

TRUSTEESHIP

A trust is the relationship which arises where 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, 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.

This definition shows the following:

- i. That there can be a trust of an equitable interest. For example, a trust is created when Mr. X's right in a trust fund is given to Mr. Y on trust for Mr. Z.
- ii. It is possible for both the legal and equitable title to vest in one person as when he, as trustee, holds a legal interest in trust for himself.
- iii. A trust is not necessarily created whenever legal and equitable interests are separated.

An **equitable interest** is an interest held by virtue of an equitable title (a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title) or claimed on equitable grounds, such as the interest held by a trust beneficiary

In a trust, the trustee has a legal interest in the trust. However, the beneficiaries to the trust have an equitable interest in the trust. The trustee has the power of attorney, or legal rights over the trust. Meanwhile the beneficiaries, the holder of the equitable interest has an equitable right in the trust. If the trustee fails to perform the duties, then the beneficiary may sue the trustee in equity to perform the duties.

Simply put, a trust is a relationship whereby property is held by one party for the benefit of another party. A trust is created by a settlor, who transfers property to a trustee, who holds that property on behalf of the beneficiaries.

Creation of Trust

As a general rule, no formality is required before a trust can be created. Hence a trust will be deemed to exist where on the mere construction of the words used whether written or oral, the settlor or donor or testator (that is the person creating the trust) has imposed an obligation on another person that his wishes on the trust property be carried out. The following trusts must however be in writing:

- i. Trust affecting land or any interest therein;
- ii. Trust that has to do with assignment of equitable interest; and
- iii. Trust created by will or codicil.

TRUSTEES IN BANKRUPTCY

The official name of a trustee in bankruptcy shall be "the trustee of the property of a bankrupt" (inserting the name of the bankrupt for example, "the trustee of the property of James Bond"), and by that name the trustee may hold property of every description, make contracts, sue and be sued, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

Appointment

The creditors may, if they think fit appoint more than one person to the office of trustee and, when more persons than one are appointed shall declare whether any act required or authorised to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are in this Act included under the term "trustee" and shall be joint tenants of the property of the bankrupt.

If a vacancy occurs in the office of a trustee, the creditors in general meeting may appoint a person to fill the vacancy. The Official Receiver shall, on the request of any creditor, summon a meeting for the purpose of filling any such vacancy.

If the creditors do not within three weeks after the occurrence of a vacancy appoint a person to fill the vacancy, the Official Receiver shall report the matter to the court, and the court may appoint a trustee. During any vacancy in the office of trustee the Official Receiver shall act as trustee.

Committee of Inspection

The creditors qualified to vote, may at their first or any subsequent meeting by resolution appoint a committee of inspection for the purpose of supervising/overseeing the administration of the bankrupt's property by the trustee.

The committee of inspection shall consist of not more than five nor less than three persons, who are creditors or representatives of creditors (whose debts have been proven). The committee of inspection shall meet at such times as it shall from time to time appoint, or at least once a month, and the trustee or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

The committee may act by a majority of its members present at a meeting, but shall not act unless a majority of the committee is present at the meeting. Any member of the committee may resign his office by notice in writing signed by him and delivered to the trustee. If a member of the committee becomes bankrupt, or is absent from five consecutive meetings of the committee, his office shall thereupon become vacant.

Any member of the committee may be removed by an ordinary resolution at any meeting of creditors of which seven days' notice has been given stating the object of the meeting. On a vacancy occurring in the office of a member of the committee, the trustee shall forthwith summon a meeting of creditors for the purpose of filling the vacancy, and the meeting may, by resolution, appoint another creditor or other person eligible to fill the vacancy.

If there is no committee of inspection any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the court on the application of the trustee.

Control over trustee

Subject to the provisions of this Act, 'the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting or by the committee of inspection, and any directions so given by the creditors at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection.

The trustees may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct. Also it is lawful for any creditor, with the agreement of one-fourth in value of the creditors (including himself), at any time to request the trustee or Official Receiver to call a meeting of the creditors, and the trustee or Official Receiver shall call such meeting accordingly within fourteen days: Provided that the person at whose instance the meeting is summoned shall, if so required, deposit with the trustee or the Official Receiver, as the case may be, a sum sufficient to pay the costs of summoning the meeting, such sum to be repaid to him out of the estate if the court so directs.

If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just.

The court shall take cognisance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties and duly observing all the requirements imposed on him by Act, rules or otherwise with respect to the performance of his duties, or in the event of any complaint being made to the court by any creditor in regard thereto by notice duly served on the trustee at least eight clear days before the date of hearing, the court shall inquire into the matter and take such action thereon as may be deemed expedient.

