Trust

Trust

- Meaning of Trust
- Creation of Trust
- Purpose for creating a trust
- Types of Trust and relevant caselaw
- Duties and Responsibilities of Trustees and relevant caselaw
- Relevant Legislation

Meaning of Trust

- Trust describes the legal relationship created when property is transferred by one person (the "settlor") to another (the "trustee") :
- to hold for the benefit of specified persons or a class of persons (the "beneficiaries" who have the right to enjoy the benefits of the trust assets),
- or to exercise property or rights for or on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes e.g. charitable purposes.
- The main characteristic of all trusts is the separation of legal and beneficial ownership. The settlor transfers the asset to be held in trust to the trustee who then becomes the legal owner and owes fiduciary duties (duties of loyalty and fidelity) towards the beneficiaries who are the beneficial owners.

Creation of /Setting up of a Trust

- A trust can be created by an individual intentionally during his or her life (an "inter vivos trust") or by will as a consequence of his or her death (a "testamentary trust").
- The terms of an inter vivos trust are usually set out in a document which is signed by the settlor.
- A trustee or trustees will be appointed and given directions as to how assets are to be held, managed and distributed to or for the benefit of the beneficiaries.
- An inter vivos trust is created as soon as the beneficiaries and the terms of the trust have been settled by the settlor and the trustee with sufficient certainty, and property has been transferred to the trustee to be held in accordance with the terms of the trust.
- A testamentary trust, on the other hand, is created as a consequence of an individual's death, usually pursuant to the will of the individual or a beneficiary designation made in respect of an insurance policy, etc., e.g. insurance trust A testamentary document or instrument is intended to come into effect when the person who executes it dies, and not before, e.g. a will.

Reasons for creating a trust and benefits of a trust

A trust can be set up for the following purposes:

- to provide protection for a minor beneficiary, or for a beneficiary who suffers from a physical or mental disability;
- to protect vulnerable beneficiaries who may make unwise spending decisions if they obtain assets too early, as assets in a trust need not be transferred to any beneficiary in one go;
- to set aside money for future purposes, such as education of the settlor's descendants, or expenses of family members who need long-term special or medical care;
- to provide a succession plan for a family business or other legacy asset;
- to provide increased confidentiality in respect of an individual's affairs
- to save tax etc.

Creation of a valid Trust

- A trust may be created intentionally inter-vivos or by will.
- Essential elements of creation of a valid trust are:
  - property or rights capable of being subjected to the trust;
  - a declaration of trust by a person competent to create a trust,
  - certainty of property and objects so that the trust is administratively workable.

Property affected, persons and objects in whose favour a trust can be created

- Any property or interest in property which a person can transfer or assign, or dispose of *inter vivos* or by a testamentary instrument e.g. a deposit in a bank is property which can be subject to a trust .
- A trust may be created in favour of any person to whom a gift can legally be made, or for charitable purposes.



Insurance Trust

- When an individual transfers the ownership of his/her life policy to a trust, a life insurance trust is created.
- The insurance policy is owned by the trust and the benefits of the policy are managed by the trustee.
- Upon the death of the insured person, the trustee distributes the funds derived from the death benefits which are paid into the trust in accordance with the terms of the trust.
- An appealing feature of a trust is that the assets of the trust can be distributed to beneficiaries in when certain milestones are reached, e.g. when a child reaches 21 or when a grandchild gets married.

Different types of trusts

In general, there are three categories of trusts:

- Inter-vivos or testamentary;
- revocable or irrevocable;
- fixed or discretionary.

Inter vivos Trust (Living Trust)

This type of trust is created during the settlor's lifetime.

- Legal ownership of the assets is passed to the trustee as soon as such assets are injected into the trust by the settlor.
- The trust can start to operate ,i.e. benefit the beneficiaries, as soon as the assets have been injected into the trust.
- This type of trust commonly benefits the settlor during the settlor's lifetime and continue to benefit the settlor's surviving family members and/or charities after the settlor's death. It can be revocable or irrevocable.
- Depending on how the trust deed is drafted, a lot of discretion can be given to the trustee or the settlor can choose to retain more control.

