# TOPIC 1 - THE CONCEPT OF THE TRUST AND CERTAINTY OF INTENTION

## 1.1 - INTRODUCTION AND CLASSIFICATION OF TRUSTS

### 1.1.1 – WHAT IS A TRUST?

**Trust:** A trust exists when the owner of a legal or equitable interest in property is bound by an obligation, recognised and enforced in equity, to hold that interest for the benefit of others, or for some object or purpose permitted by law.

**Trustee:** holds legal title to trust property and has power to deal with property, subject to equitable obligations to act in beneficiaries' best interests.

**Beneficiary**: the person or purpose for whose benefit the property is held.

**Trust property**: must be identifiable, certain and vested in the trustee.

TRUSTEE DUTIES RE HOLDING TRUST PROPERTY

- The trustee must deal with trust property with the care and skill of a prudent businessperson.
- This includes conducting sales, implementing preservation measures, pursuing debt recovery, undertaking legal actions, engaging professional services, and taking emergency protective measures.
- The trustee must always act in the best interests of the beneficiaries.

TRUST STRUCTURE AND PARTICIPANTS

- The settlor creates the trust and the trustee holds the legal title to the trust property and manages it
- The beneficiary receives the benefit of the trust property
- There is a metaphorical split in title between legal ownership (trustee) and equitable ownership (beneficiary)
- A trust is not a legal personality. The trustee can sue and be sued, enter contracts and invests trust property

### 1.1.2 – CLASSIFICATION OF TRUSTS

- Express trusts arise when the settlor has intention to set up a trust to benefit another
- Resulting trusts arise by operation of law where a person did not intend to benefit the party now holding property
- Constructive trusts are imposed regardless of intention where it would be unconscionable for the party holding property to assert ownership

### 1.1.3 – TRUST STRUCTURES

- **By time:**
  - Inter vivos trusts are created during life.
  - Testamentary trusts are created by will.

- **By beneficiary:**
  - Private trusts benefit individuals.
  - Public trusts benefit charitable purposes.

- **By interest:**
  - Fixed trusts have predetermined shares.
  - Discretionary trusts give trustees choice in distribution

- **Fixed v Discretionary Trusts:**
  - Fixed trusts: The settlor decides who gets what and the trustee has no discretion. Example: "I hold my flat on trust for Sam, Harry, Jane and Sarah in equal shares."
    - *This is an inter vivos trust by self declaration. The settlor and trustee have the same identity.*
  - Discretionary trusts: The trustee chooses beneficiaries from a class and decides distribution shares. Example: "T distributes $100,000 among A, B and C in any proportions she decides."

OTHER TRUST STRUCTURES

- Unit trusts are unincorporated mutual fund structures where profits go directly to unit owners
- Quistclose trusts are created where a creditor lends money to a debtor for a particular purpose
- The creation of a valid trust has immediate and irreversible legal consequences that cannot be undone by a change of heart

## 1.2 - CREATION OF EXPRESS TRUSTS

### 1.2.1 – CONSEQUENCES OF CREATING A TRUST

- If a valid trust has been created, there are binding consequences and it is too late for the settlor to change his or her mind
- Once the three certainties are satisfied, the legal consequences are immediate and binding regardless of subsequent practical complications or changes in circumstances
- Trust law prioritises certainty and finality convenience

Mallot v Wilson [1903] 2 Ch 494

- A settlor made a voluntary settlement in 1866 granting property to a trustee. In 1867, the trustee disclaimed and refused to act. The settlor then attempted to revoke the entire settlement.
- The court held that equity will not allow a trust to fail for want of a trustee. The trust remained valid and the settlor became trustee by operation of law.
- **Key principle:** Valid trusts are irrevocable and equity will find alternative means to give effect to the trust even when practical difficulties arise.

Re McGowan & Valentini Trusts [2021] VSC 154

- Two family discretionary trusts were established in 1977 with a corporate trustee that was not incorporated until 19 months later. Properties were acquired in various names and trusts continued operating after supposed vesting dates.
- The court found valid trusts were created despite complications. Giuseppe and Norma became trustees until the company was incorporated.
- **Key principle**: Once the three certainties are satisfied, binding trust relationships are created with lasting consequences that courts will enforce.

### 1.2.2 – CERTAINTY OF INTENTION

BASED REQUIREMENTS

- Intention is a fundamental requirement for creating an express trust. Courts must distinguish between genuine trust creation and other gratuitous dispositions.
- It is not necessary to use the words "on trust". Imprecise words may still create a trust if the intention is clear.
- Intention is determined objectively, not subjectively. Courts look at what was expressed, not what was privately intended.

INFORMAL TRUST CREATION

Re Armstrong [1960] VR 202

- George Armstrong deposited money with receipts stating "George Armstrong in re William Armstrong" and told the bank manager the investment was "for them".
- The court found a valid trust was created. Precise words are not necessary if there is "something equivalent" showing trust intention.
- **Key principle**: Courts distinguish between intention to create a trust (retaining legal ownership with obligations) and intention to make a gift (getting rid of rights entirely)

Paul v Constance [1977] 1 All ER 195

- Dennis Constance repeatedly told his partner "the money is as much yours as mine" regarding a bank account in his sole name. They shared withdrawals and deposited joint winnings.
- The Court of Appeal found an express trust was created. The court looked at "various things said and done against their own background and circumstances".

- *If the trust is charitable but purposes become problematic:*
    - **Cy-près doctrine**: Can redirect charitable gifts when original purposes become impossible, impracticable, or unsuitable (s 2 Charities Act 1978 (Vic))
    - Consider whether gift over provisions prevent cy-près application

**Statute of Elizabeth (1601) → Modern Heads of Charity**

| Elizabethan Example (from the preamble) | Modern Head of Charity (Pemsel) | Modern Examples Today |
|---|---|---|
| Relief of aged, impotent, and poor people | **Relief of poverty** | Homeless shelters, food banks, Centrelink support trusts |
| Maintenance of sick & maimed soldiers | **Relief of poverty / Community benefit** | RSL clubs, veteran hospitals, mental health services |
| Schools of learning, free schools, universities | **Advancement of education** | Scholarships, funding research, building libraries |
| Repair of bridges, ports, causeways, churches, highways | **Community benefit** (public works) | Public transport, infrastructure, parklands |
| Education and preferment of orphans | **Relief of poverty + Education** | Child welfare organisations, foster care trusts |
| Marriage of poor maids | **Relief of poverty** (social support) | Community financial aid for young women/men starting out |
| Relief, stock, or maintenance of houses of correction | **Community benefit** | Prisons, rehabilitation programs, drug & alcohol recovery |
| Supportation, aid and help of young tradesmen, handicraftsmen, persons decayed | **Relief of poverty / Community benefit** | Apprenticeship funds, job training programs |
| Repair of churches | **Advancement of religion** | Funding maintenance of mosques, temples, synagogues, etc. |
| Relief or redemption of prisoners or captives | **Relief of poverty / Community benefit** | Legal aid, prisoner rehabilitation, anti-slavery foundations |

