CHAPTER IX:

THE RIGHTS AND INTERESTS FOUND UNDER TRUST

4.1 The Rights of the Settlor

Before trust is constituted, the settlor has legal rights over the property such as land which is registered in his name that gives him legal title to it. In addition, he has beneficial title that permits him to enjoy the benefits that accrue from the property.

Upon constitution of the trust relationship, the settlor convey the land to the trustee and once this is done, he loses both rights indicated above and literally falls out of the picture. It should however be noted that if the trust has not been validly declared yet, legal title over the property will be that of the beneficiary but an equitable proprietary interest will be created in for the trustee. This happens when an express trust (expressly declared) fails, thus giving room to what is known as resulting trust.

4.2 Rights of the Trustee

Once trust is created with property transferred to the trustee, the latter only retains legal title and not the beneficial interest. It should however remain clear that it is not in all cases that the trustee will have legal title to the property conveyed to him. For instance, A may receive some money to hold it for B who in turn may decide to declare his or herself a trustee of her equitable interest in the property for C. So B declares that he holds the equitable proprietary interest he has in the property as a trustee for C. In this case, A will be said to have legal title to the money which he holds for B while B on his part has decided to hold his equitable interest in the property on trust for C. As such, B becomes a trustee (for C) but does not have any legal title to the money for instance, since legal title is in A.

4.3 The Rights of the Beneficiary

The beneficiary to a trust property has both equitable rights in that property as well as beneficial interest in it. This means that depending on the type of trust, he may decide to ask the trustee to confer the property to him so that he enters possession of it, or he may decide to leave it with the trustee and continue to receive income obtained from the property.

4.3.1 Nature of the Rights of the Beneficiary

It has already been said that from a trust relationship, the beneficiary gets equitable rights which may both be proprietary and personal. All beneficiaries are permitted to enforce this right against the trustee as a basic equitable rule otherwise we cannot say there is a trust relationship as Millett LJ pointed out in **Armitage v. Nurse (1998).**

It is common understanding that no one is compelled to accept a gift he does not want and so the beneficiary is permitted to disclaim his or her rights in the trust property and this disclaimer can be oral or in writing: **Re Paradise Motor Co. Ltd (1968) 1 WLR 1125**. If a beneficiary learns of the rights that he has in a trust relationship and stays silent, it will be inferred that he has accepted them, as seen in the case of **Standing v. Bowring (1885)**. This goes without saying that rejection (of rights in trust) must be unequivocal and timely as well.

The nature of the beneficiary's rights depend on the nature of the trust relationship even though there are some rights that are common to all beneficiaries. Examples of such rights include the right for the trustee to act in good faith and exercise his duties in the interest of the beneficiary [see **Armitage v. Nurse (*supra*)].**

In a fixed trust for instance, the beneficiary has both proprietary and personal rights. The personal rights include the proper administration of trust, the right to be informed, rights resulting from breach of trust, rights against third parties, tortuous rights and a right to trust documents.

CHAPTER X:

TYPES, APPOINTMENT AND PAYMENT OF TRUSTEES

5.1 TYPES OF TRUSTEES

5.1.1 Amateur Trustee

When a trustee is not paid, logically, less is expected of him in the accomplishment of his duties even though these duties still remain onerous. In the context of small family trusts, the trustee is usually a family member or a trusted friend who is not expected to be paid but who assumes his responsibilities as a sense of duty that he owes to the family as stated by Brightman J in the case of **Bartlett v. Barclays Trust Co Ltd (No. 1) (1980).**From such amateur trustees therefore, one should expect less professionalism, skill and diligence.

5.1.2 Professional Trustees

Previously an issue between trusted friends and family members and the settlor on the other hand, trust has increasingly become important in commercial transactions in which large funds are tied up with so much administrative bureaucracy. This is how professional trustees (such as Banks and solicitors) consequently emerged, advertised as such and paid for their services.

According to **section 28 (5)** of the English Trustee Act (2000), anyone who acts in the course of a profession or business that involves providing services in connection with the management or administration of trusts can be referred to as a professional trustee. Lord Millett again in the case of **Dubai Aluminium Co. Ltd v. Salaam (2002) UKHL 48** pointed out that: "*trusteeship too has become more professional. Clients no longer look to their trustees to be philosophers, guides and friends. They expect them to be professional fund-managers and even, sometimes, businessmen*".