Testamentary trust (Will Trust)

- It is formed under the terms of the will.
- Trust provisions should be included in the will, as in a trust deed,

to govern the trustee's powers and duties.

- The settlor is the testator (will-maker) and the trustee is usually the executor.
- The trust fund is the residuary estate , which means the estate after any debts and expenses have been paid and any specific legacy under the will has been distributed.
- The settlor testator retains ownership of the assets until his death.
- The trust is only created upon the settlor's death and can only benefit beneficiaries after the completion of the probate process.

Revocable Trust

- A revocable trust can be revoked or amended by the settlor at any time and the trust assets will then revert back to the settlor.
- For the purpose of asset protection , a revocable trust is less useful although the settlor can have more flexibility and room to change his mind. For example, if the settlor is being sued, the trust assets may still be regarded as the settlor's assets and subject to claims from third parties.

Irrevocable Trust

- An irrevocable trust cannot be revoked after the signing of the trust deed has been signed and the injection of the assets into the trust.
- As the settlor of an irrevocable trust gives up control, the beneficiaries' interests under this type of are more secured and asset protection is therefore more effective.

Fixed Trust

- Under this type of trust , each beneficiary's entitlement to the trust fund under the trust is specifically set forth in the trust deed.
- The trustee has therefore no discretion regarding the distribution of the trust fund.
- Although this type of trust is most certain, the trustee is less equipped to deal with contingencies that may occur in the future. For example, in case of divorce or third-party claims against the beneficiary, the trustee does not have discretion to suspend distribution until the dispute has been resolved.
- Or if a beneficiary suddenly needs funds to deal with a medical emergency, the trustee does not have the discretion to make a bigger distribution for that beneficiary.

Discretionary Trust

- Under a discretionary trust, each beneficiary's entitlement to the trust fund is not fixed .
- The trustee is given many powers and flexibility to deal with changes in circumstances concerning the beneficiary , for example, death or divorce, changes in laws and legislation, providing for the settlor's children who are not yet born when the trust is set up, or excluding descendants' spouses.
- Distributions to beneficiaries can be made in different amounts, in different stages or conditional.
- As a discretionary trust confers so much flexibility on the trustee, it is usually accompanied by a more detailed letter of wishes which sets out the settlor's instructions as regards how to exercise discretion, timing of the distribution, guidelines and conditions for suspension of distribution etc.
- Although a letter of wishes is not binding on the trustee, most trustees, especially professional trustees, typically follow the guidance contained in such a letter.

Quitsclose Trust

- The term "Quistclose trust" derives from the case "*Barclays Bank Ltd v Quistclose Investments Ltd*".
- Such a trust arises arise in circumstances where X (the transferor) pays or transfers money or property to Y (the transferee)so that Y holds the money or property in trust for X subject to a power for Y to apply it for a specifically stated purpose.
- X's beneficial interest in the money or property remains unless and until the money or property is applied in accordance with that power. If the parties did not intend the money to be at the free disposal of Y, a Quistclose trust will arise.

Duties and Responsibilities of trustees

- As the main role of the trustee is to carry out the directions contained in the trust, a trustee's main duties are to control, administer and distribute the trust assets for the benefit of the beneficiaries in accordance with the terms of the trust and in compliance the applicable laws and regulations
- Being a fiduciary, the trustee should act exclusively for the benefit of the beneficiaries and avoid conflicts of interest.
- Depending on the terms of the trust, a trustee should invest assets prudently/conservatively for the purpose of preserving them now and in the future.
- A trustee on whom discretionary powers are conferred by the trust should carry out trustee duties and exercise those powers with an appropriate level of skill and prudence.
- A trustee should be fair and impartial in dealing with the beneficiaries.
- A trustee should keep complete, accurate and proper accounting records in respect of the administration of the trust, including copies of all supporting documents such as tax returns, cheques, invoices and other vouchers , receipts etc.

