

# **THE USES OF TRUSTS AND FOUNDATIONS IN MAURITIUS: CHALLENGES AND OPPORTUNITIES FOR LAW PRACTITIONERS**

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**UTEEM CHAMBERS**

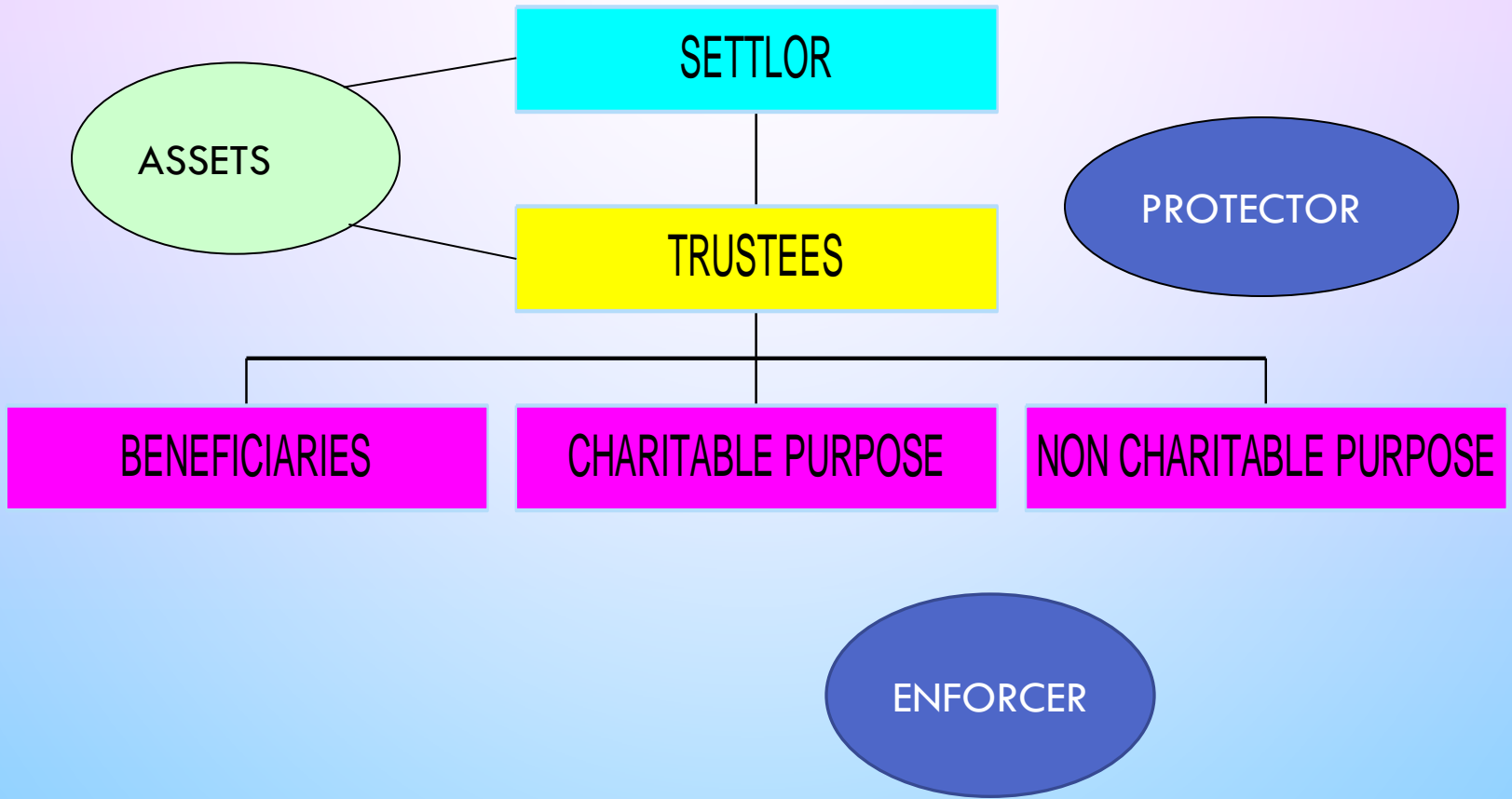
*A Law Firm registered under the Mauritius Law Practitioner's Act*

