

**EQUITY AND TRUSTS**

**LAWS5103**

**EXAM NOTES**

## EXAM TIPS/THINGS TO REMEMBER

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### **EXAM STRUCTURE**

- Worth 55%
  - Trusts question = 35 marks
  - Fiduciary duties question = 20 marks
- For the trusts question – trustee's duties and remedies are minimal

### **MOST TRUSTS EXAMS INVOLVE A COMBINATION OF:**

- **Client's question:** *What do I get?*
  - WHO gets WHAT?
- **Trustee's question:** *What can/should I do? Have I done the right thing?*
  - What is the ROLE of the trustee? What happens if they do the WRONG THING?
- **Timing:** A will takes effect *upon the death* of the testator
  - Are any interests created PRIOR to the will taking effect?
- **Nature of a trust:** *Is what you are dealing with a trust at all?*
  - Can you still use things that you have learned in Trusts to deal with the situation? Eg gifts
- **Problem solving technique**
  - What if I don't have enough information? What if I'm not quite sure?

### **THINGS TO REMEMBER**

- Brief introduction template
  - [To create a trust, the 3 certainties must be met. If not, the trust will fail (***Knight v Knight; Kauter v Hilton***)]
- Remember to conclude
  - Who gets the money?
  - How much do they get?

# ONE PAGE SUMMARY – TRUSTS

## Three Certainties: (*Knight v Knight; Kauter v Hilton*)

1. **Intention** → mandatory language (not precatory); relationship between parties; drafted by lawyer; etc
2. **Subject** → legally recognised property; presently existing trust property; identifiable with precision.
3. **Object** → fixed trust (list certainty); discretionary trusts (mere power + trust power; criterion certainty). Uncertainties = semantic, evidentiary,

**Trusts for Charitable Purposes** → (i) charitable in nature (4 heads); (ii) beneficial; (iii) no disqualifying factors; (iv) confer benefit on the public; (v) exclusively charitable | general admin v cypres schemes

**Trusts for Non-Charitable Purposes** → equity does not recognise | Exceptions: anomalous + Re Denley

## Formalities

1. **Inter vivos trusts** → s 34(1)(a) = land only; s 34(1)(b) = trust over land; s 34(1)(c) = disposition, equitable
2. **Testamentary trusts** → Will must be in writing (s 8 Wills Act); general relaxed application of rules (s 32)

## Complete Constitution

- **Rule** → Trust by transfer (S→T→B) –complete constitution required; trust by declaration –not required
- **Requirements** → legal vs equitable for Torrens land; chattels; shares; bank account; equitable interests
- **Exceptions**
  1. **Rule in Strong v Bird** → A intended to make inter vivos gift of property to B during lifetime
  2. **Donatio mortis causa** → gift made in contemplation of death + delivery + reversion if recovery
  3. **Estoppe; 4. Unconscionability; 5. Consideration**

## Trustees' Duties

1. **Initial duties** → become acquainted with terms; get in trust property
2. **Duty to adhere to and carry out the terms of the trust** → most important, strictly adhere to terms
  - a. Exceptions = directed by beneficiaries; illegality; can't be satisfied; court deviation/expediency
3. **Duty to keep accounts and supply information** → keep account; render accounts and information
4. **Duty of care** → general standard (non-professional trustee); higher standard (professional trustee)
5. **Fiduciary duties** → no profit rule + no conflict rule
6. **Duty to act personally** → trustees cannot delegate their duties (NB: exceptions)
7. **Duty to properly invest** → sources = trust instrument, statute, court
  - a. **Equity** → Duty to act in the best interest of beneficiaries; duty to act impartially; duty to act personally
  - b. **Statute** → s 17 Trustees Act – Power of investment; s 20(1) Trustees Act – Factors to consider; s 26B Trustees Act – Liability for breach

## Remedies for Breach of Trusts

- **Personal remedies** = order that trustee pay sum of money to trust; equitable compensation
  - o **Against trustee(s)** = breach of duty. Defences: equitable; s 75; trust instrument; limitation

- **Against third parties** = two grounds → knowing receipt AND knowing assistance (*Barnes*)
- **Proprietary remedies** = constructive trust; equitable charge
  - **Against trustee(s)** = tracing + following;
  - **Against third parties** = action against 3<sup>rd</sup> party recipient; BFPVWON; innocent volunteer (?)

### **Fiduciary Duties**

1. **Does the parties' relationship give rise to fiduciary duties?** → accepted category or analogous facts
2. **What is the scope of the fiduciary duties?**
3. **Have the fiduciary duties been breached?**
4. **Are there any available defences?**
5. **What are the available remedies?**

# NATURE OF A TRUST

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## ELEMENTS OF A TRUST

### 1. TRUSTEE(S)

- Trustee (person = individual or corporate) holds legal (or equitable) interest in the property for the benefit of another person or persons or for some purpose permitted by law
- Under an equitable obligation (fiduciary in nature) to hold and manage the trust property for the exclusive benefit of the beneficiary - equitable obligation: FD.
- Is equitable interest if a beneficiary of the trust.

