

Table of Contents

Introduction and Certainty Requirements	4
Types of trusts	4
Types of Interests and Trustee's interest	4
Interest of Beneficiaries	4
Requirements to create an Express Trust	4
Certainty Requirements	5
1. Certainty of Intention	5
2. Certainty of Subject Matter	5
3. Certainty of Objects	6
Test for Certainty of Objects	6
Charitable Trusts	7
Charitable purposes	7
Requirements of Charitable Trusts	8
1 Fall into (at least) one of the 4 Pemsel categories: Commissioner for Special Purposes v Pemsel	8
2 Provide a 'public benefit'	9
3 Exclusively Charitable	10
Cy près Schemes	11
Lapse	12
Non-Charitable Purposes, Formality, Legality	13
Permitted Non-Charitable Purposes	13
Formality Requirements	13
The Rochefoucauld v Boustead Principle	13
Key exception to the writing requirement:	13
Testamentary Trusts	14
Legality Requirements	14
Main Legality Rule: The Rule Against Perpetuities	14
Class gifts	15
Rule against perpetuities: application to Discretionary Trusts	16
Non-Charitable Purpose Trusts	16
Application of RaP to Charitable trusts?	16
Statutory Solution for Unincorporated Associations	17
Complete Constitution + Assignment of Property	18
Transfers of legal property (inter vivos)	19
Transferring Choses in Action	19
Voluntary equitable assignment of legal property	19
Assignment of debts	19
Declaration of Trust	20
Assignments of equitable property	20
Contracts to Assign Property	20
Future Property	21
Equitable assignment of legal interests (voluntary: no consideration)	21
Trustees I	22
Appointing and removing trustees	22
Court's power to appoint/remove trustees: Trusts Act	23
Selection of new trustee?	23
Trustee duties and powers	24
Sources of duties and powers	24
Duties of a Trustee	24
Duty of care, diligence & skill	24

The duty requires trustees among other things to:	25
Trustee powers	25
Decision-making duties (<i>Karger v Paul</i> duties)	26
Superannuation context = stricter informational duty	26
Trustees II	27
Investment Duties	27
Investment-specific standards of care (higher but excludable)	27
Statutory preservation of general law investment duties	27
Best interests duty in investment decision-making	27
Investment duties: Charitable trusts	28
Duty to avoid speculative or hazardous investments	28
Impartiality between income and capital beneficiaries	29
Duty to obtain and use advice	29
Use of agents vs non-delegation	29
Right of indemnity	30
Limits of indemnity	30
Litigation-cost: reasonably incurred?	30
Insolvent trustee?	31
Right of indemnity from beneficiaries	31
Liability of Co-Trustees	31
Judicial Advice	31
a. S 184: Court may give directions about particular matters about the trust property, management or execution of the trust property or the exercise of any power or discretion vested in the trustee.	31
Exemption clauses	32
Relief from Liability	32
Terminating & Varying Trusts	33
Ways a trust can end	33
<i>Saunders v Vautier</i>	33
Requirements for terminating a trust	33
Right to capital for charitable trusts?	34
How does the Saunders rule relate to discretionary trusts?	34
Varying trusts	35
Limits on express variation powers	35
“Fraud on power”/ Proper Purpose	35
Varying the identity of the appointer of the trust?	36
Management Powers	36
Trustees cannot exercise a variation power	37
Court-approved variations when consent is impossible (s 183)	37
Variation of vesting date	38
Fiduciary duties	39
2 Rules of Fiduciary Duties	39
When do fiduciary duties arise?	39
<i>Breen v Williams</i> (Ad hoc relationships)	40
Scope + Content of Fiduciary Duties	40
Contractual and Fiduciary Relationships	40
Defences for Breach of Fiduciary Duty	40
Informed consent	40
The Self-Dealing Rule	41
The Fair-Dealing Rule	41
Trustees purchasing trust property	41

