



NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 424

COURSE TITLE: EQUITY AND TRUSTS II

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Course Developer: Dr. C.O. Adekoya
Faculty of Law
Olabisi Onabanjo University
P.M.B. 2002
Ago-Iwoye

Course Editors: Dr. Taiwo E. Adewale
University of Ibadan
Ibadan
Oyo State
Nigeria

Programme Leader: National Open University of Nigeria
Lagos

Course Coordinator: National Open University of Nigeria
Lagos

National Open University of Nigeria
Headquarters
14/16 Ahmadu Bello Way
Victoria Island
Lagos

Abuja Office
No. 5 Dar es Salaam Street
Off Aminu Kano Crescent
Wuse II, Abuja
Nigeria
Tel: 234-1-271-2661

e-mail: centralinfo@nou.edu.ng

URL: www.nou.edu.ng

Published By:
National Open University of Nigeria

First Printed

ISBN:

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MODULE 1 NATURE AND CLASSIFICATION OF TRUSTS

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Unit 3	Requirements for Creation of Trusts
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UNIT 1 ORIGIN AND NATURE OF TRUSTS

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1.0 INTRODUCTION

The Law of Trust was part of the received English law into Nigeria, which comprised of the Common Law, the doctrines of Equity and Statutes of General Application. Equity was developed by the Lord Chancellor in the Court of Chancery, the purpose of which was to mitigate the harshness of the common law. The development of the equitable principles by the Court of Chancery also influenced the growth of trust. Consequently, the received English law and case

law has to a large extent shaped the development and practice of the law of trusts in Nigeria.

2.0 OBJECTIVES

This unit will introduce you to the origin of trusts, nature and uses of trust. You will also traverse the differences and similarities between the concept of trust under trust law, customary law and the Land Use Act. At the end of this Unit, you should be able to:

- Trace the origin of trusts
- Define or describe trust
- Understand the nature of trusts
- Differentiate between the concept of trust, under law of trust, customary law and the Land Use Act
- State the practical uses of trusts

3.0 MAIN CONTENT

3.1 Origin of Trusts

The exact origin of trust cannot be ascertained and there are controversies surrounding the subject. What is certain however is that the Court of Chancery entertained trusts cases. One school of thought believed that trust was transplanted into England from Roman legal system. The Court of Chancery no doubt also influenced the law of trusts as administered in that court. Another school of thought however disproved that English law of trust has no connection with Roman law. Notwithstanding this controversy, the law of trusts as we now have it in England was greatly influenced and expanded by the Chancellors in the Chancery Courts which administered equity, in their enforcement of uses.

The origin of the modern concept of trust has been credited to the concept of uses during the medieval period, which was a means of conveying land to someone for the use or of one or more persons. The concept then was that a person called the *feoffor* conveyed land to another person called the *foefee* for the benefit of one person or more called the beneficiaries and at that time called *cestui que use*.

In this type of arrangement, the common law recognised only the *foefee's* legal title in respect of the property conveyed and does not recognise the interest of the

cestui que use in any way. As a result, it became common place for the *feoffee to use* the property for his own benefit instead of that of the *cestui que use* or to use the same in an unconscionable way or to the detriment of the *cestui que use* or retain the property for himself without the *cestui que use* being able to get relief or remedy from the common law courts. In its equitable jurisdiction however, the Chancery courts then intervened and act on the conscience of the *feoffee* to make him perform according to the purpose of the conveyance and prevent either the *feoffee* from keeping the property for his own use or to compel the *feoffee to use* the property for the benefit of the *cestui qui use* in accordance with the agreement that the property is to be used for the benefit of the *cestui que use*. Through the enforcement of uses by the courts of equity, the equitable interest of the *cestui que use* in the property conveyed to the *feoffee* became recognised.

The Courts of Chancery do also punish defendants (i.e. *feoffee*) who disobey its orders by committing them to prison for contempt. The common law courts however do come to the rescue of such erring defendants by obtaining the release of the imprisoned defendants through the writ of habeas corpus.

In connection to the relevance of the concept of uses was at the medieval period and before the Statute of Wills 1540 was enacted, when it was not permitted to transfer land by will. At that time, land was regarded as something personal to the owner and cannot survive him. Any attempt to transfer land by will therefore fails and the tenure of the testator in the land will be extinguished. The concept of use was then employed to circumvent this rule.

Another relevant discussion concerning the origin of trust is with respect to the Statute of Mortmain, which prevented the transfer of land to corporations and ecclesiastical foundations. This was primarily to prevent situations whereby land will be taken out of circulation because corporations live in perpetuity and thus such land will be held forever. It also means that tax usually collected on inherited land can no longer be collected. As a result of the employment of the concept of use, the purpose of Statute of Mortmain was defeated resulting in the loss of tax/revenue to the crown and feudal lords.

The concept of uses then became a means of tax avoidance and this resulted in the enactment of the Statute of Uses 1535, which has the object of investing the *cestui que use* immediately with the legal title such that the *feoffee* can be eased out and incidents of keeping land out of circulation and tax avoidance could be terminated. This objective was short-lived as lawyers devised the concept of “use upon a use”, which was to convey land to the use a third party for the use of the actual beneficiary; with the effect that the Statute of Uses only had effect on the first of the uses and subsequent uses were unaffected. The incidents of feudal taxes

however became abolished in 1660 by the Military Tenures Abolition Act while the Statute of Uses was later repealed in 1925.

In England, the common law was applied and owing to the harshness or rigidity of this law, equitable principles were developed by the Lord Chancellor in order to mitigate the harshness and/or injustice of the common law rules. As a result of the flexible nature of equity and the granting of reliefs to those who the rules of common law worked injustice on, there arose profound conflict between the Lord Ellesmere, Chancellor of the Chancery Court and the Chief Justice of the Common Pleas, Sir Edward Coke, in the *Earl of Oxford's Case* (1615) 1 Rep. Ch. 1 during the reign of King James I (1603 – 1625). The conflict was resolved in favour of equity such that whenever there is a conflict between the doctrines of equity and the rules of common law that of equity will prevail.

Later, there was reorganization of the courts in England by the Judicature Acts of 1873 and 1875 which resulted in the abolition of the Chancery Court. The doctrines of equity and rules of common law then became fused and henceforth administered in the same court.

SELF ASSESSMENT EXERCISE (SAE) 1

Trace the origin of the law of trusts and the Court of Chancery's influence on its development in England.

3.2 Nature of trusts

To attempt a definition of a trust like all legal terms, is fraught with difficulty. The definition given by Keeton has however been described as adequate, which described a trust in the following manner, "All that can be said of a trust therefore, is that it is the relationship which arises whenever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed as *cestui que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust" See Keeton, *The Law of Trusts*, Eight Edition, p. 3 cited in Jegede, M.I. (1999). *Law of Trusts, Bankruptcy and Administration of Estate*. Lagos: MIJ Professional Publishers Limited, p. 11.

By way of illustration, trusts usually involve situations whereby individuals control or plan the distribution of their property or estate either in their life time or after their deaths. A trust is created by an individual when he executes a written

Declaration of Trust directing one person or more persons (sometimes this can be a corporate trust company) called a trustee(s) to hold property or assets in accordance with the terms and conditions contained in the trust instrument for the benefit or one or more persons or a section of the general public, called the 'beneficiaries' or *cestui que trust*, who are the equitable owners of the property or assets, while the legal interest is vested in the trustee. In Nigeria as in most jurisdictions, the law of trusts is governed by statutes and case law.

The trustee is charged with the management of the trust property and holding the same according to the instructions of the settlor in the trust instrument. It is however possible for a person to be both the trustee and the beneficiary in a trust. The written Declaration of Trust usually names the first trustees while it specifies the position for the appointment of successive trustees and contains the terms of the trust. These terms sets out the powers and duties of trustees and the benefits accruing to the beneficiaries. Other ways of creating a trust are through the exercise of power of appointment, transfer of trust either inter vivos or in someone's Will, by contract and statute. A trust created by a Will is referred to as a testamentary trust and the terms and conditions of such trusts are contained in the Will creating it.

A trust may be created during someone's lifetime i.e. inter vivos and such a trust is called a living or inter vivos trust, in such a case, the person creating the trust is referred to as the grantor, settlor or donor. The trust agreement or declaration usually contains the provisions guiding the trust and in the event of the death of the settlor, the trust property will be regulated by the provisions of the trust rather the Will of the settlor or provisions of any statute. This is because a trust may supplant a Will since all the estate of the settlor would have already been planned and settled by the trust before the settlor's death. On the other hand, a trust may be the creation of a Will. A trust created inter vivos may be revocable or irrevocable if such provision is reserved in the instrument creating the trust.

An example of a trust is when a father vests the title of his house in a choice area of Abuja to a reputable estate agent firm with instructions to let out the house to tenants, manage it and pay a certain percentage of the rent yearly to his daughter who is 10 years old until she attains 21 years of age when the house will become vested in the daughter and trust determined.

A trust may also be created by contract or by statute. In a trust, the trustee occupies a position of confidence and must act in good faith with respect to the trust property. He is in a fiduciary relationship with the beneficiaries and must act honestly, not make secret profit, must deal with the trust property for the benefit and in the interest of the beneficiaries and not act in a manner that can jeopardize such interest.

Trust consists of vast and interrelated parts, and the issues involved may sometimes be intricate. In most cases, trust issues often brought before the courts for adjudication are whether the trust is question is a legal one or has been validly created, questions of lawful management of the trust property, whether the trust is a private or public one, requests on a trustee to render account, requests for specific performance, recover of trust assets, breach of trust and construction of trust terms, etc.

Despite the various and the imperativeness to which trust could be put into, however, trusts are less frequently used in Nigeria as in England where the concept was received into Nigeria because of the cultural and social differences in the lives of the people.

It has to be noted that the concept of family ownership of land in Nigeria served a purpose similar to that of trust, where the concept of individual ownership is a foreign one, rather, land belongs to the family and the head of family holds the family land for the use of the family members. The head of family to some extent assumes the position of a trustee and all members of the family have equal right to the property. See *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 1A.C. 399 at p. 404 per Lord Haldane. The concept of trust under customary law is however different from that under the English law because while the trustee is regarded as the owner of the trust property, the head of family is not regarded as the owner of the family property, but rather as the caretaker.

The Land Use Act also embodied the concept of trust by vesting the control and management of land in each State of the federation in the Governors to be held in trust and administered for the use and common benefit of all Nigerians. See the Supreme Court decision in *Abioye v. Yakubu* [1991] 5 NWLR (Pt. 190) p. 130.

The concept of trust under the Land Use Act is however not the same as in the law of trusts because the trustee under the Act, which is the Governor cannot be compelled to render account as trustee under English law. Thus, the kind of trust created under the Act has been regarded as a bare trust. See *Abioye v. Yakubu* (supra). Also, while the head of family under customary law can be held to account, the Governor under the Act cannot be held to account.

SELF ASSESSMENT EXERCISE (SAE) 2

Discuss the concept of trust under trust law, customary law and the Land Use Act.

3.3 Uses of trusts

Trusts are of various types and used for different purposes which are sometimes reflected in the name of the trust. Contrary to popular beliefs, trust is not for the exclusive preserve of rich people. People with limited means and wealthy people can create or establish a trust for their own benefit or for the benefit of others. For instance, trust inter vivos may be used for the purposes of asset planning and management, for the settlor's own benefit and may be used to dispose or distribute the settlor's asset after his/her death.

Trust may be used as a means of financial support and life insurance for a settlor who is incapacitated or having some disabilities or as a security during old age. A trust can also be used to support a spouse in the event of one of the spouse dying before the other, for the education endowment of settlor's children or other persons who may be underage at the time of the settlor's death. Trust may also be used to as a means of giving out gifts or transferring property to loved ones, family members or other objects. A trust can equally be used to benefit or improve a definite section of the society or such a section of the general public capable of being made certain. Examples of these are charitable trusts established for the purpose of providing members of the public with education or those created for the propagation of religion.

Despite the variety of purposes that trusts can be put into, based on public policy, a trust that is illegal or created with the intention of evading creditors or legal liabilities, or to be used as an instrument of fraud or one contrary to public policy will not be recognised and would be set aside by the law court. The same principle was encapsulated by equity.

SELF ASSESSMENT EXERCISE (SAE) 3

What do you understand by the work "trust" in relation to the law of trusts?

4.0 CONCLUSION

Understanding the nature of trusts and the influence of equity on its development is very crucial to a better appreciation of the concept of trusts generally and the various purposes to which trusts can be used. The interrelatedness between trust and equity is also fundamental to successful understanding of and navigating through many of the terms and technical words which feature regularly in the law of trusts.

5.0 SUMMARY

In this Unit, you have traversed the origin, nature and the varying purposes to which trusts can be put into. You've also appreciated the controversies surrounding the origin of the law of trusts in England and its reception in Nigeria. You learnt how it is difficult to have a generally acceptable definition of the term trust and how the development of the law of trust was influenced by the Court of Chancery; which accounted for the harmonious relationship between trust and equity, through their administration in that same court. You are also exposed to the features of trust, the different elements making up a trust and how public policy consideration will prevent a trust from being used to evade creditors, legal liabilities or being used as an instrument of fraud. In the next Unit, you will be introduced to the classification of trusts.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Name the parties to a trust relationship and describe the role of each of the parties.
2. Discuss the concept of uses and its importance in the modern law of trust.

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UNIT 2 CLASSIFICATION OF TRUSTS

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- 4.0 Conclusion
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1.0 INTRODUCTION

In virtually all jurisdictions, trusts are classified into various types and the law of trust in English law and consequently in Nigeria are no exception. The classification or types of trusts sometimes aid in understanding the purpose or object of the trust.

2.0 OBJECTIVES

In this Unit, you will be introduced to the classification of trusts and the underlying factors for this categorization. Classification is also instrumental to formalities, consequences and achieving purpose of that trust. At the end of this Unit, you should be able to:

- Understand the different classification of trusts
- Describe the relationship between private and public trusts
- Explain the relevance of classification of trusts

3.0 MAIN CONTENT

3.1 Classification of Trusts

Classifying trusts is a bit an uneasy task and classification varies according to the classifiers. A distinctive feature of classification of trusts is according to use or object. Hence, most names of trusts are reflective of their purposes or objects. A first and major classification of trusts is into private, public or charitable trusts. Private trust is one that is meant to benefit an individual or a group or people. Public or charitable trust on the other hand is one that is structured to benefit the general public or a section of it. However, while a charitable trust is always a public trust, not all public trusts are charitable trusts.

Trusts are further divided into other compartments of express, constructive, implied, resulting trusts, ministerial or instrumental trusts and discretionary trusts. Irrespective of the classification of trusts into different classes, a distinctive difference to note in the various classifications is between those trusts that are created by the act of the parties and those that evolved by virtue of the operation of law. Flowing from this, trusts that are created by the act of the parties are referred to as express trusts while those that evolved by operation of law are called implied trusts.

SELF ASSESSMENT EXERCISE (SAE) 1

What is the difference between private and public trusts?

4.0 CONCLUSION

Classification of trusts is helpful in understanding the various types of trusts and also a reflection of the purpose and object of the trusts.

5.0 SUMMARY

In this Unit, you have learnt about the different classifications of trusts and that such categorization varies according to the classifiers. You also learnt about that a distinctive feature of the classification is according to purpose or object of the trusts. We also discussed private and public trusts, and those trusts created by act of the parties and those which evolved through operation of law. In the next Unit, you will be introduced to the requirements of trusts.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

The classifications of trusts are a reflection of the purpose and object of the trusts. Discuss.

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UNIT 3 REQUIREMENTS FOR CREATION OF TRUSTS

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1.0 INTRODUCTION

A treatment of the essentials or requirements of a valid trust is important to understanding issues relating to the creation of trusts. Although, generally, no formal requirement is compulsory for the creation of trusts as a result of the equitable nature of trusts. However some formalities may be necessary with respect to some particular types of trust. Also, the mode of creation of the trust, whether inter vivos or by will, may determine the requirements to be complied with. A discussion of these issues is necessary in order to avoid creating ineffective trusts.

2.0 OBJECTIVES

In this Unit, you will be exposed to the essentials of trusts. In particular, you learn about what is required in creating inter vivos trusts and trusts by will. You will also learn about the constitution of trusts as a fundamental requirement in the creation of trusts. A by no means a crucial issue which cannot be wishes away in the consideration of trusts is legal capacity of a person to create a trust. This is equally connected to the issue of capacity to hold interest in real property. You

will further learn about the capacity of corporations and statutory bodies to create a trust. At the end of this Unit, you should be able to:

- Understand the legal capacity required to create a valid trust.
- Analyze the position of law with respect to hold interest in land in different parts of the country.
- Know what is required to create a trust inter vivos and by will.
- Know the effect of lack of compliance with the requirements on the trust created.

3.0 MAIN CONTENT

3.1 Requirements for Creating Inter Vivos and Will Trusts

1.) Inter Vivos Trusts

No formality is required for the creation of a trust if the property involved is in personalties, i.e. tangible personal movable properties, such as vehicles, shoes, television, etc. including money. What is essential is that, the manifestation of the intention to create a trust on the part of the settlor must be very clear. See *Paul v. Constance* [1977] WLR 521. Mere intention to benefit an imprecise person will not be sufficient. See *Jones v. Lock* (1865) L.R. 1 Ch. App. 25.

If the property is realty (i.e. immovable property, such as land), the intention to benefit someone must be evidenced in writing as required by the Statute of Frauds, Section 7; which requires that any declaration of trust relating to land to be evidenced by a memorandum in writing signed by the party creating the trust. The position on the States forming the old Western Nigeria is captured by Section 78(1)(b) of the Property and Conveyancing Law, which provides to the same effect that any declaration in trust in respect of land or any interest therein must be evidenced and proved by some writing signed by some person who is able to declare such trust or by his will. See *Forster v. Hale* (1798) 3 Ves 696 per Arden M.R.

The addition of the words “signed by some person who is able to declare such trust or by his will”, is a clear indication that there are some persons who do not have capacity to declare inter vivos trust or by will. This is the reason why we have to treat the issue of capacity in separately in this unit, to enable you know those who have legal capacity and those who have not.

You must know that failure to comply with the above formalities may be fatal as the trust will be rendered unenforceable. Also note that, writing is not required in

respect of constructive and resulting trusts in realty since these are implied and arise independently of the exercise of the will of the parties.

Note however that, the formality of writing is further required in respect of a disposition of an equitable interest in both personalty and realty under a trust by the beneficiary. Failure to do so renders the disposition void. See Section 9 Statute of Frauds and Section 78(1)(C) of Property and Conveyancing Law.

2.) Trust by Will

In order to create a trust by will, some formalities are required both for the validity of the will and of the trust.

According to the law (The Will's Act 1837 (Section 9) as amended by the Wills (Amendment) Act, 1957 and the Wills Law 1959 Cap. 133, Laws of Western Nigeria, 1959 applicable to the States forming the old Western Nigeria), these requirements are:

- i.) The will must be in writing.
- ii.) It must be signed by the testator or by some other person in his presence and by his direction.
- iii.) The signature of the testator must be attested by two witnesses, who must be present together in the presence of the testator.

Failure to comply with the above provisions of the law will render the trust to be void and no interest will pass under the will. Exceptions to this are secret trusts, whereby irrespective of the non-compliance with the provisions of the law, dispositions made under such trusts can be enforced in equity.

SELF ASSESSMENT EXERCISE (SAE) 1

What are the requirements in creating a valid trust by will?

3.2 Constitution of Trusts

You must note that despite compliance with the provisions of law in creating a trust, coupled with the presence of clear intention of the testator to create a trust, such trust may run into trouble waters if the testator does not convey the property which is to be the subject matter of the trust to the trustee, a process called constitution of trust. The importance of this is that, the beneficiary upon conveyance of the trust property to the trustee, an equitable interest is created in

his favour while the legal interest is vested in the trustee. Thus, where the settlor conveys no property, then the trust is said not to be constituted and no interest passes to the beneficiary.

This issue will further be examined in the next unit for clarity.