## TOPIC 5 - STATUTORY WRITING FORMALITIES AND CONSTITUTING THE TRUST

### 5.1 - FORMALITIES

INTRODUCTION TO FORMALITIES
- Formalities means what writing requirements are necessary for validity
- Required certain contracts to be in writing including contracts to transfer land, contracts that cannot be performed within one year, contracts involving sale of goods worth more than £100, contracts made by infants, contracts made by mentally incapacitated persons
- If contract required to be in writing is not in writing, then it will be unenforceable

- Aim was to prevent fraud, provide certainty and clarity, protect people from entering into contracts they do not fully understand
- When you transfer an equitable interest, you must do so in writing or else it will be invalid. When you declare a trust in relation to land, you must do so in writing, or else it will be unenforceable until such writing is created

**STATUTORY WRITING FORMALITIES FOR TESTAMENTARY TRUSTS**
- Testamentary trusts must comply with Wills Act 1997 rather than Property Law Act 1958
- Requirements are stricter than under Property Law Act 1958
- Testator must have legal capacity to make will
- Must have unimpaired intention to execute will (compare undue influence of another)
- Must comply with formalities for execution

Section 7(1) Wills Act 1997 (Vic)
- Requires will must be in writing, signed by testator or other person in testator's presence and at testator's direction, signature made with testator's intention of executing will, signature made or acknowledged by testator in presence of two or more witnesses, at least two witnesses attest and sign will in presence of testator

**STATUTORY WRITING FORMALITIES FOR INTER VIVOS TRUSTS**
- Statutory formalities contained in section 53(1) Property Law Act 1958 (Vic)
    - Based on Statute of Frauds 1677 (Eng)
    - If not complied with, trust will be unenforceable
- Applies to transfer of land, including creation of trusts, and dispositions of existing equitable interests
- Section 53 applies to inter vivos trusts but not trusts created by will
- Does not apply to resulting trusts or constructive trusts (section 53(2))
- Property Law Act contains sections 53, 54 and 55 establishing writing requirements
- For each item of trust property, you will need to consider all three sections

**Instruments Required to be in Writing**
Section 53 Property Law Act
- Section 53(1)(a): No interest in land can be created or disposed of except by writing signed by person creating or conveying same - VALIDITY REQUIREMENT
    - "**Created**": Bring something into existence (e.g., lease creates leasehold interest)
    - "**Disposition**": Natural meaning as established in Grey v IRC; PT Ltd v Maradona described as "wide concept, extending to any form of assurance, disclaimer, or release of property"
    - "**Interest in land**": Both legal and equitable interests in land (Adamson v Hayes) but does not apply to personal property
    - "**Writing**": must be in writing at time of creation or disposition or trust fails
    - Land can be created or disposed of by will without satisfying section 53(1)(a)
    - Person's agent can also be signatory

- Section 53(1)(b): Declaration of trust respecting any land must be manifested and proved by writing signed by person able to declare such trust - EVIDENCE REQUIREMENT
    - "**Land**": Subject matter of trust must be land or interest in land (trusts over personal property don't require written proof)
    - **"Manifested and proved"**: Trust can be manifested and proved in writing at some time after its creation, with no particular form required and can be by multiple documents
    - However, manifestation and proof of trust requires details of property, beneficiaries and terms of trust (Valentini)
        - The writing, must establish intention, subject matter, object and the terms of the trust
    - "**Trust**": Applies only to declarations of trust
    - **"By some person"**: Can be settlor and in some cases trustee (Hagan v Waterhouse), but cannot be agent

## TOPIC 6 - DUTIES AND POWERS OF TRUSTEES

### 6.1 - TRUSTEES

INTRODUCTION: UNDERSTANDING THE TRUSTEE AS FIDUCIARY

- Trustee is fundamentally a fiduciary - someone who holds and manages property for benefit of others
- Basic concept underpins all trustee duties and obligations
- Understanding fiduciary nature essential because it explains why law imposes strict duties on trustees
- Trust is mechanism for managing, preserving, investing, realising and distributing assets
- Separation between legal ownership (trustee) and beneficial ownership (beneficiaries) creates need for strict protective rules

SOURCES OF TRUSTEE POWERS AND DUTIES

Trustee's powers and duties derive from three sources:

1. **Trust instrument (if it exists)**: The deed or will creating the trust
2. **Equity**: The fiduciary obligations developed by courts
3. **Statute**: In Victoria, the Trustee Act 1958 (Vic)

The statutory duties, powers and liabilities apply unless varied by clear expression in the trust instrument (section 2(3) Trustee Act 1958 (Vic))

**CORE VS NON-CORE DUTIES**

- Duties of trustees can be categorised into core (irreducible) duties and non-core duties
- Fundamental distinction for understanding which trustee obligations can be modified or excluded by trust instruments
- **Core (Irreducible) Duties:**
    - Fundamental to trustee's role and cannot be excluded or modified by trust instrument
    - Essential to very nature of trusteeship and must always be observed
- **Non-Core Duties:**
    - Can be modified, altered, or excluded by terms of trust instrument

**THE THREE CORE (IRREDUCIBLE) DUTIES**

1. **To adhere to the terms of the trust instrument**: Trustees must carry out requirements of instrument in strict conformity with its terms

2. **To perform honestly and in good faith for the benefit of the beneficiaries:** Encompasses fundamental obligation to act with integrity and avoid fraud

3. **To keep and render accounts**: Trustees must maintain proper records and provide accountings to beneficiaries