Conflicting Duties	43
Remedies for Breach of Fiduciary Duties	43
Resulting Trusts	44
1) Presumed resulting trust	44
2) Automatic resulting trust	44
Presumption of Advancement	45
What counts as purchase price?	45
Whose intention do you look at?	45
Presumed resulting trusts	45
Automatic resulting trusts	47
Quistclose Trusts	47
Constructive Trusts	49
Structure of Constructive Trusts	49
Remedial vs Institutional Constructive Trusts	49
Remedial Constructive Trusts	50
Breach of Fiduciary Duty	50
Stolen Property	51
Remedies 1	52
Definition of Tracing Claims	52
Remedies	52
Who can claim?	52
The Tracing Claim Process	52
Kinds of claims (interests) for beneficiaries	53
Where property is not traceable	53
Defences to the tracing claim	53
Exceptions to indefeasibility (see Farah in relation to knowing receipt)	54
Tracing rules	54
Claims against the trustee/fiduciary:	55
Mixed Funds	55
Wrongdoer's money	55
Property of an innocent claimant	55
Backwards Tracing	56
Restitution	56
Remedies II	58
Third Parties	58
Knowing receipt or dealing	58
Knowing assistance	59
Definition of Assistance	59
Knowledge requirement and the Baden scale	60
What categories from the Baden scale are enough to prove liability?	60
Corporate Alter Ego	60
Other grounds beyond Barnes v Addy	61
Remedies to P once liability is established	61
Duty to Account	61
Equitable compensation	62
Joint and Several Liability	63

Introduction and Certainty Requirements

Equity is a body of law distinct from statute and common law.

Described as 'the body of law developed by the Court of Chancery in England before 1873. Its justification was that it corrected, supplemented and amended the common law. It softened and modified many of the injustices in common law, and provided remedies where at law they were either inadequate or non-existent'.

Types of trusts

1. **Express:** the expressed intention of the settlor.

Can be:

- a) Created by declaration or transfer
- b) *Inter vivos* (takes effect during settlor's life) or testamentary (by will)
- c) Give beneficiaries a right to income or capital (or both)

The trust can be:

1. Discretionary: trustee has discretion about how much of the trust property the beneficiaries receive (or benefit from) relative to one another; or
 - ★ 'where the entitlement of beneficiaries to income, or to corpus, or both, is not immediately ascertainable. Rather, the beneficiaries are selected from a nominated class by the trustee or some other person and this power may be exercisable
 - ★ once or from time to time'. (*Federal Commissioner v Vegners*)
2. Fixed: trustee has no discretion in relation to any of abovementioned matters
 - ★ 'Where all the beneficiaries are ascertainable and their beneficial interest are fixed...no discretion...to vary the group of beneficiaries or quantum of their interest'. (*Federal Commissioner v Vegners*)

Note: trust can have both discretionary and fixed elements

Trustee's power (distribution/ power of appointment) is either:

- I. Trust Power: has a duty to exercise the power at or within a certain time
- II. Mere Power: can decide not to exercise at all

2. **Resulting:** arise by operation of law when a trust fails or is incomplete (the presumed intention of the settlor)

3. **Constructive:** imposed by courts to prevent unjust enrichment (can arise regardless of intention).

Types of Interests and Trustee's interest

'Interest' generally refers to a property right in or to property. Distinguish between:

Legal interest an interest recognised at common law.

Equitable interest an interest recognised only in equity.

Beneficial interest an ownership right to benefit from property.

A trustee's interest in trust property can be legal or equitable, however a trustee's interest (as trustee) is not beneficial (though they may be a trustee and beneficiary at the same time. Beneficiaries generally have beneficial interests in the property.

Interest of Beneficiaries

The beneficiaries may have proprietary interest in the trust property. That interest is (necessarily) an equitable interest rather than a legal one. The general rule is that a beneficiary of a:

- a) Fixed trust: generally has an interest in the trust property
- b) Discretionary trust: all beneficiaries are potential only and generally do not have an interest in the trust property but the answer depends on the context: (*Kennon v spry*)
 - i) 'In a certain sense a beneficiary under a discretionary trust has an 'interest'...spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity...a right to have the trustees exercise their discretion "fairly" or "reasonably"...the right is more than a mere spes' (*Gartside v Inland Revenue*)

Both legal and equitable interests may or may not be beneficial interests. A legal owner may hold a 100% beneficial interest which, when combined with legal title confers full beneficial ownership, without need for any intervention by equity. (*LA Micro Group v Frenkel*)

Requirements to create an Express Trust

Certainty Requirements

1. Certainty of Intention

The settlor must have clearly intended to create a trust.

