FACULTY OF LAW

LAWS5202
[ADVANCED TRUSTS]

Topics:

(1) Theoretical Perspectives

(2) Nature of Trusts

(3) Irreducible core of trusteeship

(4) Information Rights

(5) Exculpatory clauses

(6) Court Supervision

(7) Ousting court supervision

(8) Trust Contracts & Asset partitioning

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(10) Trust Accounts

(11) Business Trusts

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(1) Theoretical Perspectives

(A) ASSET PARTITIONING AND CONTRACTARIANISM

Affirmative and defensive asset partitioning are a proprietary form of analysis - concerned with property rights. Proprietary analysis are generally are mandatory - can't normally change property law simply because it suits you.

- *Defensive asset partitioning (owner shielding).*
  - ...protection of the owners personal assets, from claims that might be made by the firms creditors
  - ...e.g. limited liability of shareholders in company law.
- *Affirmative asset partitioning...*
  - ...concerned with protecting the firm's assets from claims by the owners' creditors.
  - ...e.g. one of the functions served by separate legal personality in company law.
- *Bonding (sometimes elided into affirmative asset partitioning)..*
  - ...concerned with the extent to which the firm's assets are available to creditors of the firm.
- *Manager shielding...*
  - ...protecting managers by claims from the firm's creditors.
- *Contractarianism...*
  - ...concerned with to what the degree does contract as a concept have anything to tell us about the way firms operate.
  - ...predominately about default rules - which rules are there as default that the parties can change if they want to.
  - ...ie. which rules are mandatory and should they be - would it be better for that rule to be a default rule.

(1) Asset partitioning

✦ Hansmann & Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale LJ 387 (see 393-395)
  - *The truly essential aspect of asset partitioning is, in effect, the reverse of limited liability - namely, the shielding of the assets of the entity from claims of the creditors of the entity's owners or managers (390)...*
  - *There are a variety of ways to coordinate the economic activity of two or more persons...*
    - ...one common approach is to have each of those persons enter into a contract with a third party who undertakes the coordination through design of the separate contracts and, most importantly, through exercise of the discretion given the third party by those contract...a third party that serves this coordination function is commonly called a 'firm'.
    - ...the firm therefore serves...as the requisite 'nexus of contracts'...it is the common party with whom each of those persons has an individual contract.
  - *To serve effectively as a nexus of contracts, a firm must generally have two attributes...*
    - ...well-defined decision making authority...one or more persons who have ultimate authority to commit the firm to contracts.
    - ...the ability to bond its contracts credibly - that is, to provide assurance that the firm will perform its contractual obligations.
      - ...bonding generally requires that there exist a pool of assets that the firm's managers can offer as satisfaction for the firm's obligations.
  - *Asset partitioning has two components...*
    - *(1)* ...the designation of a separate pool of assets that are associated with the firm (i.e. an entity that undertakes business), and that are distinct from the personal assets of the firm's owners and managers. The first part of asset partitioning is making sure that the firm has a separate pool of assets associated with it. By separate, is meant separate from the owners of the firm and also separate from the managers assets.
      - ...that pool of assets is ring-fenced - protected for the benefit of the firm. Ultimately, that is for the benefit fo the owners and managers as well, but that pool of assets is protected and belongs to the firm (i.e. distinct pools of assets: owners, managers, and assets).
    - *(2)* ...the assignment to creditors of priorities in the distinct pools of assets that result from the formation of a legal entity...the assignment takes two forms (i.e. assigning priority to different creditors in respect of the different pools of assets)...
      - *affirmative asset partitioning*...the first form assigns to the firm's creditors a claim on the assets associated with the firm's operations that is prior to the claims of the personal creditors of the firm's owners...(i.e. the firm's creditors have a prior (prior over the creditors of the owners) claim to the firm's pool of assets.
        - *(i)* ...entity shielding... 'entity shielding' means that the firm's assets are shielded from the owners' (e.g. shareholders) creditors (e.g. if a shareholder owes money to someone else - personal debt - the shareholder has no right to sell the company's assets to pay that debt - the shareholders can only get at the company's assets once all of the company's creditors have been paid out, and then you wind up, and if there is any surplus, that goes to the shareholders, and then to the shareholders creditors).
        - *(ii)* ...bonding...the question of the degree to which the firm's creditors can get at the firm's assets. If the company enters into a contract with a third party, if the company doesn't perform the contract, the third party gets judgment for damages. In terms of execution of that

judgment, the creditors are entitled to execute the judgment against the company's assets. i.e. the company when it enters into a contract, bonds its assets to that contract - its not a proprietary right, it just means that if the contract is not performed the firm's creditor can get at the company's assets to execute a judgment that it gets against the company on that contract.. (Nb bonding is a separate concept from entity shielding).