5.1.3 Pension Trustee

A pension trustee has the same responsibilities as a trustee will have in a private trust but the pension trustee has some particularities such as the fact that he cannot delegate some of his investment functions. In addition, some of his duties may be added to him by the national legislation that governs pension scheme.

5.1.4 Judicial Trustee

The judicial trustee comes into the scene when the administration of trust by the trustees has broken down. In this case, the court may take full administration of the trust which will be very time-consuming and expensive according to **Jenkins J** in the case of **Re Ridsel (1947)**. In order to avoid the court acting as trustee, the settlor, beneficiaries or trustees can apply to the court for the appointment of a judicial trustee either for him to come and assist the existing trustees or replace them simply, as seen in **Thomas and Agnes Carvel Foundation v. Carvel (2007)EWHC 1314.**

The judicial trustee is a person who may be considered by the courts to have aptitude to exercise the duties, or failing which, a court official can also assume the functions. It is the court that supervises his activities and gives him orders, but this does not in any way confiscate the discretionary powers which he has as trustee.

5.1.5 Trustee de son Tort

In some circumstances, someone may not have been appointed as trustee (as in **Taylor v. Davis (1920) AC 365**), but he takes upon himself to carry out duties akin to those of a trustee and actually discharges the duties of a trustee to other people as seen in **Dubai Aluminium (*supra*)**. In this case, we say he has become a trustee *de son tort* which means of his own wrong.

For trust to arise in this case, the person must have been assuming such duties in fact, and must have intended to be a trustee. Equally, the person must have such command and control [**Mara v. Browne (1896)**] over property as to cause title to be vested in him [see **Re Barney (1892)**].

5.2APPOINTMENT OF TRUSTEES

5.2.1Appointment by the Settlor

The settlor has the right to appoint anyone of his choice, including himself as trustee, but a child cannot act as trustee as it was held in the case of **Re Vinogradoff (1935) WN 68**. We may like to know the number of persons who may be appointed as trustees in a trust relationship. The settlor can appoint as many (or as few) persons as he or she wishes. However, considering that the trustees will have to act in unanimity, it is advisable limit the number of trustees due to the practical difficulty of bringing them all together in order to have unanimous decision all the time.

Once the settlor has appointed trustees, he or she cannot determine subsequent appointments unless that settlor retained such a power in the trust instrument.

5.2.2 Appointment by the Testator

Similar rules regarding appointment by the settlor apply for declaration of trust in a will. When both the trustee(s) and executor(s) are appointed in the will, at the death of the testator, the executors will hold the property immediately in the testator's estate until the property is vested to the trustees appointed in the will. If all the trustees in the will have predeceased the testator, his personal representative will hold the property on trust until new trustees are appointed as it was the case in **Re Smirthwaite's Trust (1871)**.

5.2.3 Appointment by People who have the Power to Appoint Trustees

This form of appointment only happens when the trust instrument confers such powers to identified people. Usually, this sort of relationship is governed by statute and the statute actually outlines the scope of power that each person has in terms of appointment of trustees.

5.2.4 Appointment at the Direction of the Beneficiaries

The rule in **Saunders v. Vautier (*supra*)** gives the power to adult beneficiaries of a trust relationship who are between them absolutely entitled to the beneficial interest in the property to terminate the trust and to direct the trustee to transfer the property to them if they are of full capacity. This does not however give all such beneficiaries the yardstick to interfere with the trust. In the case of **Re Brockbank (1948) Ch. 206,** beneficiaries were not allowed to control the trustees' power to appoint new trustees. Beneficiaries were also prevented from using their power to replace existing trustees with their own appointee(s).

So if beneficiaries wish to exercise the power to appoint trustees, they can terminate the trust by virtue of the rule in **Saunders v. Vautier** and then settle the property on new trusts for themselves with nominated trustees. This however may be an extremely complicated and difficult manoeuvre with considerable tax consequences. To avoid the convoluted process therefore, the beneficiaries may exercise their rights indirectly by proposing the appointment of other trustees to the existing ones.

