TOPIC 7 – OUSTING COURT SUPERVISION

- *Morice v Bishop of Durham*: 'there can be no trust, over the exercise of which this court, will not assume control'

Re Raven [1915]	
Facts	○ Testator made charitable gift under will; doubt as to which charity ○ Will said if there was uncertainty about charity, trustees may resolve the uncertainty, and their decision would be final and binding
Judgment	HELD: <u>clause is ineffective</u> as trustees are supposed to be limited owners of the property – should not have a say in questions of construction as these are questions of law, so it should be for the court to work out who is entitled to the gift by interpreting the will. '… it is not competent for a testator to confer certain legal rights by giving legacies and at the same time say that the question whether that legal right is or is not to be enjoyed is not to be determined by the ordinary tribunal [i.e. the court]…'

- More common now that arbitration clauses be given full effect, even if deciding questions of law – *pulled back from *Re Raven*
- 2 ways to oust court supervision:
    - (i) anti-litigation divesting clauses (i.e. 'no contest' clauses); and
    - (ii) arbitration clauses

1. 'No Contest' Clauses

- Example: somebody dies and make gift of money in will to beneficiary, but attaches condition saying 'if beneficiary makes any direct or indirect challenge to the will, they lose the gift' (idea is to avoid children fighting each other in court for more interest) – doesn't say you cannot litigate, just saying you can lose your interest (a disincentive)
- Longstanding authority that these types of clauses are valid and enforceable

Evanturel v Evanturel (1874) – Privy Council	
Facts	○ Testatrix left large gift of life interest to son and small annuities to daughters; 1 daughter brought challenge in the hopes that there would be equal split of estate among all children ○ Mother put divesting clause in will saying if there were any challenges, their interests will divest
Judgment	HELD: clause is valid, not contrary to public policy, and nothing in condition was 'repugnant to the nature of the gift being imposed'.

- Clause of this kind is not taking away beneficiary's right to go to court, is merely saying they will lose their interest if they do.
- *Permanent Trustee v Dougall*: 'a condition against disputing the validity of a will is an enforceable condition. The result is that <u>if a person interested successfully disputes the validity of the will the condition fails with the will</u>. If on the other hand he <u>unsuccessfully disputes the validity of the will, then the condition takes effect</u>.'
- *Nathan v Leonard* on 'repugnancy' point in *Evanturel*:
    - Repugnancy test is an element to the validity of these types of clauses
    - Cannot include condition if it is repugnant to the gift you are making – if it is, the clause will not be effective – cannot take away parts of gift that are a necessary element of the gift itself
    - E.g. if I make gift to you in will of absolute ownership of property, I cannot include condition saying you cannot sell the property, as that is repugnant to the nature of absolute ownership

Rhodes v Muswell Hill Land Co (1861)	
Facts	○ Man died and left property to devisees; clause in will said if devisees brought claim relating to the estate, the devise to that person will be null and void ○ One devisee wanted to sell his interest in land to purchaser; entered contract; purchaser tried to back out as devisee could not give good title dye to clause in will
Judgment	HELD: clause is ineffective as it is repugnant to the gift – thus, clause is void and of no effect, meaning no reason for purchaser to back out.

Permanent Trustee Co v Dougall (1931)	
Facts	○ Testator gives property to children and includes clause to effect of: if any of my children dispute the validity of this will or if any proceedings shall be taken for the purpose of disputing the dispositions of this will, <u>all the dispositions in favour of the child disputing/taking proceedings shall be void</u> ○ Trustees concerned about clause invalidating gift – sought judicial advice as to how to make dispositions
Judgment	HELD: clause is repugnant to gift and therefore ineffective insofar as it removes the court's jurisdiction – thus, disincentive part is still valid, but saying you lose your interest by enforcing is invalid. '… the condition against taking any proceedings is too wide as it would have the effect of preventing any questions of administration and would prevent the beneficiaries from securing the due administration of the trusts of the will by the trustees … the clause is an attempt to oust the jurisdiction of the court.'

<table>
<tr><th colspan="2">Adams v Adams [1892]</th></tr>
<tr><td>Facts</td><td>Man dies; leaves property to trustees to pay annuities to testator's son for life – clause says if son or anyone interferes with trust, he loses his annuities
Trustees were paying annuities regularly; son alleges he was not being paid; son sued claiming trustees wasting money from fund and sought to have administrator appointed to trust</td></tr>
<tr><td>Judgment</td><td>HELD: evidence confirmed son was lying; son lost as claims were vexatious and frivolous, thus son lost right to his annuities – <u>but</u>, court accepted that if claim had been brought bona fide and was for the purpose of vindicating his rights under the trust, <u>then the clause would not have applied</u> (i.e. if trustees actually had not been paying annuities).
*Adams has been applied in other case law as saying 'this clause will apply if the attack is frivolous and vexatious, but not if it is bona fide'.</td></tr>
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<tr><th colspan="2">AN v Barclays Private Bank and Trust (Cayman) Ltd [2006] – *Cayman Islands case</th></tr>
<tr><td>Facts</td><td>Discretionary trust; AN is object; complains trustees re-arranged trust in way that is prejudicial to AN; ask court to remove trustees
Cl 23: whoever contests the validity of the trust, person shall cease to be a beneficiary and shall be excluded from any benefits, direct or indirect, deriving from the trust fund
Cl 11: trustee not liable for breach unless claim brought is for wilful misconduct</td></tr>
<tr><td>Judgment</td><td>HELD: clause valid <u>but had limited effect</u> – if cl 23 read literally, it would be void for repugnancy, so the judge construed it as 'whoever unjustifiably contests' rather than 'whoever contests', thus allowing for bona fide claims.</td></tr>
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<tr><th colspan="2">Leerac Pty Ltd v Fay [2008] – *c.f. above case</th></tr>
<tr><td>Facts</td><td>L is trustee of multiple discretionary trusts; def is potential beneficiary; each trust has exemption clauses for trustees and a clause to the following effect: 'if any beneficiary commences any action in any court against the trustee, then such beneficiary shall be deemed not to be and never to have been a beneficiary…'
Def brought proceedings against trustee saying they failed to give due consideration to dispositions
Trustees wanted to know whether def could no longer be considered a beneficiary by virtue of the clause</td></tr>
<tr><td>Judgment</td><td>HELD: cl 17 only applies <u>if suing for a breach of trust</u> – thus, if suing to enforce rights, clause does not apply. Court will not start adding words in – if as a matter of construction, clause means you will lose your interest if seeking to enforce the trust, then it is void so the extent it is inconsistent.</td></tr>
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- E.g. *Trustee Act 1998* (Bahamas) s 87A: ensures divesting clauses are effective, even if there is a challenge brought in good faith and with good cause

