**EQUITY AND TRUSTS LAW II**

In this semester, we will focus on the Law of Trust. The Law of Trust was part of the received English law into Nigeria, which comprised of the Common Law, the doctrines of Equity and Statutes of General Application. As discussed in first semester, Equity was developed by the Lord Chancellor in the Court of Chancery, the purpose of which was to mitigate the harshness of the common law, so also the Law of Trust. The development of the equitable principles by the Court of Chancery also influenced the growth of trust. Thus, the received English law and case law have to a large extent shaped the development and practice of the law of trusts in Nigeria.

The origin of trust cannot be ascertained, but the Court of Chancery entertained trusts cases and it has influenced the law of trusts as administered in that court. The modern concept of trust has been credited to the concept of uses at the period, which was a means of conveying land to someone for the use of one or more persons. The person who conveys is referred to as the grantor, settlor or donor. The persons whose benefits the conveyed land is meant for are called the beneficiaries otherwise known as *cestui que use*. Under the common law the person on whom the land is bestowed- the trustee, is recognised as person with legal title in respect of the property conveyed and does not recognise the interest of the *cestui que use* in any way. Consequently, it became common place for the trusteeto use the property for his own benefit instead of that of the *cestui que use* or to use the same in an unconscionable way or to the detriment of the *cestui que use* or retain the property for himself without the *cestui que use* being able to get relief or remedy from the common law courts.

In its equitable jurisdiction however, the Chancery courts then intervened and act on the conscience of the trusteeto make him perform according to the purpose of the conveyance and prevent either the trustee from keeping the property for his own use or to compel the trustee to ensure thatthe property is used for the benefit of the *cestui qui use* in accordance with the agreement that the property is to be used for the benefit of the *cestui que use.*

What then is the definition of trust?

Keeton has defined trust as:

All that can be said of a trust therefore, is that it is the relationship which arises whenever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed as *ces tui que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust” See Keeton, The Law of Trusts, Eight Edition, p. 3 cited in Jegede, M.I. (1999). Law of Trusts, Bankruptcy and Administration of Estate. Lagos: MIJ Professional Publishers Limited, p. 11

Trusts usually involve situations whereby individuals control or plan the distribution of their property or estate either in their life time or after their deaths. A trust is created by an individual when he executes a written Declaration of Trust directing one person or more persons (sometimes this can be a corporate trust company) called a trustee(s) to hold property or assets in accordance with the terms and conditions contained in the trust instrument for the benefit of one or more persons or a section of the general public, called the ‘beneficiaries’ or *cestui que trust*, who are the equitable owners of the property or assets, while the legal interest is vested in the trustee. In Nigeria as in most jurisdictions, the law of trusts is governed by statutes and case law.

The trustee is charged with the management of the trust property and holding the same, according to the instructions of the settlor in the trust instrument. It is however possible for a person to be both the trustee and the beneficiary in a trust. The written Declaration of Trust usually names the first trustees while it specifies the position for the appointment of successive trustees and contains the terms of the trust. These terms sets out the powers and duties of trustees and the benefits accruing to the beneficiaries. Other ways of creating a trust are through the exercise of power of appointment, transfer of trust either inter vivos or in someone’s Will, by contract and statute. A trust created by a Will is referred to as a testamentary trust and the terms and conditions of such trusts are ujcontained in the Will creating it.

Trust is created *inter vivos,* for instance, when a father vests the title of his house in a choice area of Lagos to a reputable estate agent firm with instructions to let out the house to tenants, manage it and pay a certain percentage of the rent yearly to his daughter who is 10 years old until she attains 18 years of age when the house will become vested in the daughter and trust determined.

A trust may also be created by contract or by statute.

**TRUST AND OTHER LEGAL CONCEPTS**

**Bailment and Trust**

There are similarities and differences between the two concepts. Bailment arises where a chattel, owned Ayo, is with Bayo, with Ayo’s permission, placed in the temporary possession of Bayo. Here Bayo is expected to take good care of the property belonging to Ayo as it is expected of a trustee to do likewise. However, there are some differences such as:

1. Bailment is recognised at common law while trust is recognised in equity.
2. Only chattels can be bailed, whereas any property may be held on trust.
3. A trustee is the legal owner of trust property; he can sell and pass good title to a bona fide purchaser for value without notice. Whereas a bailee who makes an unauthorised sale cannot pass a good title.