3.3 Capacity to Create Trust

In order to create a valid express trust, part of the requirements is the legal capacity of the settlor, whether individual, corporation or statutory bodies, to create it. Related to this is the capacity of a person to hold interest in real property. Where a person cannot hold interest in land, this will affect the capacity to create a trust. The situation of capacity to hold interest in land varies according to the operative law. The issues will now be examined as follows:

1.) Individual

At common law for instance, an infant is capable of holding a legal interest in landed property. However, a sale or disposition of such property is voidable and may be repudiated before the infant attains the age of majority or within a reasonable time after attaining the age of majority. At common law, 21 years was adopted as the age of majority and anyone below this age is an infant. Thus, the position of an infant or a minor who attempts to create a trust, especially in a situation where the trust is not in his interest, will have the same effect at common law.

The common law age of majority is 21 years and this position has been restated by some State laws in the Federation, e.g. Section 2 of the Infants Law, Cap. 49 Laws of Western Region states that, an infant is someone under the age of twenty one years. This has been adopted and now applicable in States forming the old Western Region of Nigeria. Consequently, any person of 21 years of age and above is regarded as of full age and has the capacity to hold legal interest in real property. Although, some statutory provisions have specified 18 years as “age of majority” or “full age”, see for example, section 277 of the Child’s Right Act, Sections 29 (4)(a) and 35(1)(d) of the 1999 Constitution, and Section 20(1)(a) of the Companies and Allied Matters Act, the age of majority in Nigeria for other purposes nevertheless remains 21 years. See the Court of Appeal decision in *Elias v. Elias* [2001] 9 N.W.L.R. (Part 718) p. 429.

With respect to the States where the Settled Act, 1882 operates in Nigeria, and an infant has interest in a real property, such land becomes a settled land. Thus, the infant becomes a tenant for life and the statutory powers vested in the infant as tenant for life will be exercised on his behalf by the trustees of that settlement.

However, in some other States in Nigeria forming the old Western and Mid-Western Nigeria, an infant cannot hold a legal interest in real property and where land was conveyed to an infant, which will result in the creation of a trust for sale in favour of the infant.

It follows from the above that an infant cannot create a trust of real property or create a valid will except such an infant is a soldier at war or mariners at sea. An infant can however create a trust over both legal and equitable interest in pure personality and over equitable interest only in real property.

ii.) People with Mental Disability

People with mental disability also cannot validly create or have a trust enforced directly against them, since their mental deficiency may itself encumber their ability to validly dispose their properties or make will. Some of the things that may invalidate such trusts are the possible contradicting instructions of the insane settlor/testator or that he/she does not appreciate the nature or effect of such instructions. See *Re Beaney* [1978] 1 W.L.R. 770. It is however possible to approach the courts for directions in respect of the settlement to be made on the property of an insane person. See for example Section 180 of the Property and Conveyancing Law for example, Section 180 of the Property and Conveyancing Law. If the trust was created during the time that such an insane settlor was in his lucid period and he/she fully understands the nature of his act and the consequences of the same, such trust may be upheld as valid.

iii.) Statutory and Incorporated Companies

Statutory bodies and incorporated companies can also create trusts if the power to do so is contained in their enabling law and memorandum of association, otherwise any trust created will be declared *ultra vires*. By virtue of Section 38(1) of the Companies and Allied Matters Act, incorporated companies have all the powers of a natural person of full age and capacity in the execution of its business and objects. In effect, they can create trusts without such powers being expressly contained in their memo, the power to do so may be limited by their memorandum of association or by law.

SELF ASSESSMENT EXERCISE (SAE) 2

Capacity to hold interest in real property is sufficiently connected to the capacity to create a valid trust. Discuss.

4.0 CONCLUSION

Compliance with the requirements for the creation of a trust is sine qua non if such trust is not to be declared invalid. From the examination of these requirements above, you will realize clearly that creating or settling a trust is something that should be given to professionals to handle in order to perfect the intricacies, including ensuring that there is legal capacity on the part of the settlor/trustee, and avoid pitfalls which can render the trust from been declared void by the courts.

5.0 SUMMARY

In this Unit, you have been familiarized with the essentials of a creating a valid trust, which examined various issues relating thereto. Requirements for creating a trust inter vivos and by will were examined, constitution of trust and legal capacity to create a trust were also examined. You will observe the requirements of the law, which makes writing mandatory in creating either inter vivos or will trusts. Also, a disposition of equitable interest in both realty and personalty requires writing. The legal capacity of individuals, people with mental disability and corporations were also examined and you can see that for corporation to create a trust, such power need not be expressly contained in their memorandum of association since in Nigeria, incorporated bodies have the powers of a natural person.

In the next Unit, you will be introduced to the constitution of trusts and its exceptions.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Discuss the capacity of an infant to create a valid trust at common law, in the States covered by the Settled Land Act 1862 and the in the States covered by the Property and Conveyancing Law.
2. What are the essentials in order to create a valid inter vivos trust?

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The Property and Conveyancing Law, Cap. 100 Laws of Ogun State 1978.

UNIT 4 CONSTITUTION OF TRUSTS AND THE EXCEPTIONS

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1.0 INTRODUCTION

As part of the requirements in creating a valid trust, constitution of the trust is a very fundamental one and goes to the root of the trust. This is based on the ground that it can almost be said with certainty that where there is no subject matter of the trust, there is no trust, because is the subject matter that the whole trust is based upon. This is a factor why the part is treated separately although a mention of it has been made above as part of the requirements of trust. A consideration of related issues, such as exceptions to non-perfection of imperfect gifts will be attempted in order to have a balanced understanding of the treatment of issues.

2.0 OBJECTIVES

In this Unit, you will be exposed to the concept of constitution of trust, covenant to settle and the exceptions to the equitable maxim of 'equity will not perfect an imperfect gift' and "equity will not assist a volunteer", will also be examined. You will appreciate what it requires to constitute personalty and realty, when you can say a trust is completely constituted and when it is not. When a trust has not been constituted but there is agreement to do so, you will see when this is possible and what the general exceptions to the above equitable maxims are. At the end of this Unit, you should be able to:

- Say whether a trust is constituted or not.

- Explain what is required to constitute a trust both in personalty and realty.
- Give instances when the requirement of writing in constituting realty can be dispensed with.
- Discuss what is covenant to settle and when this will be forced.
- Name and discuss the exceptions to equity's non-perfection of imperfect gifts and non-aiding of volunteers.

3.0 MAIN CONTENT

3.1 Constitution of Trusts

As you've learnt above, constitution of the trust or conveying the subject matter of the trust to the trustee is vital to the validity of the trust created. Failure to constitute a trust passes no interest to the beneficiary and the will be void. We shall now examine the nucleus of what is regarded as constitution of trust, in order for you to have practical understanding of when a trust can be said to be completely constituted and when it is not.

The trust is said to be completely constituted when the settlor has vested or has done all that is required or necessary to properly vest the trust property in the trustee. Except the property has been transferred, the trust cannot be enforced, as equity will not perfect an imperfect gift or aid a volunteer. See *Milroy v. Lord* (1862) 4 De G.& J. 264 at 274 per Turner L.J.

In order to constitute a trust, the nature of the trust property (whether personalty or realty) will determine the mode of doing this. Also, where the settlor is both the settlor and the trustee, this might affect the mode of transfer. These issues will now be examined.

i.) Constitution of realty

To constitute a trust in respect of realty, the settlor must comply with all necessary requirements of the law. A cardinal issue here, is that there must be evidence in writing of such transaction. See for example, Section 3 of the Registration of Titles Act, Cap. 181, Laws of Nigeria, applicable in other parts of the country and Section 77 of the Property and Conveyancing Law, and the Statute of Frauds Section 7, on requirement as to writing, that the land be registered in the trustee's name or that he has done all that's required to of him with nothing left to be done by the settlor, otherwise, the trust cannot be enforced for lack of constitution.

If the interest to be transferred is an equitable one, the settlor need not vest the legal title in the trustee since he has none. All that is required is that the disposition of the equitable interest must be evidenced in writing as treated previously.

Where the settlor has not transferred the property but has covenanted to settle the same for the purpose of the trust, the beneficiary may through the equitable remedy of specific performance in some cases be able to enforce the settlement of the property, although the issue involved in a situation such as this, is one of contract but intertwined with trust.

However, where the settlor declares himself as the trustee of the trust property and now wears the double cap of both the settlor and the trustee, there is no need to execute any conveyance to transfer the trust property since he already has the legal interest. The declaration makes him automatically the trustee of the property and thereby holds the same for the interest of beneficiary. See *Lady Naas v. Westminster Bank Ltd.* [1940] A.C. 366.

ii.) Constitution of Personalty

From your knowledge of equity and classification of property, you'll realize that personalty can be divided into tangible and intangible property. To effect the constitution of pure personalty, mere delivery of the property suffices.

In respect of intangible property – such as shares, etc., the settlor must have executed the necessary transfer form for this purpose and the transfer registered in the company's register.

Where a deed was executed for this purpose but the required transfer form was not used, the transfer will be ineffective. See *Milroy v. Lord* (supra).

Covenants to settle

In situations where the settlor has neither constituted the trust nor declared himself as the trustee of the trust property, there is nothing for the beneficiary to enforce; and no interest passes to the beneficiary. In some cases however, the settlor may covenant to settle or transfer the trust property to the trustee, in which case the beneficiary may enforce such a trust.

The problem however, is that since the agreement to transfer or settle the trust property is a contractual one, and going by the doctrine of privity of contract, only a party to a contract can enforce it. In other words, the beneficiary must be a party to the covenant before he can enforce the same. Where the beneficiary has

furnished consideration for the covenant, he will be able to enforce the covenant both at common law and equity.

Where the type of consideration furnished is not the type recognised at common law, the beneficiary can only enforce the covenant in equity. For example, consideration based on marriage is not recognised at common but recognised in equity. At equity, anyone within the marriage consideration can enforce it but not the next of kin. The requirement in respect of this is that, the marriage consideration must be made on or before the day of the marriage, although a post-nuptial settlement made in pursuance of a pre-nuptial covenant will be recognised. Where the marriage consideration was given after the marriage and was not related to a pre-nuptial covenant, consideration will be deemed not to be furnished. See *Hill v. Gomme* (1835) 5 Myl. Cr. 250 and *De Metstre v. West* (1891) A.C. 264.

However, a beneficiary may enforce a covenant to settle without having furnished any consideration where the covenant is by deed, as agreements made by deed need not be supported by consideration in order to be enforced at common law.

SELF ASSESSMENT EXERCISE (SAE) 1

What do you understand by constitution of trust and when can a trust said to be completely constituted?

3.2 Exceptions to Equity's Non-Perfection of Imperfect Gifts

There are circumstances where a trust not completely constituted will be enforced and constitutes exceptions to the equitable maxims that "Equity will not perfect an imperfect gift" and "Equity will not assist a volunteer". The exceptions are considered as follows:

i.) The rule in *Strong v. Bird*

Under this rule, an imperfect gift will be perfected if the legal title has vested in the donee on the donor's death. Circumstances under which this can arise are:

- a.) Where the donor appoints the donee as the executor.
- b.) Where the donee is appointed as the administrator in the case of intestacy. See *Re James* [1935] Ch. 449.

In *Strong v. Bird* (1874) LR 18 Eq 315, the stepmother of Bird resides in his house for which she pays rent to Bird. Bird borrowed the sum of 1,000 pounds from his stepmother and it was agreed that the loan will repaid by a reduction in the rent paid until the same was totally liquidated. The stepmother was however paid the reduced rent twice and afterwards paid the full rent until her death. The stepmother on her death appointed Bird as her executor and her the next of kin then attempted to recover the debt from Bird. It was contended that the conduct of the stepmother is making full payment of rent and stopping paying the reduced rent does not discharge Bird from the debt since Bird has furnished no consideration to entitle him to be discharged from the debt.

It was however held that in making Bird her executor, the stepmother intended the loan to be a gift to Bird since it will be the duty of Bird to call in the debts due to his stepmother's estate and it cannot be expected that Bird will sue himself, thus resulting in the cancellation of the debt. It was further held that the fact that the stepmother had stopped payment of the reduced rent in her lifetime was indicative of her donative intention till she died.

For the rule in *Strong v. Bird* to apply, the following conditions must be satisfied:

a.) The donor must have intended to make immediate inter vivos gift to the donee. If the intention relates to the future and is not immediate, the rule will not apply. See *Re Freeland* [1952] Ch. 110. The immediacy requirement here makes the rule to apply to existing specific gifts. Thus, intention to make a gift by will does not come within the rule. See *Re Stenart* (1908) 2. Ch. 251.

b.) The donor's intention to make the gift must have continued till the time of his death. In other words, it has to be established, that such intention of the donor endured till he died. Where however, the donor has taken some steps which is at variance with the expressed intention to make a gift, for example, by lending the property to someone else, the rule will not apply. See *Re Wale* [1956] 1 W.L.R. 1346.

c.) The intention of the donor must relate to a specific item. If the intention is vague and does not relate to some specific items, the rule will not apply. See *Re Gonin* [1964] Ch. 288.

ii.) Donatio Mortis Causa

Donatio mortis causa is a gift made in contemplation of death. This type of gift is a conditional one and takes effect only on the donor's death. It is upon the death of the donor that title in the property passes to the donee. The conditions for the

validity of a donatio mortis causa as established in *Cain v. Moon* (1896) 2 Q.B. 283 per Lord Russell, are as follows:

- i.) The gift must have been made in particular contemplation of death and not in respect of death some day.
- ii.) The subject matter of the gift or means of control or obtaining it must have been delivered to the donee; and
- iii.) The gift must have been made under the circumstances as to show that the property is to revert to the donor if the contemplated death did not occur. This condition is not one that is usually expressed but is to be inferred from the surrounding circumstances. Thus, if the donor recovers from his illness or revokes the gift while alive, the gift fails.

iii.) Dispositions under Will

In testamentary dispositions, once the will is duly executed and probate of the same has been obtained, the beneficiaries are entitled to the gifts, irrespective of whether they are volunteers or not. Where the executor of the will failed to convey the gifts, the beneficiaries can sue the executor for specific performance notwithstanding that they have not furnished any consideration for the gift.

iv.) Doctrine of Proprietary Estoppel

Under this heading, equity will preclude a person who has made an imperfect gift to deny or assert a contrary right over such property. Such as where a father asks his son to occupy a land and the son in consequence thereof, expended large sums of money to build on the land. The father died without executing any document in favour of the son. The son's claim to get the conveyance to himself on the property was upheld. See *Dillwyn v. Llewelyn* (1862) 4 De G.F. & J. 517.

v.) Statutory Exceptions

As treated above, an infant or minor cannot hold a legal estate in realty or a legal estate created in their favour. The conveyance of realty in favour of an infant or a minor has the effect of operating as a declaration of trust in favour of the minor, while the legal estate remains vested in the donor/settlor who now becomes a trustee for sale of the legal estate in favour of the minor. See Sections 35(1) and 36 Property and Conveyancing Law, Western Nigeria. In cases where the settlor/donor who made the conveyance is death or no one available to execute the trust, the property conveyed in favour of the infant will be vested in the Public

Trustee until he attains the age of majority. See Section 37(1) Property and Conveyancing Law. For the position in States outside the former Western Nigeria, the conveyance of legal estate to an infant operates as a settled land. See Settled Act, 1882.

SELF ASSESSMENT EXERCISE (SAE) 2

1. Mention and discuss three exceptions to the equitable maxims that “Equity will not perfect an imperfect gift” and “Equity will not assist a volunteer”.

4.0 CONCLUSION

The constitution of a trust is very essential to the life of the trust. For there to be a trust at all, there must be subject matter. The non constitution of trust may render it to be void. You have to note however, what is required to constitute a trust based on the nature of the subject matter of the trust, whether personalty or realty and the interest involved, whether legal or equitable interest. You must also note the various exceptions to the equitable maxims that “Equity will not perfect an imperfect gift” and “Equity will not assist a volunteer”. In particular, the rule in *Strong v. Bird*, the conditions for its application, donatio mortis causa and its conditions for application and other exceptions. You can appreciate how the issues are interwoven and none of the requirements for the valid creation of trusts should be taken less seriously.

5.0 SUMMARY

In this Unit, you have learnt about the constitution of trusts, mode of constitution of personalty and realty, equitable and legal interest. You also learnt about the necessity of the constitution of realty to be in writing and the exceptions to this to the law in this regard. Also examined is covenant to settle and circumstances when this will be enforced. The exceptions to equity’s non-perfection of imperfect gifts and not assisting a volunteer were discussed. In particular, you appreciate the rule in *Strong v. Bird* and the rationale for the decision in that case and consequently the rule in that case. Conditions for the application of the rule in that case were equally considered among other exceptions. In the next Unit, you will be introduced to express private trusts.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. What is covenant to settle, and under what circumstances will this type of covenant be enforced and not enforced?
2. Discuss the rule in *Strong v. Bird* and the conditions to be satisfied before the rule will apply.

7.0 REFERENCES/FURTHER READINGS

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UNIT 5 EXPRESS PRIVATE TRUSTS

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1.0 INTRODUCTION

Apart from the treatment of the requirements for a valid trust generally, it is important to understand issues relating to private express trust and the essentials of this type of trust. Although no formal requirement is compulsory for the creation of trusts as a result of the equitable nature of trusts. These issues will be treated in details and will enable you to appreciate them in order to avoid creating ineffective private trusts.

2.0 OBJECTIVES

In this Unit, you will learn about private express trusts which are usually created for the benefit of human objects, although some may be instituted for non-human objects. Importantly, this unit will familiarize you with the essentials of creating express private trusts. In this regard, you will be taken through the ‘three certainties’ which are the principal requirements of express private trusts. You will also learn about the “given postulant test” that came out of the certainty of objects and the three limitations on the application of this test. At the end of this Unit, you should be able to:

- Describe what express private trust is.
- Understand the requirements of the express private trust.
- Know features of the three certainties.
- Know the application of the given postulant test and its limitations.

- Learn the appropriate laws guiding the creation of express private trust works.

3.0 MAIN CONTENT

3.1 Express Private Trusts

An express private trust, as the name implies is one created by the unilateral act of the donor, settlor or testator and not an implied or a resulting trust. Private trust is one which usually has as its objective, the benefit of human objects based on filial or other considerations. The essence of human object in a private trust was pointed out by Sir William Grant, M.R. in *Morice v. Bishop of Durham* (1804) 9 Ves. Jr. 399 at 404 when he stated that there must be someone in whose favour the court can decree performance.

However in some cases, a private trust may have as its objective, the benefit of non-human objects. These human objects in a private trust are the ones who usually take up cases of enforcement of the trusts and other matters in connection therewith. The latter class of trusts is called “trusts of imperfect obligations” or “non-charitable trusts”, which makes provisions for the building and maintenance of tombs and monuments, care of animals, etc.

As treated above, a private trust may be coupled with power, such as power of identification or selection, which may however not be exercisable immediately. See *McPhail v. Doulton* (supra). In situations, it is required that the individuals which are the objects of the trust and their beneficiary interests in the trust property must be identified/ascertained within the perpetuity period. The period is the life time of a person in existence plus twenty one years. Failure to identify the human objects and their interests within the perpetuity period renders the trust void.

SELF ASSESSMENT EXERCISE (SAE) 1

The objects and their beneficiary interests in a private trust that is coupled with a power of selection not exercisable immediately must be identified/ascertained within the perpetuity period to be valid. Discuss this assertion and exceptions, if any.

