UNIT 5: CHALLENGES IN TRUST LAW



Contents

- Law reform task
- Recapping Certainty of objects
- Purpose Trusts
- Wealth preservation
- Overseas trusts
- Secret and half-secret truts

UNIT 5: LEARNING OUTCOMES

- Explain the availability of non-purpose trusts
- Explain how trusts can be used to aid wealth preservation
- Explain the use of trusts to preserve secrecy in inheritance and the enforcability of such trusts
- Analyse how developments in private express trusts have challenged core principles
- Evaluate your law reform

ACTIVITY 1: REVIEWING YOUR LAW REFORM

- Step 1: In your law reform groups, finalise your planned law reform and be ready to present your draft proposals to the whole group.
- Step 2: Swap proposals with another group. That group should review your proposals and give feedback (do this twice).
- Step 3: Give feedback to the groups.
- Step 4: Spend 10 minutes in your group reviewing the feedback and agreeing your final plans.
- **You need to make any amendments by Friday 1st November**

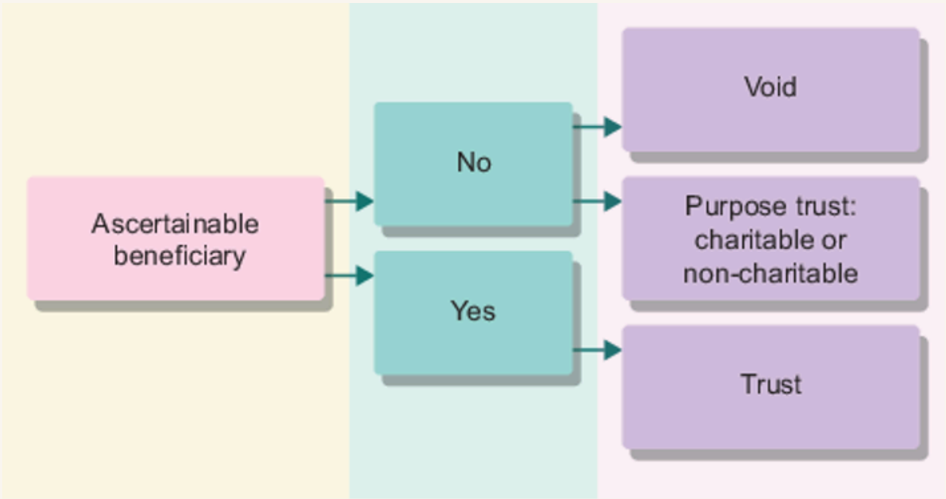
CERTAINTY OF OBJECTS

- For a non-charitable trust to be enforceable, the objects/beneficiaries must be sufficiently identifiable: ***Morice v Bishop of Durham* (1805) 10 Ves Jun 522**
- Two reasons:
  - Who can benefit from the trust
  - Who can enforce the trust
- Watkin (2007): fundamentally necessary for trustees to understand how to manage the trust property - otherwise power would be unfettered
- Discretion can be given to trustees to decide how individual beneficiaries benefit within a class



PURPOSE TRUSTS

- Per Lord Evershed MR, in Re Endacott [1960] Ch 232:
  - *"No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries."*
- Certainty of objects directs that trusts should have identifiable beneficiaries for the trust to be valid (otherwise void).
- Purpose trusts are an exception to this rule, which allow the trust to continue, despite no ascertainable beneficiary.
- Two types of purpose trust:
  - charitable (later in module)
  - non-charitable



PURPOSE TRUSTS

- Trusts created for a specific purpose
- **Re Astor's Settlement Trust [1952] Ch 354**
  - Created a trust for 'maintenance of good understanding between nations and the preservation of the independence and integrity of newspapers'
  - Court held void for uncertainty: stated aims did not specify person who was entitled to the trust and able to enforce
- **Re Endacott [1960] Ch 232**
  - Testator transferred residuary estate to Devon Parish council for providing some form of memorial to himself
  - Not a gift to council, but intended to impose an obligation on them. Failed for certainty of objects.