**Agency**

Agents like the trustees, must act personally in the business of the agency unless the circumstance justified otherwise**-** *delegatus non potest delegare.* Both have fiduciary relationship to their principal and beneficiaries respectively. They are held accountable for any profits made by them from the property.

Differences

1. Trusts are governed by Equity while Agency is by Common Law.
2. No contractual relationship between trusts and beneficiaries where the foundation of agency is contract.
3. The doctrine of “tracing” is applicable in trust but not applicable to agency.

**Contract**

Contract is a common law phenomenon while trust is equitable. Third party who is not a party to a contract cannot sue under the contract but the third party can sue under trust. For instance, the beneficiaries though not party to the agreement between Settlor and trustee can sue to recovery trust property.

The trustee occupies a position of confidence and must act in good faith with respect to the trust property. He is in a fiduciary relationship with the beneficiaries and must act honestly, not make secret profit, must deal with the trust property for the benefit and in the interest of the beneficiaries and not act in a manner that can jeopardize such interest.

It has to be noted that the concept of family ownership of land in Nigeria served a purpose similar to that of trust, where the concept of individual ownership is a foreign one, rather, the land belongs to the family and the head of family holds the family land for the use of the family members. The head of the family to some extent assumes the position of a trustee and all members of the family have equal right to the property. See *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 1A.C. 399 at p. 404 per Lord Haldane. See also the case of Ekpendu v. Erika (1959) 4F.S.C. 79. The concept of trust under customary law is however different from that under the English law because while the trustee is regarded as the owner of the trust property, the head of family is not regarded as the owner of the family property, but rather as the caretaker. The Land Use Act also embodied the concept of trust by vesting the control and management of land in each State of the federation in the Governors to be held in trust and administered for the use and common benefit of all Nigerians. See the Supreme Court decision in *Abioye v. Yakubu* [1991] 5 NWLR (Pt. 190) p. 130. The concept of trust under the Land Use Act is however not the same as in the law of trusts because the trustee under the Act, which is the Governor cannot be compelled to render account as trustee under English law. See section 1 of the Land Use Act and the case of Akinloye v. Ogungbe (1979) 2 LRN 282. Thus, the kind of trust created under the Act has been regarded as a bare trust. See *Abioye v. Yakubu* (supra). Also, while the head of the family under customary law can be held to account, the Governor under the Act cannot be held to account.

**CLASSIFICATION OF TRUSTS**

The classification or types of trusts sometimes aid in understanding the purpose or object of the trust. A distinguishing feature of classification of trusts is according to use or object. Thus, most names of trusts are reflective of their purposes or objects, but the major classification of trusts is into private, public or charitable trusts. Private trust is one that is meant to benefit an individual or a group or people. Public or charitable trust on the other hand is one that is structured to benefit the general public or a section of it. However, while a charitable trust is always a public trust, not all public trusts are charitable trusts.

There are further classifications into express, constructive, implied, resulting trusts, ministerial or instrumental trusts and discretionary trusts. The classification notwithstanding what is of importance is that trust is either created by the act of the parties or evolved by virtue of the operation of law. The trust created by the act of the parties are referred to as express trusts while those that evolved by operation of law are called implied trusts.

**REQUIREMENTS FOR CREATION OF TRUSTS**

There is no formal requirement for the creation of trusts as a result of the equitable nature of trusts. However, some formalities may be necessary with respect to some particular types of trust in order to avoid creating ineffective trusts. This depends on whether the trust is created inter vivos or by will.

**Requirements for Creating Inter Vivos and Will Trusts**

**Inter Vivos Trusts**

No formality is required for the creation of a trust if the property involved is in personalties, i.e. tangible personal movable properties, such as vehicles, shoes, television, etc. including money. What is essential is that, the manifestation of the intention to create a trust on the part of the settlor must be very clear. If the property is realty (i.e. immovable property, such as land), the intention to benefit someone must be evidenced in writing as required by the Statute of Frauds, Section 7; which requires that any declaration of trust relating to land to be evidenced by a memorandum in writing signed by the party creating the trust. The position on the States forming the old Western Nigeria is captured by Section 78(1)(b) of the Property and Conveyancing Law, which provides to the same effect that any declaration in trust in respect of land or any interest therein must be evidenced and proved by some writing signed by some person who is able to declare such trust or by his will.

