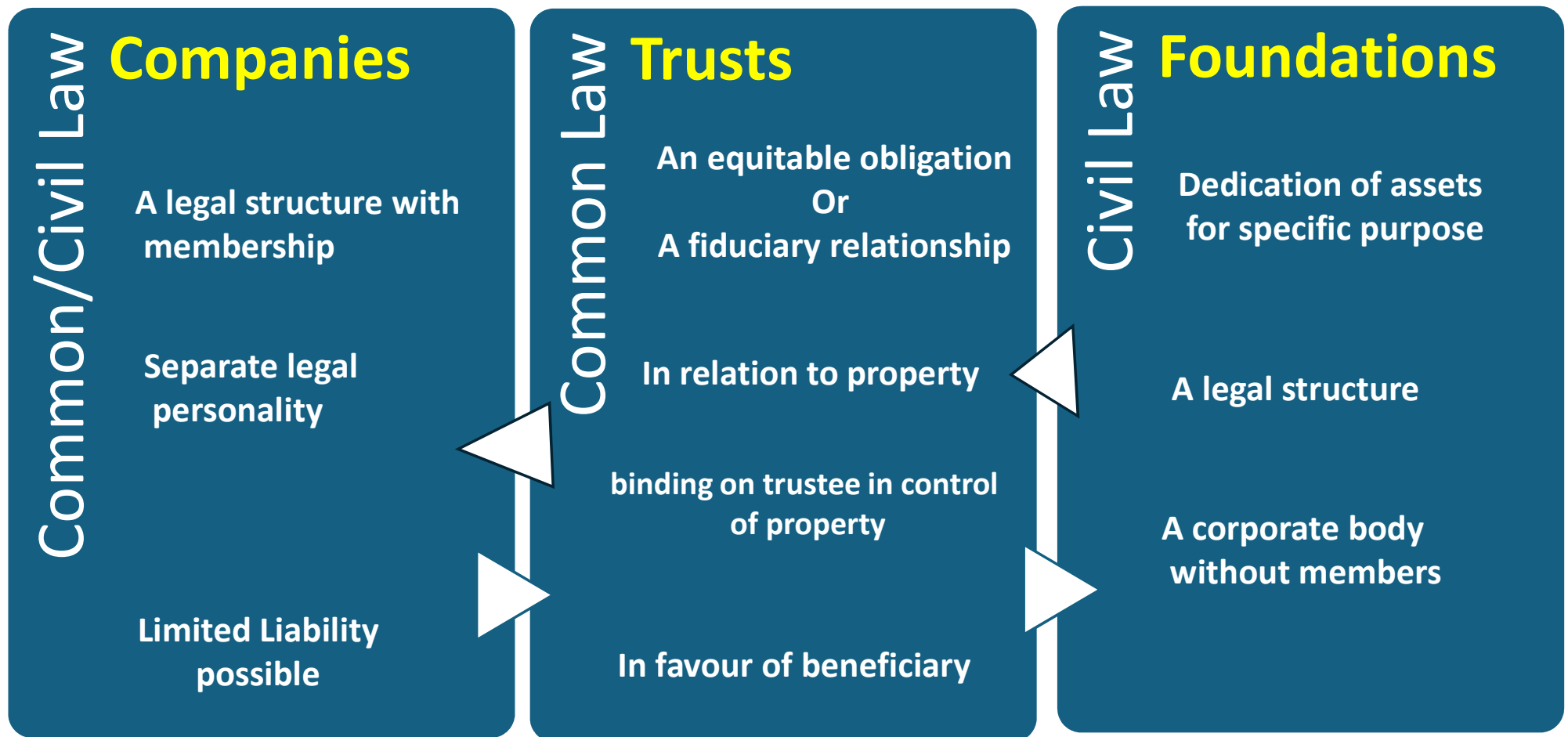


The role of the Trust in Stewardship Ownership

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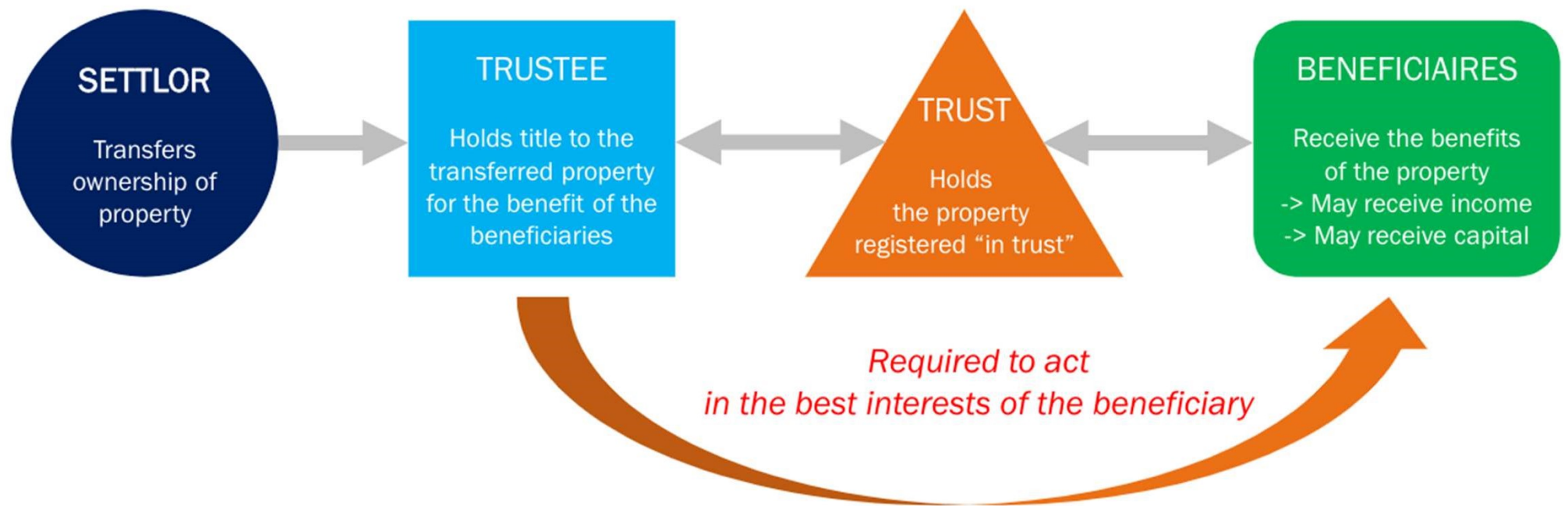
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Legal Mechanisms for Steward Ownership





Trust Basics



The fiduciary nature of Trusteeship

- Trustees hold the legal title to the trust property or trust fund.
- The Trustees owe fiduciary obligations to the beneficiaries. Trustees must exercise good stewardship of the trust property for the benefit of the beneficiaries.
- The Trustees are personally liable to the beneficiaries for any loss to the trust.
- Even though the Trustees hold the legal title to the trust property, this property is not available to the Trustee's creditors.
- Trustees must be 'persons of substance' – e.g., a bankrupt cannot be a Trustee. Responsible management of assets held for another is the essence of the trust relationship.
- If a breach of trust causes property to leave the trust, the beneficiaries have a proprietary interest in that trust property and can trace the property through different conversions. This proprietary right is in addition to their personal rights against the Trustees for breach of trust.

Unlike a company, a trust does not have any “members”.

Unlike a foundation, a trust is not a corporate body.

Trusts do not enjoy separate legal personality, and Trustees do not generally have limited liability (Tees own Trust property and incur obligations in their capacity as Tees)

What a trust is/is not . . .

Removal of Directors easier than removal of Tees

