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What is Equity?

Equity definition is dependant on the context in which it is used. Broader sense, means being fair or just, moral or ethical. Financial sense? Equity is used to describe a number of shares that a company has. Mortgage law, equity is used to describe which section of the house is yours. Etc.

Fundamentally it is about fairness and justice.

Express trusts

There are several different sorts of trusts; the most common is express private trusts. An equitable obligation, binding on a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called beneficiaries) of whom he may himself be one, and any one of whom may enforce the obligation.

Trustees may not treat the property as if it is their own, even though they own it. Trustees may also be beneficiaries can enforce this equitable obligation. Can sue the trustee if the trustee breaches these obligations in some way.

Uses: The ownership and management is split from the enjoyment of that property. The person called a trustee manages some property, but they don't manage/ look after the property for their own benefit, rather for the person who the law calls the beneficiaries. Can be used for private, commercial purposes:

- Managing family wealth under a family trust or under a will
- Manage property for those who are unable to do so, such as children
- For group investments
- As trading trusts – for business purposes
- To avoid certain types of taxation
- To protect assets in the event of bankruptcy
- Charitable purposes such as religion and education

A TRUST IS NOT A THING; IT IS A TYPE OF RELATIONSHIP

Distinction between legal and equitable title

Harrison v Harrison HC Auckland CIV 2008-404-1270, 18 September 2008, Fogarty J

It is sometimes thought by advisers, often not legally qualified, that the creation of a trust is an exercise of private ordering in the complete control of the parties. It is not. Every trust is actually a relationship. A trust is not an entity ... Trust is a word used to sum up a relationship where equity will compel a person holding the legal interest in a property to use it for the benefit of someone else ...

Fiduciary relationships

The obligation, which the trustee owes to the beneficiaries, is called a fiduciary obligation. The law of equity closely scrutinises relationships where one party has placed trust and confidence in another, as it's about good faith. Does not and cannot create protection against every breach of trust. Relationships, which equally protect are known as fiduciary relationships. Other fiduciary relationships include, solicitor and client, a director and the company, an employee and an employer.

Generally a trustee cannot delegate their tasks to a third party.

Key duties are:

1. The fiduciary obligation to avoid conflicts of interest
2. The fiduciary obligation not to make a profit at the expense of the beneficiary.

The consequences of property being recognised as trust property

The trustee is the legal owner but personal creditors of the trustee have no recourse against trust property. Moreover, the trust property does not form part of the matrimonial property of the trustee nor is it part off the trustee's estate on his or her death. The beneficiary can also sometimes recover trust property if a trustee has disposed of it in breach of trust.

The uses of an express trust include:

- Managing family wealth under a family trust or under a will
- Manage property for those who are unable to do so, such as children or those with disabilities
- For group investments
- As trading trusts - for business purposes
- To avoid certain types of taxation
- To protect assets in the event of bankruptcy
- Charitable purposes such as religion and education

Types of trust

- Express trusts (inter vivos or testamentary (i.e. in a will)). Inter vivos: **Intentionally set up, between the living.** Can also be **set up in a will.**
- Resulting trusts. Trusts by operation of law **the law assumes this is what you intended to do, under assumed intention,** a trust has been created.
- Constructive trusts. **A trust arises because the circumstances made it inequitable, even though there is no intention of creating a trust.**

The requirements for an express trust

- A trust has no legal personality.
- There is a distinction between a trust and a gift to a beneficiary; a gift would mean then the full legal ownership goes to the beneficiary.
- However a trust allows not the entire legal ownership, it remains tied up in the trust. A trustee owes a number of statutory duties in addition to fiduciary duties.
- The rule in *Saunders v Vautier* (1841) allows all beneficiaries of full age and capacity, to terminate the trust by requiring the trustee to transfer the land to them, regardless if the trustee objects to this or not.