- *Defensive asset partitioning*...the second form...is the opposite...granting to the owners' personal creditors a claim on the owners' separate personal assets that is prior to the claims of the firm's creditors (i.e. the personal creditors of the owners have a claim on the personal assets of the owners which is prior to any claim that the firms creditors may have over the owners personal assets - defensive asset partitioning - 'owner shielding' - shields the owners assets from the firms creditors);
  - e.g. limited liability in company law - once the shareholders have paid the full value of their shares, they are not exposed to any more liability to the company's creditors.
  - ...with defensive asset partitioning, we are talking bout the firms creditors not being able to go after the managers' (e.g. directors') personal assets in order to satisfy the firm's debts.
  - ...the managers pool of assets is protected from the firm's creditors (nb the firm may be able to sue the directors).

- [NB: Different business have different strengths or weaknesses in terms of defensive and affirmative asset partitioning. Eg in the company context, the entity shielding is pretty strong, it is less strong in a partnership, because in a partnership, there is no separate legal entity - the partners own the partnership assets, and that makes it easier for the partners' creditors to get at the partnership assets. A partnership has weaker affirmative asset partitioning than a company.]

(2) Trust relationships

- *Trusts have owners (beneficiaries), managers (trustees)...*
  - ...the beneficiaries can have creditors, and the trustees can have creditors.
- *Whats different with trusts, is that there is no legal entity (i.e. a firm) that is a trust...in the way that a company is a separate legal entity...*
  - ...however, trusts operate like business operates. They are not strictly legal entities, but they operate like businesses and so an asset partitioning analysis can be applied.
- *Defensive asset partitioning in trusts (owner shielding)...*
  - ...the trust creditors can get at the trust owners' (the beneficiaries) personal assets but only via subrogation to the trustee's right of indemnity against the beneficiary (i.e. there are ways that the trust's creditors can get at the beneficiaries personal assets - but those rights are weak).
    - ...i.e there is owner shielding in trusts to a reasonably good degree (because subrogation to the trustee's right against the beneficiaries is a weak ability for trust creditors to get at the beneficiary's assets)
- *Affirmative asset partitioning (entity shielding and bonding)...where the real differences come in between trusts and company law...because...trusts are not separate legal entities...*
  - ...nb: certain entities are called trusts when they're not in fact trusts (be careful of names)
  - ...in the United States, they are more willing to treat trusts as separate legal entities - which has important consequences for the asset partitioning analysis.
  - There is affirmative asset partitioning in Anglo-Australian trusts, but it is not complete...
    - In terms of entity shielding (i.e. to what degree are the trust's assets able to got at by owner creditors), there is entity shielding, but there are big holes in it in two particular ways...
      - *(i)* ...if the beneficiary is absolutely entitled to the trust assets, or to a portion of them, then they can say that they own those assets in equity, and therefore their creditors can get at those assets.
      - *(ii)* ...if all the beneficiaries get together they can wind up the trust and simply take the assets out of it, and then those assets are available to the creditors of the beneficiaries.
    - In terms of bonding...(i.e. to what degree are trust assets bonded to trust contracts - to what degree can trust creditors get at trust assets to execute a judgment).
      - ...affirmative asset partitioning becomes particularly weak here. The bonding in trust contracts is not good compared with companies...it is not easy for the trust creditors to get at the trust assets. There are ways that you can get at trust assets, but you have to subrogate to the trustee's right against those assets.