Relevant Cases

Relevant Case :
Tam Mei Kam
v HSBC International
Trustee Ltd & others
HCMP 2981/2004

The facts of the case:

- Anita Mui executed a Will on 3 December 2003, leaving her residuary estate to a discretionary trust ("the Trust"), which was set up by deed executed on the same day as her Will.
- Under her Will, HSBC International Trustee Ltd ("HSBC") was appointed as the sole executor of the Will, and trustee of the Trust.
- One of the beneficiaries to her estate was a friend, Eddie Lau, who was bequeathed two properties. "*Some funds*" were set aside " *to subsidise the tertiary education of her nephews and nieces*"; and her mother, Madam Tam, was to be provided with "*a monthly allowance of HK$70,000 until her death to maintain her then life style with one chauffeur and two domestic helpers*". Anita insisted that her mother should not be given any lump sum.

Tam Mei Kam v HSBC International Trustee Ltd & others cont.

- The Karen Trust is a "discretionary trust" which gives the trustee very wide discretionary powers in terms of administration of the trust.
- Under clauses 3(a) and 5(c) of the trust deed, HSBC is given the power to add or remove beneficiaries, provided that a person in the excluded class (ie the deceased as settlor and HSBC as trustee) cannot become a beneficiary.
- Under clause 29, the trustee can add any person, even a named beneficiary, to the excluded class.

Tam Mei Kam v HSBC International Trustee Ltd & others cont.

- In 2004, Madam Tam challenged the validity of the Will and the Trust, and sought from the Court "*a declaration that [Anita] had died intestate, and that she, [Madam] Tam, be granted letters of administration of the Deceased's estate.*"
- Madam Tam argued that Anita did not have the mental capacity and did not sufficiently know and approve of the contents of the Will and the trust documents.

The outcome of the case :

- After considering all the evidence, Madam Tam's claim was dismissed in the Court of First Instance with the finding that "*the Will was duly executed by [Anita], that she had testamentary capacity at the time of execution and that she had due knowledge and approval of the contents of the Will.*" Madam Tam's appeal was dismissed by the Court of Appeal and also by the Court of Final Appeal.

Re Chu Clansmen's Fraternity Association Ltd
HCMP 677/2024

- An unincorporated association (the Association) was founded by some businessmen in the 1950s.
- In the 1960s, various pieces of land (the Properties) were acquired in the names of some committee members of the Association (the Trustees).
- A company X1 was then incorporated. , Eligible members of the Association automatically became members of X1 which took over all business of the Association.
- The Association then became defunct but was not dissolved.
- The Properties were still registered in the Trustees' name but were used and managed by X1 and were treated as an asset of X1 in its audited accounts, with no objection from the members.
- The title deeds of the Properties were also held by X1.
- X1 took out an application to seek a declaration that X1 had been sole beneficial owner of the Properties since incorporation and an order that the whole of the legal title and interest in the Properties be vested in X1.

Re Chu Clansmen's Fraternity Association Ltd
HCMP 677/2024

The outcome of the case:

- The declaration and vesting order was granted , namely:
- Before X1's the method of holding property of unincorporated associations was a trust for members.
- After X1's incorporation, members of X1 had approved and adopted the Articles of Association, effecting a novation of the pre-incorporation contractual relationship of the members *among themselves*.
- Furthermore , all relevant parties had conducted themselves as though X1 was beneficially entitled to the Properties.
- Hence, X1 was beneficially entitled to the Properties and the Trustees held the Properties on trust for X1.

