

TRUSTS - What They Are & Potential Implications on Understanding of Disclosure Requirements

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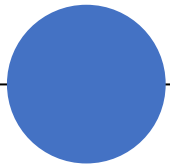
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***WHAT IS A
TRUST?***

DEFINITION OF TRUSTS

What it is

- ❖ Trust is a relationship describing how property is held –
- ❖ Oosterhoff on Trusts:

*'An equitable obligation, binding a person (called a **trustee**) **to deal with property** (called **trust property**) owned by him **as a separate fund**, distinct from his own property, **for the benefit of persons** (called **beneficiaries** or, in all cases, cestuis que trust) of whom he may himself be one, and anyone of whom may enforce the obligation.'*

- ❖ Waters Law of Trusts in Canada:

*"The hallmarks, the essential characteristics of the **common law trust**, are heavily reflective of a peculiar legal history. The foremost of these is the **fiduciary relationship** which exists **between trustee and beneficiary**. ... From the moment of the creation of the trust, there must be an ability of the beneficiary to secure an accounting or, to put it another way, a power in the beneficiary to enforce the discharge of its duties by the trustee."*

What it is NOT

- ❖ Trust is not a separate legal entity

PRIVATE TRUST vs PUBLIC TRUST

□ Private Trusts

- ❖ Mainly trusts for person, i.e. beneficiaries, who can enforce the trust.
- ❖ E.g. express trusts, constructive trusts and resulting trusts.

□ Public Trusts

- ❖ Public or charitable trusts are trusts for selected purposes beneficial to the community that the State (rather than private individuals) undertakes responsibility for their enforcement.
- ❖ Purpose Trusts.

EXPRESS PRIVATE TRUST

□ 3 Certainties to legally form an express private trust

❖ In order to form a trust, the 3 certainties must be satisfied:

- Certainty of words (i.e. the declaration of trust);
- certainty of subject-matter (i.e. property to be held upon trust, i.e. trust property); and
- certainty of objects (i.e. the persons entitled to the trust property, i.e. beneficiary).

PRIVATE TRUST

□ Express Private Trust

- ❖ Federal Court in the case of **Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64**: “*an express trust necessarily comes into existence from the moment at which the settlor declared it ... express trust is brought into existence by the deliberate act of the settlor ...*”
- ❖ An express trust is created by the absolute owner of the property either declaring himself to be the trustee of the property for identified beneficiaries, or declaring that some other person is to be the trustee of the property for identified beneficiaries and then transferring legal title in the trust property to those trustees. The settlor’s express declaration may be achieved by means of **deed, by will, other forms of writing or even orally.**
- ❖ “*A declaration of trust may be made quite informally, provided that the words used are clear and unequivocal*” – Grant v Grant (1865) 55 ER 776
- ❖ “*a mere intention to give would not be conclusive, and that it must be shewn that the property has really been given*” - Grant v Grant (1865) 55 ER 77

PRIVATE TRUST

□ Types of Express Private Trusts

- ❖ For a trust to be effective, the trust must have ascertained or ascertainable beneficiaries.
- ❖ **Fixed Trusts**: Beneficiary's identify and share of benefit of the trust property is fixed/certain.
- ❖ **Discretionary trusts**: Court of Appeal in **Tan Sri Dr M Mahadevan v. Dr Jeyalakshmi Ratnavale & Ors** held that:
 - A beneficiary under a discretionary trust had no immediate right to the trust property. The only right of a beneficiary of a discretionary trust is to require the trustees to consider from time to time whether or not to apply the whole or some part of the income for his benefit.
 - Every beneficiary in a discretionary trust has the legal right to challenge the decisions of the trustees if that decision was arrived at in bad faith or illegal even though the testator had given the trustees a full discretion to determine the proportion to be given to the beneficiaries.

IS THERE A TRUST?