(3) Contractarianism

- *Contractarianism focuses on the bargains or the voluntarily assumed obligations that the parties have created in a business organisation ...'contract like' arrangements.*
  - ...although trusts aren't strictly speaking contracts, they are 'contract like' in the sense that they are a voluntarily assumed arrangement between parties, which means that the contractarian perspective can be applied.
  - ...trusts are highly malleable in terms of the ability to change the terms of the trust, to determine what rights the beneficiaries get under the trust, and what obligations the trustees have...
- *In the trust context - that bargain in a contract like analysis is between the settlor and the trustee...*
  - ...the settlor and trustee necessarily enter into a binding legal contract (they can, but often they don't)...but, it is still 'contract like', because functionally, it is a bargain between those two parties as to what the trustee will do with the trust property.
- *Trusts are not strictly contracts...*
  - ...settlor can't sue the trustee for breach of the trust...you might be able to reserve (to the settlor a power to do that, but if you don't, once the trust is created, the settlor falls away, they can't enforce the bargain so it's not like a contract...
  - ...the settlor can be the trustee himself or herself (you can't contract with yourself, but you can self declare a trust, and it can create a binding trust).
  - ...the rights that trust beneficiaries get are greater than the rights that third parties get under contract analysis.
  - ...where a contracting party dies, the contract terminates. Trusts don't die with the trustee (new trustee is appointed).
  - ...a major breach of a contract can terminate the contract, a major breach of trust does not terminate the trust.
  - ...the court has a special inherent jurisdiction to control trusts...the court does not have an inherent jurisdiction to deal with contracts (court has a more interventionist role in dealing with trusts).
- *Connection between contractarianism and asset partitioning.*
  - Contractarianism is primarily concerned with default rules (the law has rules but they can be got rid of if the parties don't like them)...there can be some default rules that we want to place limits on - we want to limit your ability to change certain things, such as where there is third party impact from the changes .
    - E.g. in a trust, the arrangement between the trustee and the beneficiaries is predominately contractarian (the settlor and the trustee can put anything in place there, assuming it's not illegal - i.e. a mandatory limit). There are also potentially limits on how you can contract around some of the rights that the trustees and beneficiaries have.
      - ...the trustee's right to an indemnity from the beneficiaries, the trust creditors primary way of getting to the trust assets is by subrogating to that right...to what degree should we let the trust deed take away the trustee's right to an indemnity...has third party effects - if you take away the indemnity, nothing to subrogate to, therefore it takes away the creditors interests as well.
- *Contractarisnism emphasises that not all law is about litigation...*
  - ...contractarianism focuses on the other end of the transaction - putting the documentation together in the first place which will give the parties what they want within the boundaries of the law (i.e transactional).

✦ Langbein, "The Contractarian Basis of the Law of Trusts" (1995) Yale LJ 625
  - *In truth, the trust is a deal, a bargain about how the trust assets are to be managed and distributed*
  - *You can look at trusts as contractarian (contract like), and that can lead you to make arguments about how trusts ought to operate...*
  - At the time Langbein wrote his piece, the American law institute was putting a re-statement on the law of trusts.
    - ...the restatements tries to synthesise all of trust law for America, so that there is a statement of how trust law works in America.
    - Langbein was concerned that the restatement that was put together was treating trusts as a matter of property - treating them like estates in property. Langbein saw that it would be detrimental to the law of trusts, because it would take away the flexibility that you have with trusts to change the rights and obligations that a trust creates.
      - ...Langbein was saying that trusts are about property, but there is another side to them - the contractarian side, the flexible like nature.
      - ...Langbein was concerned with the social utility of trusts...

✦ Maitland, *Equity* (rev ed by Brunyate, 1936), 54
  - "But though this be so (i.e. though you can have self-declared trusts) the commonest origin of a trust is a transaction between two persons. ... S conveys land, or moveable goods, or Consols, or a debt, to T upon a trust, and T consents to execute that trust.

We have here an agreement between S and T, and since that agreement is a binding one (binding in equity) – since it can be enforced by that part of our law which is called equity, we well might say that there is a contract between S and T. Indeed I think it impossible so to define a contract that the definition shall not cover at least three quarters of all the trusts that are created."

- Maitland is making a functional point - trusts operate like contracts, because they involve a form of agreement between the settlor and the trustee to transfer the property to be held on trust, and in return to undertake to hold that property on the trusts that are agreed.

(4) Organisational Law

- *The law of organisations...the law which controls the way business organisations work (corporate law, trust law, partnership law, etc)...all the law .which controls and gives legal form to business organisations.*
  - ...organisational law is a blend of asset partitioning and contractarianism - a blend of the proprietary analysis as well as the contractarian analysis.
- Hansmann & Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale LJ 387, 416
  - "While it is sometimes said that the common-law trust lacks legal personality, in our view it is, on the contrary, quite clearly a legal entity, and trust law is consequently a form of organizational law."
    - ...nb trusts are not legal entities in anglo Australian law.
- Sitkoff, "Trust law as fiduciary governance plus asset partitioning" in Smith (ed), *The Worlds of the Trust* (2013) 428, 436
  - Sitkoff is trying to explain is that Hansmaan & Kraakman are not arguing that trusts are legal entities in the way a company is a legal entity, they are arguing about the function that trusts serve...
    - "Reifying the trust in expression is an embrace of substantive function over technical form."
    - i.e. we acknowledge that as a matter of technical form the trust does is not a separate legal entity, but in terms of the functions that trusts perform, they operate like other business entities - corporations, partnerships etc. - and therefore, we call them legal entities. (nb American law).