3.2 Requirements for Creation of Express Private Trusts

In order to create a valid express private trust, certain requirements must be satisfied, especially with respect to the creation of express trust, although, in a general sense, equity is not usually strict in the compliance with a special formality for the creation of a valid trust. For a valid express trust to be created however, requirements as to the “three certainties” must be met. This requirements was first conceived by Lord Langdale, MR., in *Knight v. Knight* (1840) 3 Beav 148 at 173 these are, certainty of intention to create a trust, certainty of the subject matter of the trust, and certainty of objects (i.e. the beneficiaries). Where there is uncertainty in respect of any of the three, the trust will fail

The three certainties will now be treated seriatim as follows:

i.) ***Certainty of intention***: For an express trust to be validly created there must be the certainty of intention to create that trust. Although no special word or language is required to indicate this intention since equity looks on the intent rather than the form. As such, it is possible for a trust to be created without technical or special words such as ‘trust’ or ‘confidence’ being used in as much as such intention on the part of the settlor or testator is clear in this regard. Where, however, the words or language used is not clear or precatory words (words making a request or expressing “hope”, “belief” and desire, etc rather than a clear command or direction to the trustee) are used by the settlor, there is always problem of interpretation and difficulty in ascertaining the intention of the settlor to create a trust. For example, ‘I belief or have confidence that the property will be used in a particular manner’.

The attitude of the courts formerly was that, where such precatory words were used, some sort of leniency was adopted and a kind construction given to hold that a trust exists, which gave rise to special class of trusts called “precatory trusts”. This approach was adopted by the court of chancery to prevent situations where the executor will be entitled to the beneficiary interest in the residue of the estate of a testator left undisposed by will. After the coming into effect of the Executors Act, 1830 the executor can no longer hold beneficiary interest in the residue left undisposed unless the testator had expressed such an intention. Thereafter, imposing a trust in absence of such intention has been criticized as being capable of imposing a trust where none was intended. See *Lambe v. Eames* (1871) 6 Ch. App. 597 at 599 per James, L.J.

Starting with the case of *Hill v. Hill* (1897) 1 Q.B. 483 however, you must note that the mere use of precatory words will not automatically result in the imposition of trust unless such intention can be inferred from relevant document and surrounding circumstances. If an obligation on the trustee can be inferred, then it

will be held that trust exists. The words “I leave in charge”, which was contained in a will came up for adjudication in *Ali v. Ali* (1942) 8 W.A.C.A. 1 whether they were capable of creating a trust. While the trial judge and the West African Court of Appeal, held that a trust was created, the Privy Council decided otherwise, on the ground that the words used are not the ones widely used and that construing the will of the testator as a whole, no trust was created.

Also, in *Mussoorie Bank Ltd v. Raynor* (1882) 7 App. Cas 321 where a testator gave his property to his wife in a will and “feeling confident that she will act justly to our children in dividing the same when no longer required by her.” The court held that no trust was created for the children.

From a consideration of the later cases, you will appreciate that it is better not to use precatory words in creating a trust rather, it is better to use certain obligatory or commanding words. The resulting change in the judicial approach to the use of precatory words was borne out of the desire of courts not to saddle a donee/trustee of the property with the onerous duties of a trustee unless the donor manifest such intention to create a trust. Where a trust is held not to be created owing to the use of uncertain words, the donee/trustee takes absolutely.

ii.) ***Certainty of the subject matter***: This means that the subject matter of the intended trust, that is, that which is to be given to the beneficiary, must in the first instance exist and be certain, identifiable or capable of being made certain when the trust is created, otherwise the trust fails. See *Palmer v Simmonds* (1854) 2 Drew 221.

The property in question may take the form of real or personal properties, tangible or intangible. Where the testator anticipates a bequest of property, such cannot form the subject matter of a trust, having not crystallized at the time of the trust. Also where the property forming the subject matter of the trust is destroyed or no longer in existence, the trust fails.

Where the words used by the testator/settlor are such that the subject matter of the trust cannot with reasonable precision be made certain, the trust fails. For example, where the words “such parts of my estate she shall not have sold”, “the majority of my estate”, or the “bulk of my said residuary estate” See *Palmer v. Simmonds* (supra). See further, *Sprange v. Barnard* (1789) 2 Bro. C.C. 585 where a testatrix gave property to the donee (the testatrix’s husband) “for his use and at his death, the remaining part of what is left, that does not want for his use” to be divided between the testatrix’s brothers and sisters. It was held that the donee takes absolutely.

In *Boyce v. Boyce* (1849) 16 Sim 476 the settlor gave two houses on trust to trustees with direction to convey one of the houses to Maria “whichever she may think proper to choose or select” and the other to be conveyed to Charlotte. It happened that Maria predeceased the testator in which case she did not have the opportunity of making her choice before Charlotte, it was held that the trust fails as the property that will go to Charlotte cannot be ascertained.

In any event where a trust fails for lack of uncertainty of the subject matter, the trustee or donee takes absolutely. See *Hancock v. Watson* [1902] A.C. 14.

iii.) ***Certainty of objects:*** This means that the intended beneficiaries of the trust must be clearly identified or possible of being made ascertainable. See *Re Hain's Settlement* [1961] 1 W.L.R. 440; 1 All E.R. 848 and *Re Vandervell's Trusts (No. 2)* [1974] Ch. 269 at 319 per Lord Denning. If the beneficiaries cannot be identified, the trust fails, except the trust is a charitable one, and the property or subject of the trust must result to the estate of the testator/donor. See *Morice v. Bishop of Durham* (1804) 9 Ves. Jr. 399 at p. 404 per Sir William Grant. In other words, the trustee must be able with reasonable certainty to identify those beneficiaries who falls within the trust, such that he should be able to compile a list of all the beneficiaries when the time for distribution is ripe. The ‘list test’ is what is required in the case of a fixed trust. See the House of Lords decision in *Re Gulbenkian's Settlement* [1970] A.C. 508. If however the trust is a charitable one, what is needed to be ascertained is the purpose of the charity, such that the certainty of beneficiaries is not of essence.

However, where the trust is a discretionary one, whereby the trustee was given power to decide who the beneficiaries will be, the power of appointment will be held valid but the testator/settlor must have expressly stated an identified or identifiable class or group from which the beneficiaries will be chosen. See *McPhail v. Doulton* [1971] A.C. 424. In stating the class or possible beneficiaries, it suffices if the testator/settler says “my grandchildren”. In this case, the beneficiaries may include those unborn at the time of the trust. In the case of discretionary trust, where either trust power or mere power of appointment was reserved, it is not necessary for the trustee to be able to identify all the objects (beneficiaries) as the requirement to be satisfied is the ‘given postulant test’ laid down in *Re Gestetner Settlement* per Harman J. [1953] Ch.672 at 681. The pivotal question here is whether the donee of the power is able to ascertain without difficulty whether a particular individual (given postulant) is or is not a member of a specified class of objects. The test will be satisfied once the donee of the power is able to draw with certainty the border line for the objects falling within that class and those outside it. In that case, there is no uncertainty.

The 'given postulant test' in *Re Gestner Settlement* was restated by the House of Lords in *Re Gulbenkian's Settlement* [1970] A.C. 508 overruling the diluted approach to the test as applied by the courts and adopted by the Court of Appeal in its decision of the same *Re Gulbenkian's Settlement*, where the test will be deemed satisfied if at least one person clearly falls within the specified objects class; notwithstanding that others cannot be ascertained. You must note that there is no distinction in the application of the test between trust powers and mere powers.

In the application of the given postulant test as postulated in *Re Gulbenkian's Settlement* (supra) at pp. 524-525 per Lord Upjohn, three limitations to its application have been set in *McPhail v. Douulton* [1971] A.C. 424 at 457 per Lord Wilberforce as follows:

i.) The first which is on linguistic or semantic uncertainty, also referred to as conceptual uncertainty; relates to when the language used is unclear and cannot be resolved, such that the trustee cannot ascertain the class of persons to be so entitled to the trust, the gift will be declared void.

ii.) The second relates to evidential uncertainty, which deals with situations where there is difficulty in ascertaining the existence or whereabouts of members of the class. As a result of the fact that this type of uncertainty can be cured by the trustees applying to court for an order for necessary directions; this may not lead to invalidity.

iii.) The third uncertainty is administrative unworkability; in this case, the meaning of the words used is clear but the definition of the beneficiaries is so hopelessly wide as not to form "anything like a class". The trust will therefore be regarded as administrative unworkable. An uncertainty of this nature has the effect of invalidating a trust power (See *R v. District Auditor ex parte West Yorkshire Metropolitan C.C.* [1986] 26 R.V.R. 24) but a mere power cannot be uncertain merely because it is wide in ambit. See *Re Manisty's Settlement* [1973] 3 W.L.R. 341.

SELF ASSESSMENT EXERCISE (SAE) 2

Mention and discuss any two of the requirements for the validity of express private trust.

4.0 CONCLUSION

Compliance with the requirements for the creation of express private trust is sine qua non if such trust is not to be declared invalid. From the examination of these requirements above, you will realize clearly that creating or settling a trust is something that should be given to professionals for proper handling of the intricacies, including ensuring that the legal requirements are complied with and that any provision or act that can offend against the rule against perpetuity is not offended or to avoid pitfalls which can render the trust from been declared void.

5.0 SUMMARY

In this Unit, you have been introduced to express private trust, its meaning and the requirements for the valid creation of this trust. In particular, you were taken through the three certainties, as the cardinal essentials of express private trust and how to satisfy there requirements. You also learnt about the given postulant test with respect to certainty of objects given in *Re Gulbenkian's Settlement* (supra) and the limitations to the application of this test as laid down in *McPhail v. Doulton* (supra). In the next Unit, you will be learning about charitable trusts.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. In creating a private trust "...there must be someone in whose favour the court can decree performance." Per Sir William Grant in *Morice v. Bishop of Durham* (1804) 9 Ves. Jr. 399 at pp. 404. Discuss.
2. Discuss the three limitations on the application of the "given postulant test" laid down in *McPhail v. Doulton* [1971] A.C. 424 at 457 per Lord.

7.0 REFERENCES/FURTHER READINGS

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UNIT 6 CHARITABLE TRUSTS

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1.0 INTRODUCTION

Charitable trusts unlike private trusts have as their objects, the benefit of the general public or a significant portion of it. Despite the common use of charitable trusts in England and the tax advantages given to this class of trusts, the use of it has been at a slow pace in Nigeria. The reason for this can be attributed to the great difference in the cultural and social life/orientation of the people in England and Nigeria. Also, the economic situation in Nigeria has to some extent limited the setting up or donating to charities in Nigeria. Notwithstanding, the use of charitable trusts has witnessed a steady growth especially with respect to the advance of education in Nigeria. It is thus important for you to be familiarized with the law and practice of charitable trusts in Nigeria.

2.0 OBJECTIVES

In this Unit, you will be taken through the meaning of what may be described as charitable trust, the relevant statutes in this regard and the major divisions to which charitable trusts have been classified. You learn about the distinctive features that marked charitable trusts different from private trusts, the tax and other advantages enjoyed by charitable trusts and the liberal construction that charitable trusts have enjoyed in the law courts, owing partly due to the fact that charitable trusts in most cases have no human beneficiaries to enforce them. You will also be introduced to the Cy-pres doctrine. At the end of this Unit, you should be able to:

- Distinguish between a charitable and a private trust.
- Know the essential features of a charitable trust.
- Mention the major divisions of charitable trusts.
- Understand the law that guides the creation of charitable trusts in Nigeria.
- Explain why charitable trusts enjoy liberal construction in the courts.
- Explain who is responsible for the enforcement of charitable trusts.
- Appreciate when the cy-pres doctrine will be applied.

3.0 MAIN CONTENT

3.1 Meaning and Features of Charitable Trusts

The meaning of charitable trust is best discerned by examining the purpose or objects of charitable trusts, as defining the word ‘charity’ or ‘charitable’ like most legal terms will be a difficult task. This difficulty was acknowledged in *Re Nottage* (1895) 2 Ch. 649 as the legal meanings of the said words are different from those ascribed to them in common usage. The provision of statutes have generally served as the relevant guide as to what can be regarded as charitable. Of great importance in this regard is the Charitable Uses Act 1601 commonly referred to as the Statute of Elizabeth, an Act of parliament 43 Eliz I, c.4. The preamble to this Statute contained a catalogue of objects that can be regarded as charitable. Although, the Statute of Elizabeth has been repealed by the Mortmain and Charitable Uses Act, 1888, Section 13(2) of the latter Act preserved the provisions of the said preamble to the Statute of Elizabeth. We shall examine the provisions of the said preamble in the next sub-unit.

The two essential features you need to know about charitable trusts are that, before a trust can qualify as a charitable one, the element of public benefit, i.e. it must be for public benefit and the class of the intended beneficiaries must not be on the basis of personal relationship. If these elements are absent in a trust, it cannot be regarded as charitable. However, trusts for the relief of poverty are exempted from this requirement of public benefit because such trusts may be restricted to family members or other restricted class of people.

Thus, a trust must be for the benefit of the community or a significant portion of it for it to pass the public benefit test. See *Verge v. Somerville* (1924) A.C. 496. A trust created for the training and education of the grandchildren of the testator and other child, was held not to be a charitable one. See *Re Obabunmi Pedro* [1961] L.L.R. 127. Also, in *Re Crompton* [1945] Ch. 299 a trust created for the education of the descendants of three named individuals only, failed the test of public benefit.

However, you need to know that, the fact that the number or size of the intended beneficiaries of a charitable trust is small may not necessarily rob it of its public benefit feature, if the class of the intended beneficiaries is not to be determined purely on the grounds of personal relationship to the testator, settlor or donor. See *Re Simson* [1946] Ch. 299 where gift made to only one person. On the other hand, a trust may be created for the benefit of a larger number of people, yet fail to pass the test of public benefit. See *Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297 where in spite of a trust for the education of children of employees and ex-employees of a particular company with the number of intended beneficiaries running into over a hundred thousand people was nonetheless held not to be charitable based on the personal relationship between the settlor and the potential beneficiaries.

It is equally essential for you to know some of the certain peculiarities that marked charitable trusts different from private trusts, although the two classes of trusts are express. As noted above, charitable trusts in most cases have no human objects or beneficiaries who can enforce them hence; it is the responsibility of the Attorney General to enforce such trusts. This is one of the reasons why the lack of human objects will not invalidate a charitable trust, unlike the case with a private trust which will fail for uncertainty of objects. However, in exceptional cases where charitable trusts have human beneficiaries, they do not have power of enforcement.

Although charitable trusts are subjected to the perpetuity rule like private trusts by which the subject matter of a charitable trust must vest within the perpetuity period, unlike private trusts however, the part of the perpetuity rule relating to the rule against inalienability does not apply to charitable trusts. See *Re Gwyon* [1930] 1 Ch. 255.

SELF ASSESSMENT EXERCISE (SAE) 1

Mention and discuss two essential features that a trust must have before it can qualify as a charitable one.

3.2 Classifications of Charitable Trusts

Section 13(2) of the Mortmain and Charitable Uses Act, 1888 which preserved the provisions of the preamble to the Statute of Elizabeth, contained a catalogue of objects that can be regarded as charitable which are as follows:

The relief of the aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and schools in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans, the relief, stock or maintenance for houses of correction; the marriage of the poor maids; the supportation, aid and the relief or redemption of prisoners or captives; help of young tradesmen, handicraftsmen and persons decayed; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.”

The above objects have been classified into four main headings for convenience by Lord MacNaughten in *Commissioners for Special Purposes of Income Tax v. Pemsel* (1891) A.C. 531 at 583 as stated hereunder:

- i.) Trusts for the relief of poverty;
- ii.) Trusts for the advancement of education;
- iii.) Trusts for the advancement of religion; and
- iv.) Trusts for other purposes beneficial to the community.

i.) Trusts for the Relief of Poverty

Although this class of trust may not necessarily satisfy the public benefit requirement, it is nonetheless accepted as charitable even if the intended beneficiaries of the trust are drawn based on personal consideration. This makes this class of trust an exemption to the public benefit test. This classification is based on the preamble to the Statute of Elizabeth which listed ‘the relief of aged, impotent and poor people’ as some of the objects of charitable trusts.

In construing the words ‘aged, impotent and poor’, interpreted the words are to be read disjunctively such that it will not be interpreted as meaning someone who is aged, poor and impotent; which will make nonsense of the provision. See *Re Glyn’s Will Trusts* [1950] 2 All E.R. 1150. What is essential for you to note here is that, a trust must have the object of being applied to the relief of poverty and it is not material that the word ‘poverty’ was not specifically used or stated in the document. Although the meaning of ‘poverty’ was not given, gifts to those who are in need, the indigent, ladies of limited means See *Re Gardom* [1914] 1 Ch. 662 and in relief of poverty, have generally been upheld. It is not required that the intended beneficiaries must be destitute or in abject poverty. See *Re Coulthurst* [1951] Ch. 661 at 665 per Evershed M.R.

Where the beneficiaries of a trust cannot be classified as poor or in need, it will not be upheld as charitable, such as where gift was made for working class and their families, which itself does not evidence poverty. Gifts to beneficiaries who are old do not present difficulty as they are easily discerned from the expression used e.g. gift to old people over 65 years resident of a particular district. See *Re Robinson* [1951] Ch. 198.

ii.) Trusts for the Advance of Education

Education has been construed in the wider sense beyond teaching and includes the promotion of arts and graces of life. As a result of the perceived value of education to the society, various acts and gifts have been held to constitute the advancement of education. Some of these are, chess playing among boys and youth, see *Re Dupree's Deed Trust* [1945] Ch. 16; advancement of learning all over the world, see *Whicker v. Hume* (1858) 7 H.L. Cas. 124; for the establishment and support of law reports, see *Incorporated Council of Law Reporting for England and Wales v. A.G.* [1972] Ch. 73; for the establishment and support of professorship and lectureships, see *A.G. v. Margaret and Regius Professors In Cambridge* (1682) 1 Vern 55. the spread of knowledge and appreciation of scholarships and prizes in Universities and schools see *University College of North Wales v. Taylor* (1908) p. 140; promotion of squash racket courts and a prize, see *Re Mariette* (1915) 2 Ch. 284.

An educational trust fund created for the benefit of the community but with preference to a particular class and to a certain percentage, such as where preference was given to the families of employees of a particular company up to a maximum of 75 per cent of the fund was held to be charitable. See *Re Koettgen's Will Trusts* [1954] Ch. 252.

Other gifts have been held not charitable such as a public library to be devoted entirely to works of pornography or of a corrupting nature were held not charitable. The important thing to note here is where the element of public benefit is lacking, it will not constitute charity.

iii.) Trusts for the Advance of Religion

The word 'religion' has not been exclusively defined but in *Karen Kayemeth Le Jisroel v. IRC* [1931] 2 K.B. 465 at 477 per Lord Hanworth MR, the promotion of religion have been interpreted to mean the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the

observances that serve to promote and manifest it – not merely a foundation or cause to which it can be related. In spite of this, the courts have taken a liberal view on the construction of the word ‘religion’ in order to ensure that the law is neutral between different religions and not to make distinction between one sect and another. See *Neville Estates Ltd. v. Madden* [1961] 3 All E.R. 769.

If however, the tenets of a particular sect inculcate doctrines adverse to the very foundation of all religions or subversive of all morality, the court will not assist to execute such bequest, but declare it void.

However, if the tendency were not immoral, although the court might consider the opinions sought to be propagated foolish or even devoid of foundation, it will not on that account declare it void. See *Thornton v. Howe* (1862) 54 E.R. 1042 at 1043-4. Thus, a bequest to promote atheistic doctrines was held to be charitable although this was not in advance of religion. A trust for the promotion of Jewish religion was also held to be charitable. *Re Thackrah* (1939) 2 All E.R. 4

Gift to a group not concerned with the promotion of religion was held not charitable. See *United Grand Lodge v. Holborn Borough Council* (1957) 3 All E.R. 281. Also, a society whose principal object is the teaching of a doctrine, which may be regarded as philosophical or metaphysical conception was held not to constitute the advancement of religion. See *Berry v. St Marylebone Borough Council* [1958] 1 Ch. 406. In this regard, the religion must be one concerned with relationship between man and God, and its purposes are for the benefit of the public and not one based on ethics; which is concerned with man’s relationship with man. See *Re South Place Ethical Society* [1980] 1 W.L.R. 1565.

