**SOLUTIONS LAW OF TRUST 2016**

**QUESTION 1**

1. **Trust and Contract**  *(5 marks)*
2. A contract represents a bargain between the contracting parties giving each some advantage, while the beneficiary under a trust is commonly a volunteer, and the trustee himself usually obtains no benefit from the trust at all.
3. It is of the essence of a contract that the agreement is supported by consideration but in the case of a trust there is no need for consideration to have been given for it to be enforceable.
4. A contract can only be enforced by the parties to it, but a completely constituted trust may be enforced by the beneficiaries, even though they may only learn of the existence of the trust long after it has been created.
5. In some cases, though, a person may enter into a contract to create a trust and the contract will be enforceable so ensuring that the property, the subject matter of the contract, ultimately becomes vested in trustees upon trust for the beneficiaries.
6. **Trust and Bailment** *(5 marks)*
7. Bailment is a delivery of personal chattels upon a condition, express or implied, that they shall be redelivered to the bailor, or according to his directions, when the purpose of the bailment (e.g. safe custody, cleaning, repairing, hire etc) has been carried out.
8. Bailment only applies to personal property, while the trust concept applies to all kinds of property.
9. The general property or general ownership remains in the bailor, whilst the bailee is said to have only a special property or special ownership in the chattels bailed: thus an unauthorised sale by a bailee normally does not pass title to the chattels. A trustee has full legal title (not merely possession); so an unauthorised sale by him will vest good title in a bona fide purchaser of a legal interest for value without notice of the trust.
10. It is the bailor who can enforce or vary the bailment, whilst the settlor cannot enforce or vary the trust (unless he specifically reserves such power).

**A and B from November 2014 paper – Q1:**

1. Personal Representatives and Trustees *(5 marks)*

**To provide solution for c**

**QUESTION 2**

**MAY 2014 PAPER QUESTION 7**

(a) Describe **four** remedies against a trustee who is in breach of trust? (8 marks)

**Please check are these the correct answers for question A!!**

1. A trustee commits a breach of trust if he violates any duty which he owes as trustee to the beneficiaries. The essence of a breach of trust is the failure of the trustees properly to carry out the duties expected of them. Trustees are liable for breach of trust both for their actions and omissions. However certain defences are available to a Trustee who is accused of breach of trust. These are listed below.
2. The first defence that is available to a trustee is that of an exemption clause. The liability of a trustee may be expressly excluded by the trust instrument. In **Armitage v Nurse** where a clause in a settlement provided that no trustees should be liable for any loss or damage to the fund or its income “unless such loss or damage shall be caused by his own actual fraud,” it was held that the clause was effective no matter how indolent, imprudent, lacking in diligence, negligent or wilful he might have been, so long as he had not acted dishonestly.
3. A trustee will also have a defence where the beneficiary has assented to, or concurred in, a breach of trust, or has subsequently released, confirmed or acquiesced in it provided:

*(a)* that, the beneficiary was *sui juris* at the date of such assent or release;

*(b)* that he had full knowledge of the facts, and knew what he was doing and the legal effect thereof; and

*(c)* that no undue influence was brought to bear upon him to extort the assent or release.

1. Under s.70 of the Trustee Act, a beneficiary who instigated or requested a trustee to commit a breach of trust could be called upon to indemnify the trustee, in respect of his liability to make good the loss to the trust estate, out of his beneficial interest
2. The Trustee can state that the action is subject to limitation as the action was not brought within six years from the date the breach occured. Section19 of the Limitation Act provides that, except for an action for fraud or fraudulent breach of trust to which a trustee was party or privy, and an action to recover from a trustee trust property or the proceeds thereof in the trustee’s possession or previously received by him and converted to his own use, no action to recover trust property or in respect of any breach of trust may be brought by a beneficiary after the expiration of six years from the date on which the right of action accrued.
3. The Trustee can state that he acted reasonably though in breach. He has to show that he acted honestly, reasonably and ought fairly to be excused for the breach and for omitting to obtain the directions of the court in the matter in which he committed such breach. s.69 of the Trustee Act empowers the court to relieve him, either wholly or partly, from personal liability for breach. The onus of proving honesty and reasonableness is cast upon the trustee; and whether a trustee has acted reasonably and honestly is a question of fact depending on the circumstances of each case.
4. Finally if a plaintiff delays bringing his action, the court may consider it inequitable for him to succeed, and the defendant trustee will be protected from liability.

