LAWS2205 Cases

Week 6: Administration of Express Trusts

Appointment and Removal of Trustees

<table>
<tr><th colspan="2">Titterton v Oates (1998)</th></tr>
<tr><td>Facts</td><td>T (testator) had created trust that distributed 1/3 of estate to his daughter (1st D) and holding remaining 2/3 in trust for other two children, the sister (plaintiff) and brother (2nd D). 1st D becomes sole trustee of the estate when T dies. 1st D, P and 2nd D were beneficiaries. Trust was structured to provide for 2nd D's needs during lifetime (disabled). P tried to have 1st D removed under s 70 on the basis she failed to distribute the income efficiently, had conflicts of interests with P and 2nd D, misunderstood the nature of discretion exercisable by 2nd D, delayed providing information, depression affected 1st D's ability to perform duties.</td></tr>
<tr><td>Decision</td><td>Held: 1st D removed as trustee and Public Trustee appointed.

T's decision to appoint 1st D as trustee should be given weight, as T must have known about the conflict and potential for conflict of interest, but cannot limit the court's jurisdiction to ensure welfare of the B's.
Appointing Public Trustee ($38,000) cost should be considered in the context of the amount to be managed in the trust ($1,000,000+)

Alternative? → court considered appointing the public trustee as co-trustee with 1st D, but would not solve underlying issues that would affect trust admin

Considerations in removing trustee:

1. Inadequate trust administration

Didn't always execute the trust in an efficient and satisfactory way, partly due to the resentment/conflict
Episode of clinical depression, but court not satisfied it fully explained her breaches as trustee, absence of medical evidence undermined her argument for deficiencies

2. Potential conflict of interest

1st D's role as both trustee and residuary beneficiary of trust, but court said this awareness did not limit her jurisdiction to ensure proper admin of trust and welfare of B's
Conflict = reasonable for B's to fear distribution not be tainted by her self-interest

3. Impossible for family tensions to not affect exercise of discretion
4. Bitterness in family relationships were a significant barrier to communications → communication breakdown = barrier to proper admin of the trust
5. Didn't fully appreciate requirement to promote 2nd D's welfare and happiness (not just meet needs) → critical factor
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<tr><td>Reasoning</td><td>Reflects judicial reluctance to allow trustees to remain in role if substantial concerns about their ability to administer trust effectively and partially</td></tr>
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	▪ Will ultimately choose the course of action that best serves the interests of the Bs and the trust itself ▪ “Consequently, I find that the jurisdiction conferred by section 70 does not extend to an application to remove a trustee against his or her will.” (Crispin J) ▪ “A trustee will not normally be removed merely because certain beneficiaries desire his or her removal… A conflict of interest will not necessarily lead to a removal.” (Crispin J)

Trustees’ Powers

McPhail v Doulton [1971]	
Facts	Pension scheme where a businessman (settlor) set up a scheme on trust to provide benefits for the staff of his company, their relatives and dependents. Trustees were not bound to exhaust the income of the fund and to make grants at their absolute discretion to members of the class (discretionary trust). Challenged by family. About distinction between Trust and Mere PoA.
Decision	Held that this was a trust power based on the mandatory language used, i.e. the trustee shall apply the net income etc (as opposed to may apply, or in their discretion apply) ▪ Distinction is narrow and artificial → no matter what power you have, still have fiduciary duty to trust ▪ Any difference in exercise of trust powers and mere powers is negligible, rather the **size and class of the fund** determines the extent of the trustees’ responsibilities. Both TP and MP involve fiduciary duties. ▪ Trustees with either kind of power must: assess the ‘permissible area of selection’, consider whether a potential object of the power is within the power and consider whether a particular grant is appropriate. ▪ Trustees “shall apply the net income of the fund…in such amounts, at such times, and subject to such conditions as they think fit”

Reasoning	▪ Duty depends on size of the class and fund + discretion → “Such distinction as there is would seem to lie in the extent of the survey which the trustee is required to carry out: if he has to distribute the whole of a fund’s income, he must necessarily make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants (MP).” (Lord Wilberforce)
	▪ Trustee must consider ‘Permissible area of selection’ for B’s and act responsibly in making distributions
	  ○ Duty → making informed decisions about Bs even in absence of a complete list of names by considering categories and priorities among potential Bs
	  ○ In other words, trustee must find the permissible area of selection but that does not mean he has to identify every single member of that class of objects before making any allocations