In the Nigerian case of *Re Obabunmi Pedro* (supra) a trust for the saying of Masses to the dead was held to be charitable while the bequest of a room to be used as a private family mosque in a private house was held not charitable. See *Iyanda v. Ajike* (1948) 19 N.L.R. 11. Trusts for the repair of parish yard see *Re Vaughan* (1886) 33 Ch. D. 187; for the maintenance of a cemetery, a gift for the stipend of clergy; have been held to be charitable.

iii.) Trusts for other Purposes Beneficial to the Community

As the heading implies, this trust covers all others which have the element of public benefit apart from the three headings earlier treated. A trust of this nature includes those promoting the mental or moral improvements of the community, such as gift for the welfare of cats and kittens; see *Re Moss* [1949] 1 Ch.D. 495 or the benefit of animals, see *Re Wedgwood* [1915] 1 Ch. 113; for home for lost dogs; see *Re Douglas* (1887) 35Ch.D. 472.

A gift for the specific animals, see *Re Dean* (1889) 41 Ch.D. 552; trusts to procure a change in the law, see *Bowman v. Secular Society* [1917] A.C. 406; were held not charitable.

Trusts for the welfare of animals in particular were given recognition as a result of their benefit to mankind. Trusts for the promotion of sport per se, has been held not charitable, see *Re Nottage* (1895) 2 Ch. 649; except if such trust is meant for the promotion of sport within a charitable institution such as schools, colleges and Universities. See *Re Mariette* [1915] 2 Ch. 284. Trust for the building of recreational facilities has been held charitable. See *Re Jones Deceased* [1918] 3 N.L.R 80.

What you need to note under this heading is that, four sub-headings can be categorized and these are:

- i.) Trusts for the welfare of animals.
- ii.) Trusts for sports and recreation.
- iii.) Political trusts.
- iv.) Miscellaneous.

The first two have been examined in details, while trusts for political purposes are not charitable since the courts have no means of determining their likelihood of benefit to the public, for example, where they promote the cause or interest of a political party, promote change in law or procuring a reversal of government policy. See *Re Hopkinson* [1949] 1 All ER 346. Under the miscellaneous sub-headings, this covers gifts or trusts for purposes not covered by the other three sub-heads, e.g. gift to a voluntary fire brigade, gift to promote the defence of a country from attack. See *Re Driffill* [1950] Ch. 92. Trust to assist victims of flood is also covered by the fourth branch. See *Re North Devon and West Somerset Relief Fund* [1953] 2 All E.R. 1032.

You need to understand that profit making charitable trusts such as schools, medical or housings bodies, will still retain their status so long as they do not distribute the profits to members. See *Re Resch's W.T.* [1969] 1 A.C. 514. Also, not that as a result of their benefit to the public, charitable trusts enjoys some tax advantages over other classes of trusts. For example, charitable trusts are exempted from tax on their income on their investment; properties donated/bequeathed to charitable institutions are exempted from capital gains or transfer tax on disposals made by the them (see for example, Section 17 Capital Gains Tax), and donations made by companies for charitable purposes are

deductible from the income of companies for the purposes of tax computations. See Section 21(5)(e) of the Companies Income Tax Act. Charitable trusts are in some cases either wholly or partly exempted from stamp duties.

The above reasons accounted for why you will observe that in many of the cases, a usual party is the Inland Revenue Commissioners, abbreviated as “I.R.C.”, which is the body in charge of revenue generation in England. This body has to be involved in the cases in order to determine whether some of the trusts qualify as charitable in order to be exempted from tax or not.

SELF ASSESSMENT EXERCISE (SAE) 2

Discuss the sub-heads of trusts covered by the heading of trusts for other purposes beneficial to the community.

3.3. The Cy-pres Doctrine

A discussion of this doctrine is important for you as a result of its usefulness in cases of ineffective or failed trusts. Under the doctrine, when a private trust is ineffective or fails, the property results to the settlor or the residuary estate in case he is deceased. In the case of a charitable trust, where this is impracticable or impossible, the property results to the settlor or his estate (if deceased), except in cases where a general charitable intention can be presumed on the part of the settlor. See *Re Rymer* [1895] 1 Ch. 19.

Where the settlor has a general charitable intention, the trust property will be applied cy-pres to other charitable purposes as nearly as possible to the original purposes. Cy-pres doctrine will also be applied in cases where an effective charitable trust becomes impracticable or impossible to perform, irrespective of whether the settlor has a general charitable intention or not.

4.0 CONCLUSION

Charitable trust is an important class of trusts as a result of the public benefit they offer. However, it is crucial to the validity of this trust that the class of the intended beneficiaries must not be one based on personal relationship. Some of the varying trusts considered on the major four headings of charitable trusts signify compliance with the public benefit element, except trusts for the relief of poverty. Charitable trusts thus have to be carefully drafted or worded in order to ensure that

they incorporate its essential features; otherwise, the trust will fail and result to the residuary estate of the settlor or testator.

5.0 SUMMARY

In this Unit, you have learnt that apart from the trusts for the relief of poverty, charitable trusts must be for the public benefit or a significant portion of it and that the class of the intended beneficiaries must not be on the basis of personal relationship. You have also learnt that charitable trusts in most cases have no human objects or beneficiaries, and unlike private trusts, cannot fail for uncertainty of objects. You equally learnt about the classification of charitable trusts into four main headings, and that out of these four classes, trusts for other purposes beneficial to the community has been further sub-divided into trusts for the welfare of animals, sports and recreation, political trusts, and miscellaneous trusts. You have been exposed to why charitable trusts enjoy some tax advantages over other classes of trusts and the Cy-pres doctrine. From a consideration of the above, you have been able to distinguish a charitable and a private trust, understand its essential features, and explain why charitable trusts enjoy liberal construction in courts. In the next Unit, you will learn about resulting trusts.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Discuss any two of the classifications of charitable trusts according to Lord MacNaughten in *Commissioners of Income Tax v. Pemsel* (1891) A.C. 531 at 583
2. The fact that the number of the intended beneficiaries of a charitable trust is small may not necessarily rob it of its public benefit feature, and on the other hand, a trust may be created for the benefit of a larger number of people, yet fail to pass the test of public benefit. Discuss.

7.0 REFERENCES/FURTHER READINGS

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MODULE 2 RESULTING, CONSTRUCTIVE AND OTHER TRUSTS

Unit 1	Resulting Trusts
Unit 2	Constructive Trusts
Unit 3	Discretionary Trusts
Unit 4	Protective Trusts
Unit 5	Trusts in Favour of Creditors

UNIT 1 RESULTING TRUSTS

CONTENTS

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	Nature of Resulting Trusts
3.2	Presumption of Advancement
4.0	Conclusion
5.0	Summary
6.0	Tutor-Marked Assignment (TMA)
7.0	References/Further Readings

1.0 INTRODUCTION

Resulting trusts are special and peculiar trusts which are not in the class of express trusts. This class of trusts can arise in varying situations and are very fundamental to our consideration of trusts by virtue of wide areas that they can arise. In fact, any consideration of trusts without the resulting trusts will be grossly deficient. The examination of the issues to be covered in this unit will enable you to appreciate the practical application and benefits of resulting trusts.

2.0 OBJECTIVES

In this Unit, you will learn about what can be described as resulting trusts, the nature of resulting trusts, situations where resulting trusts could be presumed or imposed and statutory provisions negating resulting trust in cases of voluntary

transfer of land by one person to another. You will further learn about the equitable principle of presumption of advancement and cases where such presumption could be rebutted and. At the end of this Unit, you should be able to:

- Know is a resulting trust and the varying circumstances where it can arise.
- Explain the equitable principle of the presumption of advancement.
- Explain when and how the presumption of advancement can be rebutted.
- Appreciate the practical importance of the resulting trusts.

3.0 MAIN CONTENT

3.1 Nature of Resulting Trusts

Essentially, a resulting is a creation of equity and one regarded as the presumed intention of the settlor, testator or any other party and which is imposed from the circumstances of each case and not a trust expressly declared. A resulting trust can therefore be described as one which is presumed or implied from the conduct of the parties and the surrounding circumstances.

Yet, it may be a difficult task to attempt a definition of a resulting trust, judging from the variety of ways which may arise. In *Re Vandervell's Trust* [1971] 1 All E.R. 47, however, an attempt was made to classify resulting trusts by its nature and circumstances when they may arise. The classification will be considered shortly.

Some of the characteristics of resulting trusts are that, its objects need not be immediately identifiable see *Re Gillingham Bus Disaster Fund* (1958) Ch. 300; and are not subject to the rule against perpetuities.

By virtue of the nature of resulting trusts, they are exempted from the requirements for the creation of express trusts. See Section 78(2) of Property and Conveyancing Law.

In *Re Vandervell's Trust (No. 2)* [1974] Ch. 269 resulting trusts were further classified into “presumed” and “automatic” resulting trusts. Presumed resulting trusts will arise in cases where the intention of trust is presumed or implied from the circumstances on the part of one party in the transaction; while automatic resulting trusts relates to situations where trust is not the presumed intention of the settlor or testator but one which is an automatic consequence of the circumstances of the case. The effect of this classification is that it is not in all cases that an

intention of resulting trust is implied or presumed, although it has been generally expressed that the distinction is merely cosmetic.

Situations where resulting trusts could be presumed or imposed are as follows:

1. Failure of Express Trust

Resulting trust can arise in cases where an express trust fails either totally or partially. For instance, a trust can fail totally where it was declared void by reason of uncertainty or that it offends against the rule of perpetuity and for any other reason, apart from those declared void on the grounds of illegality and public policy. In situations like these, there is a resulting trust to the settlor or testator except where the settlor or testator has indicated other purposes which the beneficial interest could be applied if the primary purpose fails. See *Hodgson v. Marks* (1975) Ch. 892.

The principle here is based on the fact that unless a clear intention was expressed to the contrary, the trustee cannot take beneficially where the trust fails. See *Re Gillingham Bus Disaster Fund* (supra) and *Morice v. Bishop of Durham* (1804) 9 Ver. Jr. 399.

Where a resulting trust is in respect of the residue of a will, there be a resulting trust in favour of the residuary devisee or legatee. Where there is no provision in a will as to who will be entitled to the estate's residue and there is a failure of the trust, relatives or next-of kin can claim benefit. See *Morice v. Bishop of Durham* (supra). In the absence of eligible relatives, the trustee is to convey or transfer the trust property to the State as *bona vacantia*. See *Hodgson v. Marks* (supra).

In cases where there is a partial failure of a trust, the part that fails will result to the settlor or testator. However, where the partial failure will not vitiate the trust, a resulting trust may not arise.

2. Unexhausted Residue of a Trust

Where there is a surplus after the terms of a trust whether created by will or *inter vivos*, has been performed or the beneficial interests were not wholly exhausted or disposed, the remainder of what is left will result to the testator's estate or settlor. The exception is where a contrary intention was expressed. See *Re Gillingham Bus Disaster Fund* (supra).

It may however be possible that there were several donors in respect of a particular trust fund, in which case, the surplus will be shared pro rata among the contributors, in accordance to the proportion of their contribution. It may also happen that some of the donors are anonymous and hence can't be identified, in that situation their interest in the surplus fund will be regarded as lost for life; in such a situation the portion of what belongs to them should be transferred to the State as *bona vacantia*. See *Re Gillingham Bus Disaster Fund* (supra).

3. Purchase in the Name of Another

In situations where someone purchases a property in the name of another and the person in whose name the property was purchased gave no value or consideration for the same, equity treats such a person as holding on resulting trust for the person who advanced the purchase money, unless a contrary intention is shown. See *Dyer v. Dyer* (1788) 2 Cox Eq. 92 and the Nigerian case of *Coker v. Coker* [1964] L.L.R. 188 where the principle in the former English case was approved and applied.

The principle of equity under consideration here has been held applicable to varying situations, some of which are as follows:

- i.) *Purchase in the name of another* – this covers cases where someone provided money for the purchase of landed property in the name of another. See *Ukata v. Emembo* [1963] 7 E.N.L.R. 137.
- ii.) Joint purchase by two or more persons in the name of one person.
- iii.) Joint purchase.
- iv.) Joint mortgage.
- v.) Joint account.
- vi.) Joint leases.
- vii) Voluntary transfer of land by one person to another, except the conveyance is expressed to be for the use of the transferee. In the former Western Nigeria however, there is no resulting trust in the situations aforesaid. See Section 85(3) of the Property and Conveyancing Law.

SELF ASSESSMENT EXERCISE (SAE) 1

Discuss the nature of resulting trusts and the importance or otherwise of the further classification of these trusts into “presumed” and “automatic” resulting trusts in *Re Vandervell’s Trust (No. 2)* [1974] Ch. 269.

3.2 Presumption of Advancement

You need to know that in certain cases of purchase in the name of another, there may be presumption of advancement where there is such level of intimacy between the person who advanced the purchase money and the person in whose name the property was purchased. In that case, it is presumed that the person who provided the purchase money wished to advance it for the benefit of the other.

This may arise in cases where the person who provided the purchase money stands in *loco parentis* or some other special relationship to the other person, such as father to son, or husband to wife. The property advanced in this case is presumed to be a gift and a resulting trust is rebutted. See *Bennet v. Bennet* (1879) 10 Ch. D. 474. This is usually the case in purchases involving family members.

From the above discussion, presumption of advancement will be made in a transaction involving:

- i.) Father and child.
- ii.) Husband and wife. See *Petitt v. Petitt* (1970) A.C. 777.
- iii.) Persons in *loco parentis*.

Rebuttal of Presumption of Advancement

In spite of the presumption of advancement in above given cases, it is possible to rebut such presumption by the party contending it. According the dictum of Viscount Simonds in *Shephard v. Cartwright* (1955) A.C. 431 at 449, evidence admissible in rebuttal of presumption of advancement shall be the acts and declarations of the parties before or at the time of purchase. Subsequent acts are only admissible as evidence against the party who made the advancement and not in his favour.

You have to note that evidence which indicates that a transfer was made for illegal, fraudulent or purposes contrary to public policy shall be not admissible in rebuttal of the presumption of advancement.

Also, evidence in rebuttal of the presumption of advancement which revealed that a transfer of property was made in order to defeat a creditor's claim will not be admissible. See *Tinker v. Tinker* [1970] 1 All E.R. 540.

SELF ASSESSMENT EXERCISE (SAE) 2

Mention and discuss with the aid of decided cases, two situations where resulting trusts could be presumed or imposed.

4.0 CONCLUSION

Resulting trusts are vital to the practical application of trusts and our examination of the issues should be able to equip you for the application of the principles. You need to be able to navigate your ways through the intricacies involved in situations where resulting trusts can arise and when there would be presumption of advancement.

5.0 SUMMARY

In this Unit, you have learnt about resulting trusts, their nature, the further classification of these trusts into “presumed” and “automatic” resulting trusts and the varying circumstances when it could arise or be imposed, such as failure of express trusts, unexhausted residue of trusts and purchase in the name of another, among others. You further learnt about the principle of presumption of advancement, which may arise in cases where the person who provided purchase money stands in *loco parentis* or some other special relationship to the other. Also learnt in this unit is about possibility to rebut the presumption of advancement by the party contending it. In the next Unit, you will learn about constructive trusts.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Discussed the equitable principle of presumption of advancement and circumstances when this could be rebutted.

2. Fikemi bought a three-bedroom bungalow with the gratuity she was paid on her retirement. Fikemi's husband - Orikanbody, expended his personal money generously to renovate and put the house in good shape after which it was let out to a tenant. Three years after the purchase, Orikanbody fell in love with a young lady – Susan, who got pregnant for him. On hearing information about the amorous affairs of her husband and the consequent pregnancy, Fikemi moved out of their matrimonial home and filed for a divorce. Orikanbody claimed that the house bought by Fikemi is jointly owned by them owing to the money he spent on improving the house. Orikanbody then requested that the same be sold and his own share of the proceeds of the sale be given to him. Fikemi however disputes Orikanbody's claim and contends that the money expended on the house by Orikanbody was an advancement to her. Meanwhile, Fikemi demanded that the Nissan X-Terra jeep which she presented to her husband – Orikanbody as gift on his 55th Birthday but which she bought in her own name be returned to her. Discuss the legal issues involved and advice the parties.

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Property and Conveyancing Law.

UNIT 2 CONSTRUCTIVE TRUSTS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Features of Constructive Trusts
 - 3.2 Practical Situations of Imposition of Constructive Trusts
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

Unlike the position with private or charitable trusts, there are certain situations where the law imposes a trust irrespective of the parties' intention to create one. In situations where justice and law requires it, constructive trust is imposed to prevent a party who has committed an unconscionable conduct go scot-free. Situations such as this are varied and not static. Constructive trust is thus imposed in as the court may deem fit especially on rights relating to properties. Because they are imposed, constructive trusts are exempted from compliance with the requirements of a trust.

2.0 OBJECTIVES

In this Unit, you will be taken through the features of constructive trusts and the reasons for imposing such a trust on a party, why constructive trusts are exempted from compliance with the requirements of a trust and an examination of some of the varying situations where constructive trusts have been imposed by law. You will learn about the fact that constructive trust is essentially a proprietary and that there must be fiduciary relationship between the parties before constructive trust can be imposed. You will equally learn about distinguishing factor between resulting and constructive trusts. At the end of this Unit, you should be able to:

- Describe constructive trust.
- Know the features of constructive trusts.

- Explain the circumstances that can give rise to constructive trusts.
- Know practical situation that can justify the imposition of constructive trusts.
- Understand why constructive trusts are exempted from formalities of creating a trust.

3.0 MAIN CONTENT

3.1 Features of Constructive Trusts

Constructive trusts are a class of trusts imposed by law (equity) irrespective of the intention to create a trust. See *Beatty v. Copperhein Exploration Co.* [1919] 225 N.Y. 330 per Cardozo J.; see also *Kotoye v. Saraki* [1994] 7 N.W.L.R. (Pt. 357) 414 at 444 per Kutigi J.S.C. Trusts of this nature relates to a variety of circumstances which may result in constructive trusts. In a way, resulting trust may be confused with constructive trusts, but they are essentially different. In respect of constructive trusts, they occur by operation of law, dating back to the event which gave rise to it and this is merely declared by the court. See *Westdeutsche Landesbank v. Islington B.C.* [1996] A.C. 669. Resulting trusts on the other hand are based on the presumed intention of the parties.

Constructive trust is concerned with preventing the legal owner of a property from escaping with an unconscionable conduct. In this way, it is related in a way to the principles of proprietary estoppel, thus protecting existing rights in property. This is often referred to as institutional constructive trust and not remedial constructive trusts, which is a judicial remedy for the enforcement of equitable obligation and commonly used in the United States of America. See *Westdeutsche Landesbank v. Islington B.C.* (supra).

The essential feature you have to note with constructive trusts is that fiduciary relationship must exist between the constructive trustee and the claimant, and that the relationship has been breached by the constructive trustee withholding property from the claimant in an unconscionable way. Thus, a constructive trust is imposed by law whenever justice and good conscience requires it. See *Hussay v. Palmer* [1972] 1 W.L.R. 1286 at 1290 per Lord Denning. If a trustee has no interest in property, constructive trust cannot arise.

Another issue you have to note is that charitable trusts are normally exempted from compliance with the requirements of creation of express trusts. See Sector 8 Statute of Frauds 1677; Section 78(2) Property and Conveyancing Law, Cap. 100 Laws of Ogun State 1978. These laws exempted this class of trusts from the

requirements of writing, as requiring otherwise will be to defeat the very essence of constructive trusts.

SELF ASSESSMENT EXERCISE (SAE) 1

Mention and discuss two essential features of a constructive trust and why the features are fundamental to this class of trusts.

3.2 Practical Situations of Imposition of Constructive Trusts

Constructive trusts have been imposed in the following circumstances:

1. Stranger intermeddling with trust property

This heading covers diverse situations, for example, where a stranger, without acting as a trustee or having the authority of the trustee takes it upon himself to intermeddle with the trust property; he becomes a trustee of his own wrong, i.e. a trustee *de son tort*, otherwise called a constructive trustee. See *Mara v. Browne* (1896) 1 Ch. 199 at 209 per A.L. Smith, L.J. Another situation is where a trustee transfers the trust property to a stranger who receives it, knowing that same to be in breach of a trust, irrespective of whether such a notice is actual, constructive or imputed. See *Soar v. Ashwell* (1893) 2 Q.B. 390.