- Objective test: court looks at the settlor's outward words and actions, not secret or subjective thoughts. (*Byrnes v Kendle*): 'subjective intention is irrelevant both to the question of whether a trust exists and to what its terms are' (Heydon and Crennan JJ).
- No magic words necessary: the word 'trust' is not required, as long as language clearly imposes an obligation (*Re Williams*)
- Inference from the circumstances: intention may be inferred from context and circumstances of transaction
Re Kayford: 'if you send money to a company for goods which are not delivered, you are merely a creditor of the company unless a trust has been created...payment into a separate bank account is a useful [though not conclusive] indication of an intention to create a trust'. [282]
Rhodes: 'The testator left a note 'all my worldly goods to my ex-wife who will distribute to my children as she sees fit'. Held: Testator intended his ex-wife to hold the property on trust rather than subject to a condition or to no legal obligation.
Gill: the court held that a testator who left his farm to son on condition he keep the homestead as a home and provide board and residence for siblings...who may wish to stay at homestead as long as they remain unmarried intended to gift the property to the son subject to an equitable condition i.e. no trust over the property. Intention to create obligation on son and confer an equitable right on the siblings.
'...there is a broad distinction drawn by the Court between conditions which are true conditions merely operating to divest [get rid of] an estate or to prevent the vesting of an estate and conditions for the benefit of third parties attached to the possession of property...where property is given to a beneficiary on condition that he should maintain certain person or pay certain liabilities, it has been held that a quasi contractual relationship is created; in other words that the person taking the property is treated as being liable in the Court of Equity to carry out the obligation in the same way as if he had been contracted to do so.'
- Equitable charge? *Countess of Bective*

When a provision is made by way of gift, testamentary or inter vivos, directing a payment to one person and expressing a purpose beneficial to another or others, it may receive one or other of at least **four different interpretations**.

1. The expression of the purpose may be taken as a statement of the donor's motive or expectation but not as a condition; the recipient may take the gift absolutely and incur no legal or equitable obligation to fulfil said purpose.
2. Purpose may amount to a condition upon and subject to which the person takes the gift beneficially; by accepting they incur an equitable duty to perform the condition which is annexed to the gift (*Gill*)
3. The first person may take the gift beneficially but the statement of the purpose particularly where it involves paying money, can operate as an equitable charge in favour of others. Bequests to parents for the maintenance/benefit of children are very susceptible to this interpretation.
4. The direction to pay the first person may be regarded as conferring no beneficial interest upon him and whether he receives in the character of trustee or some other character, the expression of the purpose may amount to a statement of objects to which he is bound to apply the fund

2. Certainty of Subject Matter

Trust 'property' must be clearly defined and identifiable (can be any kind of property) but must be certain. (*Lord Strathcona Steamship v Dominion*)

- Vague language: phrases that are too ambiguous will fail. Must be sufficiently certain what property is held on trust. (*Palmer v Simmonds*)
- Trusts over a pool of assets: portion of an asset pool may be sufficiently certain. Depends on whether the assets are fungible (identical). In order to suffice, the trust must be over the entire asset pool and declare that a certain number is held on trust for the beneficiary while the remainder is for the settlor themselves. (*Sandini*)
 - ◆ *White v Shortall*: specification of the number of shares out of an asset pool that the defendant owned 100% was sufficiently certain. Defendant held 1.5 million shares, 220,000 for P and rest for himself.
 - ◆ *Re Goldcorp*: gold bullions which had been mixed with general stock proved insufficient to constitute trust property for customers, who were thus treated as unsecured creditors.
 - ◆ Merely declaring that a 'certain number' of assets is held on trust is insufficient. (*Re London Wine*)

Note: rules are different for non-fungible assets or assets belonging to various companies: merely identifying the number will not suffice. However it is nevertheless possible. (*Hunter v Moss*): requires indication of the specific company. See also *Re London Wine Co*.