### 2. BENEFICIARY(IES)

- Must have beneficiary for whose benefit the property is held
- Beneficiary may be a person or persons or a purpose recognised by law (charitable purpose)
- Beneficiary owns equitable proprietary rights in the property
- The beneficiary has a range of personal (t/ee personally) and proprietary (property) remedies available to it if the trustee defaults in the performance of its obligation

### 3. TRUST PROPERTY

- There must be trust property vested in or held by the trustee
- There must be certainty in identification of the property bound by the trust
- Trust property may be real or persona, tangible or intangible
  - 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., shares, patents, copyrights)

### 4. SETTLOR (EXPRESS TRUSTS ONLY)

- The settlor creates the trust
- If the trust is created by a will, the settlor will also be 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
- Settler has no control over trust in capacity as settler. Rights held by trustee for benefit of beneficiaries.
- Have to be a legal person – as opposed to trustee.
- If the trust is created by will, the settlor is also the testator/testatrix (fem) of the will

### 5. PERSONAL OBLIGATION ANNEXED TO THE PROPERTY

- Trust imposes an equitable obligation on trustee to deal with the trust property for the exclusive benefit of the beneficiary
- The trustee's obligation is both a personal one binding on the trustee, and one which binds the property itself

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## CLASSIFICATIONS OF 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 / conduct).
- Have to satisfy 3 elements
  - Certainty of Intention – did settlor intend to set up trust
  - Certainty of Subject – property held on trust
  - Certainty of Object – who are the beneficiaries under the trust.

TYPE OF BENEFICIARY	PRIVATE TRUST → A trust that is intended to benefit one or more persons	PUBLIC TRUST → A trust set up for a purpose recognised as charitable by law, i.e. a charitable trust
NATURE OF INTEREST	FIXED TRUST → Beneficiary/class of beneficiaries are clearly ascertained; Trust sets out the entitlements of the beneficiaries to the trust property; Trustee must give fixed shares to fixed persons; Beneficiary has an equitable proprietary interest in the trust property	DISCRETIONARY TRUST → Beneficiary/class of beneficiaries has an interest in trust at the discretion of trustee; Trustee has absolute discretion as to how to apply the income and capital of the trust property; Beneficiary has a mere expectancy and, no vested interest in the trust property until the trustees elect to exercise the discretion in their favour
TIME OF CREATION	INTER VIVOS TRUST → A trust created during the settlor's lifetime. Comes into effect after signing or on a date specified in the trust instrument	TESTAMENTARY TRUST → A trust created by the will of the testator/testatrix. Only comes into effect on his or her death
TRUSTEE'S DUTIES	SIMPLE/BARE TRUST → Trustee is obliged to hold property for beneficiaries until they require it to be transferred to them. Trustee has no other obligations	SPECIAL TRUST → Trustee has positive active duties to perform (e.g., run business)
CREATION	INTER VIVOS EXPRESS TRUSTS Trust by declaration → settlor (creator of trust) declares themselves to hold the property on trust for a beneficiary or charitable purpose Trust by transfer (of property) → settlor transfers property to a trustee with a direction to hold it for the benefit of a beneficiary of charitable purpose	TESTAMENTARY TRUSTS → Created by the terms of a will

### NON-EXPRESS TRUSTS (Arise by operation of law regardless of intention)

#### RESULTING TRUSTS

- One person (the settlor) confers title to property to another person but retains beneficial ownership of the property, in whole or in part. Resulting trust is created on the basis of the presumed intention arising from the particular form of the transaction
- Automatic – give house on trust to mum to hold for sister, if she gets to 40 y/o – if she dies before 40, ownership goes back to you
- Presumed – presumes intention to retain beneficial title

#### CONSTRUCTIVE TRUSTS

- Imposed by court on a person where it would be a fraud for that person to assert beneficial ownership (or not account for a gain/compensate for a loss). Can be imposed irrespective of the parties' intentions

#### COHEN V COHEN

- Mrs Cohen sued her estranged husband for a number of sums of money
- Mrs Cohen's claims were:
  - 9,000 marks - For chattels sold on her behalf by an agent in Germany. She arranged for the husband to collect the money and use it to purchase goods for his business
  - \$123 pounds - From the sale of furniture on her behalf
  - \$80 pounds - From an insurance claim
- Did the husband hold these sums on trust or were they held pursuant to a debt relationship?
  - 9,000 Marks
    - No trust, just a debt. When the husband acquired the money, he was permitted to mix with his own funds and use for his business and pay her back later

- \$123 pounds
  - Yes trust, recovery allowed. He received the money on her behalf
- \$80 pounds
  - Yes trust, recovery allowed. He received money on her behalf

Non-Express Trust Type	Description	Example
<b>Automatic Resulting Trust</b>	<ul style="list-style-type: none"> <li>• 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 the trustee</li> </ul>	
<b>Presumed Resulting Trust</b>	<ul style="list-style-type: none"> <li>• 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</li> </ul>	
<b>Constructive Trust</b>	<ul style="list-style-type: none"> <li>• Imposed by the court on a person where it would be a fraud for that person to asset a beneficial ownership (or not to account for a gain / compensate for a loss)</li> <li>• Can still be imposed irrespective of the parties' intentions</li> </ul>	

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### VALIDLY CREATED TRUSTS

- Three certainties are required (*Knight v Knight; Kauter v Hilton*)
- A validly created trust will not fail for want of a trustee (*Mallott v Wilson*)
- Once a trust has been created it cannot be revoked by the settlor (without an express power of revocation)