***** These cannot be excluded or modified by trust instrument***

**NON-CORE DUTIES → EXAMPLES**

- Can be modified, altered, or excluded by terms of trust instrument
- Section 2(3) Trustee Act 1958 (Vic): powers and duties in Act apply unless contrary intention expressed
- **Examples of non-core duties:**
    - The duty of care (though may be subject to limits on exclusion)
    - Specific investment duties
    - Certain procedural requirements
    - Some reporting obligations beyond basic accounting
- **Purpose**: Ensures trust instruments can provide flexibility whilst fundamental integrity preserved through core duties

**FUNDAMENTAL EQUITABLE PRINCIPLES**

All fiduciaries, including trustees, are subject to two fundamental rules:

1. **The "Conflicts" Rule:**
    - Trustees must avoid situations where their personal interests conflict with their duties to trust and its beneficiaries

2. **The "Profits" Rule:**
    - Trustees must not profit from their position except as authorised by trust instrument, with beneficiary consent, or by court order → duty to act gratuitously

These rules often overlap - fiduciary who breaches profits rule will typically also be in position of conflict

Keech v Sandford (1726) Sel Cas CL 61; 25 ER 223

- Foundational case concerning fiduciary duty of loyalty
- Established that trustee owes strict duty of loyalty so there can never be possibility of any conflict of interest

**Facts:**

- Child inherited lease on Romford Market near London
- Mr Sandford entrusted to look after property until child matured
- Before child reached maturity, lease expired
- Landlord refused to renew lease for benefit of infant but willing to give Mr Sandford opportunity instead
- Mr Sandford took lease for himself
- When child (Mr Keech) grew up, he sued Mr Sandford for profit from market's lease

**Held**: Lord Chancellor King ordered Mr Sandford to disgorge his profits

**Lord Chancellor's Reasoning:**

- Whilst there was no fraud in case, trustee should rather have let lease run out than taken it for himself
- "Very proper that rule should be strictly pursued, and not in the least relaxed"
- Because of obvious consequences of allowing trustees to take leases when renewal refused to beneficiary

**Significance**

- Principle represents decisive break with prior case law
- Established strict and absolute duties of loyalty for trustees
- Demonstrates that any possibility of conflict of interest constitutes breach of trust, unless beneficiary consents to conflict
- Shows prophylactic approach - preventing conflicts rather than compensating after breach

Chan v Zacharia (1984) 154 CLR 178

**Facts:**

- Dr Chan and Dr Zacharia were partners in medical practice who held lease with option to renew
- After the partnership dissolved but before affairs fully wound up, Dr Chan refused to join with Dr Zacharia in exercising the option to renew the lease for partnership. Subsequently, Dr Chan obtained new lease of premises for himself

**Held**: High Court held that Dr Chan held any rights in new lease as constructive trustee for partnership

**Key Principles:**

- Relationship between partners is fiduciary in nature
- Fiduciary relationship continues after dissolution for purposes of winding up partnership affairs
- Partners hold partnership property (including lease rights) as trustees after dissolution
- Former partner cannot take advantage of their refusal to exercise partnership rights to secure personal benefit
- Extended principles from Keech v Sandford to partnerships and post-dissolution situations

ASSESSMENT OF CONTEMPORARY APPROACH

Owies suggests shift towards more active judicial supervision:

- Particularly in family trust contexts
- Where ongoing relationships create opportunities and obligations to remain informed
- Not examining wisdom of decisions but whether genuine consideration possible without basic information
- Where systematic failure to gather information over years, crosses line from "how" to "whether" consideration occurred

**SUMMARY OF EXERCISES OF POWERS AND DISCRETIONS**

Trustees must:

- Consider whether to exercise powers periodically
- Survey range of potential beneficiaries appropriately
- Evaluate individual appropriateness of distributions
- Act in good faith, with real and genuine consideration
- Act according to purpose for which powers conferred

Courts will intervene for procedural failures but otherwise respect trustee decision-making authority

**CONCLUSION**

- Exercise of trustee powers and discretions subject to well-established principles balancing:
  - Need for trustee latitude in decision-making
  - Requirement to fulfil fiduciary obligations to beneficiaries
- Contemporary developments (Owies, Grand View) show principles remain vital and evolving, particularly addressing:
  - Modern family dynamics
  - Information gathering obligations
  - Ensuring genuine consideration rather than mere formalities
- While tension exists between restrictive approach (Karger) and intensive review (Owies), both ultimately serve same purpose: ensuring trustees genuinely consider obligations to all beneficiaries

## TOPIC 9 - DEFENCES AND LIMITATIONS ON LIABILITY: RIGHTS OF TRUSTEES

### 9.1 - TRUSTEE DEFENCES

- Trustees facing breach allegations are not without recourse
- Law recognises several important defences and limitations protecting trustees from liability
- Need to balance beneficiary protection with encouraging competent individuals to serve as trustees
- **Three primary categories of protection** for trustees who have committed breaches

THREE CATEGORIES OF PROTECTION

1. **Contractual exemption clauses in trust deeds**
   - Limit trustee liability for certain breaches
   - Subject to careful judicial scrutiny
2. **Statutory relief under s 67 Trustee Act 1958**
   - For trustees who acted honestly and reasonably
   - Court discretion to excuse breaches
3. **Beneficiary consent to conduct**
   - Full knowledge and genuine consent required
   - Fairness and equity considerations

**1 – TRUSTEE EXEMPTION CLAUSES**

**Defences and Limitations on Liability**

- Trust deeds commonly contain exemption clauses limiting trustee liability
- Courts balance legitimate protection needs against fundamental accountability requirements

**TRUST TERMINATION**

- Saunders v Vautier fundamental principle
- Subject to important limitations
- Trustee indemnity takes priority

**TRUSTEE REMOVAL**

- Welfare of beneficiaries is paramount
- Multiple statutory and judicial grounds

**TRUST VARIATION**

- SS 63 and 63A serve different purposes
- Benefit requirement strictly enforced
- Courts protect those unable to consent

# TOPIC 11 - REMEDIES

## 11.1 - PERSONAL REMEDIES FOR BREACH OF TRUST

**OVERVIEW OF PERSONAL REMEDIES**

**Two Primary Personal Remedies**

- Available against defaulting trustee:
    1. **Account of profits** - to strip trustee of unauthorised gains
    2. **Equitable compensation** - to restore trust fund to proper position

- Key principle:
    - Remedies are alternatives - cannot recover both
    - Election between remedies after assessment (Tang Man Sit)
    - Different purposes: restoration vs disgorgement

