

STEP ADVANCED CERTIFICATE IN TRUST DISPUTES

Syllabus

INTRODUCTION

This document contains the detailed syllabus for the STEP Advanced Certificate in Trust Disputes.

This syllabus should be read in conjunction with the course brochure, which explains the method of delivery and assessment, entry requirements and personal and business benefits of completing the programme.

The brochure, course dates and enrolment application form can also be found on the programme website www.clint.com/stepcerttrustdisputes.

MODULE 1: SHAM TRUSTS

This module covers:

- Sham risk factors and who has standing to bring a sham challenge
- Sham and conflict of laws
- The test for sham
- How to prove sham
- Sham and asset protection
- Sham and Red Cross trusts
- The dangers of excessive settlor control
- Validity problems with illusory trusts and 'living wills'
- The court's approach to determining a settlor's intention
- Sham in the context of wider disputes
- Sham in the context of divorce
- Trustees' duties where an allegation of sham is raised
- Tips as to how to avoid the finding of a sham

MODULE 1: SHAM TRUSTS CONTINUED

By the end of this module you should be able to:

- Identify and explain the warning signs of sham
- Identify who can mount a sham challenge
- Describe which law governs the question of whether a trust is a sham
- Explain the test for sham
- Explain that if a valid trust is created, it is always a valid trust. Following settlor's 'orders' does not mean it is a sham (but may well result in a breach of that trust)
- Describe the type of evidence that will be admissible for the purpose of proving sham; in particular the relevance of ex-poste facto evidence of how the trust was administered
- Outline the similarities between the test for sham and for challenging transfers into trust on grounds that they defraud creditors
- Define what is meant by the term "Red Cross Trust" and explain how sham may arise in relation to such a trust
- Identify and explain the dangers of too much settlor control with reference to the case of Rahman
- Explain that if the trust is really an illusory trust or will in disguise. This arises if the settlor reserves placing either too much control with the result that the trust only takes effect on his death, then to be valid it must satisfy the necessary formalities for a will
- Appreciate and explain the importance of establishing that the settlor has the necessary intention to create a trust
- Describe how sham can result in the freezing of assets and enforcement judgments against trusts
- Outline the test for sham in divorce with reference to the decisions in A v A and Minwalla v Minwalla
- Identify and explain trustees' duties when allegation of sham is raised
- Describe measures that can be employed to avoid a finding of sham

MODULE 2: DEFECTIVE TRUSTS

This module covers:

- Law governing the validity issue
- Who has locus to bring validity challenges
- The formal requirements to create and constitute a trust
- The importance of a settlor's capacity to create and constitute the trust
- Whether a trust is lawful
- Settlor insolvency
- Undue influence/misrepresentation

By the end of this module you should be able to:

- Appreciate that the choice of law to govern a validity question is a crucial strategic issue which affects the eventual outcome
- Explain why the most favourable outcome (so far as the trust is concerned) is likely if the question is determined under the proper law of the trust and in the trustee's home jurisdiction
- Describe how trustees should consider taking proactive steps in their home jurisdiction to obtain a declaration that the trust is valid, thus pre-empting a validity challenge
- Describe how absence of certainty of intention could be an issue for settlors with no understanding of trust concepts
- Explain how the validity challenges based on forced heirship principles created an impetus for offshore jurisdictions to erect firewall protection
- Discuss the likelihood that the recent downturn will lead to a wave of claims based on insolvency principles
- Evaluate whether the badges of fraud developed in relation to the Statute of Fraud will be of assistance in establishing intention to defraud for the purpose of s423 Insolvency Act 1986

MODULE 3: TRUSTEE POWERS

This module covers:

- Classification of powers
- Standing of objects to complain about a breach of trust
- Whether the powers of advancement or appointment are wide enough to allow trust property to be transferred to another trust
- The duty to consider the exercise of powers
- Judicial review of exercise of trustees' powers
- Excessive exercise of power
- The duty not to exercise powers fraudulently
- Explain that related trusts cannot be viewed as one group
- The decision in Hastings–Bass
- Cases following and applying the principle in Hastings –Bass
- Examine the offshore approach to Hastings-Bass since Pitt v Holt

By the end of this module you should be able to:

- Explain the classification of powers adopted by Warner J in Mettoy, and its significance
- Describe the standing of objects to complain about breach of trust
- Describe the extent to which powers of advancement and appointment permit property to be transferred to a new settlement
- Appreciate and explain the duty to consider the exercise of powers
- Describe the principle of non-intervention in the review of the exercise of powers
- Identify and explain various limited grounds of challenge:
 - Excessive – ultra vires - exercise of a power;
 - Fraud on a power; effecting some object beyond the purpose and intent of the power;
 - Corrupt and foreign purposes; and
 - The rule in Hastings–Bass; failing to take account of relevant considerations, or taking account of irrelevant ones; following the Supreme Court decisions in Pitt v Holt and Futter v Futter, the rule is only engaged by a breach of fiduciary duty; trustees who take advice will necessarily have taken account of all relevant considerations.
- Explain how the rule in Hastings-Bass is still useful and how it has diverged in offshore jurisdictions
- Examine the offshore approach to Hastings-Bass since Pitt v Holt

MODULE 4: INVESTMENT DISPUTES

This module covers:

- The market turmoil in 2008
- The problem of long arm jurisdiction of US courts for offshore trustees in investment disputes
- Trustees' duties when investing
- Trustees' 'rescue remedies' for restricting investment duties
- Claims against investment managers/advisers

By the end of this module you should be able to:

- Identify and explain trustees' duties when investing
- Define what an investment is in the context of trustees' powers
- Explain and apply the prudent investor rule.
- Describe how loss is proved – broadly by assessing whether the trust's performance is in line with the prevailing practice at the time, rather than with the benefit of hindsight
- Explain and appreciate that trustees' need to apply their judgment to advice from experts
- Describe the benefits of diversification and of equities as a hedge against inflation
- Identify, explain and evaluate some trustee 'rescue remedies' including:
 - Extended investment powers;
 - Structuring investments through a company;
 - Protector directed trusts;
 - Exoneration clauses
- Explain trustees' duty to bring claims against investment managers and advisers, and explain how trust funds can be used to cover costs.
- Explain that the standard of care expected of trustees is reasonable competence and describe the importance of expert evidence in establishing whether this standard has been satisfied

MODULE 5: CORPORATE ISSUES

This module covers:

- The main duties of directors
- The fiduciary nature of directors duties
- Directors duties of skill and care
- Shadow directors
- Liability for fraudulent and wrongful trading
- Protection against unfair prejudice
- Trustees' duties in relation to underlying companies
- The duty of care of a trust corporation
- Beneficiaries' claims for loss suffered to underlying companies
- The decisions in Walker v Stones, Shaker v Al-Bedrawi and Freeman v Ansbacher
- Liability of directors of a corporate trustee
- Liability based on agency principles
- Shareholder's liability and the circumstances in which the corporate veil may be pierced
- Costs orders against directors and shareholders

By the end of this module you should be able to:

- Identify and explain the extent of duties and liabilities of company directors under company law
- Explain trustees' duties in relation to underlying companies following Bartlett and Re Lucking
- Describe ways of limiting the trustees' duty to supervise by the use of anti Bartlett clauses and VISTA trusts
- Explain the Prudential principle and what is meant by the term reflective loss
- Describe when a dog leg claim against directors of corporate trustees might be available
- Explain in what circumstances liability can be established based on agency principles
- Describe the extent of shareholder liability and explain the circumstances in which the corporate veil may be pierced

MODULE 6: THE CONSEQUENCES OF A BREACH OF TRUST

This module covers:

- The remedy of account for a breach of trust
- Causation and foreseeability in the context of breach of trust
- Constructive trusts
- Dishonest assistance
- Constructive trusteeship based on unconscionable receipt
- Tracing

By the end of this module you should be able to:

- Describe the trustees' duty to account
- Explain the two bases on which accounts can be prepared and distinguish the situations in which each one will be most appropriate
- Explain the circumstances in which a beneficiary can challenge entries in the account and state the remedy available if such a challenge is successful
- Describe when the beneficiaries can seek substitutive performance
- Describe the consequences of a trustee acting *intra vires* but in breach of some duty (e.g. a want of prudence) and the type of claim that can be pursued.
- Appreciate that the taking of the account is not the equitable equivalent of common law damages and explain how causation, remoteness and contributory negligence have no relevance in substitutive performance claims
- Explain assistance based liability and receipt based liability and the circumstances in which each will arise
- Appreciate how commercially unacceptable conduct could potentially give rise to liability
- Describe how regulatory rules will be relevant in establishing those enquiries that an honest person would make and that breach of them may lead to constructive trust liability
- Evaluate whether a money laundering disclosure provides unhelpful evidence of the bank's state of knowledge or whether it can be considered as a badge of honesty
- Explain the tipping off offence (following disclosure)
- Describe tracing procedures that can be used by beneficiaries at both common law and in equity

MODULE 7: TRUSTEE DEFENCES

This module covers:

- Limitation periods
- Trustee exoneration clauses
- Construction of exoneration clauses
- The importance of settlor approval of exoneration clauses
- Whether exoneration clauses are effective
- The position regarding exoneration clauses in other jurisdictions
- Trustee insurance
- s61 Trustee Act 1925

By the end of this module you should be able to:

- State and explain the limitation periods prescribed by the Limitation Act 1980.
- Identify in what type of action there is no limitation period
- Appreciate and explain how the accrual of a cause of action under the Limitation Act 1980 is a particular issue for objects of powers
- Describe how a cause of action will accrue under the Limitation Act 1980 if the beneficiary is a minor or mentally incapable
- Explain the equitable principle of laches and how this may be invoked where a limitation defence is not available
- Explain the defence of acquiescence and in what circumstances this will be appropriate
- Describe how exoneration clauses can be used to protect trustees from liability and explain how such clauses are usually construed
- Evaluate whether an exoneration clause may infringe the core of the trust, rendering the clause itself, or the trust, invalid and making appropriate reference to the leading English authority *Armitage v Nurse*
- Define what is meant by gross negligence
- Appreciate and describe the importance of drawing an exemption clause to the settlor's attention and explaining its effects to him

MODULE 8: CONSTRUCTION, RECTIFICATION & MISTAKE

This module covers:

- Principles of construction
- Rectification for inter vivos settlements
- Defences to rectification
- An example of the approach of other jurisdictions to rectification: Jersey
- Rectification for will trusts
- Setting aside for mistake and the historic position
- Considering the doctrine following *Pitt v Holt* both in the UK and its application offshore

By the end of this module you should be able to:

- Describe the court's approach to construction of trust instruments and appreciate that its main objective is to ascertain the settlor's intentions
- Explain how evidence of purpose or intent is not generally admissible, but may be used exceptionally to resolve an ambiguity
- Appreciate that the court will confine itself to the written trust instrument and the factual matrix and will not generally consider drafts or advice
- Explain how the court discerns the difference between mere powers and trust powers
- Describe the circumstances in which rectification on grounds of mistake is available
- Explain that rectification of wills is only available where there has been a clerical error or failure to understand the testator's instructions
- Explain how the court will also set aside on grounds of mistake
- Explain how the definition of mistake has been held to include mistakes over the tax consequences of a transaction, provided the consequences are sufficiently serious

MODULE 9: VARIATION OF TRUSTS, PUBLIC TRUSTEE AND OTHER SUCH APPLICATIONS

This module covers:

- The rule in *Saunders v Vautier*
- Applications under the Variation of Trusts Act 1958
- Applications for a ‘blessing’ under *Public Trustee v Cooper*
- The availability of *Re Benjamin* Orders in hostile situations

By the end of this module you should be able to:

- Explain that whilst trustees are bound to carry out the trust, this does not mean that the terms of the trust are necessarily set in stone, particularly if the rule in *Saunders v Vautier* applies
- Describe the rule in *Saunders v Vautier* and explain why it is unlikely to be of much relevance in modern discretionary trusts
- Explain the extent and limitations of the statutory jurisdiction the court has been given under the Variation of Trust Act 1958
- Explain that for the court to furnish approval of a variation, overall benefit to those on whose behalf approval is sought must be established, which does not necessarily mean financial advantage
- Describe the approach the court will take when exercising its statutory jurisdiction under the Variation of Trust Act 1958
- Explain that the interests of those on whose behalf the court is furnishing consent will be represented either by a court appointed litigation friend (in the case of category (a)) or (in the case of the 3 remaining categories) by the trustees acting as their watchdogs
- Appreciate and explain that trustees should not generally take a central role in negotiating or applying for a variation
- Describe trustees’ right to approach the court for approval of a particular course of action and explain that the court’s blessing will protect trustees from any liability for breach of trust
- Appreciate that *Re Benjamin* orders might assist in hostile situations

MODULE 10: CLAIMS IN NEGLIGENCE IN CONNECTION WITH CREATION OF TRUSTS AND THEIR ADMINISTRATION

This module covers:

- Duties owed to clients
- Duties owed to third parties – non-clients
- What the duty of care entails
- Breach of the duty of care
- Causation
- Duties of a trustee
- Limitation in negligence actions
- Rectification and the duty to mitigate
- Negligent administration of a trust

By the end of this module you should be able to:

- Describe the duties (created in contract, and in tort) owed to settlor and possibly beneficiaries
- Explain that to find a duty in tort it is necessary to show either:
 - an assumption of responsibility to the beneficiaries as held in Hedley Byrne v Heller
 - that there is a lacuna because the person owed the duties suffers no loss.
- Define the duty of care and standard of care in the context of trust disputes.
- Explain how breach of the duty is established
- Describe the ‘but for’ test and its importance in proving loss
- Explain trustees’ duties where there is a negligence claim against a third party adviser
- State what the limitation period is in most negligence actions
- Appreciate the duty to mitigate loss and explain that in practice, this might require claimants to pursue rectification or a claim under the rule in Hastings - Bass before pursuing a negligence claim
- Describe how negligence in trust administration results in breach of the statutory duty of care and explain the relevance of tort principles in establishing reparative claims
- Explain why costs of negligence actions can be significant

MODULE 11: DISCLOSURE

This module covers:

- The general duty of disclosure in connection with court proceedings
- Pre-action disclosure
- Standard disclosure
- Specific disclosure
- Third party disclosure
- Disclosure in other jurisdictions
- Beneficiaries' right to information
- The decision in *Schmidt v Rosewood*
- Disclosure of trust accounts
- Disclosure of company accounts
- Disclosure of the letter of wishes
- Factors informing the exercise of discretion to refuse information to the Default beneficiary or to give disclosure to the discretionary beneficiaries
- Disclosure to protectors
- Privilege
- Whether privilege can be overridden
- Money laundering reporting requirements

By the end of this module you should be able to:

- Explain the extent of trustees' duty of disclosure in both court proceedings and to beneficiaries invoking their rights to disclosure for the purpose of monitoring trustees
- Describe how failure to inform beneficiaries of the existence of the trust and their interest under it results in a breach of trust and may postpone commencement of the limitation period
- Explain the proprietary approach to disclosure and the House of Lords decision in *O'Rourke v Darbishire*
- Explain the Privy Council's decision in *Schmidt v Rosewood*
- Explain that the beneficiary's right to trust accounts is part of the irreducible core for a valid trust
- Describe the form of trust accounts
- Identify beneficiaries' rights to accounts of companies held within the trust.
- List the arguments for and against disclosure of letters of wishes.
- Identify and explain the range of factors informing exercise of discretion to give disclosure
- Explain the protector's right to disclosure
- Describe the different types of privilege and the extent to which these give protection from disclosure

MODULE 12: DISPUTES INVOLVING PROTECTORS

This module covers:

- The role of the protector
- Court intervention in the exercise of protector powers
- Particular protector powers
- Case law from other jurisdictions regarding protector powers
- The inter-relationship between trustee and protector

By the end of this module you should be able to:

- Explain the issues that might arise in dispute with a protector.
- Describe the protector's role in modern trusts and explain how it has evolved.
- Distinguish between personal and fiduciary powers.
- Explain how the balance of decided cases suggests that courts generally view the protector to be a fiduciary.
- Describe how although the office of protector is fiduciary, not all protector powers are fiduciary.
- Explain why it is desirable for the settlor to clarify whether particular powers are intended to be personal or fiduciary.
- Describe how the settlor's intention might be discerned in the absence of such clear statement of intention.
- List and explain the limits on protector powers and duties.
- Identify the circumstances in which a protector may be liable for breach of duties.
- Appreciate and explain trustees' exposure if the protector does not exercise powers validly.

MODULE 13: TRANSFER OF TRUSTEESHIP IN CONTENTIOUS CASES

This module covers:

- Express powers of removal
- Replacement and appointment of trustees
- Removal of a trustee on application of beneficiaries
- Trustee indemnity
- Trust documents and information to be provided to incoming trustees

By the end of this module you should be able to:

- Describe the possible challenges in relation to express powers of removal (commonly conferred on protectors)
- Explain the statutory powers to remove trustees found in s36 and s41 Trustee Act 1925
- Explain in what circumstances the court might order the removal of trustees on the application of a beneficiary and appreciate that in any removal application, the welfare of the beneficiaries is paramount
- Explain why trustees should carefully consider beneficiaries' request that they retire
- Explain that if a breach of trust is established (even one covered by exoneration clause) the court will likely order removal
- Identify outgoing trustees' rights
- Explain the scope of an express indemnity and the powers of the continuing trustees to give an express indemnity
- List the documents an outgoing trustee needs to provide to his successor
- Explain incoming trustees' duty to pursue his predecessors for breaches of trust that come to his attention

MODULE 14: COSTS

This module covers:

- The costs of administration of trusts
- The costs of trust proceedings
- Construction/directions
- Beneficiary disputes
- Third party disputes
- Beddoe applications and prospective costs orders
- The nature of trustees' right of indemnity

By the end of this module you should be able to:

- Explain trustees' right of indemnity from trust property, in particular in the context of professional costs incurred in administration of trust, and in relation to costs of trust litigation
- Explain beneficiaries' rights to information in relation to costs paid by trustees out of trust funds and the possible redress open to them if they think costs are excessive
- Describe how the extent of indemnity available for costs of trust proceedings varies for the following types of the proceedings:
 - Construction/directions applications
 - Beneficiary disputes
 - Third party disputes
- Explain the purpose of a Beddoe application for directions
- Describe the difference between a Beddoe order and a prospective costs order

MODULE 15: CONFLICTS

This module covers:

- General points relating to jurisdiction
- The Recast Regulation (Council Regulation EC No.1215/2012)
- The common law rules relating to jurisdiction
- Anti-suit injunctions
- Jurisdiction clauses in the light of the Crociani case
- An introduction to proper law in the context of jurisdiction
- Specific issues under proper law for deciding preliminary issues
- The Hague Trusts Convention 1984 and the Recognition of Trusts Act 1987
- Forced heirship
- The position with community property
- Firewalls
- Change of proper law and flee clauses
- Recognition and enforcement of judgments

MODULE 15: CONFLICTS CONTINUED

By the end of this module you should be able to:

- Explain what a jurisdiction clause is and when it is likely to operate
- Appreciate that there is uncertainty when it comes to validity questions brought by third parties and different laws could well produce different outcomes
- Explain how the law which decides the validity question will be determined
- Appreciate that a number of courts could assume jurisdiction in an international trust dispute. Explain how the trustee should consider which is likely to be most favourable for the trust and if necessary take proactive steps to try to ensure a particular court is seised of the matter
- Describe how the English court's rules on jurisdiction have been modified by the Recast Regulation and compare these with jurisdiction rules in offshore jurisdictions, which are based on common law rules
- Explain why there is considerable uncertainty as to how rights of a forced heir, or spouse under a community property regime, would translate into a common law jurisdiction
- Appreciate that there are different forms of forced heirship and how these translate into claims from disadvantaged heirs against trusts and trust assets
- Explain when a claw back claim will not be available to a disadvantaged heir
- Describe how community property can be properly settled on trustees
- Explain that forced heirship and community property rights – a feature of civilian jurisdictions and which formed the basis of the claims in *Lemos v Coutts* - have been addressed by firewall protections introduced in most offshore jurisdictions
- Explain how the validity, construction and effects of a trust should be determined according to the Hague Trust Convention, making particular reference to articles 4, 15, 16 and 18

MODULE 16: TRUSTS AND DIVORCE

This module covers:

- How the court finds out about a trust
- Whether offshore trustees should participate in English proceedings
- How to deal with equitable interests
- Sham in the context of divorce
- The concept of judicious encouragement
- The impossibility defence and the Human Rights point – possible answers to a committal application
- Fraud on a power
- Variation of ante-nuptial and post-nuptial settlements
- Variation of foreign trusts
- Setting aside dispositions
- Recognition and enforcement of orders
- Practical advice to trustees to mitigate the risk of trust assets being attacked following divorce

MODULE 16: TRUSTS AND DIVORCE CONTINUED

By the end of this module you should be able to:

- Describe the ways in which assets of a trust can be accessed in ancillary relief proceedings following divorce
- Explain that the most straightforward and commonly encountered way in which assets of a trust are accessed in ancillary relief proceedings is to treat them as a resource
- Explain judicious encouragement that is applied on trustees when trust assets are considered to be a resource
- Describe the divorce court's quasi inquisitorial powers to establish parties' financial resources and identify the categories of documents relating to a trust that the court might order the parties to disclose
- Explain the purpose of letters of request in obtaining evidence from offshore trustees
- Explain the effect and the jurisdictional extent of an order for joinder of a trustee by an English court
- Describe how trustees should usually seek directions from their home court and explain how in Jersey they are likely to be directed to ring fence sufficient funds
- Describe the evidence deployed in Charman and explain the court's conclusions about the extent of the husband's power and influence over the Dragon Trust
- Describe how fraud on a power might be committed if trustees benefit a stranger to the trust
- Explain how, in certain cases such as Netherton v Netherton there might be benefit to a beneficiary in meeting his obligations under divorce court's order, and providing adequately for an ex-spouse
- State the nature and extent of the court's powers under s24 Matrimonial Causes Act 1973 to vary an ante or post nuptial settlement
- Describe the court's powers under s37 Matrimonial Causes Act 1973 and/or s423 Insolvency Act 1986 to set aside dispositions which frustrate matrimonial claims
- Explain issues with enforcing English court orders against offshore trustees
- Explain the limits of reciprocal enforcement arrangements, firewall protections and the role of comity
- Explain the latest case on English orders varying Jersey trusts: Mubarak v Mubarik

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For full details of the programme visit:

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