(2) Nature of Trusts

(A) RIGHTS *IN REM* & RIGHTS *IN PERSONAM*

(i) The Classic Debate

- *The classic debate...is a beneficiary's right under a trust a right in rem (proprietary - good against the whole world) or in personam (good against one or two other parties individually but not the whole world)...*
  - ...even on its own terms, this classic debate is suspect...because the phrases 'in rem' and 'in personam' come out of the Civilian/Roman law tradition and it doesn't follow that the common law when it creates a right or interest is adopting those ideas in any way.
  - In Roman law, a right was a right in rem when it was enforceable against the whole world, or at least an indefinite class of people (e.g. legal property rights). In contrast to a right in rem, a right in personam was a right enforceable against one other person (e.g. right under contractual arrangement). In these terms - the beneficiary's rights under a trust are directly enforceable against the trustee (i.e. an in personam right).
    - ...But, the beneficiary's rights under a trust are also enforceable against third parties, giving them the appearance of rights in rem. However, a beneficiary's right under a trust is not enforceable against a particular kind of third party (e.g. bona fide purchaser of the legal title to the trust property who has no notice of the trust takes free of the trust)

- A trust is an equitable chose in action; i.e. a personal right that the beneficiary has against the trustee (e.g. for breach of trust). But a trust can also, at times, display proprietary characteristics.
- Trust beneficiaries have rights that are enforceable over the trust assets - i.e. they have rights in respect of the trust property (unlike a mere debt relationship). Two types of rights in respect of trust property:
  (1) *Entitlement of beneficiary to get property returned to the trust if wrongfully disposed of (right of recoupment):* If the trustee wrongfully disposes of the trust assets to a third party, the beneficiaries of the trust can get those trust assets returned to the trustee. That right, to get the property back from someone who shouldn't have it, is a proprietary right (i.e. a right *'in rem'*) in the sense that it is enforceable against third parties (nb not all third parties — e.g. bona fide purchaser without notice is protected from that right) and not merely against the trustee (an *in personam* right*)*
  (2) *Claim to equitable ownership of trust property:* Trust beneficiaries may have a right to assert that part or possibly all of the trust property is theirs in equity - they are the equitable owner of that property - don't need this right to exercise the first type of right above. This type of claim claim depends on the terms of the trust (e.g. *Baker v Archer-Shee*)

✦ Maitland, *Equity* (rev ed by Brunyate, 1936)
  - "Cestui que trust has rights enforceable against any person who has undertaken the trust, against all who claim through or under him as volunteers (heirs, devisees, personal representatives, donees) against his creditors, and against those who acquire the thing with notice actual or constructive of the trust. [i.e. a list of parties who are bound by the beneficiary's interest, which suggests that the rights are in personam and not in rem, because they are not good against the whole world - they're good against that list of people.]
  - [NB: Maitland argued in this book that trusts are in personam, that is, that trusts involve an obligation owed to the beneficiary, and it is not really proprietary...his view was that the beneficiary's interest was fundamentally in personam.]

✦ [Maitland later changed his view] Maitland, "The Unincorporate Body" in Fisher (ed), The Collected Papers of Frederic Williams Maitland: Vol 3 (1911) 271, 275-278
  - Maitland's later view was that the trust does basically involve a form of property right, in the hands of the beneficiary and his reasoning was that the number of people against who the beneficiary could enforce their rights is so large, that you might as well call it a property right (in rem).

✦ Scott, Austin "The Nature of the Rights of the Cestui Que Trust" (1917) 17 Columbia LR 269
  - Austin Scott argued against Maitland's (first/earlier view), arguing that the beneficiary's interest was a form of proprietary right...

- [CRITICAL COMMENT: The classic debate is largely meaningless for two reasons...(1) the civilian/Romanist ideas of in rem and in personam simply don't track very well onto common law concepts. And so debating whether our common law notions map on to civilian notions is largely irrelevant; (2) The debate has been conducted the wrong way... the question that is traditionally asked is whether the beneficiary's right under a trust in rem or in personam - that is a misguided question, because even in the civilian system, they don't ask that question about rights. The question whether something is in rem or in personam is a question about individual rights and against who it is enforceable. Rights and interests are not the same thing - an interest is a bundle of rights - some of those rights may be in rem, but not all of them are necessarily in rem. In the trust context, some of the beneficiary's rights may be personal against the trustee, whereas others of the rights may be proprietary in the sense of being enforceable against third parties outside the trust arrangement. e.g. if you're a trust beneficiary, you're entitled to expect that the trustee will perform the trust - a right to compel due administration of the trust, but you can only compel the trustee to do that (i.e. no one else owes you that obligation). But, if the trustee misapplies the trust property and gives it to somebody who is not entitled to, the beneficiary has a proprietary right to get it back - a right enforceable against third parties.]