However, where the stranger is a purchaser for value of the legal estate without notice of the beneficiary's equitable interest, he takes free of all equities, including that of the beneficiary. See *Boursot v. Savage* (1866) L.R. 2 Eq. 134 and *Cave v. Cave* (1880) 15 Ch. D. 639. In the case of volunteer who receives notice of the beneficiary's equitable interest after acquiring the property, the law will convert him to a constructive trustee for the beneficiary.

2. The Vendor as a Constructive Trustee

Where there is a contract for the sale of a real property, once the vendor receives the purchase price for the property, he holds the property as a constructive trustee for the purchaser until the contract is completed and title is transferred to the purchaser. This is premised on the fact that this sort of contract is one enforceable at equity and the purchaser has acquired equitable interest in the property notwithstanding that the vendor still retains the legal interest; since equity regards as done that which ought to be done. See *Lysaght v. Edwards* (1876) 2 Ch.D. 499.

3. The Mortgagee as Constructive Trustee

As it is with the case between a vendor and the purchaser, the mortgagee is a constructive trustee for the mortgagor. A mortgagee in possession of the mortgaged property for instance is treated as a constructive trustee of the mortgagor and is liable to account for all rents and profits received in respect of the property.

A mortgagee exercising his power of sale also cannot involve in sharp practices by selling the mortgaged property to himself or someone nominated by him. See *Robertson v. Norris* (1857) 1 Giff. 421. Furthermore, where a mortgagee in realizing the security for the mortgage has exercised his power of sale, he is to apply the money realized to meet the mortgage loan, costs and other charges due on the mortgage and whatever residue that is left on sale is to be paid to the mortgagor. For the statutory provisions on this position, see Section 127 Property and Conveyancing Law Cap. 100 Laws of Western Nigeria, 1959.

Furthermore, you must realize that when exercising his power of sale, the mortgagee must find proper price for the mortgage property. See *Eka-Eteh v. Nigeria Housing Development Society Ltd.* [1973] 3 S.C. 183.

4. Trustee Profiting from Position of Trust

It is a cardinal equitable rule that a trustee must not profit from his position or use the same to his advantage by virtue of the fiduciary position in which he stands. When a trustee breached this fiduciary duty and by so doing gains a personal advantage, he becomes a constructive trustee of the gains made for the beneficiary. See *Keech v. Sanford* (1726) Sel. Cas. King 61; 25 E.R. 223 and the Nigerian case of *Marques v. Edematie* (1950) 19 N.L.R. 75.

This equitable principle applies generally to persons standing in fiduciary positions, such as partners, mortgagors or mortgagees, tenants for life – see *Okesuji v. Lawal* [1986] 2 N.W.L.R. (Pt. 22) 417; joint tenants, executors and administrators. See *Re Biss* (1903) 2 Ch. 40.

5. Acquisition of Property by Fraud

Where a person has acquired property by personal fraud, he may be compelled by equity to hold such property as constructive trustee for the benefit of the person injured by the fraud. See *McComick v. Grogan* (1869) L.R. 4. Where a claimant

has acquiesced to the fraud, constructive trust will not be imposed in such circumstances. See *Lonrho Plc. v. Fayed (No. 2)* [1992] 1 W.L.R. 1.

This principle enunciated here equally covers cases of transfers inter vivos, intestacy and wills. For example, in situations where a person had been induced not to make a disposition by will on the strength of the promise of the person entitled intestate, to distribute the properties according to the wish of the donor; if on the death of the donor, the person entitled on intestacy failed to distribute the properties as agreed with the donor, equity will make the person to hold the properties as constructive trustee. See *McComick v. Grogan* (supra).

6. Persons in Fiduciary Positions

Similar to what was treated above under the sub-heading, “Trustee Profiting from Position of Trust”, generally, persons who stand in a fiduciary positions to others such as agents, trustees, executors, administrators, etc. are not entitled to make profits either directly or indirectly by virtue of their position and also should not put themselves in positions whereby their interests will conflict with their duties. See *Marques v. Edematie* (supra). To make profit by persons in fiduciary positions constitutes a fundamental breach of that position. See *Regal (Hastings) Ltd v. Gulliver & Others* [1942] 1 All E.R. 378.

The fact that the person in fiduciary position did not obtain his profit fraudulently or corruptly is irrelevant. See *Boardman v. Phipps* [1967] 2 A.C. 67. The person having beneficial interest also need not suffer any injury as a result of the profit made. See *Parker v. McKenna* (1874) L.R. 10 Ch. 96.

7. Profit form Crime

On grounds of public policy, a person will not be allowed to make profit or claim any benefit from his own crime. See *Cleaver v. Mutual Reserve Fund Life Association* (1892) 1 Q.B. 147. Where for example, one joint tenant kills the other so that the property can devolve on him as a joint tenant, he will hold the property on constructive trust for himself and the deceased’s estate or next of kin. See *Rasmanis v. Jurewitsch* [1970] N.S.W.L.R. 650.

In *Cleaver v. Mutual Reserve Fund Life Association* (supra) a wife who is entitled on her husband’s death to the benefit of an insurance policy poisoned and killed her husband in order to claim the benefit. The court appropriately disallowed her and her assignee of the benefit to claim the benefit. However, in *Re K* [1986] Ch. 180 a wife, who has been convicted of her husband’s manslaughter through inadvertent

killing by using a loaded gun intended to frighten her husband, successfully secured an order against forfeiture based on the evidence that the deceased husband had for years violently attacked her.

8. Mutual Wills

Where two persons enter into agreement for the disposal of their property in a particular manner after the death of the person who first die, and in view of this the parties executed a mutual will to reflect their agreement; any survivor will not be allowed at equity to vary or disregard such an agreement either by an amendment or a revocation of the mutual will, in order to give effect to the agreement of the parties. The survivor thus becomes a constructive trustee for the deceased party in respect of the property to be disposed. See *Duffour v. Pereira* (1769) 2 Hargr. Jurid. Arg. 304 where a wife who survived her husband by her own will at her death disregarded the agreement contained in the mutual will she made with her husband in respect of a common fund to be pooled from the residuary estate of the two of them. The will of the wife in disregard of the joint will was disallowed as the court reasoned, "...For no man shall deceive another to his prejudice..." (Ibid at 310 per Lord Camden, L.C.).

SELF ASSESSMENT EXERCISE (SAE) 2

Mention and discuss with the aid of decided cases, two situations in which constructive trust may be imposed.

4.0 CONCLUSION

Constructive trusts are in a special class and this special position exempted them from formal requirements. The imposition of constructive trusts in appropriate cases is in affirmation of the general objective of equity not to allow persons to suffer a wrong without a remedy. Thus, constructive trusts are imposed irrespective of the intention of the parties and the situations where such trusts can be imposed are by no means a close one, in order to prevent people in certain fiduciary positions from profiting from unconscionable conducts.

5.0 SUMMARY

In this Unit, you have learnt about the features of constructive trusts, the equitable reason and justification for the imposition of constructive trusts and an

examination of the varying circumstances where this trust can be imposed. You also learnt that the essential underpinning for the imposition of constructive trust is the existence of a fiduciary relationship. You have been exposed to the rationale why constructive trusts are exempted from the formal requirements associated with the creation of trusts. You can observe the necessity and the ingenuity of the law to impose constructive trusts in some of the circumstances examined. This should equip you to be able to discern practical situations when this type of trust can appropriately be imposed. In the next Unit, you will learn about discretionary trusts.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Distinguish and justify the appropriateness or otherwise of the distinction between constructive trusts imposed in respect of trustees profiting from position of trust and persons in fiduciary positions generally. Support your answer with decided cases.

2. Discuss with the aid of decided cases, the equitable rationale behind the prohibition of persons in fiduciary positions from making profits either directly or indirectly. Is this prohibition reasonable even when such profit has been made honestly and without any injury to the beneficiary's interest?

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 DISCRETIONARY TRUSTS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Description and Features of Discretionary Trusts
 - 3.2 Uses of Discretionary Trusts
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

Discretionary trusts are essential in estate planning and for a variety of other purposes. In commonwealth jurisdictions and the United States of America, the use of this type of trust is common place, although the nomenclature for it in the U.S.A. differs. Despite the common use of Discretionary trusts in other jurisdiction, its use is not common in Nigeria. The extended family systems in Nigeria coupled with cultural and social difference in the lives of the people are responsible for the uncommon use of discretionary use in Nigeria. As it is with charitable trusts, the economic situation in Nigeria has to some extent affected the use of discretionary trusts in Nigeria. A consideration of thus type of trusts is necessary to familiarize you with it and its workings.

2.0 OBJECTIVES

In this Unit, you will be taken through the description and features of what may be regarded as discretionary trusts, and the objectives of the type of trusts. You learn about the distinctive features of discretionary trusts and the limitation of court's powers in the exercise of the discretionary powers given to the trustees in this type of trusts. You will also be exposed to the brief classification of discretionary trusts. At the end of this Unit, you should be able to:

- Know the essential features of discretionary trusts.
- Understand the limited rights of the beneficiaries and the wide discretion conferred on the trustees.
- Explain why courts cannot influence the trustees in exercise of their discretion.

- Understand the types of discretionary trusts and the practical situations that discretionary trusts can be used.
- Explain the advantages and disadvantages of discretionary trusts.

3.0 MAIN CONTENT

3.1 Description and Features of Discretionary Trusts

A discretionary trust may arise by the express act of a settlor giving a property or fund to trustees for the purpose of benefiting one or more persons. The trust instrument usually states how to administer it but the actual details of how to do so is left to the discretion of the trustees. Instead of the trustees giving specific income periodically to the beneficiaries, the trustees are given the right to accumulate income from the trust property with a complete discretion to distribute the same in the future. Even in a case where the trustees do not have the right to accumulate income, they are entitled to determine the amount of income to be paid to the different beneficiaries. See *Re Gourju's W.T.* [1943] Ch. 24.

In a discretionary trust, the trustees have discretion with respect to the trust fund. They have power to determine which beneficiary or beneficiaries from within a class will be receive income from the trust and can also determine what amount of payment that goes to the beneficiaries. They can even decide not to make any payment.

The right of the beneficiary to a specific interest in the trust property is uncertain, unlike with the case with a fixed trust, where the right of the beneficiary is assured or certain. In a discretionary trust, the beneficiary can only live on the hope that the trustees will exercise their discretion in his favour to entitle him to some income or part of the trust property. Owing to the complete vesting of the trust property in the trustees, the beneficiary cannot lay claim to any part of the trust property as his and thus, cannot transfer any interest in the same.

As a result of the complete discretion of the trustees in a discretionary trust, to determine whether to give or deny the beneficiaries some entitlements from the trust property, the beneficiaries cannot compel the trustees to use the same for their benefit and neither can the court compel the trustees to exercise their discretion one way or the other. However, where the trustees refused or neglect to exercise their discretion at all, the court can give order that they be replaced. See *Re Locker's Settlement* [1977] 1 W.L.R. 1323.

The beneficiaries can however put an end to the trust where they are all of full capacity and are all absolutely entitled to the income or both income and capital, in

which case, they can request the trustees to hand over the income or trust property to them or their nominees. See *Re Smith, Public Trustee v. Aspinall* [1928] Ch. 915.

In a discretionary trust, it is required that the trust comply with the requirement of certainty of object, as it is with a private trust, although it is not required that the trustees should be able to make a complete list of the objects, as it is sufficient if the trustees can determine those within the class of the intended beneficiaries. See *McPhail v. Doultton* [1974] A.C. 424. However, where the trustees are able to come up with a complete list of all the beneficiaries, the beneficiaries in that case can put an end to the trust.

Where the beneficiary of a discretionary trust sells his interest or becomes bankrupt his assignee or trustees in bankruptcy have no more right than to the beneficiary to demand payment from the trustees. If the trustees exercise their discretion in favour of the beneficiary by paying the money to him or delivers goods to him, his assignee or trustee in bankruptcy is entitled to the money or the goods. See *Re Coleman* (1888) 99 Ch.D. 443.

It is important for you to note that discretionary trust can only come into existence by the act of the settlor, in other words as a class of express trusts. A discretionary trust can therefore not come in existence imposed by law through constructive trust, by implied or resulting trusts.

You have to note that, as a result of the often complete discretion the trustees have in a trust of this nature, it is usually important to ensure that there are people of high integrity to act as trustees in order to achieve the object of the trust, before deciding to create a trust of this nature, otherwise the object will suffer in the long run.

SELF ASSESSMENT EXERCISE (SAE) 1

What is the discretion exercisable by the trustees in respect of application of the income or the trust property for the benefit of the beneficiaries?

3.2 Uses of Discretionary Trusts

Discretionary trusts have been found to be of great use for the following purposes:

- i. As a means of estate planning and to limit tax payments.

- ii. To provide for family members or close persons.
- iii. To protect vulnerable beneficiaries.
- iv. To protect the trust properties, from creditors or other liabilities.
- v. It is flexible in the hands of the trustees, who can use their discretion appropriately in favour of the trust property.

One of the disadvantages of discretionary trust is the uncertainty of the interest of the beneficiaries in the trust property unlike the situation in a fixed trust or if the beneficiary is a life tenant.

SELF ASSESSMENT EXERCISE (SAE) 2

Discuss the advantages of discretionary trusts and the disadvantages, if any that you have noticed.

4.0 CONCLUSION

Discretionary trusts are vital part of trusts which have their unique features and can be used for various purposes. Finding people of high integrity to act as trustees in a trust of this nature is very crucial to its creation and achieving the purpose of the trust. This trust can be used especially to provide educational benefit among others to family members and other close associates.

5.0 SUMMARY

In this Unit, you have learnt about the description and features of discretionary trusts. You also learnt about the complete discretion given to the trustees in the management of the trust property to decide whether to pay or not pay any income or apply the trust property to the advantage of the beneficiaries. When the trustees decides to pay income to the beneficiaries, they also have discretion to decide how much to be paid. You have to note that the beneficiaries have no right to the trust property or any income from the same except as may be decided by the trustees and the trust instrument. You are further exposed to instances when a discretionary trust can be terminated, the uses of discretionary trusts and its advantages were examined. With the consideration of the above, you should be able to apply this trust for practical use in the Nigerian society. In the next Unit, you will learn about protective trusts.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. The right of the beneficiaries in a discretionary trust is uncertain. Discuss and indicate when the beneficiaries can put an end to the trust.
2. Discretionary trusts cannot be imposed by law or arise by resulting trust but by the express act of the settlor. Discuss.

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UNIT 4 PROTECTIVE TRUSTS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
- 3.1 Meaning and Features of Protective Trusts
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

Protective trusts are essential in estate planning, providing benefits of people, especially family members and for a variety of other purposes. In commonwealth jurisdictions and the United States of America, the use of this type of trust is common place, although the nomenclature in other places may differ. The use of protective trusts is not common in Nigeria as in England or other jurisdictions. The extended family systems in Nigeria coupled with cultural and social difference in the lives of the people are major factors militating against the use of protective trusts in Nigeria. As it is with charitable trusts, the economic situation in Nigeria has to some extent affected the use of protective trusts in Nigeria, because the majority of the people are poor. A consideration of thus type of trusts is necessary to familiarize you with it and its workings.

2.0 OBJECTIVES

In this Unit, you will be taken through the features of what may be regarded protective trusts, and the objectives of the type of trusts. You learn about the distinctive feature that distinguished protective trusts from discretionary trusts and the advantages of this class of trusts over discretionary trusts. You will also be familiarized with the usual clauses in protective trusts, which are meant to keep the benefit out of danger and from accruing to the beneficiary when the provisions of the clause are breached. At the end of this Unit, you should be able to:

- Know the essential features of a protective trust.
- Explain the rights of beneficiaries under a protective trust.
- Understand situations when beneficiary can be deprived of income under the

- trust.
- Understand practical uses of protective trusts.
 - Explain the advantages of protective trusts over discretionary trusts.

3.0 MAIN CONTENT

3.1 Meaning and Features of Protective Trusts

Protective trusts as the name imply is trust created for purpose of protecting certain beneficiaries under which the trustees are charged with the payment of an income or other income to be paid periodically throughout the life of that person or for a period lesser than that. First if may be to the benefit of A, and thereafter to the benefit of A's children and at a particular age, A will now take the benefit of the entire fund.

A protective trust may be set up in a series such that the benefit accrues progressively, at first the trust may be structured first, till the beneficiary attains the age of twenty first, second from twenty first to thirty-six, third, from thirty-six to forty-six and fourth for the life of the beneficiary. In some cases, the progressive accrual of the income may be tied to a period of time, after the maturity of the first trust, say ten years in the first instance and thereafter for another term of fifteen years, etc.

The advantage of a protective trust is that youthful vulnerability will not result in a beneficiary filter away all the trust property since it will accrue periodically and not at once. Unlike discretionary trust, the beneficiary is also assured or a steady income and not left to the mercy of trustees. See *Re Richardson' W.T.* [1928] Ch. 504.

Forfeiture clause in usually inserted in protective trusts which indicates that on the occurrence of a certain event, the interest of the principal beneficiaries will determine in the case of a series of beneficiaries, such that others can take benefit too from the trust. See *Re Sartoris's Estate* [1892] 1 Ch. 11. In some other cases, the forfeiture clause may indicate the occurrence of certain events upon which the principal beneficiary will be deprived of income or some part of it.

In some other cases, protective trusts may be structured in order to prevent the trust fund/property or some part of it from being available to creditors should the beneficiary go bankrupt, or upon attempted alienation, or from being charged or that it will become vested in some other persons, etc. and on the occurrence of such events forfeiture of the beneficiary's interest will take place. See *Re Hall* [1944] Ch. 46 and *Re Longman* [1955] 1 W.L.R. 197.

However, some common grounds for forfeiture of the beneficiary's interest are as follows:

- i. In the event of the beneficiary committing a breach of the trust terms.
- ii. The bankruptcy of the beneficiary, so as to prevent the income of the principal beneficiary from being available to the trustee in bankruptcy. See *Re Walker* [1939] Ch. 974.
- iii. When an order of sequestration of the beneficiary's income for contempt of court. See *Re Barring's Settlement Trusts* [1940] Ch. 737.
- iv. When the principal beneficiary executed a deed of variation which gives up his right to part of his income in certain situations.

You have to note that merely inserting a provision which will result in the forfeiture of the beneficiary's interest on grounds of bankruptcy or attempted alienation will be void; but it is valid to make the limitation of the beneficiary's interest to be determinable until the beneficiary goes bankrupt or when he attempts to alienate his interest. See *Brandom v. Robinson* [1811] 18 Ves. 429.

Although a settlor may create a protective trust for his own benefit, forfeiture clause or determining event will however on ground of public policy be void against his trustee in bankruptcy, as this will prevent his creditors from having access to his interest in the trust property. See *Re Burroghs-Fowler* [1916] 2 Ch. 251.

In a protective trust, the trustees may be given the discretion to apply a certain part of the trust fund for someone's benefit; such a person only entitled to part of the fund and as a result cannot request that the whole fund be handed over to him. See *Re Smith, Public Trustee v. Aspinall* [1928] Ch. 915. Where the trustees have no discretion in the application of the fund, the particular beneficiary can come to demand for the fund to be given to him. See *Green v. Spicer* (1830) 1 Russ & My 395.

Protective trusts can be used for various purposes such as education of family members, to provide for a person during his life time, etc. as it is with discretionary trusts.

SELF ASSESSMENT EXERCISE (SAE) 1

Discuss the rights of the beneficiaries to the trust property under a protective trust and under what circumstances can the beneficiaries put an end to the trust.

4.0 CONCLUSION

Protective trust has been a very useful instrument in the hand of settlor for providing benefits for one or a series of beneficiaries in the same trust. It also has the unique advantage of being used to provide for a principal beneficiary first after which his interest may determine and thereafter for other beneficiaries and also for other for life. It is better than discretionary trust in the sense that the beneficiary's interest is certain but discretionary trust is flexible. You should be able to employ protective trust in practical situations for the benefit of your clients after becoming professionally qualified.