"The only beneficiaries are purposes and at present unascertainable persons, it is difficult to see who could initiate proceedings. If the purposes are valid trusts, the settlors have retained no beneficial interest and could not initiate them. It was suggested that the trustees might proceed ex parte to enforce the trusts against themselves. I doubt that, but at any rate nobody could enforce the trust against them"
Per Roxburgh J in *Re Astor*

WHY SHOULD THEY FAIL?

- **Lack of beneficiaries (objects)**
  - Trusts are mandatory in nature: imposing obligation on trustees
  - Beneficiaries are those capable of enforcing trusts
  - Courts always guarded the rights and responsibilities of beneficiaries
  - Purposes cannot initiate proceedings against trustees: so void for lack of beneficiary
  - Beneficiary is the equitable owner (no equitable owner)
  - Cayman Islands: use of the enforcer (protector)
  - Charities: Attorney General has a role
- **Uncertainty**
  - Rights are illusionary unless capable of identifying who they belong to (equity)
- **Perpetuity rule**
  - Not desirable for property to vest indefinitely
  - Common law: void from the outset
  - Private (non-charitable) purpose trusts pre-date modern reforms

NON-CHARITABLE PURPOSE TRUSTS

- Purpose trusts are an exception to the general rule that a trust without a named beneficiary is void, assuming the specific strict requirements are met.
- Three elements need to be established for a non-charitable purpose trust to be valid:
  - it meets the requirements based on the Endacott principles ***Re Endacott*** **[1960] Ch 232**
  - it is limited in perpetuity (time limitations discussed earlier apply)
  - there is someone willing to carry out the purpose – this s a question of fact.



Key sources: Re Endacott [1960] Ch 232

ENDACOTT PRINCIPLES: TRUSTS FOR...



Pet maintenance: ***Re Dean*** **(1889) LR 41**



Erection or maintenance of graves, tombs or monuments: ***Trimmer v Danby*** **(1856) 25 LJ Ch 424**



Saying of private masses (public is charitable): ***Bourne v Keane*** **[1919] AC 815**

NON-CHARITABLE PURPOSE TRUSTS

- Generally gifts to maintain animals are charitable. Trusts to maintain specific pets can be treated as valid private purpose trusts
- ***Pettingall v Pettingall* [1842] 11 LJ Ch 176**
    - Testator's executor given fund to benefit testator's black mare. On her death, any surplus funds to executor
    - Testator willing to carry out wishes
    - Residuary legatees were entitled to supervise the performance of trust, but not primary beneficiaries
- **Re Dean (1889) LR 741**
    - Testator directed trustees to use £750 per year for maintenance of horses and dogs
    - Valid: Court treated lives of the animals as 'lives in being' for purposes of perpetuity rule (earlier cases treated as human life) – **Re Kelly [1932] IR 255, cf Re Haines The times 7 Nov 1952:** Cat 21 years
- Re Thompson [1934] Ch 342: Fox hunting



Key sources:

Pettingall v Pettingall [1842] 11 LJ Ch 176 Re Dean (1889) LR 41

MONUMENT CASES

- A trust for the building of a memorial or monument in memory of an individual is non-charitable
- Can exist if the trustees wish to carry out the task
- **Mussett v Bingle [1876] WN 170**
  - £300 to executors to erect a monument to testator's wife's first husband
  - Valid although additional gift for upkeep of monument invalid because it infringed the perpetuity rule
  - Allowed severance of some gifts to allow for first gift to take effect
- For gift for further upkeep to be valid, must restrict to within the perpetuity period, otherwise gift is invalidate: ***Re Hooper*** **[1932] 1 Ch 38** ("so long as legally can do - interpreted as within perpetuity period)



Key sources: Mussett v Bingle [1876] WN 170

SAYING MASSES

- ***Bourne v Keane* [1919] AC 815 (HL)**
  - Held: saying masses valid
  - prior to this case: held invalid for lack of human beneficiary and superstitious activity
  - *Bourne* is limited to private masses (public charitable)
- Non-Christian masses also held as valid purpose trusts: ***Khoo Cheng Teow* [1932] Straits Settlment Reports 226**
  -