The court may either of its own motion or on the application of the Official Receiver at any time require any trustee to answer any inquiry made by the court or the Official Receiver in relation to any bankruptcy in which the trustee is engaged and may examine on oath the trustee or any other person concerning the bankruptcy. The court may also direct an investigation to be made of the books and vouchers of the trustee.

Remuneration and costs

The remuneration (if any) of the trustee shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realised by the trustee, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend. Such percentage shall be as the court may approve or as may be prescribed from time to time.

Where a trustee acts without remuneration he shall be allowed out of the bankrupt's estate such proper expenses incurred by him in or about the proceedings of the bankruptcy as the court may approve.

Where a trustee or manager receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by this Act to be performed by himself.

Where the trustee is a legal practitioner he may contract that the remuneration for his services as trustee shall include all professional services.

All bills and charges of legal practitioners, managers, accountants, auctioneers, brokers and other persons, not being trustees, shall be taxed by the Registrar and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made.

Receipts, payments, accounts and audit

The trustee or Official Receiver shall, whenever required by any creditor, furnish and transmit to him by post a list of the creditors showing the amount of the debt due to each creditor.

It shall be lawful for any creditor, with the concurrence of one-fourth of the creditors (including himself), at any time to call upon the trustee or Official Receiver to furnish and transmit to the creditors a statement of the accounts up to the date of such notice, and the trustee shall upon receipt of such notice furnish and transmit such statement of the accounts: Provided that the person at whose instance the accounts are furnished shall, if so required, deposit with the trustee or Official Receiver, as the case may be, a sum sufficient to pay the costs of furnishing and transmitting the accounts, which sum shall be re-paid to him out of the estate if the court so directs.

Every trustee in a bankruptcy shall from time to time, as may be prescribed, and not less than once in every year during the continuance of the bankruptcy, transmit to the Official Receiver a statement showing the proceedings in the bankruptcy up to the date of the statement, containing the prescribed particulars and made out in the prescribed form. The Official Receiver shall cause the statements transmitted to be examined, and shall call the trustee to account for any misfeasance (wrong use of authority), neglect or omission which may appear on the said statements or in his accounts or otherwise, and may apply to the court for an order that the trustee do make good any loss which the estate of the bankrupt may have sustained by the misfeasance, neglect or omission.

No trustee in a bankruptcy or under any composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account or use them otherwise than in the administration of the estate.

The Official Receiver shall open in his name as Official Receiver an account at a bank and shall pay to the credit thereof all sums received by him as such Official Receiver or as trustee. Also every trustee in a bankruptcy, other than the Official Receiver, receiving money shall open an account at a bank in the

name of the debtor's estate and shall pay to the credit of such account all sums which may from time to time be received by him.

If a trustee at any time retains for more than ten days a sum exceeding N500, or such other amount as the court in any particular case may authorise him to retain, then unless he explains the retention to the satisfaction of the court, he shall pay interest on the amount so retained in excess at the rate of twenty per cent per annum and shall have no claim to remuneration and may be removed from his office by the court and shall be liable to pay expenses occasioned by reason of his default.

Any trustee paying money into his private banking account or using it otherwise than in the administration of the estate may without prejudice to any other liability be dismissed from office without remuneration and may be ordered by the court to make good all losses and expenses which the creditors may suffer in consequence of his conduct.

The trustee shall keep a record in writing in which he shall enter a minute of all proceedings had and resolutions passed at any meeting of creditors or of the committee of inspection and a statement of all negotiations and proceedings necessary to give a correct view of the management of the bankrupt's property.

The trustee shall also keep an account, to be called the estate account, in the form of an ordinary debtor and creditor account, in which he shall enter from day to day all his receipts and payments as trustee.

The trustee shall produce at every meeting of creditors and at every meeting of committee of inspection the record and account above mentioned and also the pass-book of the estate's bank account, and such documents shall be open to the inspection of any creditor at all reasonable times.

Every trustee other than the Official Receiver shall, at such times as may be prescribed but not less than once in each year during his tenure of office, send to the Official Receiver an account of his receipts and payments as a trustee.

The account shall be in the prescribed form, shall be made in duplicate and shall be verified by an affidavit in the prescribed form. The Official Receiver shall cause the accounts so sent to be audited, and for the purposes of the audit the trustee shall furnish the Official Receiver with such vouchers and information as he may require, and he may at any time require the production of and inspect any books or accounts kept by the trustee.

When any such account has been audited it shall be filed and kept by the Official Receiver and shall be open on payment of the prescribed fee to the inspection of any creditor or of the bankrupt or of any person interested.

The court may if it so desires examine the trustee and after hearing the explanation, if any, of the trustee, make such order as it may think just for compelling the trustee to make good any loss to the estate which after such audit or examination, may appear to the court to have been occasioned by any misfeasance, neglect or improper conduct or omission of the trustee.