- [CRITICAL COMMENT: Therefore - beneficiary's right is close to a right in rem but is not as 'in rem' as legal property rights are...it is a collection of in rem and in personam rights]

- *Livingstone v Commissioner of Stamp Duties (Queensland) (1960) 107 CLR 411, 448*
  - "for the purpose of solving a concrete legal problem with respect to such a set of rights, more hindrance than help is likely to come from an attempt to classify them according to Austinian terminology as rights *in personam* or rights *in rem*." (Kitto J)
  - [CRITICAL COMMENT: Unfair to Austin - Austin himself emphasised that you need to look at individual rights when you are looking at whether something is in rem or in personam. Austin's focus was on aspects of interests on the discrete rights that form the interest, rather than the interest as a whole. But, the basic point is that the debate is unproductive.]
- Nolan, "Equitable Property" (2006) 122 LQR 232
  - *The beneficiary's rights under a trust are a complex set of rights - a combination of various sets of rights.*
    - ...rather than focusing on whether the rights are in rem or in personam, Nolan focuses on whether the rights are positive or negative...he points out that in a trust, the beneficiaries will have a combination of positive and negative rights.
    - ...the key argument Nolan makes...the fundamental right of a beneficiary is negative, not positive...the beneficiary's fundamental right is to ensure that no one else can have access to the trust property (no one who is not entitled under the trust can have access to it)..
      - e.g. if the trustee wrongfully gives the trust property to someone who is not entitled, the beneficiary can go and get it brought back to the trustee. i.e. a negative right to exclude all of the people who are not entitled to the trust assets from benefiting from the trust assets (a negative shield - ring-fencing).
    - However...trusts also have positive rights for beneficiaries - they have a positive right to enjoy the trust property themselves in some way. However, the reason Nolan doesn't treat that as fundamental is because the rights that the beneficiaries have under the trust are inherently malleable - they depend on what the trust deed says - it depends on what the trustee gives the beneficiaries the right to enjoy...you can't speak generically about that...
      - ...You can speak generically about the negative right, because the beneficiaries always have the right to prevent third parties who are not entitled from benefitting from the property. But, if you go beyond that and ask what rights do the beneficiaries have to the trust property, you can't answer that question in the abstract, you've got to look at the trust deed.

Examples of beneficiary's positive & negative rights.

- The beneficiaries might be given a positive right to benefit from a specific asset in the trust (can claim that they own the property in equity): *Baker v Archer-Shee*;
- *Baker v Archer-Shee [1927] AC 844*
  - *Trusts can give the beneficiaries property rights in the trust assets.*
    The interest of a beneficiary in trust income was proprietary and not limited to a personal right against the trustee...
    - The beneficiary has a property right to all of the income, albeit that the trustee has a personal right to reclaim expenses (i.e. trustees have first charge upon the trust funds for their costs, charges and expenses... but this does not reduce the beneficiary's right to a balance sum).
    - 'If a landowner employs an agent to collect his rents and authorizes him to deduct a commission he does not cease to be owner of the rents...[Lady Archer-Shee's] right is not to a balance sum, but to the dividends subject to deductions as above mentioned. Her right under the will is 'property' from which income is derived.'
  - *In the present case...*
    - *The HoL held that Archer-Shee is liable to pay income tax on that income because she was entitled to it under the trust (i.e. under the trust the income belonged to Lady Archer-Shee - she owned the income, and therefore it was income that she had, and therefore had to pay tax on it in the UK)...an example of a positive right.*
  - [Trust for income in a bank account - concerned a trust that had been created under a will and the beneficiary of the trust was Lady Archer-Shee. The testator (person who had written the will) was in the US. Lady Archer-Shee was based in the UK. The trustees of the trust and the trust assets were all in the US. The trust deed/provision stated that Lady Archer-Shee was entitled to the income from the trust assets. The trustees received that income, and put it into a bank account in the US. The UK revenue authority tried to tax Lady Archer-Shee on that income. *Issue: did the beneficiary have a proprietary right to the income or merely a personal right to be repaid the income? A property right.]*
  - [CRITICAL COMMENT: cf discretionary trust - trust for A, B and C as the trustee thinks fit. A doesn't own any of the trust fund in equity, until a decision is made. A's positive right is to be considered for a distribution from the trust fund - but they can't until an appointment has been made to them, say that any particular part of the fund is there...all depends on what the trust deed gives them.]