Key sources: Bourne v Keane [1919] AC 815

COURTS APPROACH

- The approach of the court is to decide:
  - whether a gift or trust is for the promotion of a purpose *simpliciter* - which is void
  - for the benefit of persons, capable of enforcing the trust
  - determined from trust instrument
  - settlor could create what on paper appears to be a purpose trust, but actual benefits individuals indirectly (valid)



Key sources:
Re Denley's Trust Deed [1969] 1 Ch 373

TRUSTS FOR WEALTH PRESERVATION

- Trusts are an incredibly versatile mechanism.
- Originally devised to remedy injustice.... but
- Since their advent, long been used as a means to:
  - efficiently transfer wealth between generations
  - preserve wealth, e.g. hide assets from divorce
  - avoid paying taxes (even back in feudal times)
- Discretionary trust is an effective vehicle for this, as not entitled to the benefit until discretion applied in favour
- Clients will each have differing needs
- Can take effect:
  - during lifetime (*inter vivos*)
  - after death (testamentary)
  - mixed



Reflection: Is it right that wealthy individuals can use trusts to reduce their tax liabilities?

TRUSTS AND TAXES

- Taxes are mandatory financial charges imposed on individuals and corporations used to finance public services.
- Examples:
  - Income tax
  - Capital gains tax
  - Inheritance tax
- Since feudal times, trusts have been designed to exploit loopholes in tax rules, or favourable tax rules.
- Often used in a way not intended by legislature
- More prevalent use in modern times: diverse range of products available.
  - those marketing often emphasise tax benefits
- However, significantly inaccessible to most: wealth pre-requisite
- Expensive to set-up: schemes only tend to benefit the very wealthy!



TAX MINIMISATION

- Tax minimisation can involve two types of practices:
    - tax mitigation
    - tax avoidance
- Saving in tax-free ISAs or pension schemes are a form of tax mitigation.
    - Typically unobjectionable, despite reducing state income
- Common objection is to tax avoidance
- Liberal societies, typically ‘progressive’ taxes which tend to be avoided, e.g. those which charge a higher rate (%)



TAX AVOIDANCE DEBATE

- Supporters of progressive taxation view it as (Piketty, 2014, p. 630):
  - A fair, just, and legitimate way to redistribute wealth.
  - An instrumental tool in reducing inequality
- Opponents argue that using the tax system for wealth redistribution is (Hayek, 2009, Ch. 20):
  - Unfair and unjust to wealthier individuals: a coercive approach, where the majority (less affluent) forces the minority (wealthier) to pay higher rates .
- Hayek's highlights that:
  - The majority would resist paying higher taxes themselves.
  - Using political power to impose a higher tax burden on the minority is both unfair and illegitimate.
  - Whilst not explicitly advocating tax avoidance, Hayek could be interpreted as:
    - Justifying tax avoidance as counteracting the "tyranny" of the majority.
    - Suggesting that tax avoidance may not always be seen as problematic, depending on one’s perspective on fairness and justice.



ACTIVITY 2: CLOSING TAX AVOIDANCE LOOPHOLES

- Tax avoidance schemes reduce state revenue. Can you identify some reasons why successive governments might have been unsuccessful in closing such schemes and therefore recovering lost tax?

AVOIDANCE V EVASION

- Tax avoidance is **not** a criminal offence
  - legitimate use of schemes to manage wealth in a tax efficient way
  - reducing income, CGT and/or inheritance tax
- Tax evasion **is** a criminal offence
  - committed where too little tax paid
  - falsely declaring income when calculating tax due
- This is not a tax law module: you do not need to understand this difference in any more detail.



