EXPRESS TRUST

1. property must vest in Tee

***Milroy*** – no proper transfer to Tee means gift to B fails (court can’t perfect imperfect gift)

***Re Rose*** – where S has done all he can to effect transfer, equity will treat it as done (trust ok)

a. personal declaration of trust

***Glynn*** – personal declaration effective w/o communication to B

***Carson*** – personal declaration trust requires intention of S to be immediately and unconditionally bound

b. perfection of imperfect gift (only for executors)

***Strong v Bird*** – inter vivos gift imperfect for lack of vesting will be perfected if donee acquires property as executor of donor’s estate

***Re Halley*** – court refused to extend **Strong v Bird** to trusts (outside executor context) PROF: they should have applied the rule here

2. the three certainties

a. certainty of subject matter – certainty of the property and the amount of beneficial interest to each B; courts favouring finding certainty

“residue” is sufficiently certain – so trust won’t fail for uncertain subject matter if this term is used

***Beardmore Trusts*** – trust property and beneficial interest must be described with “sufficient exactness”

***Sprange*** – to H “for his sole use and at his death the remaining part of what is left, that he doesn’t want for his own wants and use...” = uncertain subject matter

***Re Golley*** – “reasonable income” sufficiently certain; objective standard of reasonableness that can be established and applied

***London Wine*** – must be able to ascertain what B’s interest is and what property that interest attaches to

b. certainty of words/intention – FUNDAMENTAL

precatory words (desire, hope, request, wish, with confidence) – starting presumption that no trust is formed; only moral obligation

looking for an imperative: is there certain and immediate intention to create a trust (not just general intent to benefit)

***Nicoll*** – look at ordinary meaning of words used & how they operate in context of document; precatory words = presumption of gift

c. certainty of objects

requires: (1) trust in favour of persons, not purpose; (2) class of Bs described in sufficiently certain terms so trust can be performed

**fixed trust** – no discretion to decide B or proportion of interest; TEST: “list certainty test” (***IRC v Broadway Cottages***)

even if certain can become void for evidential uncertainty – impossible job for Tees to draw up list

**discretionary trust** *–* Tee must distribute, but discretion to choose from Bs; TEST: “criterion certainty test” (***Baden No 1***)

even if certain can become void for administrative unworkability – if range of objects so hopelessly wide

**powers of appointment** – not required to distribute, duty to consider whether to distribute; TEST: “criterion certainty test” (***Gulbenkian***)

doesn’t fail for administrative unworkability (***Manisty; Hay’s Settlement***); fails if exercised capriciously (***Manisty***)

**Duties of T if mere power:** (1) obey trust instrument, don’t make appointment not authorized by it; (2) periodically consider whether to exercise power; (3) consider range of objects of the power; (4) consider appropriateness of individual appointments

***Jones v T Eaton*** – consider words of the trust in relation to testator’s previous history

***Baden No 2*** – evidential uncertainty: difficulty in ascertaining existence or whereabouts of members of the class; court can give directions so trust won’t fail because of it

***Baden No 1*** - when evidential uncertainty becomes administratively unworkable then discretionary trust likely fails; where class of objects too wide making trust difficult to supervise and enforce

3. revocation by settlor – can only revoke where power to revoke included in the trust; w/o reservation of this power S falls out of picture, only B can terminate the trust

***Bill v Cureton*** – S of trust is bound by it and isn’t entitled to the assistance of the court to release himself from it

RULE AGAINST PERPETUITIES

presence of giftover may indicate that interest itself is contingent

CL Rule: if vesting of equitable interest is to occur it must do so within lives in being + 21; determined at outset of trust

Comes up where some condition has to be fulfilled before person can become B with equitable interest in property

Rule prevents remoteness of vesting; ossifying property use; prevents ruling from the grave

*Perpetuity Act* – contingent interests presumed valid until actual events show interest incapable of vesting (9(1)); interest must vest w/in 80 years (7(1))

FORMALITIES

*Inter vivos*- no writing requirement for transfer from S to B; except if property is land (*Law & Equity* s 59); B transferring must be in writing and give notice to Tee (*Law & Equity* s 36)

***McCormick*** – where person uses formalities to commit fraud equity makes them a Tee for the B; only apply doctrine of secret trusts in cases of clear fraud; if Tee was allowed to keep property they gained by inducing testator based on promise to benefit B, the court would be participating in that fraud

*Wills* – must be in writing, signed, witnessed (*Wills Act* s 3, 4); exceptions = secret and half secret trusts

**Fully secret trust:**

***Ottaway*** – fully secret trust requires: (1) intention that named B to hold on trust for real B; (2) communication of this intention to named B, during testator’s lifetime; (3) B must accept or acquiesce in this proposal

***Re Stead*** – A induces B to leave property to A and C as tenants in common by promising he and C will carry out B’s wishes, but C doesn’t know anything about it until A’s death – A is bound, C is not bound

***Re Boyes*** – communication and acceptance must be done during testator’s lifetime

**Half secret trust:**

***Blackwell*** – necessary elements: intention, communication, acquiescence; parol evidence can be used to identify B; terms of will can be established in substantial part by oral evidence – this doesn’t vary the will just gives effect to testator’s intent; communication of purpose to legatee coupled with acquiescence on his part removes the matter from *Wills Act* and brings it into trusts law

***In re Keen*** – if parol evidence contradicts the will it won’t be allowed; terms of trust communicated to Tee must be consistent w/express terms of the will

IMPLIED OR RESULTING TRUSTS

1. AUTOMATIC RESULTING TRUST – operate automatically; B seen as getting beneficial interest greater than intended resulting in unjust enrichment