STANDING TO SUE

Who Can Bring Action for Breach of Trust

- Usually the trustee commences action
- Both beneficiaries and trustees have standing
- Different roles and purposes
- Trustee's obligation: reconstitute fund, not compensate individuals

Young v Murphy [1996] 1 VR 279 - landmark Victorian authority

- New trustees replaced Burns Philp Trustee Company after unit trust changes
- Court established:
    - Trustee's right and duty to sue forms part of obligation to recover trust property
    - Extends beyond retrieving specific assets to pursuing equitable compensation
    - No artificial distinction between recovering property in specie vs monetary compensation
    - Both constitute means of making restitution to trust estate
- New Trustees' Rights → Victorian Court of Appeal held:
    - New trustees may sue former trustees and third parties
    - No need to join beneficiaries as parties if only restoring trust fund
    - Distinguished from proceedings for administration where beneficiaries' interests conflict
- Double jeopardy addressed:
    - Successful trustee judgment extinguishes beneficiary claims
    - Failed trustee action binds beneficiaries (absent fraud/collusion)

**RECONSTRUCTING THE TRUST FUND**
**Primacy of Fund Reconstitution**

- Permanent Trustee Australia Ltd v Perpetual Trustee Co Ltd (1994) 15 ACSR 722
    - Trustee's duty: recover trust assets for purpose of trust
    - When aware of breaches, must recover lost assets or damages
    - Remedy: restoration to trust of assets wrongly taken or compensation for loss
- Not direct compensation to individual beneficiaries

PERMANENT TRUSTEE - WINDFALL ISSUE
**Current vs Former Beneficiaries**

- Case involved unit trust where values declined after breach:
    - Former unitholders suffered losses, received no direct compensation
    - Current unitholders benefit from restored trust fund
- Cohen J: This "windfall" represents proper restoration of trust funds
    - Well-established principle requiring restitution to trust
    - Only displaced by another established principle or clear statutory intention

ALTERNATIVE REMEDIES
Tang Man Sit v Capacious Investments [1996] AC 514

- Privy Council clarified election between remedies:
    - Account of profits and compensation are alternatives
    - No election required at time of initial court order
    - Can proceed to assess quantum under each remedy
    - Election made after determining relative values
- Ensures plaintiffs not forced into premature elections without knowing values

**1 – ACCOUNT OF PROFITS**

- Different purpose from equitable compensation:
    - Strips trustees of unauthorised gains
    - Restitutionary rather than compensatory
    - Focuses on trustee's gain, not trust's loss
    - Deterrent effect - trustees must not profit from position
- Applies even where trust suffered no loss

*EXAMPLES*

- **Example 1**: Trustee uses $100,000 trust funds in own business
    - Generates $50,000 profit
    - Must account for entire $50,000 profit
    - Regardless of whether trust could have made similar returns
    - Trust recovers original $100,000 plus $50,000 profit

- **Mixed funds**: If trust funds = 40% of capital, entitled to 40% of profits
    - Orthodox approach: proportionate allocation
    - Dishonest mixing: possibly entire profit to trust as deterrent

**2 – EQUITABLE COMPENSATION**
Re Dawson [1966] 2 NSWLR 211

- Street J established foundational principle:
    - Trustee who breached trust must make good the loss
    - Restore assets of which trust deprived
    - Where property unavailable, pay monetary compensation
    - Compensation operates as restitutionary remedy
- **Aim**: reconstitute trust fund, not simply compensate for loss. Distinguished from common law damages

| TOPIC 1 - CONCEPT OF THE TRUST & CERTAINTY OF INTENTION | |
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| Mallot v Wilson [1903] 2 Ch 494 | **Consequences of creating a trust**<br>Held: Valid trusts are immediate and irrevocable and equity will find alternative means to give effect to the trust even when practical difficulties arise<br>● Settlor attempted to revoke settlement when trustee disclaimed and refused to act |
| Re McGowan & Valentini Trusts [2021] VSC 154 | **Three certainties**<br>Held: once three certainties are satisfied, binding trust relationships are created with lasting consequences<br>● Corporate trustee that was not incorporated until 19 months later. Valid trust was created despite complications |
| Re Armstrong [1960] VR 202 | **Intention to create a trust**<br>● Valid trust created despite precise words absent. 'Something equivalent' showing trust intention necessary<br>● Intention to create a trust vs intention to make a gift |
| Re Williams [1897] 2 Ch 12 | **Precatory words (alternative gratuitous disposition)**<br>Held: no trust created<br>● Expressions of hope or confidence are insufficient to create trust obligations without imperative language |
| Re Gardiner [1971] 2 NSWLR 494 | **Gift with legal consequences (alternative gratuitous disposition)**<br>Held: no trust created, true condition imposed<br>● Distinguish between conditions and trusts based on precise wording. Words requiring performance 'within' a time create conditions, whereas 'after' may create a trust |
| Gill v Gill (1921) 21 SR (NSW) 400<br><br><br>Cobroft v Bruce [2013] NSWSC 774 | **Intention: Equitable conditions (alternative gratuitous disposition)**<br>Held: no trust created, only enforceable equitable obligations<br>● When property given on condition that recipient do something for identified third parties, it creates enforceable equitable obligations<br><br>Held: no trust created, only Gill v Gill condition binding on the estate<br>● Even absolute gifts can be subject to enforceable equitable obligations if language sufficiently clear and imperative |
| Byrnes v Kendle [2011] HCA 26 | **Intention: Objective determination of intention**<br>Held: valid trust<br>● Courts cannot look beyond unambiguous written declarations to examine subjective intention. Trust creation depends on intention manifested by the declaration, not settlor's subjective or secret mental state |
| Lewis v Conon [2013] NSWCA 204 | **Intention: Sham trust**<br>Held: valid trust<br>● Transaction only a sham if parties intended it should not have its apparent legal consequences. Mere dishonesty of motive is insufficient |
| Vanta Pty Ltd v Mantovani [2023] VSCA 53 | **Intention: Proof of trust terms**<br>Held: valid trust<br>● Despite losing the trust document, trust remained valid. The correct test for proving terms is the balance of probabilities, not 'clear and convincing proof'. Only essential terms need to be proved, courts can 'fill gaps' regarding non-essential terms. |