China Life Trustees Ltd v China Energy Reserve and Chemicals Group Overseas Co. Ltd & Ors [2024] HKCFA 15 - A recent case about Quistclose Trust

The facts of the case :

- A group of companies under China Energy Group ("Group") develop (among other things) fossil fuels in Mainland China.
- The group of companies included several special purpose vehicles (SPV) the sole purpose of which was to issue a series of bonds to finance the group's operations.
- This case concerned two series of these bonds. The first series were HKD bonds issued by SPV1, with a maturity date in 2022 ("**2022 Bonds**"). The second series were USD bonds issued by SPV2, with a maturity date in 2018 ("**2018 Bonds**").
- The purpose of the funds raised was to finance the operations of the Group. The SPVs had no other operations or assets.
- The Group had a "treasury subsidiary" which had an account holding the funds generated from the bonds ("**Treasury Account**").
- SPV1 opened two bank accounts that were denominated in HKD and USD respectively.
- SPV1's USD account was a segregated account for transactions relating to the 2018 Bonds, which were denominated in USD.

China Life Trustees Ltd v China Energy Reserve and Chemicals Group Overseas Co. Ltd & Ors [2024] HKCFA 15 (cont.)

- As the Group did not have sufficient funds to pay the amounts due when the 2018 Bonds matured . The default on the 2018 bonds caused a cross-default on the 2022 bonds. As part of its fundraising efforts, a total of USD 120 million was remitted from the Treasury Account to SPV1's USD account. This was an intra-group transfer .
- The bondholders of the 2018 Bonds and those of the 2022 fought for the funds in the SPV1's USD account.

The outcome of the case:

- It was held that The restrictive intention may be implied from an objective assessment of the circumstances. The CFA held that in this case, the restrictive intention , namely the USD 120 million in SPV1's USD account was intended for the sole purpose of funding the redemption of the 2018 Bonds, could be implied from an objective assessment of the circumstances .
- Therefore , the funds did not form part of SPVI's assets and were held on trust by SPV1.

A recent case about trustee's breach of duties

Zhang Hong Li and another v DBS (Hong Kong) Ltd and others CACV 138/2017

<u>The facts of the case</u>

In 2005, Zhang Hong Li (Zhang) and his wife Ji Zhengrong (Ji), the settlors, set up a family trust (a Jersy law trust) for succession planning and estate duty purposes, with a wholly-owned Jersey subsidiary of DBS Bank carrying on business as a professional trustee/trust management (the Trustee)being the trustee.

They transferred to the trust their sole share in their BVI investment company, Wise Lords Limited (Wise Lords). A DBS corporate director (the Director) was appointed the sole director of Wise Lords and Madam Ji was appointed as an investment adviser of Wise Lords with the authority to give investment instructions on Wise Lords' behalf.

Zhang Hong Li case cont.

- The anti-Bartlett and exclusion clauses of the Trust deed relieved the Trustee from any duty to get involved or interfere in the management or operation of Wise Lords except if it had actual knowledge of dishonesty.
- The Trust deed also specifically stated that the Trustee should assume that any information received was accurate and the management or conduct of business of Wise Lords was being carried out correctly without any obligation to verify the accuracy of this assumption unless it had knowledge to the contrary.
- The Trustee was not to be held liable for any loss sustained by Wise Lord or the Trust Fund fund arising from any act or omission of the directors or Madam Ji, even if negligent, dishonest or fraudulent.

Zhang Hong Li case cont.

- Between 2005 and 2008 , Ji made a great number of investment transactions in mutual funds and reaped handsome profits.
- Wise Lords' overdraft facility granted by the Bank, DBS, was greatly increased by tenfold.
- From January 2007 to August 2008, invested increasingly in foreign exchange transactions.
- By November 2008, Wise Lords had sustained substantial losses from transactions conducted at Madam Ji's direction.

The outcome of the case:

- the judge of the Court of First Instance (CFI)found that (a) the Trustee failed to discharge its supervisory duty owed to the trust and the judgment of CFI was upheld by the Court of Appeal.

Zhang Hong Li case cont.