Re Hay's Settlement Trusts [1982]	
Facts	In a trust deed, trustees were directed to hold trust funds for any persons (with the exception of the settlor, her husband and Ts) or purposes they appoint with 21 years of settlement. Ts executed deed of appointment, transferring the funds to another discretionary trust with themselves as the trustees, with the power to appoint B's of both the fund and income among any person in the world. Nieces and nephews sought to claim the money.

Decision	Held the power was valid, the delegation was invalid
	▪ Even if you have a mere power, you have to periodically consider wither to exercise it
	▪ A trustee with a mere power is obligated to (1) 'consider periodically whether or not…[to] exercise the power' and (2) 'the range of objects of the power' and '(3) the appropriateness of individual appointments' (Megarry VC).
	    o Ts must also assess appropriateness of granting benefits to specific individuals in range of objects → evaluate whether it aligns with trust's purpose and needs and qualification of Bs
	    o Power exercised in manner consistent with trust objectives and interests of Bs

Reasoning	▪ Those with MP not free to ignore their responsibility, even if no obligation to act, they must periodically consider whether to exercise power → cannot let power lie dormant without revisiting decision, ensures Ts remain engaged with their duties and maintain oversight over trust potential Bs o Safeguard against any negligence or passive management ▪ Ts must understand scope of potential Bs and necessitates clear understanding of who may potentially benefit from the trust → fiduciary duty

Karger v Paul [1984]	
Facts	Estate left on trust to husband of deceased. States that upon husband's death any residue of trust to go to her cousin (residual beneficiary). Trustees (husband and solicitor) may transfer to husband himself and given 'absolute and unfettered discretion'. They do so and the cousin deprived of inheritance when the husband dies and leaves everything to his new fiancé. Argued the exercise of the discretion was improper and deprived her of entitlements under the will.
Issue	▪ Do trustees really have absolute unfettered power when trust says so? ▪ Powers of trustees and how they should be exercised ▪ Beneficiaries' right to information
Decision	Held Ts had not exercised their discretion improperly in authorising the transfer of capital to the husband.
Reasoning	▪ Court's scope of review = 'The issues which are examinable by the Court are limited to whether there has been a failure to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred.

	In short, the Court examines whether the discretion was exercised but does not examine how it was exercised.' (McGarvie J) - Trustee not obliged to explain reasons for decisions/ consult or inform with objects of power before making decision (unless trust deed or statute says otherwise) - Protects confidentiality of T's decision-making processes and reduces administrative burden - But if failure to do above, court can examine exercise of discretion ▪ An exception is if trustees choose to state their reasons for their exercise of discretion. - If T's voluntarily disclose their reasons, they waive their immunity and court may then reveal reasons to ensure they align with purposes of the trust and made in good faith ▪ Court does not reveal manner in which discretion exercised, no reasonableness review of decision itself, role not to substitute judgement for that of T's, but ensure they act within bounds of their FDs ▪ If court finds didn't exercise in good faith or genuinely consider their decision, remedy = set aside decision, instruct T's to reconsider matter, court does not substitute its decision but rather requires T's to properly exercise their discretion ▪ Court rejects application of natural justice principles → e.g. right to be heard

Trustees' Duties

- **Duty to Exercise Care and Skill**

Re Speight (1883)	
Facts	Trustee employed a stockbroker to invest trust funds. The investments made a significant loss.
Decision	Held trustee did not have to make good that loss to the fund. ▪ Standard of care for trustees → "A trustee ought to conduct the business of the trust in the same manner that an **ordinary prudent man of business** would conduct his own, and that beyond that there is no liability or obligation on the trustee." (Jessel MR)
Reasoning	▪ Court rejected idea that trustees are absolutely liable for all losses of trust funds and all decisions they make ▪ Liability only if T's fail to act with **reasonable care and skill** in managing trust, incl. selection and oversight of agents. T cannot abdicate all responsibility and forget about duty even when an agent is selected, must ensure agents are performing their tasks sufficiently. - Here the court said that a trustee will have met the SoC (same one) if they have selected the agent according to the usual method of that business. - T may not employ an agent where they should do the work themselves, but may if in the ordinary course of business to