2. ADR Clauses

- Focus on moving enforcement venue to arbitration
  - Benefit for public families to keep their personal affairs out of the media with court proceedings
  - Also a quicker and cheaper result

Re Coxen [1948]	
Facts	○ Person set up trust; if wife ceased to permanently reside at property left to her in trust (e.g. she died) the house would go into residuary estate ○ Was a divesting condition
Judgment	HELD: condition valid – meaning of 'resigning permanently' and 'ceasing to reside' was clear; fact that trustees were given power to decide whether that condition was satisfied did not detract from the effectiveness of the condition. But: 'If testator had insufficiently defined the state of affairs on which the trustees were to form their opinion, he would not have saved the condition from invalidity on the ground of uncertainty by making their opinion the criterion' – *i.e. can give trustees final decision-making power on terms of fact, but cannot give trustees ability to fix uncertainty of a legal question. A difficult question of law still sits with the Court (not trustee or arbitrator).

Dundee General Hospitals Board of Management v Walker [1952]	
Facts	○ Dundee Royal Infirmary was intended recipient of testator's deceased estate, unless trustees thought hospital had been taken by the state/placed under state control ○ Trustee decided it was under state control as particular statutes passed centralising control over how hospitals operated ○ Trustee's opinion was that it was not free of state control, and thus money would form part of residuary estate – infirmary sued as they wanted the money
Judgment	HELD: agreed with trustees – <u>was legitimate for them not to hand over the money</u>.

*Need to consider:

- (i) Arbitrability – is dispute capable of being resolved by arbitration?

- (ii) if dispute is arbitrable, is there a clause saying the dispute must be arbitrated? Are they forced to arbitration, or can the parties go straight to court?

(i) Arbitrability

- No clear theory as to what makes something arbitrable – idea of non-arbitrability from case law is that certain types of disputes, e.g. public rights or third party rights/ interests are usually not arbitrable
    - Categories accepted as being non-arbitrable: consumer rights, crime, employment law issues, IP disputes, etc.
- For trusts, the irreducible core says a trust must involve enforceable obligations, but does not say which venue they need to be enforced at

Rinehart v Welker [2012]	
Facts	- Beneficiaries of family trust (GR's children) trying to have GR removed as trustee, alleging serious breaches of trust - GR and beneficiaries signed arbitration agreement about earlier dispute between parties – signed agreement as part of settling - Beneficiaries went to court to seek remedy; GR argued they could not do so due to arbitration agreement
Judgment	HELD: split on whether the dispute was arbitrable. Majority said that provided court jurisdiction is not ousted entirely, then arbitration is acceptable – 'at least in circumstances where the trustee and each beneficiary have expressly agreed to their disputes being referred to arbitration, a court should give effect to that agreement. The supervisory jurisdiction of the court is not ousted. It continues to have the supervisory role conferred upon it by the relevant legislation…' Bathurst CJ: addresses that arbitrators do not have same power as courts – e.g. cannot remove trustees or vest assets, but they can order trustee to retire and order assets be transferred, and these orders can then be enforced by the court – procedural way to give effect to arbitration.

- *Commercial Arbitration Act 2010* (NSW)
    - s 34: court can overturn an arbitrator's decision if it was procedurally defective – e.g. one party had incapacity, one party did not give proper notice, dispute not arbitrable [done to ensure procedural fairness]
    - s 34A: court can only deal with appeal of an arbitrator's decision on a substantive error of law under this section – can also only appeal if both parties agree to an appeal (unlikely the winner would agree to an appeal)
    - s 5: if matter between parties is governed by this statute, no court must intervene except where the statute provides (i.e. cannot go around s 34A)
    - s 35: court may make orders giving effect to an arbitrator's decision

(ii) If arbitrable, is beneficiary bound to arbitration clause?

- *Commercial Arbitration Act 2010* (NSW)
  - s 7: arbitration agreement is valid when the parties agree to submit present or future disputes arising from the relationship to arbitration – must be in a recorded, accessible written form, including electronic communications or incorporated documents
  - s 8: court must refer parties to arbitration upon timely request unless the arbitration agreement is invalid
- *Trustee Act 1998* (Bahamas)
  - s 91A (1): all beneficiaries to trust, if trust has arbitration clause, are deemed to be parties to an agreement to arbitrate – i.e. all disputes must go to arbitration
  - s 91B (2): arbitral powers of arbitrator extended – arbitrator may exercise all powers of the court, whether by statute, inherent jurisdiction of the court, or otherwise
- *Trustee Act 2019* (NZ)
  - *More recent and different from Bahamas
  - Has 'Arbitration Regime' for trusts – if beneficiaries agree, they can transfer from court to arbitration; if parties haven't agreed, the court still has a discretion to send the matter to arbitration