ACTIVITY 3: TRUSTS TO REDUCE TAX

- Consider the following product, which is a real example of a product advertised by Canada Life UK called the ‘Wealth preservation account’ and answer the questions that follow. This account uses a trust model to assist with wealth planning.
    - How does this account reduce the amount of tax the settlor pays during their lifetime?
    - How does the account reduce the tax due by the settlor on the gift made to her daughter?
    - How does this account reduce the tax due on the settlor’s estate after their death?



OVERSEAS TRUST

- The trust cited in the last activity was housed overseas
- Several jurisdiction worldwide established themselves as specialist international finance centres: tax havens
- Offshore financial centres proven attracted with several individuals seeking to preserve wealth
- Note not all mechanisms described in the video are trusts.
- The video was recorded in 2018, rates of tax may have changed since publication, and tax rules or the specific examples may have since changed
- The post-Brexit proposals discussed were never enacted



WWW.YOUTUBE.COM/WATCH?V=JRLNDGFIPB4

Reflection: How does the example trust given challenge the traditional roles and responsibilities of the trust parties?

OFFSHORE INTERNATIONAL TRUST

- Offshore international trusts are trusts that seem to be administered in different jurisdictions to where the settlor is domiciled/resident
- Exact benefits will depend on domicile/resident status and the specific trust created
- Typically attractive wealth preservation tools:
  - tax advantages, lower tax regime of jurisdiction where trust is administered applied
  - outside the E&W courts remit for litigation
    - family or creditors
- Useful in avoiding perpetuity rules, as in other jurisdictions do not apply



SUCCESSFUL TAX HAVENS

- The success of any jurisdiction in establishing itself as an international finance centre has chiefly been driven by their offer of a combination of:
  - favourable (low) tax rules
  - a supportive regulatory environment
  - specialist legal and financial expertise
  - high levels of confidentiality.
    - Highly sought after
    - Defeat object if routinely disclosed
    - Secrecy significantly challenges tax authorities of home state in pursuing taxes



TAX AUTHORITIES CATCHING UP

- Attempts to oust E&W courts and HMRC not always successful
- Historic legal loopholes closed
- Various rules for overseas trusts and avoidance mechanisms (you do not need to know these)
    - significantly tightened rules applicable to UK residents and taxpayers
    - various mechanisms to counter avoidance
    - retrain the ability to levy taxes against overseas gains: **Income Tax Act 2007, Part 13 Ch 2**
- Constant game of cat and mouse: as quick as one loop hole closes, another opens