Vacation of office by trustee

When the trustee has realised all the property of the bankrupt or so much there of as can, in his opinion, be realised without needlessly protracting the trusteeship, and distributed a final dividend, if any, or has ceased to act by reason of a composition having been approved, or has resigned or has been removed from his office, he shall apply to the court for his release, and if all the requirements of the court with respect to accounts and with respect to any order of the court against the trustee have been fulfilled, the court may make an order for release accordingly.

Where the release of a trustee is withheld the court may, on the application of any creditor or person interested, make such order as it thinks just, charging the trustee with the consequences of any act or default he may have done or made contrary to his duty.

An order of the court releasing the trustee shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the Official Receiver shall be the trustee. Where on the release of a trustee the Official Receiver is or is acting as trustee, no liability shall attach to him personally in respect of any act done or default made or liability incurred by any prior trustee. If a receiving order is made against a trustee he shall thereby vacate his office of trustee.

The Creditors may by ordinary resolution, at a meeting specially called for that purpose of which seven days' notice has been given, remove a trustee appointed by them and may at the same or any subsequent meeting appoint another person to fill the vacancy as provided in case of a vacancy in the office of trustee.

The court may order the removal of a trustee if the court is of opinion that:

- i. a trustee appointed by the creditors is guilty of misconduct or fails to perform his duties under this Act; or
- ii. his trusteeship is being needlessly protracted without any probable advantage to the creditors; or
- iii. he is by reason of mental or physical disability or absence incapable of performing his duties; or
- iv. his connection with or relation to the bankrupt or his estate or any particular creditor might make it difficult for him to act with impartiality in the interest of the creditors generally; or
- v. the interests of the creditors require it, the court may remove him from his office and appoint another person in his place.

CLASSIFICATION OF TRUSTS

Traditionally, trusts can be classified into those that are express or implied.

1. **Express trusts:** An **express trust** is a trust created "in express terms, and usually in writing, as distinguished from one inferred by the law from the conduct or dealings of the parties. Express trusts are created by a settlor, who transfers property to a trustee for a valid trust purpose. The trustee then distributes the trust property to a beneficiary pursuant to the terms of the trust

Types of Express Trust

Express trusts may take a number of different forms. The most common categories of express trusts are living trusts, testamentary trusts, revocable and irrevocable trusts, fixed trusts, and discretionary trusts.

- **Living Trusts:** A living trust, or *inter vivos* trust, is created for the benefit of another during the settlor's life.
 - **Testamentary Trusts:** Testamentary trusts are created by a settlor's will. A settlor's property is therefore transferred into the trust when the settlor dies. Eg. a will.
 - **Revocable Trusts:** A revocable trust allows the settlor to retain sole control of the trust. While the settlor does not receive any tax benefits from a revocable trust, the settlor can withdraw funds from the trust, or alter or cancel the trust at any time.
 - **Irrevocable Trusts:** The trustee of an irrevocable trust is given sole control over the trust property. Typically, the trust will not come to an end until the trust purpose is fulfilled. The trust may be altered or revoked before this time only with the consent of the trustee and all beneficiaries.
 - **Fixed Trusts:** Beneficiaries to a fixed trust receive trust property on a specific schedule set forth by the settlor. The trustee of a fixed trust has little or no discretion to distribute trust property.
 - **Discretionary Trusts:** A discretionary trust gives the trustee the power to choose how and when, if at all, to distribute trust property to beneficiaries. A discretionary trust may provide significant tax benefits to beneficiaries, since no beneficiary has an interest in trust assets until they are distributed.
2. **Implied trusts:** Implied trusts refers to a trust that has not been expressly created by the settlor. It may be an express trusts where the intention of the settlor or testator is implied in the non-technical language they have used or where the trust arises by operation of law, as in the case of constructive and resulting trusts.
 - a. **Constructive trusts** are those that are constructed on the basis of the presumed intention of the settlor or testator or irrespective of intention, imposed by a court of equity in circumstances in which it would be unconscionable or inequitable for a person holding property to keep it for their own use and benefit absolutely. Constructive trusts may be subdivided into two categories:
 1. the constructive trust proper (known as the institutional constructive trust)
 2. the so-called constructive trust (known as the remedial constructive trust)
 - b. A **Resulting trust** is one that returns beneficial ownership of the trust property to a person who owned the property before it reached the trustee's hands. It is the creation of an implied trust by operation of law, where property is transferred to someone who pays nothing for it;

and then is implied to have held the property for benefit of another person. The trust property is said to "result" back to the transferor (implied settlor). There are said to be two kinds of resulting trust, a **presumed resulting trust** or an **automatic resulting trust**.