- The parties came to a settlement after the parties had made their argument before the Court of Final Appeal (CFA).
- The CFA decided to exercise its discretion to deliver judgment in this case notwithstanding its settlement after argument but before judgment was delivered because It involved issues of general importance and it was in public interest to do so. Further, the delivery of the judgment was not opposed by the parties.
- In November 2019, the Hong Kong Court of Final Appeal (CFA) overturned earlier judgments of the lower courts
- It was held by the CFA that :
- The basic duty of the trustees was to carry out and administer the trust in accordance with its terms and a "high level supervisory duty" was obviously inconsistent with the anti- Bartlett provisions.
- Further, the governing law of the Trust, the Trusts (Jersey) Law 1984 did not provide a basis for the "high level supervisory duty" to be imposed on the trustees.
- The anti-Bartlett clauses in the Jersey law trust deed exempted the trustee from any liability incurred in transactions undertaken by Madam Ji and the provisions of the trust deed restricted the powers of the trustee to interfere in management of investment business of Wise Lords.
- The Trustee did not have actual knowledge of dishonesty.

Trustee Ordinance (Cap. 29) (TO)

- The Trustee Ordinance was amended by the Trust Law (Amendment) Ordinance 2013 in December 2013.
- Under s.3A(1) There is now a statutory duty of care imposed on trustees, whereby trustees are required to exercise a level of care and skill which is reasonable in the circumstances, taking into account the trustees' special knowledge, experience or professional status.
- Under section 41W(3)(a) ,which imposes a statutory control on trustees' exemption, remunerated trustees acting in a professional capacity are not allowed to exclude their liability for wilful misconduct, gross negligence or fraud.

Trustee Ordinance (Cap. 29) (TO) cont.

- A number of provisions relating to trustees' powers and trustees' rights to remuneration were also amended, Section 41X
- Under s.41X the new Hong Kong trust law, the settlor is allowed to reserve the investment and asset management of the trust to himself or herself without the trust being invalidated.
- Under s. 41Y of the TO, foreign law of inheritance (forced heirship rules) will also not affect the validity of transfer of movable property to trusts that are expressly governed by Hong Kong law.

The Perpetuities and Accumulations Ordinance (Cap. 257)

- The Perpetuities and Accumulations Ordinance was also amended and the rules against perpetuities and excessive accumulation of income were abolished, section 3A ,which means non-charitable trusts governed by Hong Kong law and set up on or after 1 December 2013 are no longer required to have a perpetuities period and accumulation period.
- Under s.3B, the rule against excessive accumulation of income continues to apply to Hong Kong charitable trusts.

Jacky Zong v Kelly Fuli Zong [2025] HKCFI 3355 – The Wahaha Case

- The parties essentially are:
  - The Plaintiffs -

    The 1st, 2nd and 3rd Plaintiffs ("Jacky", "Jessie" and "Jerry" respectively) are the three children Zong Senior had with Madam Du Jianying ("Madam Du").

    The Defendants –

    The 1st Defendant ("Kelly") is the daughter Zong Senior had with Madam Shi Youzhen ("Madam Shi"). the chairman of Wahaha Group.
- The 2nd Defendant ("Jian Hao") is a BVI company, whose sole registered shareholder has since 2 February 2024 been Kelly, and whose sole director is Kelly after the death of Zong Senior on 25 February 2024.
- Zong Senior was the founding chairman and CEO of Hangzhou Wahaha Group Co Ltd ("Wahaha Group"), a beverage manufacturer in China.

The Wahaha Case (cont.)

- Jian Hao holds various assets in Hong Kong, among which are the net assets of US$1,799,062,412.25 as at 31 May 2024 held in its account maintained with HSBC (the "HSBC Account"), comprising mainly bonds and other fixed income assets and some cash and time deposits.
- Zong Senior left two wills executed on 2 February 2024 (the "**Wills**"), one of which concerned his specific offshore assets but did not cover Jian Hao and its assets.
- The other of will concerned his onshore assets in Mainland China.
- The beneficiaries of the Wills were among others, Kelly, Madam Shi and Zong Senior's mother Wang Shuzhen ("**Madam Wang**"). The Plaintiffs or Madam Du were not named as beneficiaries.
- The executors named by both Wills are Chen Han 陳漢 (a lawyer of Han Kun Law Offices) and Guo Hong 郭虹.

