers the issue
 - If yes, COULD ALSO BE BREACH OF 'ADHERING TO TRUST TERMS' (core duty)
 - E.g. saying you will not invest in X, you will not invest in Y, then you cannot invest in those things
 - If no, HAS INVESTMENT DUTY been excluded by the trust instrument?
 - Second, look at case law and the standards of care required in investment (business prudence test+ nuance as to what that means in an investment context.
 - Third, legislation (Statutory standards re investment powers)

Standard of Care, Diligence and Skill re Investments

- Ts can invest trust funds in any type of investment (TA s 5(a)) and vary it at any time (b).
- However, they must comply with specific duties and are held to standards of prudence based on their skill and expertise. Case law and statute apply concurrently (s7(1))
- TA and the general law suggest that the court would take a holistic or portfolio approach when making assessment of whether there's been a breach of investment duty (Nestle).

Step 1: WHAT IS THE STANDARD OF CARE??

- Who is the trustee?
 - PROFESSIONAL
 - Where the person's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons
 - As T is in the trustee/investment profession (e.g. a trust co), the standard of care is of a prudent person engaged in the profession (TA s 6(1)(a)).
 - Thus subject to HIGHER STANDARD of care, diligence and skill.
 - BUT NO GUARANTEE: BUT it does not mean that professional trustees guarantee results; they are not insurers (Nestle).
 - LAYPERSON
 - As T is a layperson, the standard of care is of a prudent person managing others' money (TA s 6(1)(b))
- The T must regularly review performance of trust investment at least once a year unless altered by the trust instrument (s6(3)).
- What is a "PRUDENT PERSON" [prudence test]
 - Prudence test is a flexible test, which takes into account modern markets.
 - the prudence Ts should adopt is adaptable to current economic conditions or market understandings. (Nestle).
 - No 'PROPHETIC VISION': court will not expect trustees to predict what will happen in the future (*what may be profitable*). Rather, duty will be tested against commonly accepted wisdom at the time. (Nestle).
 - Consider: s8(1)
 - Seeking advice:
 - Trustees may seek independent/impartial advice from a person they reasonably believe to be competent (s 8(2)(a)) and use trust funds to pay reasonable costs (s 8(2)(b))

Step 2: Duties Created by General Law, Codified by s 7

Investment duties derived from law or equity are preserved under TA s 7(1). These include, but are not limited to:

- 1) Section 7 (2)(a) act in Present and Future BEST INTERESTS

- Type 1: trust for persons (Cowan)
- The trustee must exercise their powers in the best financial interests of all present and future beneficiaries.
- Unless otherwise specified by the trust instrument, the best interests of beneficiaries is seeking FINANCIAL MAXIMISATION for the Bs (NOT social benefit) (Cowan) So Ts must exercise their investment powers to provide the best return, despite their own or beneficiary's personal interests and moral view
 - Though it's unlikely to succeed, Beneficiary may argue that [narrow caveat] If all the beneficiaries, actual and potential, (1) are all well-informed adults (2) who hold strong views on a particular social/moral matter, then it might be said to invest in sth they're very clearly against, may not be in their best interests, even if that investment would generate better financial returns. (Cowan)
 - THEN there is heavy burden on trustees to prove that less financially beneficial investment option would still be in the OVERALL best interests of the beneficiaries (Cowan)
- Type 2: if charitable prepose trust is involved
- if function of Trustees of a CPT covers raising funds, they must also aim for FINANCIAL MAXIMISATION (Harries).