1. Discuss and state briefly the legal principle established in the case of **saunders-v-vautier**? *(7 marks)*

**Please provide solutions**

**QUESTION 3**

Write brief notes on the following types of trust:

1. Constructive Trust. *(5 marks)*
2. Special Trust. *(5 marks)*
3. Discretionary Trust. *(5 marks)*

**TO provide solutions**

**QUESTION 4**

(a) John, a public servant, has embezzled public funds to the tune of MK2, 000, 000. Using the funds, she has purchased a house in one of the townships. The embezzlement has been discovered. Advise the Government on its remedies against John. (5 **marks**)

**ANSWER:** *In this case John was holding the public funds in trust for the benefit of the people of Malawi. He was to be treated as a trustee. By embezzling the funds, he has breached the trust that was placed in him. As a result, the government has amongst several remedies, the remedy of tracing. Tracing is a process which equity makes available to the beneficial owner who seeks to recover his property from those into whose hands it has come. Since John has bought a house, using the embezzled funds, the Government is at liberty to trace the money from the seller since this is public money. Again, the Government can confiscate the house and sell the same to recover the embezzled funds.*

*Apart from tracing, the Government is at liberty to commence criminal proceedings against John for theft of a public servant. If convicted, then he will be penalised in any manner the court deems fit as per the penal provisions.*

**b. What is the trust in the lower sense and what is its legal effect? (10 marks)**

**Provide solutions B**

**A from November 2014 paper**

**SECTION B**

**QUESTION 5**

1. Differentiate between total intestacy and partial intestacy. *(4 marks)*
2. State under what circumstances will a give by Will fail? *(16 marks)*

**To provide solutions**

**QUESTION 6**

1. Explain the following Wastes:
2. Ameliorating Waste. *(4 marks)*
3. Equitable Waste. *(2 marks)*
4. Permissive Waste.

**6a. Ameliorating Waste**

Waste consists of any act or omission which results in a change in the land. Suppose A granted land to B for life and thereafter to C. if B makes an improvement to the land, for example if he repairs old stone buildings and converts them into a house, he alters the nature of the land and thus commits an act of waste. It might seem unlikely that C would wish to raise any objection to B improving the value of the land, but it could happen that C objected to a particular change proposed by B, for instance converting a farm into a market garden (notwithstanding that the change would increase the value of the land) and would therefore wish to restrain B from making alterations.

Since the value of the land will have increased, B is not liable for ameliorating waste and no damages are recoverable. Further, if C seeks an injunction to restrain B from making the change, then unless the change will affect the whole nature of land (perhaps, for example, building a holiday camp on a wild stretch of coast) the courts will be unlikely to grant the remedy sought.

**6b. Equitable Waste**

This consists of acts of wanton destruction for example stripping lead off the roof, chopping down trees planted for ornament, pulling down a house and felling trees planted to provide shelter.

**6c.Permissive Waste**

This consists of allowing land (including the buildings to deteriorate for want of attention; for example allowing a house to fall into disrepair or failure to repair walls.

**B. Explain in detail four rules that a court of law will use to interpret a Will.**

**Please expand answers**

**:** *These are:*

*(i) probate which is granted when an executor proves a will*

*(ii) Administration with the will annexed which is granted when a person other than an executor proves a will.*

*(iii) Administration or simple administration that is granted when the deceased died wholly intestate.*

**QUESTION 7**

John is a successful businessman with business interests in the three regions of the country. His mother appointed him trustee of her Trust whose beneficiaries are homeless kids. However due to his expanding business, John is not able to perform his duties and would like to appoint his friend Mike who is a parttime teacher, to act as Trustee on John’s behalf. Is this possible and are there any restrictions to the appointment?