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| Korda v Australian Executor Trustees [2015] HCA 6 | **Intention: Commercial context**<br>Held: no valid trust created<br>● Commercial necessity or advantage does not establish trust intention. Clear objective evidence of intention required. Courts will not imply trusts merely because they would provide commercial protection |
| Harpur v Levy [2007] VSCA 123 | **Intention: immediate intention requirement (for inter vivos trusts)**<br>Held: no valid trust created<br>● Must be a present declaration of trust, not merely a promise to create a trust in the future. Promises to create future trusts are legally ineffective without consideration |
| Richards v Delbridge | **Intention: immediate intention requirement**<br>● Settlor must have absolutely parted with that interest and effectually changes his right **immediately** |
| **TOPIC 2 - CERTAINTY OF SUBJECT MATTER, TRUST STRUCTURES AND POWERS** | |
| Norman v FCT (1963) 109 CLR 9 | **Certainty of subject matter**<br>Held: no valid trust<br>● Dividends were mere expectancies dependent of company decisions and interest is paid in arrears and might never become payable since the loan was repayable at will<br>● Future interest and dividend payments are future property |
| Shepherd v FCT (1965) | **Certainty of subject matter**<br>Held: valid gift of royalties<br>● Assigning a right to royalties, not the royalties themselves, meant the assignment was valid as it was not an assignment of future property.<br>● "Tree and fruit" analogy → present contractual right was assignable even if it might not produce the fruit |
| Mussoorie Bank v Raynor (1882) 7 App Cas 321 | **Certainty of subject matter**<br>Held: no valid trust for children<br>● Two essential requirements for a valid trust → words must be imperative and subject must be well defined and certain |
| Re Golay's Will Trusts (1965) 1 WLR 969 | **Certainty of subject matter**<br>Held: valid trust<br>● Possible to make an objective measurement of what would constitute a reasonable income in any particular case. Objective standards can satisfy certainty requirements |
| Sprange v Barnard (1789) | **Certainty of subject matter**<br>Held: no valid trust<br>● Provision was too uncertain to create valid trust due to multiple uncertainty problems. Multiple uncertainties compound to invalid trust provisions:<br>○ Vague descriptions of property<br>○ Unclear amongst to be held on trust<br>○ Ambiguity about who determines amount |
| Hunter v Moss (1993) 1 WLR 934 | **Certainty of subject matter**<br>Held: valid trust<br>● Segregation not required for identical intangible assets where the beneficiary's interest is clearly quantified. When declaring a trust over a portion of intangible property like shares, it is not necessary to segregate them |

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| Ellison v Sandini Pty Ltd (2018) FCFCA 44 | **Certainty of subject matter**<br>Held: valid trust<br>● Must be sufficiently identified subject matter that is not uncertainty and may include a specified proportion of a fungible asset if the proportions are clear<br>● Courts must adapt certainty of subject matter principles to contemporary relatives whilst maintaining fundamental legal requirements, recognising that electronic share registries are not standard and physical share certificates are obsolete |
| Morice v Bishop of Durham | **Trust structures**<br>Held: no valid trust (lacked certainty of objects)<br>● For any trust structure to be valid, there must be someone with the legal capacity to enforce the trust obligations and hold trustees accountable |
| **TOPIC 3 - CERTAINTY OF OBJECTS & QUISTCLOSE TRUSTS** | |
| McPhail v Doulton (1970) | **Fixed interest trust test - list certainty test**<br>Held: valid trust<br>● Can the court compile a complete list of all the beneficiaries?<br><br>**Discretionary trust/trust power test & mere power - criterion/semantic certainty test**<br>● Can it be determined whether any given individual is or is not a member of the class?<br>● Class: must be defined by reference to a commonly held characteristic such as a relationship with a particular individual/institution |
| R v District Auditor No 3 Audit District of West Yorkshire (1986) | **Discretionary trust/trust power test - Administrative workability test**<br>Held: no valid trust<br>● Whilst a class may be conceptually certainty, distribution of trust property must be administratively workable for the trustee<br>● Class cannot be too hopelessly wide as to not form 'anything like a class'<br>● Demonstrates the practical limits of the 'is or is not' test |
| Re Manisty's Settlement | **Mere power - Capriciousness test**<br>Held: valid power of trustee to have discretion to add to a class of beneficiaries, despite the power being very broad<br>● Introduced the concept of capriciousness<br>● *Do the terms of the trust "negative any sensible intention on the part of the settlor" or create an "accidental conglomeration of persons with no discernible link with the settlor or with any institution"?* |
| Barclays Bank Ltd v Quistclose Investments Ltd (1970) | **Quistclose trust**<br>Held: valid trust despite no certainty of object<br>● Trust for purpose → characterised dual trust structure:<br>1. Money only for dividend payment<br>2. If dividend not paid, money returned to Quistclose (investor who lended money for sole purpose of paying projected and declared dividends)<br><br><u>Requirements:</u><br>(a) Must be determined by reference to a mutual intention of both the lender and borrower. All relevant parties must be aware of this intention which must be clearly defined and communicated<br>(i) *Distinction*: mere purpose for lending vs intention to create a resulting trust relationship between the two parties<br>(ii) Intention is a *factual inquiry* based on circumstances surrounding payment, commercial necessity and urgency, nature of relationship, segregation or special |