5.0 SUMMARY

In this Unit, you have learnt that about protective trusts, its features, uses and advantage over discretionary trusts. You have learnt that the importance of protective trusts is the protection of youthful vulnerability and for providing for a life tenant, and at the same time, the beneficiaries are not left to the mercy of the trustees. You are further familiarized with the fact that forfeiture clause are usually inserted in protective trusts which indicates the occurrence of events upon which the interest of the beneficiaries will be forfeited, and a brief instances when this can happen. In the next Unit, you will learn about trusts in favour of creditors.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Discuss the importance of inserting a forfeiture clause in protective trust instruments and state the likely events when forfeiture of the beneficiary's interest will take place.
2. What is a protective trust? Discuss the rights of trustees under a protective trust.

7.0 REFERENCES/FURTHER READINGS

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UNIT 5 TRUSTS IN FAVOUR OF CREDITORS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
- 3.1 Features and purposes of Trusts in Favour of Creditors
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

Trusts in favour of creditors are a unique feature which the law of trusts can be put into. Trusts in fact cover a series of situations which results from the nature of equity not suffer a wrong to be without a remedy. From this nature, trust develops constructive and resulting trusts, and trusts can therefore be expressly declared in favour of creditors or presumed from the surrounding circumstances as examined below. The objective of having a trust created in favour of creditors is for no other purpose than to secure the interest of the party in whose favour the trust is being declared, and in the case of creditors, to secure their money. Trusts, as will be seen in this unit obviously have advantage over enforcing debt in contract.

2.0 OBJECTIVES

In this Unit, you will be taken through the features of trusts in favour of creditors, the forms of such trusts and what it requires to create them. You will also learn the advantages of creating a trust in favour of creditors and the legal consequences that flows from this. You will also be familiarized with the principle of law in *Quistclose Trusts* which established a two-trust mechanism. At the end of this Unit, you should be able to:

- Know what trusts in favour of creditors are.
- Understand the features and formality of trusts in favour of creditor.
- Explain the advantage of having a creditor's interest secured by trust.
- Explain the legal consequences of declaring a trust of a company's assets.
- Understand practical uses of trusts in favour of creditors.

3.0 MAIN CONTENT

3.1 Features and Purposes of Trusts in Favour of Creditors

Trusts may be created or an agreement to create a trust in favour of those advancing moneys for specific purposes and other varying purposes. These may be in respect of customers' deposits, loans generally or to insolvent companies or companies in liquidation, money for payment of sub-contractors, moneys advanced to borrowers from which they are to pay third party creditors. This practice is however common but not limited to insolvency cases. Creating trusts in favour of creditors can take many forms. You need to note that to create a trust of money requires no formality of writing and there is no need to use the word 'trust'. However, it is important that specific agreement or memorandum be put in place for this, in order to ensure certainty of intention to create a trust.

In the absence of clear intention to create a trust in favour of creditors, the relationship between the parties will be regarded purely as that of contract and not one based on trust. See the Canadian case of *Seller v. Industrial Incomes Ltd.* (1963) 44 W.W.R. 485, 41 D.L.R. (2d) 329. In the Canadian Supreme Court case of *Industrial Incomes Limited v. Maralta Oil Company Limited* [1968] S.C.R. 822 the trial judge in fact held that the matter between the parties rest solely on contract, the Supreme Court however overturned this and held that a trust was created in favour of creditors. Such a confusing state might trail relationship between the parties in the absence of a written memorandum.

There are ways to create a trust in favour of creditors and this can take the form of:

i.) Property may be transferred or money is paid to a named supervisor in pursuance of a company's voluntary arrangements (CVA) with the property or money held on trust for creditors who are parties to such agreement. The advantage of this is that in the event of winding up of the company, the assets forming the subject matter of the CVA cannot be assessed by other creditors. See *Re TBL Realisations Plc, Oakley-Smith v. Greenberg* [2004] B.L.C. 81. Only the parties to such agreement can take benefit under it. See *R.A. Securities Ltd v. Mercantile Credit Co Ltd* [1995] 3 All E.R. 214.

ii.) An agreement by a company to a named supervisor to transfer assets which are identified or identifiable on the bases of entering into company's voluntary arrangements is also sufficient to create a trust. See *Re TBL Realisations Plc, Oakley-Smith v. Greenberg* (supra). The reason why form of trust is enforceable is based on the equitable maxims that equity looks on that as done that ought to be done and equity imputes an intention to fulfill an obligation. Thus, an agreement to

deposit the proceeds of production from an oil well in a separate account in a named bank will suffice as trust. See *Industrial Incomes Limited v. Maralta Oil Company Limited* (supra).

Note however that when a company creates a trust its ownership in the assets which now forms the trust property is extinguished. See *Re N.T. Gallagher & Sons Ltd Sheierson v. Tomlinson* [2002] B.L.C. 867.

iii.) An insolvent company may seek to declare a trust in favour of creditors in that case; those who continue to pay deposits to the company are converted to beneficiaries under a trust and are no longer treated as creditors. See *Re Kayford (in liq)* [1975] 1 W.L.R. 279. In that case, there is transformation of the contract to property and conversion of the debt to trust.

iv.) An insolvent company or company in liquidation still operating may convert its assets into a trust fund for the benefit of creditors in such an instance; preference to general creditors may be disallowed. In this case, trust accounts are used to protect customers of insolvent businesses. See *Re Kayford* [1975] 1 All E.R. 604

v.) A company can create a trust in favour its customers by making itself a trustee of the monies paid by its customers. In that case, as soon as the company is receiving these moneys, the money goes into a trust account. See *Farepak Foods & Gifts Ltd.* [2006] EWHC 3272. The purpose here was to protect creditors who continue to pay moneys into the company following their declaration to cease trading.

From the time a company makes itself a trustee of some of its customers, the relationship between them is based on trust and not contract because from the inception, the customers are beneficiaries and not creditors and as such their priority is assured over those that are creditors. See *Re Nanwa Gold Mines Ltd.* [1955] 1 W.L.R. 1080. The consequence being that the trust property which is the money paid by those customers has to be transferred to those who originally paid them in on trust. See *Re Nanwa Gold Mines Ltd.* (supra). An example here is deposit for purchase of shares and where share cannot be allotted to the depositors, they have to get their money back.

vi.) In some jurisdictions, such as United States of America, trusts may be created in favour of some creditors by statute, owing to the nature or importance of their services and the huge capital outlay required to run or execute such businesses.

vii.) Where monies were received on the understanding that it will be keep in a separate account to be applied towards the depositor's use or purpose, the person

whose account the money is, holds the same on trust for the sender. See *Re Australian Elizabethan Theatre Trust*, (supra).

You have to know that generally the relationship between a creditor and borrower is that of contract and creating a trust has the double advantage of making transaction enforceable both at contract and equity. For instance, where there is a contractual obligation between the borrower and the lender to pay some third party creditors, it will be presumed that concurrent intention to create a trust in favour of the third party creditors exist and the borrower will hold the money on trust for the lender. However, where no such contractual obligation exists between the parties, the borrower will hold the money on express trust for the lender but subject to a trust declaration by the lender that the monies should be used to pay creditors. See *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681 at 689 per Gummow J.

Quistclose Trust

You need to know that in some instances, there may arise a two-trust situation in the same transaction. This principle of law arose as a result of the decision in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 commonly known as *Quistclose Trust*. This is to the effect that where there is agreement between the lender and the borrower as to how the loan granted is to be utilized, then a primary trust is created and if the actual purpose of the loan fails, then there is a secondary trust (resulting trust) which will take effect in that event.

SELF ASSESSMENT EXERCISE (SAE) 1

Discuss the principle of a two-trust mechanism established in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

4.0 CONCLUSION

Trusts in favour of creditors are very useful from the practical points of view as discussed above. Creditors enjoy an added advantage of having their money protected in the event of liquidation of the borrowers. The position of trust converts the relationship of lender and borrower to trustee and beneficiary. The lender or creditors enjoys priority by such higher position of trust than one based on contract. With the exposure you have in this area, you should be able to employ trusts in favour of creditors in practical situations for the benefit of your clients after becoming professionally qualified.

5.0 SUMMARY

In this Unit, you have learnt that about trusts in favour of creditors, its formality, features, uses and practical advantages. You have learnt that the importance of trusts in favour of creditors is primarily for the protection of creditors, customers and sub-contractors, among others and that in the event of liquidation, the class of mentioned are not left in limbo. You further examine practical situations where trusts in favour of creditors exist and the legal consequences flowing from this. with the principle of two-trust in *Quistclose Trust* which is to ensure that loans advanced for specific purpose is not diverted and that should the purpose fail, the lender will get his money back. In the next Unit, you will learn about appointment of trustees.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Discuss the legal consequences that will flow from a company creating a trust in favour its customers by making itself a trustee of the monies paid by its customers.
2. In order to create a trust in favour of creditors, the intention to create such trusts must be clear. Discuss the formalities of creating a trust of this nature and state the consequences of inability to infer such an intention with respect to the enforcement of the debt by the creditor.

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MODULE 3 APPOINTMENT, DUTIES, BREACH OF TRUST, RETIREMENT AND REMOVAL OF TRUSTEES

Unit 1	Appointment of Trustees
Unit 2	Duties of Trustees
Unit 3	Powers of Trustees
Unit 4	Breach of Trust
Unit 5	Retirement and Removal of Trustees

UNIT 1 APPOINTMENT OF TRUSTEES

CONTENTS

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	Appointment of Trustees
4.0	Conclusion
5.0	Summary
6.0	Tutor-Marked Assignment (TMA)
7.0	References/Further Readings

1.0 INTRODUCTION

In trust matters, trustees are indispensable and their appointment is equally an essential issue that needs to be examined. Although a trust will not fail by reason of lack of trustees as the court can appoint trustees on application to it. There are several ways of appointing trustees for a trust and the settlor can also appoint himself as trustee for the trust either solely in conjunction with other trustees, by a declaration of trust. Apart from the law guiding the issue of appointment of trustees, it is important to ensure that reliable and trust worthy people are appointed as trustees in order to ensure that the wishes of the settlor or testator are carried out.

2.0 OBJECTIVES

In this Unit, you will learn about the appointment of trustees and the different means of appointing or replacing a trustee. The statutory powers of appointing a

trustee will also be considered and the various cases of what will happen when a trustee is unable to act, unwilling to act or is incapable of acting or is dead. At the end of this Unit, you should be able to:

- The manner of appointing trustees expressly.
- Explain what will happen if no trustee is appointed.
- Understand circumstances when the court can appoint trustees.
- Explain the hierarchy stated by statute in respect of appointment of trustees.
- Navigate the manner or replacing trusts and mode of appointment generally.

3.0 MAIN CONTENT

3.1 Appointment of Trustees

Appointment of trustees may take various forms, depending on the mode of creation of the trust, whether it was created by settlement or in a will. Also, appointment may be in respect of the first trustees known as the original trustees or replacement trustees in the case of a retiring, dead, incapacitated or unwilling to act trustees, etc. The position of appointment is governed both by equity, case law and statute. An examination of the various modes of appointment of trustees will now be considered as follows:

i.) Appointment of Original Trustees by Settlor/Testator

The original trustees may be expressly by the settlor of the trust in case of *inter vivos* trust and the testator in the case of trust by will by insertion of a clause in the settlement instrument or will, naming particular persons as trustees. In situations where the settlor desires to make himself as a trustee, he can do this by making a declaring a trust, stating that from the creation of the deed of settlement, he holds the trust property as trustee either as sole trustee or together with others, for the benefit of the beneficiaries of the trust.

Where the testator or settlor did not appoint any trustee, the court on application to it can appoint the original trustees as equity will not allow a trust to fail for lack of trustee. In the alternative, the settlor or testator instead of naming particular persons as trustees may reserve the power of appointment in the trust instrument to be made by a named individual or an institution. In that case, it will be unnecessary to make application to the court for appointment of trustees as the donee of such power will make the appointment.

You must note however that if a settlor did not appoint a trustee when creating the trust, he loses the right to do so or the right to appoint additional trustees after the trust is operative. He can however only do so after the trust is operative where such power is reserved in the trust instrument.

Where the power of appointment is conferred on an individual or an institution, such person or institution then retains the right to appoint the original trustees or additional ones in cases where there is vacancy. See *Re Power's Settlement* [1951] Ch. 1074. A donee of a power of appointment cannot appoint himself as a trustee by virtue of the Trustee Act 1893. See *Re Power's Settlement* (supra) and *Re Skeats* (1889) 42 Ch. 522. However, by virtue of Section 24 (1)(b) of the Trustee Law, Cap. 128, Laws of Oyo State and the corresponding laws in the States where the Property and Conveyancing Law is applicable, it is permitted for the donee to appoint himself as trustee except where such an appointment is for the purpose of appointing additional trustees. See Section 24 (1)(b) of the Trustee Law.

Note that appointment of trustees can be done in writing without more but it is better if the appointment is done by deed because this has the advantage of vesting the trust property in the trustees directly. If the deed of appointment contains a vesting declaration, vesting the trust property in the new trustee, there is no need for another conveyance or assignment to vest the trust property in the joint name of the new trustees. See Section 12 of the Trustee Act.

ii.) Appointment under Statutory Provisions

Under both the Trustee Act 1893 (Section 10(1) and the Trustee Law (Section 24(1), (the Act is operative in the States outside the Property and Conveyancing Law States) there is provision for the appointment of new trustees subject to such limitations as may be contained in the trust instrument. Statutory appointments can be made in the followings in the following orders.

a) Appointment by persons nominated in the trust instrument: Persons nominated or named in the trust instrument for the purpose appointing new trustees, can make such appointments.

b) Where there is no such person nominated as contained in (a) above, or there is no such person that is able and willing to act, in that case, the survivor or continuing trustee or trustee for the time can make such appointment.

c) In the absence of (a) and (b) above, the personal representatives of the last surviving or continuing trustee can make such appointments.

According to the statute, new trustee may be appointed when there is vacancy due to an outgoing trustee or where it has become expedient to appoint new trustees in addition to the existing ones.

A replacement of an outgoing trustee may occur in the circumstances where a trustee remains out of Nigeria for more than twelve months, desires to be discharged, refuses to act, is unfit to act, incapable to act, is an infant, or being a corporation which has been dissolved and thereafter incapable of acting as from the date of dissolution. See Sections 10(1) of the Trustee Act and 24(1) Trustee Law.

iii.) Appointment by the Court

It is also possible for new trustees to be appointed under its inherent jurisdiction of the court and such power may also be conferred by statute on the court. As mentioned above, where no provision is made in the trust or will for trustees or power to make such appointment conferred on an individual or an institution, the court on application to it can such appointment. In cases where all the trustees appointed in a will are dead before the testator or by any other reason such trustee cannot act or is unfit to act or make appointment, the court can appoint the trustees.

Apart from appointment by the court under its inherent jurisdiction, statutes can also confer power of appointment of new trustees either in substitution for or in addition to any existing trustee expressly on the court. See Sections 25 Trustee 1893 and 28 Trustee Law 1959. Note however that the statute provides that such statutory powers became exercisable by the court only in situations when appointment is found to be inexpedient, difficult or impracticable; e.g. where a trustee is incapable of acting or where there is problem between the continuing trustees, etc. See *Re Henderson* (1940) Ch. 764.

When the court is exercising its power of appointment, what must be taken into consideration by the court are the wishes of the testator (express or implied), the overriding interest of all the beneficiaries and the efficient administration of the trust. See *Re Tempest* (1866) 35 L.J Ch. 632.

SELF ASSESSMENT EXERCISE (SAE) 1

A trust cannot fail by reason of lack of the appointed of trustees in a trust. Discuss with respect to the power of appointment reserved in a trust instrument.

4.0 CONCLUSION

Appointment of trustee as noted above is an important one but what you must note is that where the trustee has not appointed trustees expressly, a power of appointment may be reserved in the trust deed and in the absence of the two, the court can appoint trustees on an application being made to it. Perhaps, it is better for efficient administration of the trust to ensure that trustees are expressly appointed in the trust instrument in order to avoid unnecessary litigation with its attendant costs.

5.0 SUMMARY

In this Unit, you have learnt about the appointment of trustees, the formality of appointment and the various ways of appointing the first or original trustees. You also learnt that principally, appointment of trustees can be made expressly by the settlor or testator; trustees can also be appointed under statutory provisions and by power of appointment by the court both under its inherent jurisdiction and under statutory powers. You further learnt that the settlor loses the power to appoint trustees after the trust becomes operative if such power is not reserved in the trust instrument. Situations when the court can make appointments were also examined with the guiding principles for the court to follow when exercising their power of appointment. You learnt that it is of utmost importance to ensure that people of integrity are appointed as trustees if the interest of beneficiaries is not to suffer. In the next Unit, you will learn about duties of trustees.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Discuss the order of statutory appointment of trustees under as contained in Section 10(1) of the Trustee Act 1893 and Section 24(1) and the Trustee Law and the instances when a replacement of the trustee can occur.
2. Discuss the express appointment of the first or original trustees by the settlor or testator and what will happen in situations where only power of appointment was reserved in the trust instrument and no trustee was named.

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 DUTIES OF TRUSTEES

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
- 3.1 Duties of Trustees
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

The trustee by virtue of the fiduciary position that he occupies in relation to the trust property and the beneficiaries, there are enormous duties placed on in order to ensure that he perform the roles of his office efficiently and without any conflict of interests. It will not be an understatement to say that the duties are onerous but these are designed by equity in order to achieve the purpose of the trust and anyone appointed as trustee needs to find out what these duties are before accepting to act as one.

2.0 OBJECTIVES

In this Unit, you will essentially learn about the duties of the trustee in relation to the trust property and the beneficiaries. These duties are so many and places heavy responsibilities on the shoulders of the trustee. You will learn for instance that in spite of the numerous duties of the trustee which he may need to perform for years, yet equity regards him as a volunteer and therefore expected to act gratuitously without any remuneration, except in special circumstances. You also learn that a trustee may liable for a breach of the trust despite having acted honestly and reasonably, and may in fact be liable for a beach committed by his co-trustee. You will however learn of the situations when a reprieve might come the way of the trustee in respect of a breach not due to his negligence or fault. At the end of this Unit, you should be able to:

- State what the duties of a trustee are.
- Explain why some of the duties are so placed despite appearing too harsh.
- Give circumstances when a trustee may be absolved or liability in respect of a

- breach of trust.
- Explain the equitable underpinnings of some of the duties of trustees.

3.0 MAIN CONTENT

3.1 Duties of Trustees

Upon the appointment and acceptance to act as trustee, the trustee must bear in mind that his duty is an onerous one. Importantly, it is the duty of the trustee to distribute the income and/or capital of the trust to the beneficiaries and shoulder the management or administration of the trust property. This essentially involves the safeguarding and enhancing the value of the trust property. See *Low v. Bouvery* (1891) 3 Ch. 82 at 99 per Lindley L.J. The duties of a trustee are so numerous but we shall consider some of these as follows:

1. Duty to Collect and Secure the Trust Property

When a trustee is appointed and he accepts to act, he should ascertain what the trust property is and make sure that the same is vested in him. In other words, the trustee must inquire about the whereabouts of the trust property, locate them and secure them by taking possession of them. See *Hallows v. Lloyds* (1886) 39 Ch. D. 686 at 691 per Kekewich J. The trustee is liable if he did not perform his duties in this respect and loss results to the trust in consequence thereof. See *Re Brogden* (1888) 38 Ch.D. 546.

Where the trust property is an equitable interest, the trustee must give necessary notices to the legal owner in order to preserve the priority of the beneficial owners.

In the case of additional trustee, he must make inquiries about the trust property and be satisfied that no breach of trust has been committed.

2. Duty of Investment

A trustee has a duty to invest the trust fund in order to grow it and ensure that the fund is not eroded and can invest the trust fund as the trust investment or law may permit. For this purpose, the law has categorized some investments in which trustees may invest. See The Trustee Investment Act, Cap. 449 Laws of the Federation of Nigeria, 1990. By virtue of Section 2 of the Act, a trustee can invest in government securities (both Federal and State), securities of government

corporations specified in the schedule to the Act, debentures and fully paid up shares of any public company incorporated in Nigeria, etc.