	do so, as long as they run no needless risk o T must supervise functions of agent as far as is possible, but they don't have to monitor every single movement → to the extent that they can intervene to protect assets if necessary e.g. in Bartlett ▪ Lay trustees → Some trustees may have no expertise in investment and business, so court reluctant to impose onerous burdens, also no statutory exonerating provisions at the time

Bartlett v Barclays Bank Trust Co Ltd (No 1) [1980]	
Facts	BB was the sole trustee of the B trust. The sole asset was 99.8% of the shares in a family company. The B company board altered its constitution to allow it to change from traditionally conservative investment policy to one of speculative property development. BB, trustees, agreed to the change in policy provided that income to the beneficiaries not affected. B board went ahead and invested speculatively, some of these were disastrous. B suffered a significant loss as the property was the shares in the company.
Decision	Held BB had been in breach for failure to secure a better flow of information, if they had done this they could have intervened and prevented the projects ▪ "A professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have." ▪ "A higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management…the trust corporation hold itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of a trusteeship." (Brightman J) ▪ Even without the flow of information, Ts had been put on notice, had access to enough info, so should have made further enquiries ▪ By failing to secure the info they failed to meet standard of a professional trustee but also of an ordinary prudent investor, so failed to meet high standard and minimum standard
Reasoning	▪ Professional trustees with controlling interest must exercise higher care and skill o Some particular expertise o In monitoring and managing affairs of that company o Especially if they hold themselves as having special expertise and they receive payment for their services, are service providers ▪ They cannot rely solely on the company's board to manage the business; they must intervene if needed o They must actively monitor company's performance, attend meetings and ensure company is managing the trust in a way that protects the trust's purpose and interests

	▪ Professionals = Information, Expertise, Experience, Access to information → liable for loss if they neglect to exercise the special skill that they claim to have

- **Duty to Account**

Re Simersall (1992)	
Facts	Simersall (trustee) had been declared bankrupt, so had duty to recover assets for creditors. T's former solicitor refused to disclose information about S' financial affairs, citing solicitor-client privilege. S argued that the privilege, which generally protects client communications, should not prevent them from accessing this information. Argued rights of a trustee in bankruptcy to access trust account records under Bankruptcy Act 1966.
Decision	Held solicitor-client privilege did not automatically prevent disclosure in the context of bankruptcy proceedings, particularly where the information was necessary for the T to perform their duties ▪ As the T must hold and deal with the trust property for the benefit of the B's, T must account for their stewardship. ▪ Duty incl. keeping proper accounts and allowing B's to inspect these accounts upon their request, so they can scrutinise whether trustee is complying with obligation/fulfilling their duties ▪ Must maintain accurate and detailed records of their management of the trust property
Reasoning	Gummow J: ▪ The T has an obligation to "keep proper accounts and to allow inspection of them by the beneficiaries." ▪ Ts must account in remedial sense and in administrative sense. ▪ A "necessary incident" of the T's "obligation to hold and deal with the trust property for the benefit of the beneficiaries" is "the liability of the trustee to account to the beneficiaries for his stewardship of the trust property." Beneficiaries' access to information is not unbounded ▪ Only entitled to access information relevant and necessary for them to understand the administration of the trust and assess whether T is fulfilling their fiduciary duties

Re Londonderry's Settlement [1965]	
Facts	Family discretionary trust entitled trustees to dispose of trust capital so as to terminate the trust. Trustee distributed the fund, beneficiaries objected, demanded minutes of trustee meetings, documents prepared for meetings and correspondence between the Ts, Bs, and As and between their solicitors. Wanted to figure out why decision was made in that way.
Issue	What documents should trustees have a right to access to in relation to Ts exercise of discretionary powers?
Decision	Held B's had the right to see '**trust documents**' which are:

	▪ 1. Documents in the possession of trustees as trustees
	▪ 2. Contain information about the trust which the beneficiaries are entitled to know
	▪ 3. The beneficiaries have a proprietary interest in the documents and thus entitled to see them
	▪ This does not include documents prepared by T for own purposes or reasons for exercise of discretions e.g. minutes of trustee's meetings, agendas, correspondence records etc → internal documents, records reasons of Ts
	  o Trustees needs the shield of privacy to make free and uninfluenced decisions.
	  o Particularly in family situations → significant source of contention, emotional and personal relationships at stake
	  o Prevents fear of litigation and disputes

Reasoning	▪ "Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family were the trustees obliged to state their reasons for the exercise of the powers entrusted to them" (Salmon LJ)
	▪ Trustees have no obligation to disclose reasons for discretionary decisions
	  o Court → even though T accountable to B's, they still have discretion when it comes to their actions
	  o B's right to access trust information → if they relate to management of the trust property

Hartigan Nominees Pty Ltd v Rydge (1992)	
Facts	R established an extended family discretionary trust. The settlor provided the trustees with a memorandum indicating his preferences and wishes about what the trustees should do. A beneficiary (grandson) (plaintiff) invited the trustees to make payments to him and when they refused sought a declaration from the court that the B's be entitled to inspect the memorandum.
Decision	Held: Court denied access to the memorandum of wishes and plaintiff was not entitled to inspect. ▪ Memorandum of wishes is not part of the property of the trust. ▪ It is likely to have been given on a confidential basis and disclosure is likely to result in family difficulties and undermine the trustee's ability to act impartially and effectively (rationale) ▪ The Bs' right is limited to documents which are property of the trust as opposed to property of the T which are prepared for his own purposes. ▪ Trustees duty to disclose → Court emphasised it is not absolute and is subject to limitations → especially for documents that review trustee's reasons for exercise of their discretion Aligns with Re Londonderry
Reasoning	Mahoney JA:

	▪ "if a beneficiary requests it, a trustee is in general obliged to provide documents and information to the beneficiary, at his cost, in relation to the trust property and to provide an accounting in respect to the administration of it… However there are limits to the extent of the right." ▪ "The documents or information sought may be the property of the trustee and not, in the relevant sense, of the trust." ▪ "I would, for myself, see the matter of confidentiality as being of particular significance in discretionary trusts of the present kind… if the settlor's wishes cannot be dealt with in confidence, the purposes of the trust may be defeated." Suggests that the courts can infer an obligation of confidentiality over particular trust information

McDonald v Ellis (2007)	
Facts	Testamentary trust directing income (rent) to be paid to Mrs Ellis and that upon her death, the property pass on to her children. One of the children sought to be provided with the accounts in relation to the trust property. Vested interest.
Decision	Held B's were entitled to accounts included in information in this context. ▪ Someone with future right not yet vested can inspect property and documents.
Reasoning	Bryson AJ: ▪ "there is nothing in the nature of a discretionary ground on which any withholding of the plaintiff's entitlement to information could reasonably be based." ▪ "nothing was advanced as a reason for the Court to enforce Ms Ellis' confidentiality by withholding the rights of some other person" This right of vested interest of B is stronger than that of an object of a discretionary trust, as the former has a direct and fixed entitlement to the trust property or income as opposed to a mere expectancy → right to information is more robust as it directly relates to your ability to monitor and enforce the trustee's fiduciary duties, not just merely expecting it.

- **Duty to Administer the Trust Personally**

Re Speight (1883)
Facts: A lay trustee under a will was responsible for investing trust money. He chose to invest funds in municipal corporation securities and a reputable broker to handle the investment – the broker embezzled the funds without purchasing securities as instructed. B's sued Gaunt, claiming he breached his duty by paying the money to the broker. **Held:** Trustee cannot delegate trust. **Reasoning**: a trustee may not employ an agent where he should do the work himself; but he may employ an agent where … it is in the ordinary course of business to use others, and if he runs no needless risk in doing so. (Bowen LJ) COME BACK TO THIS IN YOUR LECTURE NOTES??

- **Duty to Invest**