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Introduction

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

The whole relationship which arises between the parties in respect of the property the subject of the trust, and the obligation of the trustee to the beneficiary and the interest of the beneficiary in the property as results flowing from the existence of that relationship.

The Nature and Classification of Trusts

Different kinds of trusts:

- **Express trusts**
  - Created when the settlor intends to create a trust (rather than a gift), must declare it over property they hold and it makes possible a split between the ownership and management of an asset and the enjoyment of the property
  - The trustee has the ownership and management and the beneficiary has the enjoyment

- **Constructive trusts**
  - Arise by operation of law – the legal owner is treated as trustee (although they never agreed to be) – and are imposed for breach of fiduciary duty

- **Resulting trusts**
  - Arises where person A transfers property to B in circumstances where B is not intended to obtain beneficial title to it
  - Equitable title in the property is said to ‘result’ back

Basic Structure of an Express Trust

There are two main forms of an express trust:

- **Self-declaration**
  - The settlor owns property, and declares that from then on, the settlor holds it on trust for the object (beneficiary/purpose);

- **Transfer**
  - The settlor vests property in a trustee, subject to an equitable obligation to hold the property for the benefit of the beneficiary

A trust is not a legal entity in the same way as a corporation – it has no standing in legal actions. Therefore, the trustee is the party that must sue, or be sued – not the trust itself.

The Parties to an Express Trust

To establish a valid express trust we need the following parties:

- Settlor
- Trustee
- One or more beneficiaries

The Settlor

Any person or corporation can be the settlor of the trust, provided they have legal capacity

- Where a trust is established by self-declaration, the settlor is also the trustee
- The settlor can also be a beneficiary
- The settlor usually has no rights with respect to the trust property once a valid trust is created

Trustee

The trustee is the legal titleholder of the trust property (subject matter)
Dual ownership ('split') of property: legal (or equitable) title vested in trustee; and equitable (beneficial) ownership vested in beneficiary.

Trustee cannot be sole trustee and sole beneficiary

The no. of trustees in Victoria is limited to 4: Vic s40 Trustee Act 1958

A trustee must have legal capacity to act

- Corporations can be trustees
- If the trustee is unable or unwilling to act as trustee, the trust itself will not fail
- Bankruptcy/insolvency does not create automatic disqualification, but does create grounds for a beneficiary to seek a trustee's removal

A trustee has certain obligations and duties imposed on him/her by 3 sources:

1. Trust deed (if there is one)
2. Equity – fiduciary obligations; and
3. Legislation – the Trustee Act 1958 Vic

Objects/Beneficiaries

There are the two main permissible objects of a trust:

- **Persons** = Beneficiaries  
  - Persons include natural and legal persons (often called the *cestui que trust*)
  - These are called private trusts
  - Settlor can determine beneficiaries (fixed trust) or leave it to the trustee to decide according to some criteria (discretionary trust).

- **Purpose**  
  - Only charitable purposes are valid (some exceptions)
  - These are regarded as public trusts
  - The Attorney-General has standing to enforce a charitable trust because they lack beneficiaries that have standing to sue
Creation of Express Trusts

Express trusts can be created during the settlor’s lifetime (*inter vivos*) or by the testator's will (testamentary).

**Consequences of Creating a Trust**

Generally, the creation of a trust is irrevocable – once property is vested, where certain intention exists, it is taken as the settlor parting with the property, with a permanent disposition (*Mallott v Wilson*).

- A valid trust can continue after refusal by a trustee, and can exist before the trustee knows about it
- Once a trustee disclaims a trust, the legal title reverts back to the settlor who has to hold it on the terms in the trust (as if a self-declaration)

A right of revocation must be inserted into the trust deed at the time the trust is created in order for it to be valid.

**Essential Components of an Express Trust**

An express trust has several components:

- The three certainties:
  - Certainty of intention
  - Certainty of subject matter (trust property)
  - Certainty of object (beneficiary/purpose)
- Constitution – trustee holds legal title to the trust property – only relevant to trusts by transfer
- Formalities under PLA s53-55

**Modern Application of the Trust**

**Family Trusts**

Trust property given to trustee (nominee company) – trustee has wide discretion as to distribution of income (income splitting).

- Discretionary trust – tax advantages
- Trustee has power to accumulate income
- Beneficiaries usually husband, wife & children
- Trust to continue for specified period
- Usually power to advance capital to beneficiaries

**Unit Trust**

Beneficiaries (‘unitholders’) have fixed interest in all trust property & usually right to call for distribution of income attributable to unit & proportionate distribution of proceeds (assets) of trust on termination. It is a popular means of effecting joint investment.

Unit differs from share in company – a share is a separate piece of property, whereas a unit confers equitable interest in trust property. It consists of a Manager (usually private company) who purchases property & vests in trustee

- Trust property divided into shares (‘units’) – represent investor’s entitlement to annual distributions & interest in assets
- Manager sells units to public for market value + service charge
- Additional units may be created

**Advantages of unit trusts:**

- By pooling money, investors can gain access to financial markets & diversify risks
- May be tax advantages. Especially if income distribution is discretionary
- Unit price reflects asset base (not like shares which have market values which fluctuate independent of the asset base)
• No legal obstacle to manager of unit trust repurchasing unit at price equal to market value (would require formal reduction in capital of investment company)
• Legislation to protect unit holders – Chapter 5C Corporations Act

Trading Trusts

Trusts in which trustee carries on business for beneficiaries. The trust deed must provide trustee with powers to conduct business, including powers of investment.