A trustee is however limited in its power of investment and cannot invest in a company unless the nominal value of the fully paid up shares of the company is at least one million Naira, the company securities is quoted on the Stock Exchange and the company must have paid dividends aggregating five per cent of the nominal value of each share in each of the three years preceding the current year and the dividends must have been paid when they became due. See Section 2(3) of the Act as to when any investment is prohibited.

Despite the provisions of the law, a trustee must take such due care as an ordinary prudent man would take when investing trust property. See *Re Whiteley* (supra).

3. Duty Not to Delegate

Trustees by virtue of their peculiar and fiduciary position cannot delegate their duty to others, as equity does not allow a delegate to further delegate his duties known as *delegatus non postest delegare*. In addition, by virtue of the trustee's assuming responsibility for the management of the trust property for the benefit of others, they cannot shift their duties on others and even where they employ agents, their responsibility to the beneficiaries is not affected. See *Turner v. Corney* (1841) 5 Beav. 515 at 517 per Longdale M.R.

It is however permitted for a trustee to delegate his duty if the trust instrument allows it or when it is reasonably necessary or when engaged in the ordinary course of affairs. See *Exp. Belchier* (1754) Amb. 218. Where an agent was employed merely to carry out things already agreed by the trustees, it is permitted to delegate. A trustee could however not delegate the exercise of his discretion except if this was expressly permitted by the trust instrument. See *Robson v. Flight* (1863) 4 De G.J. & S. 608; *Re Airey* (1897) 1 Ch. 164.

A trustee who engages the services of an agent in breach of trust is liable for all losses that might flow from this. See *Att.-Gen v. Scott* (1749) 1 Ves. Sen 413.

A trustee must be prudent in his choice and supervision of an agent and must exercise the care of a prudent man of business in his choice of agent. He should not employ an agent to perform act outside the scope of the agent's business. See *Fry v. Tapson* (1884) 28 Ch.D 268.

Apart from the express authorization by the trust instrument, statute can also confer on a trustee the right to delegate by appointing agents to perform specialised or professional duties. See Section 17 of the Trustee Act 1893; Section 2(4)(C) of the Trustee Investment Act and Section 14(3) and (4) of the Trustee Law.

4. Duty to Distribute Trust Property

One of the cardinal duties of a trustee is the distribution of the trust property, i.e. of income and/capital to the beneficiaries according to the dictates of the trust instrument. See *Low v. Bouvery* (supra). A trustee is therefore liable for the breach of trust if he fails to do this or made payments to wrong persons. See *Eaves v. Hickson* (1861) 30 Beav. 136.

In order to properly ascertain those entitled to benefit from the trust fund or property and avoid paying to wrong persons, Section 18 of the Trust Law has laid down the procedure to be followed in this regard. The Trustee is required by law to identify the beneficiaries by giving notice through advertisement in State Gazette or in a newspaper circulating in the area where the trust property is located. A beneficiary who did not bring his claims within the time specified by the notice cannot make the trustee liable for any distribution made which excluded him. See Section 27 of the Trustee Law.

When there is uncertainty as to the existence or otherwise of a beneficiary, a “Benjamin Order” as laid down in *Re Benjamin* (1900) 1 Ch. 723 can be sought by the trustee, on application to the court as to the interest of a missing beneficiary.

In situations where the trustee overpays a beneficiary in good faith, he can ask for a refund of the amount overpaid or deduct the same from any future payments due to the particular beneficiary. See *Re Musgrave* (1916) 2 Ch. 417.

When the trustee has fully distributed the trust property, the trustees should present their final accounts to the beneficiaries and obtain a discharge from them, which can appropriately be done through a Release by Deed and the trust is thereby determined.

5. Duty to Act Gratuitously

A trustee is by the rules of equity a volunteer and therefore expected to act gratuitously without any remuneration, notwithstanding the onerous tasks placed upon him by the trust. See *Barrett v. Hartley* (1866) L.R. 2 Eq. 786. A trustee

may however earn remuneration if a provision to that effect is reserved in the trust instrument and the court can grant an order to that effect. In addition, statutes may in some cases authorize trustees to earn remuneration, especially in respect of particular trustees.

Some of the recognised exceptions to the rule that a trustee cannot earn remuneration are follows:

i.) Authorization by the trust instrument - where there is a charging clause authorizing the trustee to charge for their services.

ii.) Authorization by statute – by virtue of Section 19 of the Public Trustee Law, Cap. 162, Laws of Lagos State 1994 and Section 19 of the Public Trustee Law, Laws of Western Nigeria.

iii.) Authorisation by court – a court can remunerate where it appoints a judicial trustee e.g. a corporation. See Section 1(5) Judicial Trustee Act 1895 and Section 29 of the Trustee Law, Cap. 125, Laws of Western Nigeria, 1959.

iv.) Authorisation by beneficiaries – where all the beneficiaries enter into agreement with the trustee for the remuneration of his services.

v.) Remuneration under the rule in *Craddock v. Piper* (1850) 1 Mac & G. 664. Here, the rule is that a solicitor cannot recover remuneration for professional services as solicitor where he acts for himself alone but if he acts for co-trustees he can. See *Re Corsellis* (1887) 34 Ch.D. 681 at 682 per Cotton L.J.

6. Duty to Provide Accounts and Information

It is a cardinal duty of a trustee to provide accounts of the trust property and equally furnish necessary information as regards the same, as may be required by the beneficiaries. See *Low v. Bouvery (supra)*. In this regard, it is incumbent on the trustee to keep accurate accounts of the trust property and furnish information with respect to the same. This includes the right of the beneficiaries to access and inspect all trust documents. See *O'Rourke v. Darbyshire* [1920] A.C. 581 at 619 per Lord Wrenbury.

Section 14(4) of the Trustee Law applicable to the States forming the former Western Nigeria and Mid-Western Nigeria, provides that it is the discretion of the trustee to audit accounts of the trust and this should be done once in three years. Where a trustee failed to keep accounts of the trust, the beneficiaries on application to the court can compel him to do so.

Other duties which you may wish to further examine are:

- i.) Duty not to purchase trust property. See *Okesuji v. Lawal* [1986] 2 N.W.L.R (Pt. 22) 417. A trustee may however purchase a beneficiary's interest.
- ii.) Duty of loyalty.
- iii.) Duty not to deviate from the terms of a trust.
- iv.) Duty of impartiality.

SELF ASSESSMENT EXERCISE (SAE) 1

A trustee is expected to act gratuitously without any remuneration despite the heavy duties placed on him by his position as trustee. Discuss the justification or otherwise of this equitable rule.

4.0 CONCLUSION

The duties of a trustee are necessary for the effective and efficient performance of the position of trustees and in order to ensure that the trust property is adequately protected and that the interests of beneficiaries do not suffer. At burdensome as some of the duties are the terms or purposes of a trust may be derailed without them. You should however need to ascertain in appropriate cases, the suitability or otherwise of persons being proposed as trustees in terms of being able to carry out those duties.

5.0 SUMMARY

In this Unit, you have learnt about duties of trustees, how numerous these duties are and how some of these are in fact onerous. You further learnt that most of the equitable rules concerning the duties of trustees are so designed in order to protect and the trust property and beneficiaries interests under the same. You however learnt that in appropriate cases, a trustee may be granted reprieve from a breach of trust, where he has acted honestly and reasonably. In the next Unit, you will learn about the powers of trustees.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Discuss the duty of the trustee not to delegate and the circumstances when it is permitted for the trustee to deviate from this duty.
2. The duty to distribute is the bedrock of the trustee's duties. Discuss and state how a trustee can resolve the dilemma surrounding the uncertainty as to the existence or otherwise of a beneficiary.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 POWERS OF TRUSTEES

CONTENTS

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- 4.0 Conclusion
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1.0 INTRODUCTION

The trustee, as a result of the numerous duties his post is saddled with, it will be unconscionable if he were to perform such duties like a robot without any power of discretion to exercise in the administration of the estate. It is in cognizance of this that the trustee is endowed with some powers for the effective and successful performance of his duties. It can therefore be said that the exercise of discretion may in fact be of great advance to the beneficiaries in some cases where such is exercised in their favour.

2.0 OBJECTIVES

In this Unit, you will essentially learn about the powers of trustees in relation to the performance of his duties and the extent or limitation of these powers. You will further learn that even where a trustee have discretion with respect of a certain issue, the requirements or duty of his office may nevertheless make such issue imperative for him to perform. You will be exposed to the specific issues of the power of the trustee to insure and duty not to delegate, but you will be exposed to the exceptions of these rules. At the end of this Unit, you should be able to:

- State what the powers of a trustee are and their limitations.
- Explain why some of these powers are germane to the performance of the duties of trustees.
- Give practical examples of when the exercise of discretion is beneficial to beneficiaries whose interests are contingent or yet to mature.
- Explain the rationale underpinnings the court's non interference with the exercise of discretion by trustees.

3.0 MAIN CONTENT

3.1 Powers of Trustees

In order for the trustee to be able to perform his numerous duties, it is necessary to clothe him with some powers for the efficient administration of the trust property and discharge of his duties. The exercise of power may be contained in the trust instrument or may be conferred by statute. Given the fact that the exercise of power is discretionary, the courts do not usually disturb the issues relating to the exercise of discretion except when power was exercised in *mala fide* (in bad faith). In consequence of his various duties, trustees generally have the following powers:

1.) Power to Insure

Trustees generally are not obliged to insure the trust property except where there is a specific provision in the trust instrument requesting the trustee to insure. See *Bailey v. Gould* (1840) 54 E.R. 479. The trustee's duty of care and management however makes it imperative on him to give serious consideration to insurance but where the trustee after such consideration decides not to insure he will not be liable for any loss or damage resulting to the trust property.

Statutory powers of the trustee to insure is however reserved by Section 11(1) of the Trustee Law, Laws of Western Nigeria, 1959 by which they are required to insure trust property against loss or damage by fire to any amount not exceeding three-fourth parts of the full value of the building or property.

2. Power to Delegate

As treated under the duty not to delegate above, although a trustee generally cannot delegate his duties, he is permitted to delegate if the trust instrument allows it or when it is reasonably necessary or when the agent is engaged in the ordinary course of affairs. See *Exp. Belchier* (supra). It is also allowed that trustees can delegate their duty where what is being delegated was for a third party to merely carry out things already agreed by the trustees. It is important to note however that a trustee cannot delegate the exercise of his discretion except if this is expressly permitted by the trust instrument. See *Robson v. Flight* (supra)

A trustee is required to be prudent in his choice and supervision of an agent and must exercise the care of a prudent man of business in his choice of agent, and should not employ an agent to perform act outside the scope of the agent's business. See *Fry v. Tapson* (supra).

Apart from express authorization by the trust instrument, statute can also confer on a trustee the right to delegate by appointing agents to perform specialised or professional duties. See Section 17 of the Trustee Act 1893; Section 2(4)(C) of the Trustee Investment Act, 1990 and Section 14(3) and (4) of the Trustee Law.

3. Power of Sale

Trustees can exercise the power to sell the trust property if such power is expressly stated by the trust instrument or by statute, as it is with the trustee for sale. Where the trust makes it imperative for the trustee to sell, then trustee has an obligation to sell the trust property and in that case, he has more than mere power to do so. Irrespective of whether the trust instrument makes it obligatory for the trustee to sell, he can nonetheless exercise discretion to postpone sale and adopt the usual means of sale. A trustee for sale however has power to sell by auction.

4.) Power to Compound Liabilities

By law, personal representatives or two or more trustees acting together can or a trust corporation has power to accept any real or personal property before the time the same is payable or transferable. They also have powers to sever and apportion any blended trust funds or property, to pay or allow any debt or claim on evidence he or they think sufficient, accept any composition or any security real or personal for any debt or property claimed and to compromise, compound or abandon or submit to arbitration any debt or claim relating to the trust or estate. See Section 7 of the Trustee Law, Cap. 125, Laws of Western Nigeria. The trustee must however ensure that a compromise is not detrimental to the trust. See *De Cordon* (1879) 4 App. Cas. 692.

5.) Power to Give Receipts

Formerly, the rule was that a trustee has power to receive money but has no implied power to give receipts for the same. The position has been changed by statutory provisions which empower trustees to give receipts in writing and such receipt shall be a sufficient discharge to the person paying, transferring or delivering any money, securities or other personal property. See Section 6(1) of the Trustee Law, Cap 125, Laws of Western Nigeria.

A single trustee can validly give receipts for money received while at least two trustees or a sole corporation can validly give receipts for capital moneys (i.e. proceeds of mortgage or sale of land).

6. Power of Maintenance and Advancement

Trustees have powers of maintenance to make necessary provisions for the benefit of beneficiaries whose interests under the trust property are yet to mature. For instance, under a discretionary trust, a trustee can entertain claims brought by a beneficiary by exercising his discretion in favour of the beneficiary although the beneficiary is not as of right entitled to a fixed or any income from the trust property. A trustee can in exercise of his power of maintenance make provisions for beneficiaries' necessities, such as food, accommodation, etc.

The power is also useful in cases where beneficiaries' interest in the trust property is contingent upon certain conditions, such as attaining a certain age, etc. The trustee can therefore make provisions for the beneficiary's welfare pending the time such condition is fulfilled.

Apart from maintenance, a trustee can make advancement from the trust property for the benefit of the beneficiaries by applying a capital sum to make permanent provision for the beneficiary. See *Hardy v. Sloo* [1975] 2 All E.R. 1057.

SELF ASSESSMENT EXERCISE (SAE) 1

It can hardly be far from the truth that a trustee cannot successfully and efficiently perform his duties under a trust without the right to exercise discretions. Discuss.

4.0 CONCLUSION

Powers are crucial to the effective performance of the trustees' duties and except trustees can exercise discretions to some margins in appropriate cases may render the duties of a trustee almost an impossible task. Although the court have adopted the policy of not disturbing the trustee's exercise of discretion, a trustee should however need to guard against exercising discretion in bad faith

5.0 SUMMARY

In this Unit, you have learnt about the powers of trustees and how the exercise of discretion is instrumental to the successful performance of the trustee's duties. You also learnt that the exercise of discretion cannot be delegated and that the court will usually not interfere with a trustee's exercise of discretion. You were familiarized with the practical benefits of granting of the trustees having to

exercise discretion in respect of the trust property and his duties generally. An example of the trustee exercising his discretion to benefit a beneficiary who or ordinarily not entitled to income in a discretionary trust was given and other cases where the interests of the beneficiary is contingent or yet to mature. In the next Unit, you will learn about breach of trust.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Mention and discuss two of the powers exercisable by the trustee and how these are fundamental to the performance of his duties.
2. The trustee's power of maintenance and advancement portends great value only in hands of a benevolent trustee and nothing in the hands of a trustee who is a stickler for rules. Discuss.

7.0 REFERENCES/FURTHER READINGS

Banire, Muiz. (2002). *The Nigerian Law of Trusts*. Lagos: Excel Publications.

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UNIT 4 BREACH OF TRUST

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
- 3.1 Breach of Trust
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

It is impossible to say that breach of duty will not occur in respect of the performance of the trustees duties. It is thus important to examine what constitutes breach of trust and the extent of liability in some of the cases. It will be important for a trustee to be able to project before hand what his liability will be in respect of a particular breach and what would be the position of the beneficiary in each case.

2.0 OBJECTIVES

In this Unit, you will learn about breach of trust and the various acts that can amount to a breach. You will further learn about how the liability of trustees, how the measure of liability is determined in each case of breach and when trustees can be protected from liabilities. Another important issue that you will learn in this unit is the remedies available to a beneficiary in respect of a breach of trust concerning the trust property, and the time limitation in instituting cases of breach of trust. At the end of this Unit, you should be able to:

- State what kind of trustees' act can amount to a breach of trust.
- Understand the extent of trustee's liability and how liability is measured.
- State grounds upon which a trustee may be relieved from liability.
- Explain what the remedies of breach of trust are.
- Advice as to the limitation period within which a suit concerning breach of trust can be brought.

3.0 MAIN CONTENT

3.1 Breach of Trust

It can be said with reasonable certainty that a breach might occur on the part of the trustee in the performance of his duties, whether directly or indirectly. Owing to the fiduciary nature of the trustee's duties, a breach of trust will be deemed to have occurred where the trustee has failed in his duties as contained in the trust instrument, as imposed by equity or by statute. If a trustee failed in his duties to the beneficiaries under the trust, a breach of trust has also occurred. Where as a result of his breach the beneficiaries suffered any loss; he will be liable to make good such loss to the beneficiaries. You must note that the act in question need not be in respect of fraud or dishonestly before it can amount to a breach of trust. Indeed, it may be just act of honest mistake or technical error, but that will not absolve a trustee of liability.

A trustee is personally responsible for any breach of trust committed by him such that a breach by a trustee does not necessarily make others liable. See *Bahin v. Hughes* (1886) 31 Ch.D. 390. A co-trustee will however be liable where his negligence of duties facilitates the breach committed by the other trustee. See *Lewis v. Nobles* (1878) 8 Ch.D. 591. Section 12 of the Trustee Law Cap. 125, Laws of Western Nigeria 1959 provides for personal liability of trustees.

Where a breach has been committed before a trustee was appointed, he is not liable. See *Re Strahan* (1856) De G.M. & G. 291.

The following issues have to be noted in respect of breach of trust.

1. Measure of Liability

The basic principle is that a trustee shall make good the loss that his breach has caused to the estate. See *Knott v. Cottee* (1852) 16 Beav. 77. The trustee is normally bound to restore the estate to the position it would have been had the breach not occur. See *Re Dawson* (1966) 2 N.S.W.R. 211. If the loss was an inevitable one and the breach merely increased the loss, the trustee shall be liable only to the extent to which the breach increased the loss. See *Lord Gainsborough v. Watcombe Terra Cotta Co.* (1885) 54 L.J. Ch. 991.

Where a trustee has committed act of serious misconduct such as fraud or misappropriation of funds, the court may order him to pay the capital loss with interest to be calculated from the date of fraud or misappropriation. See *Wallersteiner v. Moir (No. 2)* [1975] 1 All E.R. 849.

If the trustee has made an unauthorized investment, the measure of liability of the trustee will be the difference between the unauthorized investment and the authorized one. See *Knott v. Cottee* (supra). Where the trustee has applied the trust funds for his own use, he will be deemed to be a constructive trustee for the profits accruing from the transaction. See *Re Davis* (1902) 2 Ch. 314. In cases where the fund was applied for a commercial venture, the interest rate to be paid by the trustee will be at a compound rate, which will be one percent above the minimum lending rate together with yearly rates. See *Wallersteiner v. Moir* (No. 2) (supra).

2. Liability

Trustee's liabilities are joint and several but in an action concerning the liability of trustees, the beneficiary must join all the trustees. In cases of breach of trust, the trustees and the third parties who committed the breach are all liable. See *Cowper v. Stoneham* (1893) 68 L.T. 18. Where a trustee has been made liable for a breach of trust which was not due to his fault, he can make a claim for reimbursement from the other trustees. See *Bahin v. Hughes* (supra). A trustee in some cases can claim indemnity for damages sustained by him from the co-trustees but such damage must not be due to his fault. See *Re Partington* (1887) 57 L.T. 654. Also, where a beneficiary has successfully sued a trustee liable for a breach of trust, he is entitled to contribution from his co-trustees.

A trustee/beneficiary who has committed a breach of trust is not entitled to his beneficiary interest until he has remedied such breach. See *Re Dacre* (1916) 1Ch. 344.

3. Protection of Trustees

A trustee who despite having acted honestly and reasonably was nonetheless found liable for breach of trust, he may be granted reprieve by being relieved wholly or in part from personal liability. See Section 44 Trustee Law, Laws of Western Nigeria, 1959. The court has the discretion to relieve a trustee of personal liability and this will depend on the facts and circumstances of each case. See *Re Pauling S.T.* (1964) Ch. 303.