***Vandervell*** –analyse based on S’s intention that property results back may be invalid; may arise even when S doesn’t want property return to him (now analysed on basis of unjust enrichment)

***IRC v Broadway Cottages*** – trust found void; therefore Tees viewed as holding legal title on ART for S

***Re West*** – surplus estate isn’t for Tees personally unless specifically directed by will; otherwise they hold on ART for testator’s estate

***Re Foord*** – words showing affection pointed to outright gift to sister; therefore no ART to estate despite ambiguous granting words

***Schmidt*** – ART doesn’t arise if at time trust created the S demonstrates intention to part with money outright; usually use non-reversion clause

***Quistclose*** – where specific purpose of loan fully identified to lender, primary duty to use money for that purpose; secondary duty in favour of lender (ie. repayment to lender)

***Balkan Fund*** – funds received through subscription surplus rateably held on ART for individual subscribers

***Re Gillingham*** (NOT FOLLOWED) – ART for surplus funds that were raised through street collection; money could be paid into court to be repaid to those who claimed; any unclaimed money categorized as *bona vacantia*

***West Sussex*** – money collected in small amounts through street collection, tickets, etc meant givers intended to part with money outright (no ART); surplus money was *bona vacantia*

***Re Bucks*** – prima facie distribution of surplus on basis of equality (present members only have right to assets); unless terms in contract provide otherwise; if there is only 1 member left society ceases to exist and assets are *bona vacantia*

2. PRESUMED INTENTION RESULTING TRUST – create rebuttable presumption that gratuitous transfers not intended to transfer beneficial interest (onus of rebutting on transferee)

***Standing v Bowring*** – actual intention to give legal and beneficial title as shown by conduct is binding, isn’t thwarted by PIRT; clear intention that transferor intended to benefit transferee rebuts PIRT

***Niles v Lake*** – standard bank form for joint account doesn’t rebut PIRT; arrangement w/bank doesn’t define relationship of joint account holders; agreement w/bank creating right of survivorship wasn’t adequate evidence to rebut PIRT

***Russell v Scott*** – where no PA you need “satisfactory affirmative proof” of intention to confer beneficial interest; declaration of intention to solicitor was satisfactory proof to rebut presumption

***Young v Sealey*** – intention that transferee have no beneficial interest until transferor’s death avoids *Wills Act*; but this has been allowed by jurisprudence so can violate w/impunity

a. Presumption of Advancement – creates rebuttable presumption that gratuitous transfers to family meant as gift (beneficial interest transfers) (onus of rebutting on transferor); based on idea of natural affection in the relationship

***Murles v Franklin*** – PA is an exception to PIRT where transferee is under species of natural obligation to provide for nominee

HUSBAND TO WIFE

***Mehta Estate*** – where litigation between spouses doesn’t arise from marital breakdown and spouses unable to testify, PA applied; strength of PA varies according to circumstances of the case (PA between H and W is tenuous, easily rebutted)

***Warm*** – joint bank account, H contributes most; PA applies to money in account and rolls over to assets purchased with that $$

FATHER TO CHILD – must be to minor child (***Madsen Estate; Pecore***)

***Shephard v Cartwright*** – acts before/at time of transfer or immediately after are admissible for or against party who did the act; subsequent declarations are admissible only against the party who made them

***Foster*** – PA applies transfer to kids for illegal purpose; couldn’t rebut presumption by introducing evidence of illegal purpose

MOTHER TO CHILD

Historically mother to child = PIRT

Today where custodial obligations (mother or father) = PA operates

***Radway; White v Reid; Hewitson*** – applied PA to transfer from mother to child

WIFE TO HUSBAND

***Re Mailman***; ***Biljanic*** – transfer from W to H = PIRT

ILLEGALITY AND PRESUMPTIONS

*Locus poenitentiae* – allow evidence to rebut where parties didn’t actually carry out illegal scheme and repent; only able to repent if you’ve undone any damage caused (applied in ***Tribe v Tribe***)

***Scheuerman*** – W argues PA, H argues PIRT; court refuses to give effect to any presumption, court won’t be part of illegal scheme; title stays with person in possession [*same result as other cases, PA effectively applied because H couldn’t rebut w/illegal evidence*]

***Goodfriend*** – intent to defraud not enough to preclude evidence rebutting presumption; no one actually defrauded

***David v Szoke*** – gave effect to PIRT; let presumption determine outcome w/o hearing evidence of illegal intent; both parties were involved in illegal intent; court also influenced by fact that there were no creditors at time of transfer

***Gorog v Kiss*** –PIRT couldn’t be rebutted because it would require evidence of illegal intent even though no creditor loss; no PA between brother/sister

***Tinsley (UK)*** – even where illegality was known to courts, person could succeed in recovering property if case could be pleaded w/o need to rely on illegality; PIRT gives equitable title whether illegal purpose revealed or not; DISSENT: once court becomes aware of illegality it will assist neither party (followed strict approach from ***Scheuerman***)

***Foster (Aus)*** – evidence of illegal intent inadmissible to rebut PA; *par delictum* favours possessor; where PA involved refusal to hear illegal evidence works against fraudulent transferor

***Nelson (Aus) rejected in UK (Tinsley)*** – allowed illegal evidence to rebut PA; public conscience TEST: application of (1) is law proportionate; (2) civil sanction must further purpose of the statute and not impose sanctions the statute doesn’t consider (don’t want to overpenalize)

3. COMMON INTENTION RESULTING TRUST – presumption of intention inferred from conduct of parties; formula for doing equity

***Pettkus v Becker*** – DISSENT: contribution by one spouse freely accepted by the other for use in common household gives rise to PIRT

BENEFICIARY

***Schalit v Nadler*** – B has no rights to manage/control therefore can’t exercise administrative or dispositive powers over property in trust; B can’t effect actions that only legal owner has right to effect; B only has personal right of action against T for breach of trust