The three certainties

Before a trust is created, certain formalities such as the valid transfer of property must have been complied with, there must be no breach of the laws concerning perpetuities and the three certainties must exist. They are:

1. Certainty of intention

Precatory trusts: Note that precatory trusts, which **use words of hope or prayer, were once valid trusts but this is no longer the case. It is now necessary for the words to impose a clear obligation on the trustee. The modern test for certainty of intention requires an assessment of the overall intention to create a trust.**

Re Adams v Kensington Vestry (1884) 27 Ch D 394

"I give, devise and bequeath all my real and personal estate... to my dear wife Harriet... in full confidence that she will do what is right, as to the disposal therefore between my children, either in her lifetime or by will after her decease. HELD: this statement showed no evidence of an intention to create a trust.

Cotton LJ considered the will-maker's thought process was like this:

I am the head of the family, and it is laid upon me to provide property for the members of my family – my children: my widow will succeed me when I die, and I wish to put her in the position I occupied as the person who is to provide for my children. **He did not entail upon her any trust so as to bind her, rather in leaving her the property he was calling to her attention the moral obligation which he felt he had – and he hopes that she will do what is right. It was not, however, his intention to impose on her a trust that she must adhere to.**

Re Williams (1897) 2 Ch 12

"... In the **fullest trust and confidence** that she **[would] carry out** [his] wishes in the following particulars..."

These were that she would continue paying the premiums on a life insurance policy of her own and that she would leave all her property, including the life insurance policy, to his daughter Lucy. Lindley LJ:

There can be no doubt **that equitable obligations, [such as] trusts ... can be imposed by any language which is clear enough to show [sic] an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is and in whose favour it is to be performed ... But still in each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist...**

Re Singh (Deceased) [1995] 2 NZLR 487

Tompkins J:

The question is whether it is apparent from the will as a whole ... that the testator intended to create a ... trust. More particularly, the issue is whether on the will as a whole the testator intended that the majority of the children in exercising their power to determine the distribution ... were bound to do so in accordance with the expressed wish. Will contained this statement: And I express the wish without creating a binding trust in that regard that my residuary estate shall pass on my son... absolutely... unless there are special circumstances which in the opinion of the majority of my... children warrant alternative distribution.

Belton v Commissioner of Inland Revenue [1959] NZLR 1372

Trust deed said:

Whereas the settlor being desirous of creating a trust fund for the benefit of the beneficiaries did on or about the first day of February 1947, appropriate to such fund 60 hoggets' of a value of £60.

Re Kayford [1975] 1 WKR 279

- A mail order company got into financial difficulties.
- Its accountants advised it to open a "Customers' Trust Deposit Account".
- However, the company used an old account with a different name.

Megarry J: It is well settled that a trust can be created without using the words "trust" or "confidence" or the like: the question is whether in substance a sufficient intention to create a trust has been manifested ... Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust.

Paul v Constance [1977] 1 WLR 527 and intention of trust can be inferred from conduct. Said on several occasions to

Mrs P: "this is as much yours as mine". The court held that a trust did exist.

Lord Scarman discusses the difference between the intention to make a gift and the intention to create a trust.

2. Certainty of subject matter

The subject matter of a trust must be certain. That is, the property on which the trust is to operate must be clear. There can be no trust without property – that is fundamental.

Uncertain intention

If there is a failure of certainty – if it is not certain that the trustee intended a trust – then the courts will either:

1. Decide that an outright gift was intended (the requirements for gifting are satisfied).
2. Decide that the trust fails and that the settlor stills owns the property (but see the discussion of 'resulting trusts' later in the course).

Two central issues arise from this:

1. What property has been left on trust; and
2. The entitlement of each individual beneficiary under the trust

The subject matter of a trust must constitute legally recognised property. This can include intangible property such as a "chose in action". A "chose in action" is a property right that can only be obtained or enforced through legal action.

In *Don King Productions v Warren* [1998] 2 All ER 608 at 630; affirmed [1999] 2 All ER 218 where it was said 'it makes no difference that the subject matter is a chose in action. The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land ...'.

In *Palmer v Simmonds* (1854) 2 Drew 221; 61 ER 704 Hnerietta Rosco stated that she left the "bulk of my estate" on trust for various people. *White v White* [1909] 28 NZLR 129 "... and May is to have a small portion of what is left".

But in *Re Golay's Will Trusts* [1965] 1 WLR 969 "... enjoy one of my flats during her lifetime and to receive a reasonable income from my other properties". The question was raised around the term reasonable and it was held that it did not provide enough certainty.