- ◆ 1) starting point: If the trust deed says you will not invest in X, you will not invest in Y, then you cannot invest in those things *Butler-Sloss*
- ◆ 2) Charity trustees' primary/overarching duty is to further the purposes of the trust. The power to invest must therefore be exercised to further the charitable purposes. *Butler-Sloss*
 - Furtherance of the C purpose is normally achieved by maximising the financial returns on the investments that are made. *Butler-Sloss*
 - charity trustees can take into account non-financial considerations when exercising their powers of financial investment *Butler-Sloss*
 - ◆ where trustees are of the reasonable view that particular investments potentially conflict with the charitable purpose, they have a discretion as to whether to exclude such investments, by balancing all relevant factors (and can invest in a second best financial maximisation option) *Butler-Sloss*
 - ◆ The balancing act: MUST consider how serious the conflict is and what financial impact would have if refrain **【likelihood and seriousness' of losing donations/how much financial gain is possible】** *Butler-Sloss*
- ◆ *Butler-Sloss* The court drew that distinction between the investment duties of a trustee and then their duties to carry out the relevant charitable purpose
 - ◆ 1) [social Investments as an aspect of carrying out the charitable purpose *Butler-Sloss*
 - ◆ 2) [exercise of pure power of investment, only to build funds for the charity (raising funds to further those purposes)] (Harries)
 - ◆ there may be a minority of cases where
 - ◆ If investment IS diametrically opposed to purpose of trust, less financially advantageous option may be chosen (Harries)
 - ◆ the charitable objects are such that they would be in conflict with the particular type of investment that might be contemplated, trustees might be able to refrain from those investments, even if this would create financial detriment (Harries)
 - ◆ e.g. Anti-war charity and Boeing/weapons manufacturing; Cancer research charities and investment in tobacco

- 2) Section 7 (2)(b) re investments that are not speculative

- ****The trustee must invest trust funds in investments which are not speculative.**
 - there is the possibility of speculation it appears risky
 - Usually refers to: lottery, race courses
- 3) **Section 7 (2)(c) re duty to act IMPARTIALLY**
- The trustee must act impartially towards beneficiaries and between different classes of beneficiaries.
 - Cannot prefer one class over another entirely
- 4) **Section 7 (2)(d) re duty to take advice**
 - The trustee must take advice, arguably when necessary (Re CCR)

Step 3: When considering whether there is a breach of investment duties, the Court may consider whether a trustee has considered **sec 8(1) factors** as far as is appropriate to the circumstances of the trust (**s 12C(b)**);

○ Consider: **s8(1)**

■ **Section 8(1) – what a trustee must take into account when investing.**

■ (1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee must, so far as they are appropriate to the circumstances of the trust, have regard to—

■ (a) the purposes of the trust and the needs and circumstances of the beneficiaries; and

■ (b) the desirability of diversifying trust investments; and

■ **s8 and Nestle:** though we don't expect the trustees to have prophetic vision, or to guarantee results. Putting 1 million out of 2 million suggest insufficient diversification

■ (c) the nature of and risk associated with existing trust investments and other trust property; and

■ (d) the need to maintain the real value of the capital or income of the trust; and

■ (e) the risk of capital or income loss or depreciation; and

■ (f) the potential for capital appreciation; and

■ (g) the likely income return and the timing of income return; and

■ (h) the length of the term of the proposed investment; and

■ (i) the probable duration of the trust; and

■ (j) **the liquidity and marketability** of the proposed investment during, and on the determination of, the term of the proposed investment; and

■ (k) the aggregate value of the trust estate; and

■ (l) the effect of the proposed investment in relation to the tax liability of the trust; and

■ (m) the likelihood of inflation affecting the value of the proposed investment or other trust property; and

■ (n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment; and

■ (o) the results of a review of existing trust investments.

LIABILITY IN CASE OF BREACH?

When considering the trustee's liability for a breach of investment duties, the Court may consider the following factors:

- ◆ **NATURE and PURPOSE of the trust (**s 12C(a)**)**
- ◆ Whether the trustee has had regard to the sec 8 MATTERS so far as is appropriate to the circumstances of the trust (**s 12C(b)**);
- ◆ Whether investments have been made pursuant to an **INVESTMENT STRATEGY (**s 12C(c)**)**;
- ◆ The extent the trustee acted on INDEPENDENT AND IMPARTIAL ADVICE of a competent (or seemingly competent) person (**s 12C(d)**)

REMEDIES

- ◆ Discretionary by the court

- ◆ **s12D Trustees Act:** court may offset the loss from the gains by the T (if T ee has made gains themselves)
[set-off re investment]