***Baker v Archer Shee*** – B has distinct equitable interest in the individual items of property that make up the trust fund (as opposed to having interest in proper administration of the trust as a whole)

***Archer Shee v Garland*** – B’s equitable interest is in the fund as a whole rather than in each specific asset that makes up the fund at any given time

***In Re Bagot’s*** – if B as B were able to manage trust this would contradict nature of trust (T has legal title); court can allow B to act as agent of the T and collect rents; if agent B acts contrary to best interests of B (herself) she could be removed

ALIENTATION OF BENEFICIAL INTEREST

*Law & Equity Act* s 36 – beneficial entitlement can be disposed as chose in action; requires writing, signed, delivered to T; w/o notice T can continue to deliver trust as under the trust instrument

***Di Guilo*** – compliance with *L&EA* s 36 allows assignee to sue for damages in his own right; no compliance = equitable assignment subject to rules before *LE&A* (ie. new B needs assistance of old B to sue for damages); noncompliance doesn’t vitiate transfer but makes it very difficult to enforce

***Timpson’s*** – beneficial interest can be disposed by: (1) direct assignment to 3rd party; (2) direct T to hold property in trust for 3rd party; (3) contract for valuable consideration to assign equitable interest to assignee; (4) B declare himself to be T for transferee of interest; where no enforceable rights against T are given to sub-Bs = revocable mandate, not assignment of equitable interest

***Re Wasdale*** – priority among assignees determined by time; first assignee gets priority

PROTECTIVE TRUST – “spendthrift trust”

Terminates B’s right to income when they have done something or something happens that S sets out in trust instrument

After that event occurs – capital and income of B are shifted to new Bs

Use of determinable interest important (until, when) – if worded as condition subsequent it is void; determinable interest is ok

***Re Brewers Settlement*** – S can’t transfer property on protective trust for himself; against public policy

TERMINATION OF TRUST

Requirements for B to terminate trust: (1) B has attained age of majority; (2) B is compos mentis; (3) B is absolutely entitled to trust property (there aren’t any contingencies – equitable interest is vested in B) = *sui juris* (***Saunders v Vautier*** requirements)

***Saunder v Vautier*** – interest vested in B at time of testator’s death only enjoyment postponed; court ignored intentions of testator that B should enjoy at 25 in favour of B’s preference to enjoy now (at 21); law leans toward interpretation favouring early vesting

***Re Lysiak*** – “until Bs are free from Russian regime”; vesting of gift wasn’t suspended just timing/manner of distribution; interest was absolutely vested, Bs could terminate trust

***In Re Smith*** – to terminate discretionary trust: (1) Bs are entitled to all of the funds (both capital and income; T must apply entire funds for Bs); (2) Bs act in unison; (3) Bs are *sui juris*; (4) Bs all agree they want to terminate the trust

***Re Chodak*** – testator had intention that executors had discretionary power but also that Bs would take immediate interests; held discretionary trust was presently vested interest w/future enjoyment subject to T discretion; presently vested = can terminate

Individual Bs who are *sui juris* and absolutely entitled can individually call for transfer of their share of the property; can’t do w/land

***Lloyds Bank v Duker*** – division can occur if it results in minor reduction; but not if reduction is too great; here shares all sold and B calling trust got his share of money

***Re Marshall*** – division of trust property can occur even if division would cause reduction in value of trust property; doesn’t matter if property held on trust for sale w/power to postpone sale

***Re Sandeman*** – can’t divide if it would cause undue hardship on remaining Bs; termination allowed unless clearly unfair to others

VARIATION OF TRUSTS – CL gives courts little jurisdiction to vary trusts; *Trust & Settlement Variation Act* gives more

4 exceptions to inability of courts to vary: (1) inherent jurisdiction – vary admin terms in unforeseen emergency; (2) maintenance jurisdiction – trust to support maintenance isn’t achieving that purpose; (3) conversion jurisdiction – convert trust property where maintenance of kid requires change in asset mix; (4) compromise jurisdiction – where conflict between parties, to avoid litigation

***Chapman*** – court said it has no power to authorize variation of terms even if all adults assent and variation is for benefit of all kids; eliminates court’s compromise jurisdiction

*Trust and Settlement Variation Act* – allows court to approve variation on behalf of certain Bs; increases court’s inherent jurisdiction

**s 2 –** court can only approve arrangement on behalf of B if it’s in that person’s benefit; benefit construed broadly

***Re Burns*** – “benefit” includes financial benefit of tax minimization; tax minimization, advancing financial interests of B = benefit

***Re Weston’s*** – consent refused; financial benefits aren’t the only consideration in determining what benefits a minor; considered educational and social benefits equally as important

***Re Remnant’s*** – “benefit” not confined to financial benefit; includes benefit of any other kind; here benefit of family harmony and marital choice was sufficient to give consent for variation

***Re Harris*** – considerations other than financial may and should be made; but emotional and psychological well being which may or may not occur in the future isn’t enough to justify a substantial variation of the trust; these benefits to group of Bs might be outweighed by disproportionate financial disadvantages to one of them

***Russ*** – TEST for court giving consent: “prudent advisor”; should look at what S’s intent was but not bound by it

***Re Tweedie*** – paramount consideration is possibility of unborn (or contingent B) realizing financial benefit; where likelihood small give liberal interpretation to benefit; less likely new B = more likely court will allow variation proposed by current vested Bs

***Bentall Corp*** – good bargain TEST: would prudent adult motivated by intelligent self-interest and sustained consideration of expectancies and risks and the proposal made be likely to accept; court here gave lots of weight to fact that 97% approved proposal