**(Total 20 marks)**

1. It is clear that John ants to delegate his powers as a trustee. Traditionally, equity took the view that a trustee had no power to delegate his powers to an agent - as the Latin maxim expresses it: *delegatus* *non* *potest* *delegare*. The principle was that “trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons.” The rationale for this restriction was that the settlor had placed his confidence in the trustees he had chosen to perform the trust obligations, and not any other persons.
2. It was recognised, however, that administration of a trust would often be impracticable unless exceptions were permitted, and thus the general principal has now been replaced by a more moderate formulation, and now “the law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so.” Trustees can “act by other hands” on the grounds of legal or moral necessity or commercial practicality.
3. S.32(1) of the Trustee Act revolutionized the position as to the employment of an agent, in that a trustee is no longer required to do any actual work himself, but he may employ a legal practitioner or other agent to do it, whether there is any real necessity for the employment or not. S32 states:

‘Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a legal practitioner, bank, stock broker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator’s or intestate’s estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.’

Therefore S32 allows for the delegation to any person. Though Mike is a part time teacher, this does not stop John from delegating to Mike because S32 specifically states that a trustee can amploy an agent whether a legal practitioner, bank, stock broker or other person. Hence John can delegate to any one regardless of their profession. I therefore would advise John to go ahead. Furthermore he is protected from any default of Mike where he is employed in good faith.

**QUESTION 8**

**A AND B from November 2014 paper q2**

1. The Certainty of Words *(8 marks)*
2. The certainty of subject *(7 marks)*
3. The certainty of object (*5 marks)*
4. The Certainty of Words (8 Marks)
5. In order for a trust to be created, there must be certainty that he intend to create such a trust from the wording of the document creating the trust. Since “equity looks to the intent rather than the form” there is no need for any technical expression to be used in order to constitute a trust. It is a question, in every case, of construction of the words to ascertain whether they (together with any admissible extrinsic evidence) establish an intention to set up a trust. When the intent to create a trust is clear and obvius, it will be carried into effect, however crudely or elliptically it may have been expressed. Whether an intention to create a trust is sufficiently evidenced is in each case a question of interpretation, and may even be inferred from the context.
6. Use of the words “in trust for” or “upon trust to” are the most proper for expressing a fiduciary purpose; but wherever a person vests property in another and shows an intention that it is to be applied for the benefit of third parties who are sufficiently pointed out, an express trust will be created, whatever form of words may have been used.
7. Where there is a gift by will to a person, followed by precatory words expressive of the testator’s request, recommendation, desire, hope or confidence, that the property will be applied in favour of others, may create a trust if, on the will as a whole, it appears that the testator intended the words to be imperative, but the court will not presume the imposition of a precatory trust merely from the presence of particular precatory words.
8. In **Re Adams and the Kensington** Vestry it was held that there was no trust created by a testator who gave all his property to his wife “in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease”.
9. In **Lambe v Eamesa** testator gave all his property to his widow to be at her disposal “in any way she may think best for the benefit of herself and family”. It was held that the latter words imposed no trust on the widow in favour of the family.
10. The certainty of subject (7 Marks)
11. For a trust to be created, there must be certainty of subject i.e. either the property, or the person to be benefited, or the way in which they are to benefit, have to be indicated with reasonable certainty. This is the case even where the most direct and imperative words are used.
12. Thus, where a testator gives property to, or in trust for, his wife, and directs that such part of it as may not be required by her shall, after her death, be held in trust for his children, the latter trust’ is void for uncertainty, for no one can say how much the wife may or may not require. (**any other example will suffice)**
13. If there is certainty of words, and the property subject to the trust is clearly identified, the trust will be valid. If however, the beneficial interests to be taken are not certain, those interests will fail for uncertainty, and the trustees will hold on a resulting trust for the settlor, as in ***Boyce v Boyce[[1]](#footnote-1)***, where

*a testator devised two houses to trustees on trust to convey one to Maria “whichever she may think proper to choose or select” and the other to Charlotte. Maria predeceased the testator and it was accordingly held that Charlotte had no clai****m.***

**Provide solution C 5 marks**

1. (1849) 16 Sim 476 [↑](#footnote-ref-1)