The formality of writing is further required in respect of a disposition of an equitable interest in both personalty and realty under a trust by the beneficiary. Failure to do so renders the disposition void. This is contained in Section 9 Statute of Frauds and Section 78(1)(C) of Property and Conveyancing Law.

**Trust by Will**

It is important to note that according to the Will’s Act 1837 (Section 9) as amended by the Wills (Amendment) Act, 1957 and the Wills Law 1959 Cap. 1 33, Laws of Western Nigeria, 1959 applicable to the States forming the old Western Nigeria), these requirements are:

1. The will must be in writing.
2. It must be signed by the testator or by some other person in his presence and by his direction.
3. The signature of the testator must be attested by two witnesses, who must be present together in the presence of the testator.

Failure to comply with the above provisions of the law will render the trust to be void and no interest will pass under the will. Exceptions to this are secret trusts, whereby irrespective of the non-compliance with the provisions of the law, dispositions made under such trusts can be enforced in equity.

**Constitution of Trusts**

It is important to note that despite compliance with the provisions of law in creating a trust, coupled with the presence of clear intention of the testator to create a trust, such trust may run into problems if the testator does not convey the property which is to be the subject matter of the trust to the trustee, a process called constitution of trust. The importance of this is that, the beneficiary upon conveyance of the trust property to the trustee, an equitable interest is created in his favour while the legal interest is vested in the trustee. Thus, where the settlor conveys no property, then the trust is said not to be constituted and no interest passes to the beneficiary.

**Capacity to Create Trust**

The capacity of parties to create a trust is related to the capacity of a person to hold an interest in real property. Where a person cannot hold interest in land, this will affect the capacity to create a trust. The situation of capacity to hold interest in land varies according to the operative law.

**Individual**

 At common law, for instance, an infant is capable of holding a legal interest in landed property. However, a sale or disposition of such property is voidable and may be repudiated before the infant attains the age of majority or within a reasonable time after attaining the age of majority. However, in some States in Nigeria forming the old Western and Mid Western Nigeria, an infant cannot hold a legal interest in real property and where land was conveyed to an infant, which will result in the creation of a trust for sale in favour of the infant. At common law, 21 years was adopted as the age of majority and anyone below this age is an infant. Thus, the position of an infant or a minor who attempts to create a trust, especially in a situation where the trust is not in his interest, will have the same effect at common law. In Nigeria however, some statutory provisions have specified 18 years as “age of majority” or “full age”, see for example, section 277 of the Child’s Right Act, Sections 29 (4)(a) and 35(1)(d) of the 1999 Constitution, and Section 20(1)(a) of the Companies and Allied Matters Act.
In summary, an infant cannot create a trust of real property or create a valid will except such an infant is a soldier at war or mariners at sea. It should be noted however that an infant can create a trust over both legal and equitable interest in pure personality and over equitable interest only in personality and over equitable interest only in real property.

**People with Mental Disability**

It is trite that People with mental disability also cannot validly create or have a trust enforced directly against them, since their mental deficiency may itself encumber their ability to validly dispose their properties or make will. Some of the things that may invalidate such trusts are the possible, contradicting instructions of the insane settlor/testator or that he/she does not appreciate the nature or effect of such instructions. However, if the trust was created during the time that such an insane settlor was in his lucid period and he/she fully understands the nature of his act and the consequences of the same, such trust may be upheld as valid- see Section 180 of the Property and Conveyancing Law of Old Western Region.

**Statutory and Incorporated Companies**

By virtue of Section 38(1) of the Companies and Allied Matters Act, incorporated companies have all the powers of a natural person of full age and capacity in the execution of its business and objects. In effect, they can create trusts without such powers being expressly contained in their memo, the power to do so may be limited by their memorandum of association or by law.