TRUSTEE

APPOINTMENT – must have legal capacity, live in jurisdiction; no ability to delegate their responsibilities

T must accept an appointment; trust instrument may name replacement; court has inherent powers of appointment (won’t let trust fail for lack of T); if all else fails court can appoint Public Trustee

Ts can be appointed by: (1) express power in trust instrument; (2) general statutory power *Trustee Act*; (3) Bs under principles of ***Saunders v Vautier***; (4) court on application by Bs under *Trustee Act* s 36

Unanimity among Ts required for all decisions unless trust instrument provides otherwise

*Trustee Act* s 27 – ensures that someone can appoint new T; to minimize applications to court to make appointments

*Trustee Act* s 36 – B, T and others w/beneficial interest in trust have standing to apply to court

*Trustee Act* s 31 – power of court to appoint new Ts; court can appoint where “expedient” – persons designated to appoint can’t

***In Re Tempest*** – guiding principles for appointing new T: wishes of S especially re: undesirable characteristics, people who don’t have axe to grind toward S or B, people who will promote and not impede execution of the trust; broadminded, evenhanded people

RETIREMENT/REMOVAL OF T

*Trustee Act* s 28 – if one T wants to retire, other Ts must consent; subject to contrary intention in trust instrument

*Trustee Act* s 30 – removal and substitution on application to court by B who is not legally disabled, with support of majority in interest and number of trust Bs who have capacity – might be necessary where differences among Bs prevent termination

*Trustee Act* s 31 – if expedient to appoint new T and difficult w/o court help court may make order appointing new T whether there is existing T or not; and as substitute or addition to existing Ts

***Conroy v Stokes*** – removal of T requires acts/omissions that endanger trust property or show want of honesty, appropriate capacity, reasonable fidelity (acts that impair the welfare of B); failure to produce accounts doesn’t amount to impairing welfare unless persisted in

***Re Consiglio Trusts*** – misconduct by Ts not prerequisite for removal; enough if continued administration has by virtue of situation between Ts become impossible/improbable; includes widespread disagreement; issues that affect admin of trust affect welfare of B

GENERAL DUTIES

T (because legal owner) has rights and powers to deal w/management, use and administration of all trust property on continuing/changing basis subject to directions in trust instrument

T must exercise rights and powers in good conscience; must act in good faith and advance interests of B; obligations re: fair dealing and self dealing in course of administering the trust (fiduciary responsibilities)

T has duties and powers to advance S’s intention; requires T have measure of competence to meet objectives of S

T has no automatic right to remuneration – must be agreed upon

T can’t place self in position where interest conflicts with that of B – if they do must disgorge profits; T prohibited from self dealing

DUTY OF INVESTMENT

\*Look at trust instrument – may direct how T is to deal w/propery

Unless contrary intention in trust instrument, must invest in compliance w/*Trustee Act*

*Trustee Act* s 15.1 – allows for broad investments; in any form of property/security a prudent investor might invest in

*Trustee Act* s 15.2 – in investing must exercise care, skill, diligence and judgment that a prudent investor would (***Speight*** test)

***Speight v Gaunt*** – T has obligation to act as an ordinary prudent person of business would act in managing his own affairs; requires T put mind to matter of investing; not required to beat market; usually requires diversified portfolio; unless allowed by trust instrument T can’t invest speculatively and must avoid hazardous investments as much as possible

***Fales*** – prudent person test operates uniformly for all types of T; no higher standard for corporate T; can be exempted from liability under *Trustee Act* s 96 – T acted honestly and reasonably and ought fairly be excused from breach court may relieve T wholly/partly

*Trustee Act* s 15.3 – T exempt from liability where losses resulted from implementation of reasonably investment plan

***Cowan*** – T can’t refrain from making investments that would be more beneficial to B because they are against personal views of T; T may even have to act dishonourably (but not illegally) if interests of B require

OUSTING COURT JURISDICTION

***In Re Wynn*** – attempts to oust court jurisdiction contrary to public policy; courts treat these trust terms as invalid

***Re Tuck’s Settlement*** – rabbi allowed to determine “conclusively”; but court retained control if rabbi misconducts himself or made wholly unreasonably decision

***Boe v Alexander*** – courts allow ousting to certain point; privative clause won’t prevent review if T: (1) didn’t exercise discretion at all; (2) acted dishonestly; (3) didn’t exercise level of prudence expected from reasonable business person; (4) didn’t act impartially between classes of Bs/acted in manner prejudicial to their interests; must act in accordance w/laws, are subject to court supervision

***Re Poche*** – trust instrument that protects T from liability through exculpatory clauses won’t protect T if he has been dishonest, wilfully breached trust or grossly negligent

DELEGATION – general duty that T act personally; only appoint agents where specifically allowed by law or statute

***Speight v Gaunt*** – T may in admin of trust use the agency of 3rd parties if he does so from moral necessity or in regular course of business; if loss of trust funds results from this T won’t be liable unless it resulted from negligence or default on his part

*Trustee Act* s 7 – authorizes T to appoint solicitor, banker, can’t leave money w/them for longer than reasonably necessary

*Trustee Act* s 95 – implied indemnity for Ts; not liable for breach when others in control of money who are properly delegated

***Re Wilson*** – BOD of trust co should decide where discretionary powers regarding sale, retention or investment of the trust property are involved

***Fales*** *obiter* – rejected that in trust co only BOD can exercise discretionary power; equal to treating directors as Ts rather than the co

PROF: likely S has to look at constating docs for governance structure of co; S appointing trust co expected to be aware of this

LOYALTY – defining obligation of fiduciary is duty of loyalty

***Keech v Sandford*** – T making apt lease for himself; no conflict rule should be strictly applied; decision designed to deter other Ts who might act contrary to the interests of their Bs