The Wahaha Case (cont.)

- In the Wahaha case, the Plaintiffs sought interim reliefs in form of injunctive reliefs under s.21M of the High Court Ordinance (Cap. 4), namely a preservation order for the assets in the HSBC Account (the "HSBC Account Assets") and disclosure orders in aid of their proceedings against the Defendants in the Hangzhou Court which are mainly concerned with the declaratory relief that there has existed the trust over the HSBC Account Assets.
- The Plaintiffs rely primarily on three documents: The dispute centred on three documents: the Handwritten Instructions in January 2024, a Letter of Entrustment dated 2 February 2024, and an Agreement between the parties dated 14 March 2024.
- The Handwirtten Instructions were addressed to Guo Hong in which Guo Hong was asked to set up three off shore trusts with Hong Kong Bank in Hong Kong , naming The 1st, 2nd and 3rd Plaintiffs and their issues as the beneficiaries . Only the interests of the HSBC Account Assets could be drawn for the benefit of the beneficiaries.
- The second document ,the Letter of Entrustment under which Zong Senior was the Settlor and Kelly was the Trustee for the above mentioned trust. The beneficiaries named were the three Plaintiffs and their issues, excluding the spouse of the three plaintiffs. Further, only the interests derived from the assets under the trust were to be distributed to the beneficiaries . No one would be allowed to distribute the said assets to the beneficiaries.

The Wahaha Case (cont.)

- The third document was "the Agreement". On 14 March 2024, shortly after the death of Zong Senior, Kelly, Jacky, Jessie and Jerry entered into an agreement titled the "Agreement" in relation to the matters arising from Zong Senior's death This is the third document the Plaintiffs rely on. It provided that

- the parties would not dispute the validity of the Wills of Zong Senior,
- Kelly would , in fulfilment of Zong Senior's wish, set up three irrevocable trusts in favour of the three plaintiffs, each with the value US$ 700 million , The assets under the trusts were fixed income investments. Only the interests derived from the assets under the trust were to be distributed to the beneficiaries

- Kelly would set up the trusts with the assets of the Jian Hao Ventures Limited. After the transition period, Kelly would step down as trustee and a new trustee would be nominated by the three plaintiffs ,
- Kelly would not obstruct the setting up of the trusts through action or inaction ,

The Wahaha Case (cont.)

- *The Plaintiffs argues that these documents established the 1st Defendant's obligation to use the HSBC Account Assets to set up offshore trusts for them and the 1st Defendant had breached her obligation and duties.*
- The Plaintiffs alleged that Kelly had made unauthorized withdrawals out of the HSBC Account , proposed in the draft Deed of Trust that her issues might also be beneficiaries, refused to provide any information relating to the HSBC Account (except for the January 2024 Statement and the May 2024 Statement) to them , and had not set up the offshore trusts as promised.
- Kelly, however, asserted that the withdrawals were legitimate repayments of loans and interests and she had not breached her obligations and duties.

Outcome of the case:

- The court granted both the preservation order and disclosure order .
- As regards the terms of the Preservation Order, as the The HSBC Account is an investment account . As the HSBC Account Assets are for fixed-income investments, it is inappropriate to prohibit "disposing of" or "dealing with". Furthermore, the investments fluctuate in value. Therefore, it is also inappropriate to prohibit any diminution of value.
- In the end, the Court decided that the appropriate terms should be a a prohibition of "withdrawal" and "encumbrance" which strikes the right balance between the preservation of the HSBC Account Assets and avoidance of interference with the case management of the PRC Court .