Preferred in recent years esp. for small business – not taxed in same way as companies for income/payroll tax. Unit trusts can be used for business partnerships.

| Certainty of Intention |

We are looking for evidence that the settlor creates a kind of relationship of the kind in law known as a trust. We look at the words of the trust instrument (trust deed) or that words that were used (if oral declaration).

It may be possible to look at extrinsic evidence, but this is much less significant after Byrnes v Kendle.

We look for:

• Clarity of Intention
• Objective Intention
• Immediacy of Intention

Rules of Construction

Equity looks to intent rather than form, therefore no particular form of words is necessary. The court will attempt to construe the language of the settlor according to its ordinary meaning of the words in the context of the overall document. We are looking for imperative words – words imposing an obligation.

The onus of proof lies with the party seeking to establish the existence of the trust.

Clarity of Intention

The settlor need not use the word ‘trust’; evidence of an intention to create a thing at law that can be described as a trust is enough (Re Armstrong, Re Kayford).

• The court may look at subsequent conduct to read what the intention of the parties were at the time, or to contextualise statements like ‘the money is as much yours as mine’ (Paul v Constance)
  o This appears problematic after the decision in Byrne

Objective Intention

Intention is to be determined objectively. The settlor does not need to know that the relationship they are setting up is a trust – the substantive effect is crucial.

The High Court has affirmed that the intention to create a trust is determined objectively on the basis of the express terms of the trust, and not according to what the settlor’s ‘real’ intention may have been. Insofar as the High Court’s earlier decision in Jolliffe held otherwise, it is now overruled (Byrnes v Kendle)

The judges’ views can be outlined as follows:

French CJ: The relevant intention is that manifested by the declaration of trust. It doesn’t require any further inquiry into the subjective or real intention of the settlor. He agrees with Gummow and Hayne JJ in regards to objective intention.

Gummow and Hayne JJ: Like contract law, the test is not concerned with the real intention of the parties, but the outward manifestation of the parties. While the origin and nature of contract and trust are different, there is no dichotomy between the two.

Crennan and Heydon JJ: emphasise the importance of looking at the text itself, consistent with contract and
The availability of the ‘subjective intention’ test opens up the possibility of parties coming to court with self-serving evidence, seeking to establish a manifestation of a trust that favours them – this presents evidentiary and policy problems. By placing a focus on the text, it promotes parties’ adherence to drafting precise documents.

Extrinsic Evidence

Extrinsic evidence cannot be used to contradict a clear manifestation of an intention to create a trust, unless there are vitiating factors (Byrnes v Kendle). If there is clear writing, then there is no need to go beyond the text. Similarly, if there are clear oral statements of a declaration of trust, there is no need to go beyond what was said.

If there is ambiguous writing or statements, you can look to all surrounding circumstances to help resolve the ambiguity (Byrnes v Kendle)

- This doesn’t change the nature of the task
- We are trying to work out what a reasonable person would make of the words in the context of the conduct and surrounding circumstances

If there is a sham or a vitiating factor, we can immediately have regard to extrinsic evidence to prove that

Immediacy of Intention

In order to create a trust, the intention must be to create a trust immediately. A declaration of intention to create a trust must be immediate, as opposed to at some future date (Harpur v Levy). To purport to declare a trust but to state that it won't come into operation until a later date is inconsistent with an intention to relinquish beneficial interest in the property.

It is therefore necessary to distinguish between the creation of a trust immediately, and the creation of a promise to create a trust in the future (which equity will not enforce)

- If the beneficiary has provided consideration, equity will enforce the trust at the date specified

Wills – Testamentary Trusts

Intention for Wills

In the context of a will, it is clear the testator intended to dispose of all of their interest in the subject of the will. The issue at hand is whether their intention was to do so by way of trust or some other method.

If there is no clear manifestation of an intention to create a trust, an alternate legal characterization as a gift may be recognized instead. The options per Dixon J in Countess of Bective:

1. **Trust**: The recipient of the gift would be a trustee for the other named party
2. **Charge**: The recipient takes the gift, subject to a charge
3. **Condition**: The recipients’ rights to the property are subject to performance of a condition (sometimes called a ‘true condition’)
4. **Equitable condition**: The gift is subject to a legally enforceable personal obligation (see Gill v Gill, 1921, NSW)
5. **Gift with no condition/restriction**

An equitable condition says that if you get the property, you must do A, and if you don’t, the person who in favour for it must be done, can sue for performance. The court will generally try to avoid construing a true condition – since everyone ‘loses’ if a true condition is not met due the forfeiture of property

- We analyse what type of condition it is in light of the proportionality of the condition to the gift (Gill v Gill)
  - Giving one son the family home on the condition that he allow his sisters (so long as they remain unmarried) to live in the house, with 2 separate bedrooms and a sitting room is an equitable condition (Gill v Gill)
  - Giving all property to one son (of 5) subject to him paying sums to his brother in 2 years is a true condition, due to the centrality of the condition to the gift (Re Gardiner)