***Boardman v Phipps*** – held to be fiduciaries because attended meetings as agents or reps of trust; held a B to have fiduciary duty because acting as agent of 3rd party; owed fiduciary duty to the trust and therefore to Bs (unclear); strict application of no conflict

***Peso*** – no conflict principles are strict but should be interpreted in light of modern practices and way of life; DISSENT: complexities of modern business require strict application of the rule to ensure people are protected

***Canaero*** – if placed in position where you can direct affairs of co you owe a duty of utmost good faith; Ds weren’t acting in bad faith and Canaero couldn’t have been successful, but D’s found liable as “faithless fiduciaries”; lists factors to consider in finding liability (“real conflict”)

***Holder (UK)*** – an inflexible rule prohibiting all transactions is unnecessary and could lead to injustice; courts should look at facts to determine if sufficient grounds to set aside the contract; move away from strict no conflict rule application in ***Keech; Boardman***

***Molchan v Omega Oil*** – adopts ***Holder*** into Canadian law

SELF DEALING/FAIR DEALING

Self dealing = voidable transaction if T purchases trust property or sells his property to trust; unless expressly authorized (see ***Holder v Holder*** – T renounces position then buys farm that trust is selling)

Fair dealing = where T purchases equitable interest in trust property from B; obligation on T to show no fraud or concealment of advantage taken by him; duty of utmost good faith still applies so T must disclose everything to B

***Crighton*** – for fair dealing transaction to stand T must show: (1) there has been no fraud/concealment of advantage taken by him of info acquired in character of T; (2) that B had independent advice and every kind of protection and fullest info re: the property; (3) that the consideration was adequate

DUTY OF IMPARTIALITY – impartiality assumed unless partiality directed in the trust instrument; only applies in wills

Duty of impartiality may impose obligations on T to sell some of the trust assets and convert them into authorized investments that neither favour unduly the income account or the capital account

***Howe v Dartmouth*** – where testator leaves residuary personalty to persons by way of succession and the residue includes a wasting asset the T must sell the personalty that is a wasting asset, invest proceeds in authorized investments, income of which is for benefit of life tenant B; doesn’t apply to real estate; rule is subject to contrary intention in the will

***Earl of Chesterfield*** – income received from wasting assets prior to their sale under ***Howe*** must be apportioned, 4% of value of personalty given to life tenant, rest ploughed into fund to enhance capital base; for non-income producing asset T must calculate portion of sale price that, had it been invested at the date of testator’s death would have produced 4% per year and risen to the sale price

***Lottman*** – if income is in real estate then payment is *in specie*; life tenant not entitled to notional interest from real estate and limited to actual income generated from it

***Re Oliver*** – combined assets of realty and personalty are not together treated as personalty; where devise of real estate, until sale of land occurs life tenant entitled to rents and profits *in specie*; where personalty life tenant entitled to sum representing interest at fixed rate on value of personalty

***Re Lauer and Stekl*** – trust for sale with powers to postpone (clause for conversion seen as primary and dominant) extended to entire fund (including realty); trust for sale precludes payment *in specie*; because eventually required to be sold duty of impartiality required payment from all assets to life tenant

***Royal Trust v Crawford*** – intention of testator to displace apportionment must be clear from will and surrounding circumstances; where direction to convert and power to retain – is power to retain merely ancillary or subsidiary to the trust for conversion; if yes must find other indication (than power to retain) to show that life tenant entitled to income *in specie*

***Re Smith*** – *inter vivos* settlement; T refused to convert low income earning assets; confused power to retain with trust to retain; resulted in partiality to remainder person; T had discretion to retain and a duty to be impartial

***Re Welsh*** – sale of capital assets and distribution of cash dividends; form is substance in corporate law is subject to testator’s overriding intention

***Allhusen v Whittel*** – attempt to strike balance between life tenant and remainder person in paying trust debts during initial administration; income B should only get income from net estate; since debts have to be paid after 1 yr of appointment of T – capital + 1 yr income = assets available to pay debts (overruled by *Trustee Act* s 10)

*Trustee Act* s 10 – overrules ***Allhusen***; unless testator indicates otherwise, all income is available for payment of debts and is to be treated as part of residuary estate

INVESTMENT – WHERE DIFFERENT CLASSES OF B

Investment policy and strategy should be fair to different classes of Bs – absent contrary intention in trust instrument

***Nestle*** – bank did a bad job investing but still won; able to (1) show deliberate investment in tax exempt bonds which suited life tenants and shielded trust from inheritance tax; (2) win battle of experts – show that in past investment in equities was considered risky; T’s performance can’t be judged with hindsight – where invests as ordinary prudent man would he can’t be faulted as reckless

***Cowan*** – T powers must be exercised in best interests of present/future Bs; financial benefit is main concern; in considering what investment to make T must put personal interests/views aside

PROVIDING INFORMATION

On reasonable notice B has right to see trust accounts, investments, trust docs, all reasonable info concerning trust management

Not entitled to see info about T making actual decisions – confidential so T given freedom to decide and change minds w/o review

***Re Londonderry*** – B not entitled to docs covering T’s exercise of a discretionary power; not entitled to reasons T made decision; if T acting in bad faith obligation to disclose can be enforced by court order

***Froese*** – solicitor opinion letter to T held to be proprietary info belonging to trust; even if related to T’s fear of personal action against him it wouldn’t be privileged if paid for by the trust

*Trustee Act* s 99 – T must file accounts w/in 2 yrs from appointment; if B serves notice, must file accounts annually

***Sanford v Porter*** – although Bs entitled to inspect accounts they aren’t entitled to instantaneous response; will depend on facts