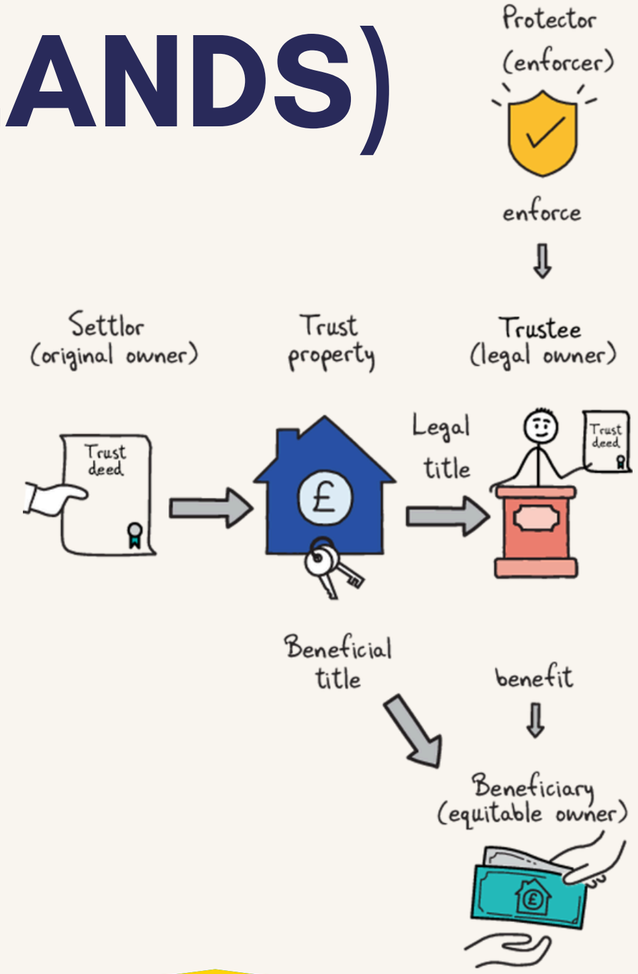
REVISITING BENEFICIARY PRINCIPLE

- Fact that assets are held in overseas arrangment does not always mean that assets are outside the E&W courts jurisdiction
- Limited circumstances can find that assets are held in trust arrangement even where such arrangements are not recognised in the jurisdiction held: ***Akers v Samba Financial Group*** **[2017] UKSC 6**
- Key challenge for offshore trust is beneficiary principle.
- Trust law regime of the jurisdiction may be different from that operating in E&W, conflicting with beneficiary principle
- Example is the STAR trust of Cayman Islands



STAR TRUSTS (CAYMAN ISLANDS)

- Cayman Island trusts for settlors living in other jurisdiction are governed by the STAR regime
- STAR does not require a beneficiary with enforcable rights in order for the trust to be held as valid.
- Instead, requires an ‘enforcer’ (protector).
- Beneficiary under STAR does not have the right to enforce the trust, only the enforcer can do so
- Enforcer is not (usually) a beneficiary to the trust - usually a local professional



Key sources: Trusts Law (2011 Revision), s 100(2) (Cayman Islands)

STAR TRUSTS

- Removing beneficiaries from enforcement role: settlors can structure the STAR trust in a away that enables beneficiaries to be treated as if they have no rights for tax purposes (Hudson, 2014)
- Raises the question as to how far such trusts may be considered trusts if the beneficiaries have no prop rights
- STAR trust is controversial:
    - unclear if would be recognised in E&W because of failure for certainty of objects.
    - how would be treated for tax purposes
- If invalid: property would be regarded as that of settlor for E&W tax law (as trust failed)



PRIVACY IN SUCCESSION

- During lifetime, will is entirely private
- But after die, probate records become public, including any will
  - ensures transparency and fulfils public function
  - alerts prospective beneficiaries of inheritance
  - other people (family) who may want to make a claim against estate
- Privacy ends in relation to testamentary gifts
- Risks reputational impact for the testator, their family and potential beneficiaries



Reflection:
What might give rise to reputational impact or embarrassment following the publication of a will?

REINSTATING PRIVACY

- Trusts law offers some solutions to reinstate privacy in succession:
  - can create family trusts and place property in trust during lifetime:
    - benefiting settlor in life, and others after death
    - trust property escapes estate and not
- Secret and half-secret trusts
  - generally operate behind will
  - secretly arrange for inheritance to be transferred to beneficiary named in the will



SECRET TRUSTS

- Fully secret
- Testator states in will gift/property inherited by X
- Outside of will inform X that they will hold property on trust for another beneficiary
    - This is not recorded in the will
    - Separate documentary evidence may exist
- Information about the secret trust escapes the public record
- Enables testator to benefit an individual or an organisation without identifying them in their will
- Risk: named beneficiary (X) denies they hold property on trust, and do not ultimately transfer the property



HALF-SECRET TRUSTS

- Similar to secret
- Main difference is that does state in will that named beneficiary will hold the property on trust for another
- Additional layer of transparency
- Reduces possibility for named beneficiary to deny they hold the property on trust for someone else



ENFORCEMENT



- Neither full or half secret trusts need to comply with the formalities for a valid will, even though they are created after death
- Might seem bizzare as conflicts with legislation, but this is defended as equity intervenes to protect the rights of the intended beneficiaries: ***Re Fleetwood*** **(1880) 15 Ch D 594**
- Social factors may have influenced this position:
  - historically were used to benefit illegitimate children
    - reputational and sometimes safeguarding factors, may not want to name illegitimate children in will
- Maxim applies: that equity intervenes to prevent a statute being used as an instrument of fraud
  - equity otherwise permit secret trustee to use wills act to deny rights of secret beneficiary: ***McCormick v Grogan*** **(1869) LR 4 HL 82**