- ❖ “I hereby give and make over to Dr X a Malaysian bond”
- ❖ “I undertake to hold the bond for you”
- ❖ “So long as I was alive, the lands would be held by me absolutely and any transfers to my sons would only have taken place after my death”
- ❖ “My intention always was for the land to be shared amongst my 10 children”
- ❖ Transfer of ownership in assets for “love and affection”

“Any words that shews that the donor means, at the time speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust.” [Grant v Grant]

IMPLIED TRUSTS

□ Examples of Implied Trusts

❖ Such trusts can also arise by operation of law. Eg:

- ✓ Certain insurance policies;
- ✓ Trusts for debentures or by order of court.
- ✓ Family dispute cases

RESULTING TRUST

- ❑ Court of Appeal in **Koh Siew Keng & Anor V. Koh Heng Jin [2008]** held that the label "implied trust" encompasses both resulting and constructive trusts, both of which are trusts imposed by law
- ❑ Resulting trust is to give effect to the presumed intention of the settlor. Where an express trust fails, settlor can reclaim the property.
- ❑ E.g. where a transferee is required by equity to hold property on trust for the transferor or for the person who provided purchase money for the transfer.
- ❑ E.g. Guardian holding the property of an infant can be regarded as a trustee under an implied trust for the infant which arises as soon as the guardian comes into possession of property belonging to an infant:- see **RE: ESTATE OF YONG WAI MAN; EX PARTE: YONG KHAI MIN [1994]**.

CONSTRUCTIVE TRUST

- ❑ Constructive trusts arise by operation of law. i.e. where equity says that the legal owner of the property must hold it on trust for others (e.g. due to fraud, proceeds of breach of fiduciary duty or breach of confidence, incomplete transfers, etc). Covers a wide variety of circumstances.
- ❑ Contractual terms such as Romalpa clauses can also give rise to a trust. See Court of Appeal in **Interdeals Automation (M) Sdn Bhd v Hong Hong Documents Sdn Bhd [2009]**:

It is settled law that parties to a contract for the sale of goods may agree that the ownership in them would only be transferred from the vendor to the buyer when the latter has met all his or her obligations contained in the contract. ... Such a term in a contract for the sale of goods (styled a "Romalpa clause") has the effect of making the buyer a trustee or fiduciary of the goods for the seller thereby entitling the latter to trace them into the hands of third parties to whom the buyer may transfer them.

CAN THERE BE A TRUST ON SHARES?

- ❖ Registered shareholder may declare himself a trustee of his shares, or may transfer the shares to another person on trusts directed by him
- ❖ When Shareholder agrees to sell specifically identified shares (which are registered in his name/nominee's name etc), equitable ownership immediately passes to purchaser.
- ❖ When an option to purchase specifically identified shares is exercised by the potential purchaser, the option vests an equitable interest in those shares in the potential purchaser.
- ❖ **Hawks v McArthur [1951] 1 All ER 22**: F and R agreed to purchase 300 + 200 shares from M separately and to hold them as beneficial owner if no other member of the company wished to purchase said shares. Company's constitution stated that no shares should be transferred until the rights of pre-emption had been exhausted. **None of these provisions were complied with.** Notwithstanding the complete failure to comply with the company's articles in regard to the procedure to be followed before shares could be transferred, F and R, having paid to M the full consideration for the shares, had obtained equitable rights therein, i.e. M held the said shares in trust for them.

TRUSTS & SITUATIONS INVOLVING TRUSTS

- ❖ Legislative Trusts, viz. a trust imposed or required by a statute etc.
- ❖ Trusts imposed by court order
- ❖ Pension scheme trusts
- ❖ Trusts of insurance policies, e.g. life policies
- ❖ Charitable Trusts
- ❖ Commercial transactions, viz trust created to enable or facilitate a commercial transaction/enforce rights relating to transactions
- ❖ Testamentary trusts, viz. trusts effected by will
- ❖ Trusts for specific purposes, such as holding client monies, securities or assets, incidental to the carrying on of business
- ❖ Trusts arising as part of professional services, e.g. unit trust schemes, agents holding sums or assets in escrow until a contractual condition is performed etc.
- ❖ Trusts for the purpose of transferring assets, e.g. bare trustees on sale of land
- ❖ Plan trust for a share incentive plan/share option scheme etc

***Financial
Action
Task
Force***

R24: DISCLOSURE OF ULTIMATE BENEFICIAL OWNERSHIP

❑ Disclosure Requirements for companies

- ❖ R24 (Recommendation 24) by the Financial Action Task Force (“FATF”) on beneficial ownership of legal persons.
- ❖ Beneficial Ownership vs Legal Ownership
- ❖ Ultimate control of entity, types of ownership interests, exercise of control through voting rights, economic rights,
- ❖ Requires countries to ensure that competent authorities have access to adequate, accurate and up-to-date information on the true owners of companies.
- ❖ Disclosure of ultimate beneficial ownership required to be made by companies incorporated in Malaysia.