REMUNERATION

No automatic right to remuneration – trust instrument may specify whether remuneration and what scale

Bs can also act together to modify trust to provide remuneration

***Boardman v Phipps*** – court exercises inherent jurisdiction to provide for remuneration – provided a liberal allowance

*Trustee Act* s 88 – Ts entitled to fair and reasonable allowance as remuneration for T’s care, pains, trouble, time spent on trust admin; court can make an order re: remuneration and it must be paid to T; T also reimbursed for expenses incurred; T can apply annually to court for care and management fee – where T is doing something special

*Trustee Act* s 90 – s 88 doesn’t apply where remuneration is set out in the trust instrument

***Re Sproule*** – care and management fee applies where there is responsibility requiring judgment and decision making to resolve problems over and above usual regular procedures of admin; must be special reasons for getting this fee; guidelines for setting remuneration: magnitude of trust, care and responsibility arising; time spent performing duties; skill and ability displayed; success of T’s administration

***Re Pedlar*** – C&M fee allowed in addition to fair and reasonable remuneration; court can determine amount up to 0.4% to be paid as C&M fee; relevant factors in assessing C&M fee: value of estate assets administered; nature of assets; degree of responsibility on T in trust instrument; time spent on C&M of estate; degree of ability exhibited; success or failure of T; extraordinary services

INDEMNITY OF T

T entitled to indemnity for all debts incurred in executing trust

*Trustee Act* s 95 – T only liable for own acts; may reimburse self of expenses incurred; not liable for loss unless from his wilful default

***Re Reid*** – T liable for expense incurred because he was personally accountable for it under statute; no indemnity from B

***Stringman*** – even indirect attempt by gov to collect taxes is good reason for T not to pay taxes; where T shouldn’t have made payment, won’t be indemnified for it by B

CONTROL OF T

***Re Brockbank*** – Bs wanted court to force T to comply w/new T appointment decision; this is w/in discretion of T and neither courts nor B should interfere; fiduciary power of T to make T appointments is not controllable by Bs; B can accept it or terminate the trust

***Butt v Kelsen*** – Bs can’t control Ts who are directors in terms of info flow; Bs have same rights as shareholders not more; Bs can compel Ts to vote the shares as directed or to change articles of co

*Trustee Act* s 86 – T can ask the court for advice or direction in administering trust property

*Trustee Act* s 87 – T acting on advice from court is deemed to have discharge his duty as T; but isn’t indemnified if he committed fraud, wilful concealment or misrepresentation in obtaining that advice

***Re Wright*** – Ts given discretion should exercise it as they see fit w/o court interference; only in event of real and absolute deadlock will court intervene in matters not fundamental to scope of powers written in the trust

***Tempest v Camoys*** – only where bad faith or refusal to discharge duties should court control exercise of discretion of a T

***Re Lohn*** – it is abuse of power in *Trustee Act* s 87 to unload responsibility for admin details on court; especially where task calls for careful enquiry and exercise of tact and discretion; court won’t ratify it to indemnify Ts

***Re Billes*** – serious deadlock amongst Ts; court adopted proposal of one T to diversify assets; this would avoid unwarranted risk, enable distribution of greater income to income Bs and stabilize capital value; ordered sale of shares at advantageous time

***Re Blow*** – T relied on side memo but should have only taken direction from trust instrument; court had ability to intervene but didn’t; court won’t intervene unless failure to do so would be manifestly prejudicial to Bs

***Schipper*** – court generally refuses to interfere w/uncontrolled discretion of T; will interfere where T is attempting to exercise discretion to achieve purpose not intended under terms of trust instrument

***Re Fleming*** – court will intervene where T hasn’t been even-handed

CONSTRUCTIVE TRUST – imposed by law to do justice in specific situation; can only arise where existing assets CT can attach to

Provides successful P w/right to property in hands of fiduciary (or 3rd party not bona fide purchaser for value) – effectively says equitable ownership vested in P

INSTITUTIONAL CT – list isn’t closed; but difficult to add to

Established legal categories where CTs imposed: faithless directors, delinquent agent, overreaching partners, bribes, undue influence, breach of confidence, intermeddlers in trusts, unjust enrichment through overpayment, separating cohabiting persons

***Mara v Brown*** – intermeddler who isn’t T acts like T he may make himself a T of his own wrong

**3 categories:** (1) breach of trust or existing fiduciary duty; (2) involvement in property inconsistent w/trust (3) CT w/o pre-existing fiduciary relationship (this is really more remedial)

Action for recognition of institutional trust – usually about whether facts have been proven to support recognized elements of listed CT; institutional CT seen as arising automatically when legal criteria have occurred in the relationship between parties

“institutional” = success in getting CT doesn’t depend on court discretion to open a new basis for CT; just fit w/in listed category

UNJUST ENRICHMENT – used to move beyond existing list of institutional CTs

Overarching principle that results in remedial CT – is circumstances of unjust enrichment; all CTs common feature: used to help victim of unjust enrichment

TEST for unjust enrichment (***Pettkus v Becker***): (1) enrichment; (2) corresponding deprivation; (3) no juristic reason for enrichment

FIDUCIARY RELATIONSHIP – finding one outside of pre-existing trust relationship; those are always fiduciary

***LAC Minerals*** – characteristics of fiduciary relationship: fiduciary has scope for exercise of some discretion or power; fiduciary can unilaterally exercise that power or discretion to affect B’s legal or practical interests; B is peculiarly vulnerable to or at mercy of fiduciary holding discretion/power; not all of these characteristics have to be present to find a fiduciary relationship exists; majority said vulnerability is indispensible feature to find fiduciary relationship

***Pettkus v Becker*** – fiduciary relationship exists between title owner and equitable co-owner of property; CT used remedially; gave B equitable estate; could then call for shared legal title; imposed CT because if not would let P be enriched unjustly at B’s expense