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| | handling of funds, communications and conduct indicates restricted purpose of the trust property<br>(b) Parties must not have intended for the funds to become part of the borrower's general assets<br>(c) Funds should not become part of the borrower's general assets<br>(d) Must be clearly evidenced by transactions and circumstances<br>(e) Must have ascertainable beneficiaries who can enforce the trust (e.g. Quistclose lender) rather than abstract purposes<br>(f) Must be sufficiently certain to be enforceable<br>(g) Funds must not be at the free disposal of the borrower → express or implied restrictions preventing this<br>(h) Must remain identifiable and traceable. If funds are dissipated or mixed beyond recovery, trust claim fails (emphasis on importance of acting quickly)<br>(i) Evidence of mixing may defeat trust claim<br>(ii) If untraceable, only personal debt claims remain for lender |
| **TOPIC 4 - CHARITABLE TRUSTS**<br>*Note: only AG has standing to enforce a charitable trust!!* | |
| Commissioner for Special Purposes of Income Tax v Pemsel [1891] AC 531 | **Four heads of charity**<br>Established classification of charitable purposes into four principal divisions:<br>1. Trusts for the relief of poverty<br>2. Trusts for the advancement of education<br>3. Trusts for the advancement of religion<br>4. Trusts for other purposes beneficial to the community, not falling under any of the preceding heads |
| Latimer v Commissioner Inland Revenue [2004] UKPC 13 at [29]-[37] | **Exclusively charitable purpose requirement**<br>● Exclusively charitable purposes → to qualify as a charitable trust, its purpose must be exclusively charitable<br>● Ends, means and consequences test → the ends must be exclusively charitable. Non-charitable benefits that are merely the means or the incidental consequences do not destroy charitable status, however purposes that are neither a means of furthering the trust's charitable purpose nor an incidental consequence ***will defeat the charitable status*** |
| Oppenheim v Tobacco Securities Trust Co Ltd [1951] AC 297 | **Public benefit test for charitable trusts**<br>Held: invalid charitable trust, as was not for public benefit<br>● A trust is not charitable unless it is directed to public benefit and must benefit the community or a section of the community<br>● Two-part test:<br>1. Possible beneficiaries must not be numerically negligible (cannot have a charitable trust for a couple of people)<br>2. Quality which distinguishes them from other members of the community must be a quality which does not depend on their relationship to a particular individual or institution |
| Dingle v Turner [1972] AC 601 | **(1) Trusts for relief of poverty**<br>Held: valid charitable trust for relief of poverty<br>● Oppenheim public benefit test **does not** apply to poverty relief trusts<br>● Charitable trusts for relief of poverty needs to provide relief amongst a 'particular description of poor people' rather than merely a gift to particular poor persons<br>*Note: poverty trusts are judged by modern standards and they do not need destitution (someone who has got less than average)* |

# RIGHTS OF OBJECTS DEPENDING ON TRUST STRUCTURE

<table>
<tr><th>TRUST STRUCTURE</th><th>RIGHT</th></tr>
<tr><td colspan="2">FIXED INTEREST OBJECTS' RIGHTS</td></tr>
<tr><td>Fixed interest trust</td><td>Trustee's powers: trust powers → trustee is required to distribute the trust property amongst the identified beneficiaries in fixed proportions<br><br>Beneficiary rights:<br>1. Have a vested equitable interest in the trust property → Saunders v Vautier<br>2. Can compel performance of the trust (i.e., compel the trustee to distribute)<br>3. Can sue for breach of trust<br>4. Interest is assignable or alienable (subject to the fair-dealing rule)<br>5. Entitled to information and accounts relating to their share</td></tr>
<tr><td colspan="2">DISCRETIONARY OBJECTS' RIGHTS</td></tr>
<tr><td>Discretionary trust (exhaustive trust)</td><td>Trustee's powers: trust powers of appointment → trustee must distribute, but has discretion as to who within the class receives what proportion<br><br>Beneficiary rights:<br>1. No right to any particular share of the trust property<br>2. No proprietary interest in trust assets<br>3. Cannot compel a distribution to themselves individually<br>4. Cannot assign any interest (they have no proprietary interest until appointment) → Kennon v Spry<br>5. Have a right to be considered as potential beneficiaries → McPhail v Doulton<br>6. A right to have their interests protected<br>7. If all objects are sui juris + unanimously agreed to proceed of division, they can compel trustees to distribute the whole of the fund → Re Gestetner's Settlement (extending Saunders)<br>○ Once appointed, the chosen beneficiary obtains a vested equitable interest in that distribution</td></tr>
<tr><td>Discretionary trust (non-exhaustive trust)</td><td>Trustee's powers: mere discretionary powers of appointment → trustee is not required to distr<br><br>Beneficiary rights:<br>1. No right to compel trustee to exercise their power → Re Gulbenkian<br>2. No proprietary interest in trust property – only a mere expectancy<br>3. Cannot assign any rights<br>4. They can compel trustees to consider exercising power → Re Hay's Settlement<br>5. Have a right to due consideration – trustees must properly exercise discretion and consider whether to distribute → duty to exercise discretion<br>6. Can challenge improper exercise or non-exercise of discretion and seek court intervention → Re Manisty's Settlement (e.g., acting capriciously, in bad faith, or under mistake)</td></tr>
</table>

## DUTIES AND POWERS OF TRUSTEES

| CHECKLIST OF TRUSTEE DUTIES |
|---|
| **CORE DUTIES** |
| Duty to adhere to and carry out the trust |
| Duty to act in good faith in the interest of the beneficiaries |
| Duty to keep accounts and inform |
| Beneficiaries right to inspect trust documents |
| **EQUITABLE FIDUCIARY DUTIES** |
| Duty to avoid conflicts of interest |
| Duty to avoid making a secret profit |
| Duty to act gratuitously |
| Self dealing rule |
| Fair dealing rule |
| **MANAGEMENT AND PERFORMANCE DUTIES** |
| Duty to keep trust assets separate/not mix assets |
| Duty to act personally |
| Power to delegate/employ agents |
| Duty to supervise and monitor agents |
| Duty not to act under dictation |
| Duty not to fetter discretion |
| Duty to act unanimously |
| Duty to inquiry and 'get in' / preserve trust property *(look out for land where trustee is not registered proprietor, thus trust not properly constituted)* |
| Duty of proper transition |
| **PRUDENT DUTIES** |
| Duty to act prudently (case law) |
| Duty to invest prudently and actively (Trustee Act) |
| Power to invest |
| Duty to obtain proper returns |
| Duty to diversify investments |
| Duty to take advice |
| Duty to not invest speculatively |
| Duty to review annually |
| Duty to act impartially |
| **DUTY OF DISCRETION** |

Trustees are subject to duties owed to beneficiaries. Trustee powers and duties may be derived from three different sources:

1. **Trust instrument** (if it exists) → Deed or Will creating the trust
2. **Equity** → fiduciary obligations developed by courts
3. **Statute** → Trustee Act 1958 (Vic) ('TA')