The above provisions of the law can however avail a trustee only where he has acted honestly and reasonably and it is on this basis that the court can exercise discretion in the trustee's favour and relieve him of personal liability.

In other cases, a trustee can be entitled to be indemnified by a beneficiary where the breach was committed at his instigation or request. In such a case, the interest of the beneficiary may be applied to make good such loss. See Section 45(1) Trustee Law. For the beneficiary to be liable to indemnify the trustee, he must have known that the request or instigation was in breach of the trust and his act must have gone beyond mere offering advice to the trustee. See *Bolton v. Curre* (1895) 1 Ch. 544. A beneficiary may on account of that be deprived of any income from the trust property until the loss has been satisfied.

You must know however that action for breach of trust can only be brought within a period of six years after which such action will be statute barred. See Section 31(1) of the Limitation Act and Section 32(1) Cap. 118, Laws of Lagos State 1994. Actions concerning fraud or fraudulent breach of trust is not affected by the limitation law. Also, where the trustee has converted the trust property, such action will not be affected. See *Re Howlett* (1949) Ch. 767.

Where the beneficiary or any other person who has a right of action in respect of the breach of trust is under a particular disability, the right of action will not be deemed to accrue until the disability is removed or ceases. See Section 35 of the Limitation Act.

However, where a beneficiary who is of full age has acquiesced or assented to the breach, then no action will lie against the trustee.

5. Remedies for Breach of Trust

As a result of the equitable nature of trust, several remedies are available against the trustee and third parties for breach of trusts, some of which have been examined above. Others will however be briefly outlined as follows:

i.) *Injunction and receivership* – the court can make an order of injunction to restrain a trustee from performing his duties in respect of the trust property, if the trust property is endangered and a receiver may be appointed in respect of the same. See *Fletcher v. Fletcher* (1844) 4 Hare 67.

ii.) *Tracing of Trust Property*

In appropriate cases, the remedies of tracing the trust property into the hands of the trustee and third parties may be available to a beneficiary. This remedy will be appropriate where the trustee although is personally liable for the breach has no means to make good the loss. This remedy is available both at common law and at equity. Tracing in equity is however a right in *rem* and for the beneficiary to be

able to exercise the right to trace, there are some conditions that must be fulfilled. Essentially, the conditions are that there must be fiduciary relationship involved and the fund or property must be identifiable or in a form that it can be traced.

Note however, that the right to trace may be lost where the trust property has ceased to exist, where the equitable owner cannot identify the property and where the property has lost its distinct quality, etc. See *Taylor v, Blakelock* (1886) 32 Ch.D. 560.

SELF ASSESSMENT EXERCISE (SAE) 1

Discuss how the liability of trustee in cases of breach of trustee is determined with particular reference to unauthorized investment and misappropriation of funds.

4.0 CONCLUSION

Liability for breach of trust is necessary to enable trustee to be alive to their responsibilities and the graduation of the liabilities by measuring the same is consistent with deterrence of trustees from committing serious acts of breaches. The trust property and the beneficiaries are equally protect by the prohibited acts and remedies that are available to the beneficiaries.

5.0 SUMMARY

In this Unit, you have learnt about the breach of trust and the likely acts of breach that could be committed by the trustees. You also learnt about the extent to which trustees could be liable either individually or jointly for breaches committed against the trust. You were familiarized how the liability of trustees is measured and the instances where he is protected from liability and thus be absolved blame. Also covered in this unit is the remedies available for breach of trust and in particular, the equitable remedies of injunction and tracing were treated. You should be able to apply what you've learnt in this unit to practical situations effectively. In the next Unit, you will learn about the retirement and removal or trustees.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Discuss the remedies available for a breach of trust, paying particular attention to the equitable remedies of injunction and tracing.
2. Discuss the extent of liabilities of co-trustees for a breach of trust committed by one of them and the instances when a trustee may be protected from liability.

7.0 REFERENCES/FURTHER READINGS

Banire, Muiz. (2002). *The Nigerian Law of Trusts*. Lagos: Excel Publications.

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UNIT 5 RETIREMENT AND REMOVAL OF TRUSTEES

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Retirement of Trustees
 - 3.2 Removal of Trustees
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

It is important to examine issues of retirement and removal of trustees as a result of the inevitable consequence of this. Not only is it essential for a trustee who is desirous of relinquishing his position as trustee to know what are the acceptable ways of doing so but to equally know when he could be removed against his wish as a trustee. Although death is a natural phenomenon that will bring an end to someone's office, except the same is hereditary, the issue of death has therefore not been treated. This is based on the common knowledge that death terminates a trustee's appointment and position cannot pass to another person by inheritance.

2.0 OBJECTIVES

In this Unit, you will learn about the retirement and removal of trustees, circumstances when they can retire or be removed. You will further learn that in some cases, a trustee may be required to fulfill certain conditions before his retirement could be approved. Also to be learnt in this unit is instances when trustees could be removed from office, irrespective of whether they are still willing to act or not. Some of the issues appeared to cross each other, but an examination of the issues will enable you to lucidly difference them. At the end of this Unit, you should be able to:

- Sufficiently state when a trustee can retire from his trusteeship.
- Explain circumstances when a trustee has to fulfill certain conditions before his retirement could be consented.
- State when trustees can retire without the need to satisfy any condition.

- Give instances when trustees could be removed from trusteeship.
- Acquire practical knowledge of how to apply what is learnt here in real life.

3.0 MAIN CONTENT

3.1 Retirement of Trustees

A trustee may retire from his duties by being discharged from the same and this could be by express provision in the trust instrument, by statutory provisions or by an order of the court. A consideration of these issues will now be discussed as follows:

1.) By Trust Instrument

A trustee may retire by virtue of the provisions of the trust instrument and thereby relieve himself of the duties of the trust. In appropriate cases, the trust instrument may include provisions for retirement and resignation of a trustee. See *Davis v. Richards and Wallington Industries* [1990] 1 W.L.R. 1511.

However, where no such provision is included in the trust instrument, it has been held that the power to resign arises by implication and that a trustee could retire from his trusteeship by writing a letter of resignation to the secretary of the trust. See *Davis v. Richards and Wallington Industries* (supra).

2. By Statutory Provisions

A trustee may also retire under statutory provisions by virtue of Section 10 of the Trustee Act 1893 and Section 24 of the Trustee Law. Under those provisions, upon the appointment of new trustees, a trustee may cease such opportunity to retire. However, in the absence of new appointments, a trustee could still retire in accordance with Section 11 of the Trustee Act, provided that there is a trust corporation or at least two trustees remaining to perform the trust. The co-trustees or any other person vested with power to appoint new trustees must also consent to such retirement. The retirement must be done by deed and where this is done, the trustee is effectively discharged from the trust.

In cases where there is a Public Trustee remaining as the sole or one of the trustees, there is no need for the above conditions to be fulfilled before a trustee can retire. In that case, a trustee can retire whether a new trustee is appointed or not. See Section 9(2) of the Public Trustee Act and the Trustee Law.

3. By Consent of all Beneficiaries

A trustee can retire where all the beneficiaries of full age consent to such retirement and they are also absolutely entitled to all the beneficial interests of the trust. This is based on the fact that the beneficiaries in such cases could validly terminate the trust as they are entitled to request the trustee to hand over the trust property to them, thereby putting an end to the trust.

4. By Order of the Court

It is also possible for a trustee to be discharged from his trusteeship both under Sections 25 of the Trustee Act and 28 of the Trustee Law and under the inherent jurisdiction of the court.

Where a trustee could not retire by any of the ways previously discussed above, the court could exercise power conferred by statute or under its inherent jurisdiction to discharge him from trusteeship and appoint another person to replace him.

Furthermore, under its inherent jurisdiction, the court may impose such conditions as it may deem fit. The court may require for instance that there must be at least one continuing trustee or that a suitable person must be available to act as trustee, in order to ensure that the trust is not in any way prejudiced by the retirement.

SELF ASSESSMENT EXERCISE (SAE) 1

Mention and discuss two instances when a trustee could retire from his trusteeship.

3.2 Removal of Trustees

As it is with the case under retirement of trustees, trustees could also be removed by virtue of the provisions to that effect in the trust instrument, under statutory provisions and by an order of the court. Some of the ways by which a trustee could be removed will now be examined briefly as follows:

- i.) By express provisions in the trust instrument - a trustee could be removed for any reason which may be specified in the trust instrument.
- ii.) On grounds of unfitness to act - a trustee can be removed if he found to be unfit to act by virtue of being declared bankrupt or where he has absconded.

iii.) On grounds of incapacity to act – a trustee may be removed from his trusteeship if he has become senile or can no longer exercise good judgment by reason of old age, etc. See *Re East* (1873) 8 Ch, App. 735.

iv.) By statutory provisions – a trustee could be removed from office under the following statutory grounds:

a) If a trustee remains out of Nigeria for more than twelve months.

b) By refusing to act.

c) On grounds of incapacity to act.

d) By an order of the court – where among others, the continued stay of the trustee in office will be prejudicial to the trust. See *Adeseye v. Williams* [1964] 2 All N.L.R 37.

In respect of the above, see the provisions of Sections 10(1) and 25(1) of the Trustee Act and Sections 24(1) and 28(1) of the Trustee Law, Cap. 128, Laws of Oyo State 1978.

SELF ASSESSMENT EXERCISE (SAE) 2

State and discuss four grounds upon which a trustee could be removed from office.

4.0 CONCLUSION

Retirement of trustee is one that may become imperative by so many factors such as old age or incapacity to act. A trustee could also be removed from office as may be laid down by law, trust instrument and by order of court. The trust may become difficult to perform if a deserving trustee cannot retire and a non performing one cannot be validly removed. It can therefore be seen that both elements of retirement and removal serve useful purposes.

5.0 SUMMARY

In this Unit, you have learnt about the retirement and removal of trustees, the various sources of the right to retire and circumstances when conditions may be imposed for their retirement and when such conditions may be dispensed with.

You further learnt about the grounds upon which a trustee may be removed from office irrespective of whether he is willing to act or not, and the sources of the power to remove a trustee. With our consideration of the issues, you should be able to successfully navigate through problems bothering on whether a trustee can retire in a particular case or not, and whether a trustee could validly be removed from office. In the next Unit, you will learn about the administration of estate.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. Relate the possibility of a trustee to retire from a trust where the trust instrument did not provide for this and the statutory hurdles that a retiring trustee might face.

2. A, B, C and D are trustees of the estate of XY and as a result of the American lottery that won by A, A travelled to the United States of America where he spent sixteen months before returning to Nigeria. Meanwhile, A has been removed as trustee before his arrival. B, absconded and could not be traced but surfaced three years later by which time D has committed a breach of trust by misappropriating trust funds for which the beneficiaries have sued A, B, C and D. C alleged that he has been validly discharged from the trust with the consent of all the beneficiaries and hence not liable for the breach of trust later committed by D. Discuss the legal issues involved and advice on the liabilities of A, B, C and D for the breach of trust and the validity or otherwise of the removal of A as trustee and the alleged discharge of C from the trust by the beneficiaries.

7.0 REFERENCES/FURTHER READINGS

Banire, Muiz. (2002). *The Nigerian Law of Trusts*. Lagos: Excel Publications.

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MODULE 3 ADMINISTRATION OF ESTATES

UNIT 1 ESSENTIALS OF ADMINISTRATION OF ESTATES

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Administration of Estates
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

This part will discuss the essential issues involved in the administration estates, in order for you to know the basic things concerning them. As such, some of the issues may not be comprehensively discussed. Administration of estates involves running and/or dealing with the property of a deceased person. It does not matter whether such a person left a will or not. The reason why the estate of a deceased person has to be administered according to law is because those property belonged to the deceased and for any other person to be able to deal in them legally, procedure laid down by law on this has to be complied with otherwise, such property cannot be legally dealt with.

2.0 OBJECTIVES

In this Unit, you will learn about how to administer the estate of a deceased person according to law. You will essentially learn about grant of probate, letters of administration, executors and administrators, their duties and liabilities, those entitled to apply for a grant, when letters of administration *de Bones non* may be granted and when grant of probate or letters of administration could be revoked. You further learn about the office of the Administrator-General and resealing. At the end of this Unit, you should be able to:

- Know what a grant of probate and letters of administration is.
- State those entitled to apply for letters of administration in order of priority.
- Explain the liabilities of sureties, when grant of probate and letters of administration could be revoked.
- Understand what is resealing and its purpose.
- Acquire practical knowledge about the issues involved in administration of estates.

3.0 MAIN CONTENT

3.1 Administration of Estates

Before attempting an examination of the issues involved in the administration estates, you need to know that where a person died leaving a will, he or she is said to have died testate, and intestate, where the deceased did not leave any will. You need to know also that those who are granted letters of administration in respect of the estate of a deceased's estate who died intestate are called administrators, while those who are granted probate in respect of a deceased' estate who died testate are called executors.

The issues involved in the administration of estates are as follows:

1. Probate and Letters of Administration

Upon the death of a person intestate and until the letters of administration is granted in respect of the estate of the deceased, such estate vests in the Chief Judge of that State. See Section 10 of the Administration of Estate Law, Cap. 3, Laws of Lagos State, 1994.

The letter of administration gives the legal powers to deal with the estate of the deceased and may be applied for by the personal representatives of the deceased. On the grant of the letters of administration, those named in it can legally and validly deal with the estate of the deceased.

In order to avoid contention that often trail who is entitled to apply for letters of administration especially between the surviving spouse of the deceased and family members, the various rules or courts have assisted in streamlining and eliminated doubts as to those entitled to apply and the order of priority in which they can apply. Thus, if those entitled are absent in the order of priority, the next in line can apply. The order is as follows:

- i.) Surviving spouse.
- ii.) The surviving children of the deceased who are over 21 years or the children of such children who predeceased the deceased.
- iii.) Parents of the deceased.
- iv.) Brothers and sisters of whole-blood with the deceased or their children where they predeceased the testator.
- v.) Brothers and sisters of half-blood or their children over 21 years old where they predeceased the testator.
- vi.) God parents.
- vii.) Uncles and Aunts of whole-blood.
- viii.) Uncles and Aunts of half-blood.
- ix.) Creditors.

In respect of the above, see Order 58 Rule 50 Cap. 61 High Court of Lagos State (Civil Procedure) Law, 1994 which deals with cases of those who died testate, i.e. leaving a will and Section 49(1) Administration of Estate Law, Laws of Lagos State, 1994, which deals with priority issues in succession and may serve as a guide to determine priority in cases of intestacy.

You have to note that letters of administration cannot be granted to more than four persons on the same property and that in a situation where persons originally granted letters of administration dies or have been discharged or removed on the order of court, letters of administration *de Bones non* may be granted for the purposes of allowing new administrators to finalize the administration of the estate.

Administrators of a deceased estate whether real or personal are accountable and are also liable in the same way as the executors of the deceased. It is however possible to grant separate letters of administration in respect of real and personal estate. In some cases however, the grant may be limited to the real estate.

A trustee corporation may be granted letters of administration whether solely or together with others in case of intestacy and can be granted probate if named in a will as an executor.

Until they attain the age of majority (21 years), infants cannot be named as an executor but where he so named and is the sole executor, he can be granted letters of administration with the will annexed to his guardian or any other person as the court might name. See Sections 26(1) and 29(1) of the Administration of Estate Law, Laws of Western Nigeria, 1959.

Where there is a pending litigation in court concerning the validity or otherwise of a will, the court may grant the administration of the estate concerned to an administrator, known as administrator *pendente lite*.

2. Grant to the Administrator-General

The Administrator-General is a corporation sole with perpetual seal and his office is one created by statute. See for example, the Administrator-General Law of Lagos State, Western Nigeria, Cap. 2; for Lagos State, Cap. 4 and also Cap. For Eastern Nigeria.

The Administrator-General can act as executor or administrator of an estate and can use and be used in its corporate name. He may even be named as a sole executor in a will.

In applying for the letters of administration or proving a will, the Administrator-General has to follow the same procedure to be followed by an individual but he is not required to enter into a bond as an individual would.

You have to note that for reasons best known to those concerned, it is possible for those who have been granted probate or letters of administration to transfer the estate covered by such grant to the Administrator-General with the prior consent of the Administrator-General.

In certain situations, it is possible also for the Administrator-General to apply to the court as may be prescribed by law, to be granted probate or letter of administration where he has knowledge that an estate is unrepresented. The court can grant such application if satisfied that such estate is indeed unrepresented.

3. Administration Bonds and Sureties

An administrator in most cases are required to enter into a bond in a stated sum (this may be up to two times the gross amount of the estate) before letters of administration could be granted. Sureties are required to guarantee that the

administrator on the grant of the letters of administration will collect the same, enter and administer the estate of the deceased, real or personal.

4. Liability of Sureties

As stated above, the sureties guarantee the administration of the estate and they must endeavour that the administrator perform his duties by duly administering the estate. An administrator is primarily liable for any breach committed against the estate but the sureties may be liable for improper administration of the estate where such loss cannot be made good by the administrator. The sureties may however apply to court to be relieved of liability under the bond by way of an indemnity where the administrator is likely or is in the process of committing a breach a breach against the estate. See *The Anderson-Berry* (1928) Ch, 290. See also *Chief Registrar v. Somefun* [1930] 13 N.L.R. 89.

5. Revocation

After probate or letters of administration has been granted, an application for revocation of the same may be made to the Probate Registrar on various grounds. See *Ijeni v. Ijeni* [1967] 9 CCHCJ 2175. Such grounds may include a mistaken grant in respect of the estate of someone still alive, the disappearance of the original grantees, where the grantees are incapacitated, where the grant was obtained by fraud or the grantees lacked sufficient interest in respect of the estate over which it was granted. See *Ephraim v. Asuquo* [1923] 4 N.L.R. 98.

A grant will however not be revoked merely because an executor has not complied with an order of court for account. See *In the Estate of Cope* [1954] 1 All E.R. 698.

An application for revocation is required to be made within six months of the grant, although the time may be extended on ground grounds.

6. Resealing

Resealing is done where a grant which has been sealed originally in one State of Nigeria or outside the country is sealed again with the seal of a court of another State, with the purpose of making the grant effective within the jurisdiction where it has been resealed. This is usually done where the deceased has estate located outside the State which originally issued the grant. See Section 75 of the High

Court of Lagos State (Civil Procedure) Law and corresponding provisions in other High Courts Rules in Nigeria.

SELF ASSESSMENT EXERCISE (SAE) 1

In order of priority, mention those entitled to apply for a grant of letters of administration and in the absence of all those entitled to apply what becomes of the estate?

4.0 CONCLUSION

Administration of estates of deceased persons is vital to government both from the practical aspects of the protecting the interest of beneficiaries and seeing to the due administration of that estate. This is what informed the requirement for sureties, apart from ensuring that ineligible people or people without sufficient interests do not apply for a grant. You should be able to apply the knowledge gained in this unit to practical life situations.

5.0 SUMMARY

In this Unit, you have learnt about the essentials involved in the administration of estates. Importantly, you have learnt about the grant of probate and letters of administration, the class and priority of people entitled to a grant, duties and liabilities of executors and administrators. You further learnt that a grant of probate and letters of administration gives the legal powers to deal with the estate of the deceased and that these could be revoked on grounds of a mistaken grant in respect of the estate of someone still alive and so on. You were exposed to the office of the Administrator-General and resealing.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

1. State the requirements for a grant of letters of administration and the grounds upon which the same could be revoked.
2. After the death of Jalingo, since no will was found to have been left behind by him, his wife – Anyigba, who did not have any child for Jalingo applied for a grant of letters of administration in respect of her husband's estate. After the grant of the letters of administration in Anyigba's favour, Jalingo's mother – Mummy J filed a

action in court seeking a revocation of the letters of administration granted to Anyigba, contending that according to their native custom, a wife who did not have any child for the husband cannot have a say in respect of the late husband's estate and that she is the person entitled to the estate or her son since she was the one that brought him up. It was later discovered that Jalingo in fact left a will where he named his father – Daddy J and mother, Mummy J as the only executors of his will. Identify the legal issues involved and advise the parties.

7.0 REFERENCES/FURTHER READINGS

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