Revision Box Questions: Guidance for approach

Revision Box Chapter 14

1. Joining the materials from this chapter with the previous chapter’s introduction to trusteeship, ensure that you can answer the following.

(a) In what way can the duties of a trustee under an express arrangement be seen as a measure of a beneficiary’s entitlements under it?

This takes us back to the very outset when we first encountered the express trust. Here an owner of property will transfer legal title to it to a person intended to take responsibility for the property in order that this property may be used for the benefit of another. Here a trustee becomes subject to a number of enforceable duties to ensure that this will happen as intended.

(b) How can the duties of a trustee be explained in reference to the ‘life cycle’ of an active trust?

The lifecycle of an active trust can be seen as three key phases: the creation of a trust, the operation of a trust once it has come into being; and a trust coming to the end of its life, or the end of a trustee's involvement with it. There are duties for a trustee at each phase. A trustee will be particularly active in the activity phase that is after the trust has validly come into being, and prior to it coming to an end, where he will be particularly busy managing the trust property in terms of safeguarding assets and helping them to grow and ensuring that any administrative matters associated with this are complied with. It is also the case that as a trust comes into being, a trustee will have responsibilities, such as to ensure trust property is properly vested in him, and to ensure legal formality necessary to achieve this is complied with. A trustee will incur responsibility for ensuring that a trust coming to the end of its life is properly wound up, and there are also provisions governing his cession of involvement with a trust which will continue to be active, as well as provisions to end the involvement of a trustee deemed unsuited to carry on with a trust which is active.

(c) What issues arise where there are a number of beneficiaries under a settlement?

This requires you to think about the trustee’s involvement with an active trust, and how safeguarding trust assets is a central part of the duties he incurs here. This is closely connected with numbers of beneficiaries in how it requires us to think about balancing the needs of different types of beneficiaries at different points in time: here you will need to elaborate on how the interests of so-called life tenants and remaindermen are balanced as well as what might need to be done for a beneficiary who is a minor.

(d) How do rules relating to the administration of an active trust seek to balance the entitlements of a beneficiary with equipping the trustee actually to carry out the trust?

Here we see rules which try to provide some balance for the position whereby trustees are duty-bound to administer the trust in furtherance of a beneficiary’s entitlement to trust
property, but that doing this diligently and conscientiously involves a great deal of work. Just because a beneficiary is entitled to benefit from the trust property, it does not mean they are entitled to control how the trust is administered or even have access to information about how the trustee acts and particularly how he might (or might not) exercise the powers he has available to him to carry out the trust. Here rules relating to how a beneficiary might challenge a trustee’s actions, and what documentation he might inspect to try to glean information try to reflect that a beneficiary is in a position of enforced reliance upon a trustee, but it also acknowledges that a trustee must be given the ‘space’ and support to undertake this. This can be seen in the key cases of O’Rourke v Darbishire (1920) Re Londonderry’s ST (1965); Schmidt v Rosewood Trust (2003); Re Beloved Wilkes’ Charity (1851); Tempest v Lord Camoys (1882, and Klug v Klug (1918).

2. Ensure that you understand the nature of trusteeship in the twenty-first century by reference to:

- growing dissatisfaction with the legal framework for trusteeship dating from the latter years of the twentieth century;
- the rise of the ‘professional trustee’; and
- the way in which the Trustee Act 2000 can be seen to embody two key trends—that is, increased liberalization and also accountability—and how these aims can conflict.

This requires you to reflect on the origins of trusteeship and the nature of trustee providing the basis for equity’s longstanding governance of trusteeship and then the explosion of developments during the nineteenth century reflected through new statutory provision as well as occurring through case law. The rise of the professional trustee— that is a person who offers trusts services by way of a business or profession— is in many ways the antithesis of the respected and esteemed amateur who traditionally became a trustee out of obligation and who as a matter of strict rule was not entitled to be paid. The rise of the professional trustee has produced two narratives for law reform which are quite different from one another, both of which can be seen in the Trustee Act 2000 and the jurisprudence which predates this which remains relevant as we try to understand the import and effect of the legislation. On the one hand there is the liberalising agenda, calling for reform on account that highly skilled professional trustees should not be subject to constraints applied— for good reason— to those taking up trusteeship as duty-bound amateurs. Here the safeguarding of trust assets, which arguably is trusteeship’s most important and certainly visible aspect, illustrates longstanding dissatisfaction that professional experts should not be subject to the constraints which quite properly apply to those duty-bound to protect trust property but who lack any expertise and often experience in such matters. This can be seen in how the general power of investment under s 3 of the Act allows a trustee to make any investment as he could do if he were absolutely entitled to the property. The accountability agenda approached law reform from the angle that those who command heavy fees for their services, doing so on the basis of purported expertise should be held to higher standards than the duty-bound amateur, with the s 1 duty embodying this key idea. The net effect of increased liberalisation and increased accountability is not easy to calibrate, with the widespread use of trustee exemption clauses being widely believed to have diluted the intended effect of increased accountability.