***Guerin*** – nature of relationship not specific category of actor involved that gives rise to fiduciary duty; hallmark is that relative legal positions make one party at mercy of the other’s discretion

***Hodgkinson v Simms*** – fiduciary can exist where under circumstances one party could’ve reasonably expected the other party would act in its best interests; vulnerability not seen as hallmark, but important indicia; existence of contract doesn’t preclude fiduciary

***M v M*** – parent/child relationship recognized as traditional head of fiduciary obligation; fiduciary law not confined to economic interest

REMEDIES – Ts liable for breach of trust if fail to perform their duties by doing/omitting to do an act they are (not) supposed to

COMPENSATION FOR LOSS – based on full restitution; full compensation

Ts in breach are liable to put the trust estate in the position it would have been in but for the breach

***Guerin*** – can apply where trust asset unavailable, difficult to determine; where restitutionary relief instead of CT it’s based on T restoring to estate the money equivalent of the assets which it has been deprived of; assessed at date of restoration not deprivation; don’t have to look at foreseeability, mitigation, other CL requirements to get damages, just look at opportunity lost

***Canson*** – equitable remedies are elastic and policy considerations apply; foreseeability isn’t a concern in assessing compensation; but losses made good must be only those that, on common sense view of causation, were caused by the breach

SET OFF

***In re Deare*** – T can’t set off profit from one breach of trust against the loss resulting from another

ACCOUNTING FOR PROFIT – T required to disclose to B his dealings w/trust property

Fiduciary must account for unauthorized profits he receives that are attributable to fiduciary position – ie. pay them to B

Accounting won’t go on forever – court will set a timeline; often just approximation of how long it will take to disgorge exact profit

***Warman v Dyer*** – accounting for profits is personal remedy; policy is deterrence; equitable defences available: estoppel, laches, acquiescence, delay; if loss suffered by B exceeds profits made, then B must elect which remedy, accounting or compensation

***Scott v Scott*** – equity prohibits T from making profits by management of trust directly/indirectly; profit made w/combination of trust and personal money = B entitled to profits at least in proportion to trust contribution; Bs entitled to claim proportionate amount

REMEDIAL CONSTRUCTIVE TRUST – only use if there is significant connection to property

***Peter v Beblow*** – 2 possible remedies for unjust enrichment: monetary or CT; CT applied where monetary damages are inadequate and there is link between contribution that founds the action and the property in which CT is claimed; W’s interest in CT property determined on value survived basis (portion of value of property that is attributable to her services, contributions)

***Pettkus v Becker*** – CT used remedially to give W equitable estate in property; could then call for shared legal title; imposed CT because not to do so would have resulted in unjust enrichment of H at W’s expense; unjust enrichment TEST: enrichment, corresponding deprivation, absence of juristic reason

ACTIONS AGAINST THIRD PARTIES – in each case 3rd party bound to B using principles of unconsiconability

3 categories of intermeddlers: (1) trustee de son tort (person not appointed as T but treated as T for purposes of breach); (2) knowingly receiving or dealing w/trust property for own use; (3) knowingly assisting T in fraudulent/dishonest transaction

***Nelson v Larholt*** – bookie given cheques w/”as T”; money couldn’t be traced, B sued bookie; bookie gave value but had notice that they belonged to estate (therefore not *bona fide* purchaser for value); notice = deemed to know what any reasonable person would

***Air Canada v M&L Travel*** – degree of knowledge required for stranger to be liable: actual knowledge, recklessness, wilful blindness; carelessness or want of probity is insufficient; personal benefit from breach may indicate wilful blindness by 3rd party

***Royal Brunei Airlines (UK)*** – UK cases require actual knowledge by 3rd parties; subjective approach: considers their personal attributes, personal intelligence, business experience; *Canadian courts*: look objectively, don’t consider personal characteristics

TRACING – ability to follow/reclaim property stops w/bona fide purchaser for value

***Re Diplock’s Estate*** – volunteers aren’t bona fide purchasers for value; they hold property on CT for B

Allows recoup property even when its form has changed – CL claim would end when form changed

If run up against bona fide purchaser for value – can back track and bounce claim onto proceeds from that exchange

3 requirements for tracing: (1) must be breach of trust or fiduciary relationship (might be changing); (2) property must be in traceable form; (3) no inequitable results must arise from application of right to trace

***Chase Manhatten*** – suggests fiduciary relationship/breach of trust might not be precondition to tracing; court allowed tracing on basis that in good conscience, money couldn’t be retained

***Brady v Stapleton*** – no fiduciary relationship; thief held stolen money on CT for rightful owners

***Re Halletts Estate*** – asset purchased by T w/trust funds is regarded as security for the trust money used to purchase it; if T mixes trust assets w/his own equity presumes he spends his own first; therefore B entitled to remaining money in account

***Re Oatway*** – if T invests trust and personal monies into personal assets, B will be able to claim against asset for amount of his claim

***Scott v Scott*** – B’s claim can include proportionate share of increase in value of asset

***Clayton’s*** – where funds from multiple trusts combined; money first into account is money first out; T still considered to withdraw his personal funds first

***OSC v Greymac*** – compare w/***Clayton***; various tracers get an interest in proportion to their contribution to mixed fund; pro rata approach; regarded as more fair and is increasingly followed more than ***Clayton*** approach of first in/first out

OTHER REMEDIES

For B who has suffered breach of trust: recovery of losses from T; recovery of gains T obtained from breach; recovery from 3rd parties who have wrongfully received trust property or dishonestly assisted T in breach; recover property to which B can identify subsisting equitable interest; **if multiple remedies available they can be combined** (doesn’t lead to double recovery; not mutually inconsistent)