S 2(3) TA: The non-core duties, powers and liabilities of trustees apply unless varied by a clear expression in the trust instrument

| DUTY / POWER | DESCRIPTION |
|---|---|
| **THREE CORE (IRREDUCIBLE) DUTIES**<br><br>*Note: core duties are fundamental to trustee's role and cannot be excluded or modified by the trust instrument as it is essential to the very nature of trusteeship and must always be observed* | |
| **Duty to adhere to and carry out the trust** | **Duty**: Trustees are under a core positive duty to adhere to and carry out the terms of the trust in strict conformity unless ordered by the Court (Green)<br><br>**Exam answer:**<br>1. Determine the clause of the trust that has been breached by the trustee<br>2. Articulate the breach of the clause<br>3. Consider if the beneficiaries consented → they may unanimously direct the trustee to depart from the deed if sui juris<br><br>**Sub-duty**: Trustee must be familiar with the trust's terms, documents, papers and deeds (Turner)<br><br>**Sub-duty**: Trustees must ensure they distribute trust assets to only those who are entitled<br>● *Fixed interest trust* → beneficiaries already determined by settlor<br>● *Discretionary trust* → consider duty to consider |
| **Duty to act in good faith in the interests of beneficiaries** | **Duty**: Trustees are under a core positive duty to perform honestly and in good faith for the benefit of the present and future beneficiaries → s 7(2)(a) TA<br><br>● **Good faith** → subjective assessment of what the trustee actually thought in conducting trust affairs<br>● **Best interests** → objective assessment of whether the trustee has acted in the best interests of the beneficiaries<br>○ *Best interests* → financial interests of the beneficiaries (Cowan)<br>○ This is to be prioritised to other interests<br><br>A trustee may have to act dishonourably (but not illegally) to achieve this and must put to one side their own social or political views (Cowan).<br><br>Note:<br>(a) **Charitable trusts**: starting point is best financial interests (Harries)<br>(b) **Superannuation trusts:** treated the same as other trusts, trustees owe exclusive duty of loyalty to fund members and must act solely in their interests, not in the interests of employers (Asea Brown) |
| **Duty to keep accounts and inform** | **Duty**: Trustees are under a core positive duty to maintain, keep and render proper accounts and records of the trust fund, and provide accountings to beneficiaries (Spellson) |

| | |
|---|---|
| | *Determining appropriateness of distributions*<br>The court will not interfere unless the trustee has acted improperly. Exercise of power will not be examined by a court unless the beneficiary can prove (Tempest v Lord Camoys; Karger v Paul):<br>● Evidence of bad faith<br>● Trustee has given no real or genuine consideration<br>● Not exercised in accordance with purpose for powers conferral<br>● Trustee has given reasons for decisions<br><br>Distinguished between the powers:<br>● **Trust powers (exhaustive discretionary trusts):** Require "a wider and more comprehensive range of inquiry" than mere powers<br>● **Mere powers:** Require only "an appreciation of the width of the field"<br><br>Note<br>● Objects do not have rights to trust property, but do have rights to enforce proper administration → Kennon v Spry<br>● s 33 TA allows trustees to give notice in a Government Gazette or newspaper of their intention to make distributions if those who are not entitled cannot be located |

## DEFENCES FOR TRUSTEES IN BREACH OF DUTIES

Three defences provide important protections whilst maintaining standards for trustees in breach of their duties.

| DEFENCE | DESCRIPTION |
|---|---|
| **Exemption clauses** | **1 – Exemption clauses**<br>● AKA Armitage clause<br>● The trust deed can exclude liability for an action or omission that would be a breach of duty → s 2(3) TA<br>● Essentially, it protects liability for trustees against negligent conduct<br>● *Cannot exclude liability for:*<br>  ○ A trustee cannot exclude liability for the irreducible core duties of a trustee (i.e. honesty and good faith duties)<br>  ○ It cannot exclude liability for a trustee proven to have engaged in actual fraud, bad faith or dishonesty → Armitage<br>    ■ **Actual fraud** = intentionally deceitful or reckless indifference as to the truth or falsity of a representation → Derry<br><br>Exam script: *The trust deed contains an exemption clause which purports to exclude trustee liability for negligent investment decisions. Under Armitage v Nurse, such clauses can validly relieve trustees of liability for negligence or carelessness, provided the conduct does not amount to dishonesty, bad faith, or actual fraud. Here, the trustee acted carelessly but without any dishonest intent. Consistent with Armitage and s 2(3) of the Trustee Act 1958 (Vic), the clause likely shields the trustee from liability, as the conduct falls short of fraud or bad faith.*<br><br>*The clause cannot, however, exclude the trustee's irreducible core duties, namely the duties of honesty and good faith. If the trustee knowingly acted contrary to the beneficiaries' interests or with reckless indifference to the truth, the clause will not protect them. Given the trustee's actions were negligent but not fraudulent or dishonest, the exemption clause provides a strong defence against personal liability.* |

<table>
<tr><td>Honest and reasonable conduct</td><td>
2 – Honest and reasonable conduct defence
<ul>
<li>Relief granted under s 67 TA</li>
<li>If the trustee acted honestly, reasonably and ought to be fairly excluded, the court may excuse their liability
<ul>
<li>Applies to personal, but not proprietary liability</li>
<li>A professional trustee has to establish a strong case for application in their favour → Green</li>
<li>Honestly = acted in good faith in the interests of all the beneficiaries/benefit of the trust</li>
<li>Reasonably = acted in a way that was not negligent or careless objectively</li>
<li>Ought to be fairly excused = balance between the interests of the trustee and the persons affected by their conduct</li>
</ul></li>
</ul>
Exam script: Section 67 empowers the court to relieve a trustee from personal liability if they acted honestly, reasonably, and ought fairly to be excused. The defence focuses on the trustee's good faith and objective reasonableness in the circumstances. The trustee made the impugned decision after seeking professional advice and genuinely believing it was in the best interests of the beneficiaries. This suggests honest and reasonable conduct within the meaning of s 67.
While the decision was arguably negligent, mere error of judgment is insufficient to disqualify the defence if the trustee's actions were both honest and objectively reasonable. Following Green v Wilden, professional trustees bear a heavier onus, but the trustee's careful process and absence of bad faith make it likely that the court would exercise its discretion to excuse liability under s 67.
Accordingly, even though a technical breach occurred, the trustee's honest and reasonable conduct may justify full or partial relief from personal liability.
</td></tr>
<tr><td>Consent</td><td>
3 – Beneficiary consent
<ul>
<li>Beneficiaries may consent to conduct that amounts to a breach of duty</li>
<li>Once consented to, the trustee is absolved of liability → Spellson</li>
<li>Can arise before, during and after their breach → Spellson
<ul>
<li>Consent = must come from all sui juris and fully informed beneficiaries + fair and equitable to permit the breach → Spellson
<ul>
<li>Beneficiaries must have knowledge of all the material facts</li>
<li>The Court must consider if it would be fair and equitable for a beneficiary to be able to sue anyway</li>
</ul></li>
</ul></li>
</ul>
Exam script: Beneficiary consent can absolve a trustee from liability where all sui juris and fully informed beneficiaries have consented to, or subsequently ratified, the impugned conduct. Here, all adult beneficiaries were informed of the trustee's proposed investment strategy and expressly agreed to it. Under Spellson v George, such informed consent prevents those beneficiaries from later alleging breach of trust."
The effectiveness of the defence depends on the beneficiaries' knowledge of all material facts and whether the consent was freely given and fair to uphold. If some beneficiaries were minors or lacked full knowledge of the relevant risks, the consent will be ineffective, and the trustee remains liable. Assuming full, informed consent was provided by all beneficiaries, the trustee is likely absolved of liability for this conduct, consistent with Spellson.
</td></tr>
<tr><td>Investment defence (process-based</td><td>
4 – Investment defences (process-based defence)<br>
S 12C TA<br>
Whether the trustee can rely on s 12C to defend an allegation of breach of trust in relation to investment decisions. This section provides a process-based defence, shielding trustees from liability for reasonable, properly informed investment decisions that later underperform.
</td></tr>
</table>