(ii) Modern debate

- *More modern version of the classic debate - instead of asking whether in rem or in personam - look at the trust institution as a whole (the trust structure) and ask whether it is a form of property or a form of contract.*
  - Langbein is the main proponent of the view that trusts are contractarian...
  - Hansmaan with Kraakman (and Mattei specifically in respect of trusts) is on the property side.
- *Different from the classic debate...*
  - ...part of the reason for that difference is that Langbein and Hansmann etc. know that trusts have different aspects to them.
    - ...e.g. Langbein is arguing that the trust is contractarian (that contract malleability is more important), but he acknowledges that property is important to the way trusts operate as well (i.e. acknowledges a combination of in rem and in personam aspects).
  - ...the different camps are focusing on what they think is important about trusts (i.e. is it more important that trusts are recognised to be malleable/flexible/contractarian? Or, is it more important to recognise that trusts have a property aspect to them with third party effects.
    - ...these two views (The Langbein contractarian view and the Hansmaan property view) are talking past each other, because they have different criteria applied to that category of importance. They're asking what's important about trusts, but importance is a relative concept - things are not important in their own right.
      - ...For Langbein what is important is what achieves social utility out of a trust (the malleability - the commercial application of trusts)
      - ...Haansman & Kraakman are focused on importance in the sense of things that can't be replicated by contract.

- Langbein, "The Contractarian Basis of the Law of Trusts" (1995) Yale LJ 625
- Hansmann and Mattei, "The Functions of Trust Law: A Comparative and Economic Analysis" (1998) 73 NYULR 434, esp at 471–472
- Nolan, "Understanding the Limits of Equitable Property" (2006) 1 Journal of Equity 18
- Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can Bar Rev 219

(B) MANDATORY & DEFAULT RULES

(1) *To what degree is the trust doctrine mandatory...and if so...why...*
   - ...mandatory rules tend to be property like - because they tend to be there for third party effects.
   - ...part of the answer as to why rules are mandatory, may be because of their third party effects.

(2) *Alternatively - to what degree are trust rules default rules...and therefore more inherently contractarian in nature...and if they are contractarian in nature, to what degree are there limits on how you contract around those default rules.*

- *Mandatory rules of trust...(to what degree are they actually mandatory...)*
   - ...three certainties (intention, subject matter, object)...
   - ...beneficiary principle...
   - ...administrative workability...
   - ...perpetuities and accumulation rules...

(i) Certainty of intention

- *Paul v Constance [1977] 1 WLR 527*
   - *'This money is as much yours as mine' was sufficiently certain to create a trust...*
      - ...the was sufficient certainty of intention that he was putting the bingo winnings into a trust for him and his partner.
   - [A couple shared their financial affairs. Mr Constance put bingo winnings into the account. The specific question was whether Mr Constance's bank account was held legally for him unencumbered, or whether he held the legal title on trust for himself and Mrs Paul (i.e. Constance had a bank account - a chose in action against the bank. He therefore had legal title to that chose in action against the bank. Was that legal title his, or was that legal title held on trust for him and Mrs Paul). Mr Constance said 'this money is as much yours as mine'. *Held: there was enough evidence to suggest that there had been a declaration of trust - an indirect/ informal declaration of trust*.]
   - [CRITICAL COMMENT: If you don't have certainty of intention...then you don't have a trust]

Commercial application of the need for certainty of intention in trusts

- *Korda v Australian Executor Trustees (SA) Ltd [2014] VSCA 65 [overturned in HCA]*
   - *Majority in CA held that the funds were held by the milling company and forestry company on trust...because...objectively, were the funds intended to be held on trust when they were received by the milling company and then by the forestry company even before they got put into the trust?*
      - "Investors knew that the investment returns would depend on the commercial success of the forestry operations. They also knew that, in the event of such commercial success, the benefits would be held for them on trust. No investor would have imagined – and the prospectus certainly did not suggest – that the investment returns could be put at risk by reason of any activity of the operating companies, less still of their holding company (Guns) outside the scope of the timber production enterprise (i.e. the charges are securing other debts that Guns owed - nothing to do with the Forrestry investment). The whole tenor of the documentation was to precisely the opposite effect [35]."
      - ...the investors can't have imagined that the investment monies would be exposed to other debt obligations and so the proceeds of trust were held on trust for the investors.
   - *HC held that there was not trust...the right question was asked (was a trust intended), but the CA got the wrong answer...*
      - ...the Forestry company and Milling company owed all sorts of obligations not all of which were consistent with saying that they held the money on trust...for example, neither the milling nor the forestry company were obliged to keep those funds separate from their own operating funds...traditionally, where there is a trust, you're expected to keep the funds separate - an indicator of the parties' intention.
      - ...because the Forestry company was entitled to take a percentage of the proceeds based on its capitalisation (i.e. not fees for the work they did as trustees but rather some percentage based on capitalisation that has no bearing with operating a trust), tends also to suggest that there wasn't a trust.
      - the fact that the trust documentation indicated that there would be at trust, but that the trust arose once Forestry put the money into the trust, tends to suggest that the parties did not intend a trust earlier on (i.e. why did they create a trust at the end if they intended a trust at the beginning when the proceeds of sale would come in).
      - ...flaw in the CA's reasoning '...no investor would have imagined...': the fact that investors don't imagine losing their money doesn't mean that all of the parties to the transaction are creating a trust which will ring-fence their assets and protect them against loss.