R25: Disclosure Requirements imposed on TRUSTEES

□ FATF – Recommendation 25 (R25)

- ❖ Countries should require trustees of any express trust and persons holding an equivalent position in a similar legal arrangement, that are residents in their country or that administer any express trusts or similar legal arrangements in their country, to obtain and hold adequate, accurate, and up-to-date beneficial ownership information regarding the trust and other similar legal arrangements.
- ❖ This should include information on :
 - i. identity of the settlor(s)
 - ii. identity of the trustee(s)
 - iii. identity of the protectors (if any)
 - iv. identity of each beneficiary(ies) or, where applicable, the class of beneficiaries and objects of a power; and
 - v. any other natural person(s) exercising ultimate effective control over the trust.

R25: Disclosure Requirements imposed on TRUSTEES

❑ FATF – Recommendation 25 (R25)

- ❖ Countries with express trusts and other similar legal arrangements governed under their law should have mechanisms that:
 - a) identify the different types, forms and basic features of express trusts and/or other similar legal arrangements;
 - a) identify and describe the processes for the setting up of those legal arrangements and the obtaining of basic and beneficial ownership information;
 - a) make such information publicly available.

R25: Disclosure Requirements imposed on TRUSTEES

□ FATF – Recommendation 25 (R25)

❖ Purpose:

To assess the money laundering and terrorist financing risks associated with different types of trusts and other similar legal arrangements.

❖ Scope:

- Applies to “**express trusts** and other similar legal arrangements.
- To be contrasted with implied trusts, constructive trusts, resulting trusts etc.
- General Glossary of The FATF Recommendations:
 - **Express trust refers to a trust clearly created by the settlor, usually in the form of a document e.g. a written deed of trust. They are to be contrasted with trusts which come into being through the operation of the law and which do not result from the clear intent or decision of a settlor to create a trust or similar legal arrangements (e.g. constructive trust).**”

R25 Disclosure Requirements imposed on TRUSTEES

□ Under Article 2 of the Convention:

*“The terms trust refers to the legal relationships created – **inter vivos or on death** – by a person, the settlor, when assets have been placed **under the control of a trustee** for the benefit of a beneficiary or for a specified purpose.*

A trust has the following characteristics –

- a) *the assets constitute a **separate fund** and are not part of the trustee’s own estate;*
- b) *title to the trust assets stands **in the name of the trustee** or in the name of another person on behalf of the trustee;*
- c) *the **trustee has the power and the duty**, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.*

R25 Disclosure Requirements

□ **“Settlor”** is defined in the General Glossary of The FATF Recommendations:

- *“Settlers are natural or legal persons who transfer ownership of their assets to trustees by means of a **trust deed or similar arrangement**.”*

□ **“Trustees”** is defined in the General Glossary of the FATF Recommendations:

*“The terms trust and trustee should be understood as described in and consistent with Article 2 of the Hague Convention on the law applicable to trusts and their recognition. **Trustees may be professional** (e.g. depending on the jurisdiction, a lawyer or trust company) if they are paid to act as a trustee in the course of their business, **or a non-professional who is not in the business of being a trustee** (e.g. a person acting on behalf of family).”*

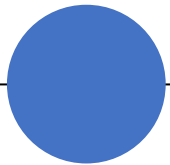
R25 & TRUSTS – INDICATORS & POTENTIAL RED FLAGS

- Separation of legal and beneficial ownership in assets/property
- Nominee arrangements
- Family assets, family companies & family arrangements on transfers of property
- Who has actual control over manner and division of assets
- Contractual arrangements on transfers of property/asset
- Existence of trust deed, letter of wishes
- Clauses regarding protection of assets
- Clauses giving powers to trustees or other fiduciaries

Q&A Session



THANK YOU



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The contents of these slides are not intended to constitute any advice on any specific matter and should not be relied upon as a substitute for legal advice on specific matters or transactions.