CHARITABLE TRUSTS

Advantages: tax breaks; exemption from rule against perpetuities; don’t fail for uncertainty of objects; court will supply directions if S’s are insufficient; may apply *cy-pres* to trust property if there is general charitable intention (***Canada Trust Co v Ont Human Rights***)

Focus is on the purpose instead of the objects – law is very strict about what is considered “charitable” (***Chichester Diocesan Fund***)

*Law & Equity Act* s 44 – if person gives property for charitable purpose and gift would be void for uncertainty it’s not invalid but operates solely for benefit of the charitable purpose

***Jewish Home for Aged*** – if court sees intention to make unconditional gift to charity then gift regarded as immediate; not subject to condition precedent and therefore not w/in rule against perpetuities

*Constitution* – regulation of charitable entities is provincial jurisdiction; but most regulation is undertaken through federal statutes

*Income Tax Act* s 248 – “registered charity” charitable organization registered w/ the gov; exempt from income tax, capital gains tax; not necessarily a trust, ownership passes to charity outright

*Statute of Elizabeth* – “charity” construed in accordance with preamble; courts most often interpret charitable through analogy

***Vancouver Regional FreeNet*** – internet analogous to highway; highway is in public interest (listed in *SoE*), will benefit society; therefore as analogous to highway provision of internet is charitable

***Pemsel*** – “charity” has 4 main heads: (1) trusts for relief of poverty; (2) trusts for advancement of education; (3) trusts for advancement of religion; (4) trusts for other purposes beneficial to community (must be public in nature, w/o political purpose)

RELIEF OF POVERTY

has been interpreted broadly; possible Bs can be economically able; bequest for suffering, distressed, mentally ill, blind kids, widows, orphans, neglected children, unmarried mothers, refugees or displaced persons, ex-army – have been considered charitable

ADVANCEMENT OF RELIGION – interpreted more strictly than poverty

*Statute of Elizabeth* – only construction of churches would fit into this head

**Considerations:** is it recognized religion, does it promote/advance that religion; consider spirituality, worship, faith, etc

***Re South Place Ethical Society*** – where society involved in acts that don’t contain element of worship, doesn’t fit under religion head

***Thornton*** – considering “benefit of society” consider S’s intentions; trust can’t be void just because opinions are foolish or unfounded; if purpose was promotion of immoral, averse religion this wouldn’t be upheld

***Gilmore v Coats*** – belief by S that it is a benefit for public isn’t determinative; can’t be benefit for community where too removed

ADVANCEMENT OF EDUCATION

Dissemination of knowledge, training, encouragement, publication, training of the mind improvement of branch of knowledge

***IRC v McMullen*** – trusts for sports in the context of education will be considered charitable

***McGarth v Cohen*** – gardens for quiet contemplation have been considered beneficial to community, therefore charitable

***Re Hopkin’s Will*** – education must be used in wide sense; extends beyond teaching; must be educational value to researcher or will lead to something which will pass into the store of educational material to improve the sum of communicable knowledge

***In Re Pinion*** – court generally presumes benefit in educational trusts; but will investigate quality of proposed gift to determine if it’s conducive to education of public; court also considered testator was leaving bequest to perpetuate his name and repute of family

***In re Shaw’s Will Trusts*** – trusts for advancement of arts, language, drama, music, opera, ballet, painting, sculpture, under this head

FOURTH HEAD – OTHER

Some purposes found to fall w/in this category: country, province, municipality or locality (***Cox v Hogan***); administration of law (***IRC v Glasgow Police***); promotion of health (***In re Resch’s Will Trusts***); relief of suffering and distress (***Re Forgan***) promotion of agriculture (***Brisbane City Council v AG for Queensland***); recreational activities (***Re Laidlaw Foundation***); the environment (***Re Knowles***); prevention of cruelty to animals (***Re Moss***); foreign charities (***Re Levy***)

***Native Communications Society*** – for purpose to fit under head 4 must be beneficial to community coming w/in spirit and intent of *SoE*; whether purpose is for public benefit is answered by court on basis of circumstances and in its exercise of equitable jurisdiction

***Vancouver Society*** – under this head, look at what is provided; for benefit of community look at who is recipient; test must focus on charitable purposes as well as activities; charitable character of an activity can be determined only through reference to its purpose

THE BENEFICIARY – must be definite community or section of community

What identifies the community can’t depend on a personal relationship; individual Bs can’t sue to enforce charitable trust, only AG

***Oppenheim v Tobacco*** – trust not charitable unless directed to public benefit; section of community: possible Bs can’t be numerically negligible and quality that distinguishes them from other members must not depend on their relationship to certain individual; employment is not a quality which constitutes those employed as a section of the community

***Dingle v Turner*** – no trust can be charitable unless directed to benefit of community or section of community as opposed to benefit of private individuals; no trust where claimant must show relation to someone or employment by someone to be considered B can ever be a charitable trust because personal relationship between individuals enters into qualification (this is in essence non-public)

POLITICAL PURPOSE

Organization formed to pursue political purpose can’t be charitable; advocating changing laws is considered political purpose

*Income Tax Act* s 149.1(6.1) – organization can still have charitable purpose if it devotes substantially all of its resources to charitable purpose and part of its resources to ancillary political purposes not including direct or indirect support of a party, candidate

***Anti-Vivisection Society*** – society established to “educate”; court found aim was actually advocating for change of laws, can’t be considered charitable

***Everywoman’s Health*** – can’t be charitable if activities are illegal, contrary to public policy; can’t be contrary to public policy w/o definite policy in place; public opinion doesn’t = public policy; health care services seen as analogous to medical care for sick in *SoE*