- ...the objective intention here was not to create a trust beforehand...
  - [Concerned an investment in forestry plantations. There was a forestry company which would take investments and use those investments to plant forests. There was a separate company called the milling company, which operates the forests that the forestry company has planted. The milling company cuts the timber down and sells it (i.e. gets proceeds of sale), it takes a commission from those proceeds and pays the rest up to the forestry company. The forestry company deducts its costs and expenses from that sum, and whatever is left gets put into a trust for the investors. Both of the forestry and milling companies were bought out in 2008 by Guns Ltd. Part of that transaction involved the granting of charges by the forestry and milling companies, in order to secure debts that Guns owed. Guns then goes into receivership (in 2012). *Where do the investors stand? As to the proceeds of the sale of the timber which had been put into the trust, there is no question that that money was held on trust for the investors. But, the proceeds of sale of the timber, when it's in the hands of the milling and forestry company (i.e. before its been put into the trust) - is it held in trust for the investors, because if it is, it is ring-fenced and protected from the charge-holders.*
  - [CRITICAL COMMENT: The actual conclusion on whether there was a trust or not doesn't matter so much as the need to find that certainty of intention to be a trust. *Korda*, alongside *Paul v Constance* shows us that that question remains constant even outside of a domestic/family type situation. *Korda* was a commercial investment transaction. You need certainty of intention to create a trust, no matter what the context is.]

- *Byrnes v Kendle [2011] HCA 26, (2011) 243 CLR 253*
  - *The intention is objective. It is to be extracted from the words used...not a subjective intention of the parties...*

- [CRITICAL COMMENT: Certainty of intention is a mandatory requirement. Across the board, for there to be a trust, there needs to be certainty of intention to create that trust.]
- [CRITICAL COMMENT: *Why must there be certainty of intention?* Certainty of intention is a requirement that is not limited to trusts. For example, in contracts, you need an intention to enter into contractual relations. There must also be certainty as to what that intention is. If your contract arrangement is insufficiently certain, then it fails, and it's not a binding contract. In contract, the intention to create the contract and the certainty of intention is looked at objectively (that is the same as the way intention is scrutinzed in trusts: *Byrnes v Kendle).* One difference, is that in a contract situation primarily you're looking at the intention of the parties, whereas in a trust context, prima facie you're looking at the settlor's intention.]

Different jurisdictional attitudes to approaching certainty of intention & retention of title clauses

- *Clough Mill Ltd v Martin [1985] 1 WLR 111 (CA)*
  - The english courts have tended not to wanted to find that the parties intended to make a trust. There approach to the certainty of intention question is that it has to be extremely clear.
- *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd [2000] HCA 25, (2000) 202 CLR 588*
  - *Although this looked like an equitable charge, AA had instead established a trust with M...there was a manifest intention to create a trust...*
    - ...if you intended to create a trust, it doesn't have to be a charge, the way it works is the proceeds come in, which discharges the debt. So, the proceeds are now held on trust for the supplier, they are not held to secure a debt because the debt is discharged by the creation of the trust. So the property is now held on trust for the supplier.
  - *The trust did not have to be registered in order for AA to have priority over other creditors. The trust discharged the debt (i.e. the trust did not secure payment of the debt, rather, in place of the debt there is a trust interest).*
  - [The vendor, Alloys, supplied steel on a retention of title basis (i.e. reserving title in the goods until they'd been paid) to the purchaser, Metropolitan, on 90-day terms, subject to a contractual clause which provided that if Metropolitan used the steel to manufacture goods and sold those goods to third parties, the proceeds of such sales, up to the value of the amount which it owed Alloys, would be held on trust for the benefit of Alloys. Metropolitan then sold various manufactured steel products to third parties and became insolvent. Alloys claimed the amount still owing to it for the supply of steel to Metropolitan on the basis that the retention of title clause in the contract had created a 'trust' in its favour. If the clause did not create a trust, but rather, a charge, then the failure to register the charge under s 266 of the Corporations Law would render the charge void and ineffective. *Issue: Did AA have a charge over the proceeds, or did M hold the proceeds on trust for AA? - HC held there was a trust,*]
  - [CRITICAL COMMENT: The Aus court was more prepared to treat these sorts of clauses as trusts if that intention was manifested in some way...greater willingness to find a trust if the circumstances objectively indicate that.