| | |
|---|---|
| **defence)** | *Exam answer steps:*<br>● Step 1: identify if the investment loss or alleged breach relates to an investment decision<br>● Step 2: discuss whether the trustee considered relevant s 8 factors (risk, diversification, return etc) → s 12C(b)<br>● Step 3: state whether the trustee formulated and followed an investment strategy consistent with the trust's purpose → s 12C(c)<br>● Step 4: consider whether the trustee sought independent and competent advice → s 12C(d)<br>● Step 5: evaluate whether their decision-making process was reasonable and informed in all of the circumstances<br><br>Exam script: *Although the trustee's investment in [investment type i.e. shares] resulted in a loss, s 12C directs the court to consider the process adopted. The trustee formulated an investment strategy, obtained advice from a licensed financial planner, and diversified the portfolio. Accordingly, despite the poor outcome, the trustee's conduct appears consistent with s 12C and accordingly is unlikely to attract liability.* |
| **Investment defence (outcome-based defence)** | **5 – Investment defences (outcome-based defence)**<br>S 12D TA<br>Whether the trustee can rely on s 12D to offset losses from one investment against gains from another in assessing liability. This section provides an **outcome-based defence**, by permitting a holistic evaluation of the trust's investment performance.<br><br>*Exam answer steps:*<br>● Step 1: Identify the investments → which made gains and which caused losses<br>● Step 2: determine whether both investments were part of the same portfolio or investment strategy<br>● Step 3: argue that the trustee should be assessed on the overall performance of the trust fund<br>● Step 4: apply s 12D to argue that gains can offset losses, reducing or eliminating liability<br>● Step 5: conclude whether the trustee's conduct, viewed across the portfolio, was consistent with prudence<br><br>Exam script: *While the trustee's investment in [investment type: i.e. speculative mining shares] breached the duty to [duty breached: i.e. diversify], the trust simultaneously realised significant gains in [other investment: i.e. government bonds]. Under s 12D, the court may set off the mining losses against these gains, as modern investment prudence is assessed across the portfolio as a whole.* |

## RIGHTS OF TRUSTEES AND BENEFICIARES

| RIGHT | DESCRIPTION |
|---|---|
| **RIGHTS OF TRUSTEES** | |
| **Right of indemnity (ROI)** | **Right**: trustees are entitled to reimburse expenses properly incurred in administration<br><br>Exam answer steps:<br>**1 – Overview of the ROI**<br>● Trustees are personally liable, because unlike corporations, trusts are not a separate entity to the trustee. What the trustee does, the trust does and vice-versa<br>● When a trustee transacts on behalf of the trust, the trustee incurs personal liability → Carter<br>● Equity gives indemnity to trustees and protects trustees who properly incur expenses/liabilities in the administration of the trust |

## REMEDIES FOR BREACH OF TRUST DUTIES

| INTRODUCTORY MATTERS |
|---|
| **Right:** Once a party has identified a breach of a trustee, they have the right to remedy for any breaches committed by a trustee or their agent<br>● Consider: is the breach custodial or management<br><br>Exam answer steps:<br>**1 – Identify the type of remedy**<br><u>(a) Personal remedies – against the trustee personally:</u><br>1. Account of profits – strips trustee of unauthorised gains (restitutionary)<br>2. Equitable compensation – restores trust fund to its proper position (reparative)<br><br>**Principle**: Remedies are alternatives, election made after assessment. Double recovery is not permitted → Warman; Tang Man Sit<br><br><u>(b) Proprietary remedies – enforceable over specific trust property:</u><br>1. Tracing into substituted property<br>2. **Remedies include:** constructive trust, resulting trust, election to take property, equitable charge/lien, account of profits secured by lien<br>3. **Priority**: Beneficiaries' proprietary rights can override general creditors<br><br>**2 – Establish standing to sue**<br>A beneficiary, co-trustee or subsequent trustee is able to bring proceedings → Young<br>● In relation to common law rights, trustee is the right party to sue<br>● When an action is bought for loss or damage, the action is for the benefit of the fund → Young<br>○ Trustee is to reconstitute the fund, rather than the beneficiaries → Permanent Trustee<br><br>**3 – Proceed to analyse appropriate remedies** |

| REMEDY | DESCRIPTION |
|---|---|
| **PERSONAL REMEDIES** | |
| **Account of profits** | Allows a party to recover profits that have been made because of a breach → Keech; Chan; Boardman<br><br>**Purpose:**<br>● A restitutionary remedy aimed at stripping the trustee of any unauthorised gain obtained from a breach of trust.<br>● Focuses on what the trustee gained, not on the loss to the trust.<br>● Operates even if the trust did not suffer actual financial loss.<br><br>**Key Principles:**<br>● Beneficiaries can recover all profits directly resulting from the breach (Tang Man Sit v Capacious Investments)<br>● Can be stripped regardless of whether intentionally or unintentionally, honestly or dishonestly, whether the plaintiff could make the profit themselves (i.e. *no causative element*) → Boardman<br>● Applied to prevent trustees from exploiting their position.<br>● If trust funds are mixed with the trustee's own funds, the gain is apportioned proportionally, unless dishonesty allows the trust to claim the entire gain. |