In certain cases, beneficiaries can bring a trust to an end and take control of the trust property absolutely.

There is no “managing trustee” in a trust.
All co-trustees will be jointly and severally liable.

A Trustee may only carry on business if authorized by the trust deed.

There is no public register of trusts, per se.

In a private trust, a majority of trustees cannot (subject to the trust deed and to statute) bind the minority. If the trustees own shares, the voting rights must be exercised with the consent of all. In contrast with the default position in private trusts, the trustees of a charitable trust may act by majority.

And yet, we have the concept of Corporate Trustees . . .

- In the case of a Corporate Trustee, we have an assetless company (the corporate trustee) holding property on trust for named beneficiaries who are often connected to the Settlor.
- “In its general manifestation, the only asset that a corporate trustee will own is the right to indemnity out of trust assets that is available to any trustee.” (Heath, 2010).
- The corporate trustee will require directors to comply with company law.
- A director of a company owes the same duties to a company, whether the company is a trustee or operating on its own behalf.
- Incorporated trusts are commonly used in situations in which shareholding in a business (whether controlling or otherwise) is held for the purpose of dividend creation for ultimate charitable ends.

Examples of trust structures in steward ownership spaces

Incorporated non-charitable trust

**The Irish Times Trust
CLG**

Trust in a holding company structure.