- [CRITICAL COMENT: What these cases (*Clough Mill Ltd v Martin* and *Associated Alloys*) show is that the judges within different countries can take different attitudes to these certainty of intention requirements. *Clough Mill Ltd v Martin* & *Associated Alloys* are about retention of clauses where the question arises as to whether the clause is a retention of title clause or is it a charge, because if it's a charge, then normally it won't be registered and it will not be effective against a liquidator in liquidation. One possibility in the retention of title clause context is to say that what you are dealing with is a trust, rather than a charge - did you have the intention to create a trust. The english courts have made it clear that they don't like retention of title clauses, and so they tend not to want to find that the parties intended a trust: see *Clough Mill Ltd v Martin*. As a matter of judicial attitude, their approach to that certainty of intention question is that it has to be extremely clear that what you intended to create was a trust. The attitude point comes out when you look at *Associated Alloys* (an Australian decision), because the Australian court was much more prepared to treat retention of title clauses as trusts, if that intention was manifested in some way.

Why do we insist of certainty of intention to create the trust...

- *...because there are third party effects (i.e. they may be directly affected by the transaction).*
  - ...trustee (need to understand that they owe obligations in respect of the trust property)...
  - ...Court (needs to know so it can supervise the administration of the trust)
  - ...beneficiary...(needs to know so that they know they've got rights under the trust)
  - ...third parties (creditors)...(need to know in what capacity they're dealing with people's property holdings).
- *Need to know that the parties really did intend that transaction and what that transaction was...in the same way as we do in other contexts...*
- *Proprietary and contractarian analysis...*
  - ...the certainty of intention requirement exhibits proprietary characteristics because of the proprietary consequences of the trust arrangement (i.e. if you set up a trust arrangement, it creates its proprietary consequences that can affect third parties, and so we put in place a property like rule, a mandatory rule - a certainty of intention rule - that says we will only let you have those consequences if we know that you actually intended that).
  - ...the construction of the trust arrangement is objectively ascertained (*Byrnes v Kendle)*, because it can affect third parties as well.

(ii) Certainty of subject matter

- In respect of what property does the trust subsist...
  - ...the certainty for that has been tested in recent years.
- Who needs to know...
  - ...trustee...because they need to know what property they are administering subject to the trust.
  - ...beneficiaries...affects what right they can assert against the trustee in respect of the trustee...
  - ...third parties...
  - ...court...court needs to supervise the trustee's administration of the trust - it needs to be able to tell the trustee when they've done something wrong or what they should/shouldn't do. The Court can't do that if they don't know what the property is in respect of which the trustees need to be acting in that way. Similarly, the court needs to be able to tell the trustee that that property is held in trust so it's not available to the trustee's general creditors, it's only available to the beneficiaries in an insolvency.
- Why we require a trust to be clear in its subject matter...because we want to be clear in respect of what property the trust subsists because that has third party impacts. The certainty of subject matter rule is concerned with certainty of subject matter as to what the trust property is - a question about property. The point of property is that it affects third parties - that's why something is 'property'...part of the reason why we have this as a mandatory requirement.

- *Hunter v Moss [1994] 1 WLR 452*
  - *Trustee declared 50 of his 950 shares would be held on trust...*
    - ... the shares were fungible in the sense that they were indistinguishable in character and quality...(the shares all came from the same company)
    - ... the trustee was not required to specify which particular shares were part of the subject matter of the trust...
  - [The settlor declared a trust over 50 of his 950 shares. *Was their sufficient certainty of subject matter*? *Yes].*
  - [CRITICAL COMMENT: The decision was criticised by David Hayton, on the basis that the cases the CA relied on were cases that were concerned with testamentary trusts. *Hunter v Moss* concerned an inter vivos trust. The difference is that with a testamentary trust, the settlor can't do anything else to make it clear which shares are held in trust (they're dead) - their executor steps into their shoes and the executor is duty bound to separate assets out. However, in an inter vivos trust, until *Hunter v Moss*, it was dealt with differently, because the settlor is still alive and can separate the assets out - and until he/she does that, the assets were treated as the settlor's assets (i.e. they're not held in trust until they are separated out as to which assets are to be held in trust) because the trust hasn't been properly constituted. *Hunter v Moss* goes against that, and says that you declared the trust, there are ways of working out what the trust assets are (e.g tracing rules).*]*
  - [CRITICAL COMMENT: The problem in *Hunter v Moss* is that if you have 950 shares and you declare a trust over 50 of them, what happens if you give away 100 shares? Whose shares are given away - the trustee's or the trust shares? *Re Hallet* and *Re Oatway* can be applied (i.e. treat the trustee as having given away the their own property and not the trust property. The problem is that it begs the question - you can apply *Re Hallett* and *Re Oatway* if there is a trust. Those rules work because the trustee is obliged to hold the trust assets for the beneficiaries and not for their benefit. But, if we don't know if there is a trust, we can't use those rules to create the trust.]