5.2.5 Appointment by the Court

It is a sacrosanct rule of trust law that trust will not fail for want of trustee. So where the trustee or anyone with the power to do so fail to appoint a trustee, the court can come in with its power of appointment. It should be noted that the court only exercises this power as a matter of last resort as it was held in the case of **Re Gibbon's Trust (1882) 30 WR 287**.

In **Re May's Will Trusts (1941) Ch. 109**, even though one of the trustees was in Belgium at the time of the German invasion of that city during World War II, there was no evidence she was incapable of exercising the power of appointment, so the court was unable to exercise her power of appointment. Good examples of situations in which the court will be able to exercise her power of appointment is if the trustee dies

interstate or the person who receives the power to appoint trustees is underage, as it was the case in **Re Parsons (1940) Ch. 973**.

5.3THE PAYMENT OF TRUSTEES

5.3.1 Reimbursement of Expenses

The reimbursement of the trustee for expenses incurred in carrying out his duties may be done either with money from the trust fund or from the beneficiaries.

5.3.1.1 Reimbursement from the Trust Fund

From this fund, trustees are not bound to make any payments to the beneficiaries until their expenses have been reimbursed; see the case of **Scott v. Milne (1884)**. In effect, trustees even have what we call a *lien* on the trust property which permits them to secure their right of reimbursement as indicated by Lightman J in **Alsop Wilkinson v. Neary (1996)**.

If a trustee is unsure whether he has to be reimbursed from the trust fund, he can apply to the court for directions. The right for trustees to be reimbursed from the trust fund only makes them to retain part of that fund such that they cannot entertain a cause of action in debt or damages against the fund. This is the reason why they cannot claim interest on the reimbursement that they retain (see **Foster v. Spencer (1996) 2 All ER 672**.

5.3.1.2 Reimbursement from the Beneficiaries

Where the trust fund does not have sufficient money with which to reimburse the trustee, he may turn to the beneficiaries. The beneficiaries will have to indemnify him for expenses incurred in holding the trust property even if the expenses are more than the value of the trust property.

It was held in the case of **Hardoon v. Belilios (1901) AC 118, 123** by Lord Lindley that the plainest principles of justice require that the beneficiary who gets the full benefits of the property should bear its burden unless he can show good reason why his trustee should bear them himself. In **JW Broomhead (Vic) Property Ltd v. JW Broomhead Property Ltd (1985) VR 891**, it was held that if the trustee incurred liability when he was not acting on behalf of the trust, the beneficiaries may still be liable to indemnify the trustee, but only if they requested this liability to be incurred. So in the case of **Bush v. Highman (1728),** a trustee was entitled to be indemnified by

the beneficiary for interests when he had borrowed money at the request of the beneficiary.

5.3.2 Remuneration for Services Provided

5.3.2.1 Remuneration Authorised by the Trust Fund

The form of remuneration from the trust fund is especially available for trustees acting in their professional capacity: **Re Spurling's Will Trusts (1966) 1 WLR 920**. The (professional) trustee who is entitled to remuneration from the trust fund will still be entitled even if the services could have been provided by a lay trustee.

5.3.2.2 Remuneration Authorised by Statute

This form of remuneration is available when the trust agreement makes no provision for remuneration and when there is no other legal text that makes such provision. In England, the Trustee Act makes provision for payment to be obtained from the trust fund if the trust instrument does not provide so in case of a professional trustee or a corporation acting in that capacity. This means that the Act excludes charitable trusts from this form of remuneration. When a Statute authorises remuneration of the trustee from the trust fund, such remuneration must be commensurate the service rendered.

5.3.2.3 Remuneration Authorised by the Court

The court can exercise her power to order for remuneration in two circumstances:

When the trustee is in breach of his fiduciary duties, it is still possible for the court to order for what is known as "equitable balance". This payment is meant to reflect the work that the trustee has done irrespective of the breach.

The second circumstance under which the court can exercise this power is when the trust agreement is silent to this effect and statutory power is not engaged or does not order for payment in the circumstance, for instance where the trustee is not a professional.