

A Definition of a Trust?

What is a trust?

1. A Trust arises whenever the owner ('Trustee') or owners ('Trustees') of a right comes or come under an obligation to deal with that right, not for his or their own exclusive benefit but instead for the benefit of other persons or purposes.
2. Those persons or purposes may be any of the following:
 - (a) A person – the 'Beneficiary' – or persons – 'Beneficiaries' – whether concurrently or consecutively, whether identified by the terms of the Trust, or as the result of the exercise of discretion (whether by the Trustee or another person), whether presently or in the future, or any combination of these; *or*
 - (b) An abstract purpose or purposes considered by the law to be of such public benefit as to be regarded as charitable and therefore enforceable; *or*
 - (c) (In some but not all trust states) any other lawful and sufficiently certain abstract purpose or purposes, *or*
 - (d) Any combination of (a), (b) and (c) above.
3. The person creating the trust – the 'Settlor' – may be the Beneficiary or one of the Beneficiaries. A Trustee may be one of the Beneficiaries, but not the only one.
4. The right the subject of the Trust may be a real right, such as ownership, usufruct, security right, *etc*, or a personal right, such as a debt, a company share or a conditional obligation, *etc*

How does a trust arise?

5. A person owning a right comes under such an obligation as is mentioned in paragraph 1 above:
 - (a) By sufficiently manifesting an intention freely to assume that obligation, *either*
 - (i) In relation to his own pre-existing right; *or*
 - (ii) In relation to a right transferred to him by the Settlor, whether during life (*inter vivos*) or on death (*mortis causa*), for that purpose;
 - (b) In circumstances where (i) an attempt to manifest an intention under (i)(b) above has been wholly or partly unsuccessful because the law does not permit the relevant intention to have effect (*eg* because the 'beneficiary' is already dead or the purpose is unlawful), or (ii) such an intention has been manifested successfully in part but not as to the whole, and there has been a failure to manifest such an intention in respect of the remainder, in either of which cases the obligation is to deal with the right for the benefit of the Settlor; or

- (c) In other circumstances prescribed by the relevant law, either (i) to frustrate wrongful or unconscionable conduct, or (ii) to provide a solution to cases where there is no sufficient evidence of the party's intentions.

Real effects of Trustee's obligation

- 6. The obligation mentioned in paragraph 1 above is binding on the Trustee, but also on every subsequent owner of the right, *except*:
 - (a) a subsequent owner who acquires the right in good faith for valuable consideration without notice (actual or constructive) of any relevant trust obligation; or
 - (b) a subsequent owner who acquires the right directly or indirectly from a person within sub-paragraph (a).
- 7. Where the obligation mentioned in paragraph 1 above is binding on the Trustee, and on a subsequent owner under paragraph 6 above, it is binding not only in relation to the *original* right mentioned in paragraph 1 but also in relation to *any right which is substituted for that right* in the hands of that Trustee or subsequent owner (real subrogation).

Personal effects of Trustee's obligation

- 8. The obligation mentioned in paragraph 1 above requires the Trustee:
 - (a) to prefer the interests of the beneficiaries or purposes to his own interests;
 - (b) not to make a profit from his position as Trustee;unless the Trustee is authorised to the contrary by:
 - (i) the terms of the Trust;
 - (ii) *all* the beneficiaries; or
 - (iii) the court.
- 9. The obligation mentioned in paragraph 1 above requires a subsequent owner on whom it is binding under paragraph 6 above to observe the obligations in paragraph 8 above at least from the time when he becomes aware that the obligation exists.