**Garfield Weston
Foundation**

Wellcome Trust Ltd

Incorporated assetless trust, money in & out to pay Governors

Common Law Examples of Trusts in Steward Ownership Arrangements

Freedom of The Press

- **The Irish Times** (Corporate Trustee holding controlling share of newspaper).
- **The Guardian Newspaper** (Scott Trust 1936-2008; Trust dissolved in 2008 in favour of Company Ltd by Shares).
- **The New York Times** (a controlling shareholding of Class B shares is privately held by the Ochs Family Trust, giving them 2/3 control of the NYT Board).

Retiring Entrepreneurial Philanthropist

- **Garfield Weston Foundation** (philanthropic permanent endowment of controlling shares in Associated British Foods on trust to charitable Foundation).
- **The Robertson Trust** (corporate trustee holding controlling shares in Edrington Whisky with dividend income used for charitable purposes).
- **Wellcome Trust** (in 1936, permanent endowment of 100% share interest in Wellcome pharma given on trust to Wellcome Foundation. Overtime, with court permission, nature of investment has been diversified with dividend income from broader investment portfolio still applied for charitable purposes).

Case Law precedents on Trust Stewardship

Maher v Maher [2020] UKHC



CONTEXT: Group of construction companies. Under a settlement trust, the shares in central company of Group “WMS” were transferred to a trust for the benefit of settlor’s 5 children, three of whom were the trustees. Fallout between trustees interfering with trust business.

- a) It is the Court's duty to see that trusts are properly carried out;
- b) That duty includes the jurisdiction to remove and/or replace trustees; however the removal of trustees is a drastic step that should only be taken in a clear case;
- d) The guiding principle in exercising the jurisdiction is ensuring the welfare of beneficiaries and the competent administration of the trust in their favour;
- e) Proof of actual misconduct, such as acts or omissions that endanger trust property, show a want of honesty, fidelity or capacity are likely to lead to a trustee being removed;
- f) A trustee may be removed to facilitate the performance of the trust;
- g) Friction or indeed outright hostility between trustees and beneficiaries are not of themselves reasons to replace trustees, unless they impede the due administration of the trust;
- h) The court should bear in mind the cost of removing and replacing trustees.

Re Lucking's Will Trust [1968] 1 WLR 866 (ChD)



HELD: “Trustees of a controlling interest in a company ought to ensure that they have as much information as to the company's affairs as a director has. If they sit back and allow the company to be run by the minority shareholder and receive no more information than shareholders are entitled to, they do so at their risk if things go wrong.” (per Cross J)

CONTEXT: Failure of Trustee Director to properly supervise managing director of a company in which the trust had a 70% controlling interest resulted in that Trustee being liable to a beneficiary for breach of trust.

Steel v Wellcome Custodian Trustees Ltd [1988] 1 WLR 167



HELD: Courts can and do review trustees' exercise of their powers, as shareholders, to buy and sell shares which are part of an investment portfolio. Since a trustee must vote trust shares in accordance with trust principles it follows that, in voting, s/he must meet the traditional standard applied to trustees: s/he must act as a reasonably prudent person would do in the management of their own affairs -- bearing in mind that where the trustee is investing to provide for others, he/she is not free to take the risks which even a prudent man might take with his own money. Failure to meet that standard is a breach of trust. Sometimes, prudence requires an application to court for directions or approval of a proposed action.

CONTEXT: Between 1986 and 1995, Wellcome trustees applied to Court under the Trustee Investment Act 1961 (E&W) for authorisation to sell permanently endowed shares in Wellcome to diversify their investment portfolio and better achieve their charitable mission. This led the foundation ultimately to sell all its shares to Glaxo in 1995, thereby ending its 59-year old ownership of the pharmaceutical company.

Further areas of interest under exploration

Trustee's right of indemnity

The trustee has a right of indemnity, encompassing a right to reimbursement for trust expenses that have been met from its own funds and a right of exoneration, being a right to apply the fund to discharge outstanding liabilities. These rights are protected by an equitable lien, which arises by operation of law, constitutes a proprietary interest in the trust property, and is not dependent on possession. (Slevin, 2015)

Intersections and Tensions between Trustee-Director duties

In some circumstances trust law and corporate law impose the same duty. If a trustee-director harms his corporation through an act of incompetence or disloyalty, he breaches his duties to the corporation. The same act may diminish the value of trust assets and therefore place the trustee-director in breach of his duties as a trustee to his beneficiaries. (David Hughes, 1980)

Private Purpose Trusts

Limitations with duration so different from charitable trusts; legal changes in the US making private purpose trusts more available, hence their use in the restructuring of Patagonia.



Questions and comments welcome!

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