ENFORCEABILITY

- For a secret or half-secret trust to be enforceable, three key elements need to be established
    a. intention on the part of the testator that the beneficiary identified in the will/secret trustee be subject to an obligation in favour of the secret beneficiary
    b. that this intention is communicated to the secret trustee before the testator's death, along with details of terms and extent of the secret trust
    c. the intended secret trustee has accepted this obligation.
- For half-secret trusts, there are two additional requirements, that:
    a. communication was made before the will was executed
    b. the information communicated is consistent with that detailed in the will.
- But, even where enforceable, ability to ensure property reaches the intended secret beneficiary is at risk because it still relies on the secret trust being able to transfer the property to the intended beneficiary. **Why?**

FAILURE OF SECRET TRUST

- If the secret trustee dies before the testator, they won't be able to inherit the property under the testator's will.
- This prevents the property reaching the intended secret beneficiary.
- This risks the secret trust being void for absence of certainty of subject matter. This is because:
    - any gift made by the testator's will fails, and does not pass to the intended secret trustee (who is the beneficiary named in the will).
    - this means the gift reverts to the estate, and is otherwise distributed (via the will if stated, or intestacy)
    - so no property enters the secret/half secret trust, and the trust would fail for certainty of subject matter



ACTIVITY 5: SBA BENEFICIARY (SBA) 1

A settlor has established a trust in which she has provided £1,000,000 for the maintenance of good understanding between nations and the preservation of the independence and integrity of newspapers.

Which of the following best describes the enforceability of this trust?

a)The trust satisfies the three certainties. It is a valid private express trust.
b)The trust satisfies the three certainties because this is a valid non-charitable purpose trust.
c) The trust fails for certainty of objects because it is not a valid non-charitable purpose trust.
d)The trust fails for certainty of subject matter because it is not a valid non-charitable purpose trust.
e)The trust fails for certainty of intention because it is not a valid non-charitable purpose trust.

UNIT 5: LEARNING OUTCOMES

- Explain the availability of non-purpose trusts
- Explain how trusts can be used to aid wealth preservation
- Explain the use of trusts to preserve secrecy in inheritance and the enforcability of such trusts
- Analyse how developments in private express trusts have challenged core principles
- Evaluate your law reform

RECAP

UNIT 5: READING MATERIALS

- You can draw on the following chapters of your textbooks to deepen your understanding of the topics discussed in this unit.
  - Watt (2023) chapter 4 and 9
  - Ramjohn and Bray (2024), chapter 3, 10 and 11
  - Barr and Pearce (2022) chapters 18, 24-29

EXPLORING FURTHER

- You may find the following sources of interest to you in exploring the topics discussed in this unit further. You are not expected to read these to pass the module, they are provided should you wish to explore the topics further.
  - Allan, G.W. (2011) 'The secret is out there: searching for the legal justification for the doctrine of secret trusts through analysis of the case law', Common Law World Review, 40(3), pp. 311-344.
  - Edelman, J. (2013) 'Two fundamental questions for the law of trusts', Law Quarterly Review, 129(1), January, pp. 66-86.
  - Goodman, D. (2014) 'The trust protector - a creature of duty or settlor's shadow?', Private Client Business, 6, pp. 264-270.
  - Hudson, A. (2014) Great debates in equity and trusts. London: Palgrave Macmillan.
  - Kincaid, D. (2000) 'The tangled web: the relationship between a secret trust and a will', Conveyancer and Property Lawyer, 2000, pp. 420-426.
  - McKay, L. (1973) 'Trusts for purposes - another view', The Conveyancer and Property Lawyer, 37(6), pp. 420-435.
  - Penner, J.E. (2014) 'The (true) nature of a beneficiary's equitable proprietary interest under a trust', Canadian Journal of Law and Jurisprudence, 24(2), pp. 473-500.