# HISTORICAL BACKGROUND

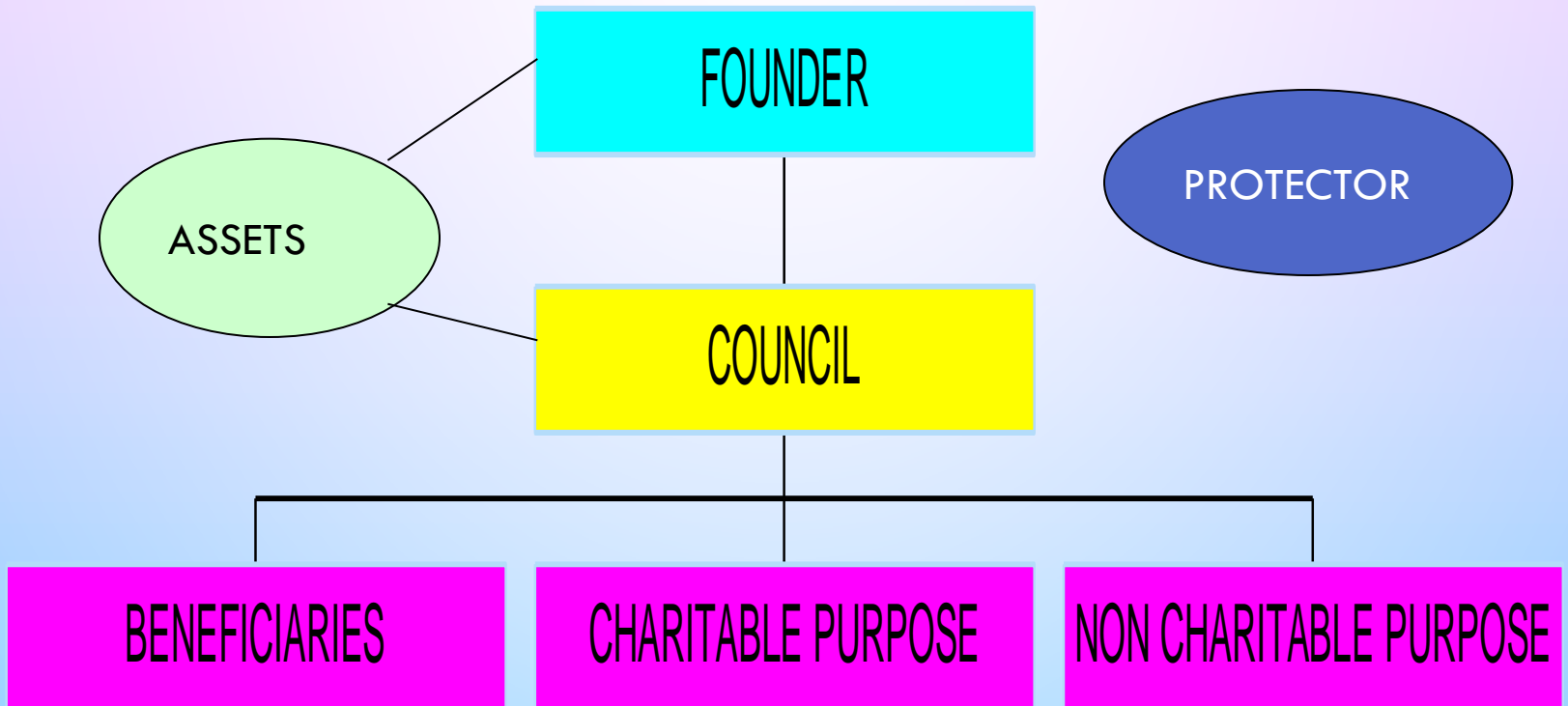
- COMMON LAW
- WAQF ACT 1945
- AUSTIN v BAILEY (1962)
- THE TRUSTS ACT 1989
- THE OFFSHORE TRUSTS ACT 1992
- THE TRUSTS ACT 2001
- THE FOUNDATIONS ACT 2012



# TRUST



# FOUNDATION



	FOUNDATION	TRUST
Legal Personality	Separate legal entity Full capacity and power	Acts through trustees
Duration	Unlimited unless otherwise specified in Charter	Purpose trust: perpetual Others: 99 yrs
Management	Council At least one resident Cannot be an officer	Trustees Max 4 At least one qualified trustee
Registration	Registrar of Foundation  Registration process similar to companies	No registration formalities  No Registrar

# CHARITABLE PURPOSE

- Exclusive purpose
  - Relief of poverty;
  - Advancement of education;
  - Advancement of religion;
  - Protection of the environment;
  - Advancement of human rights and fundamental freedoms;
  - Any other purpose beneficial to the public in general.
- Charitable purposes and beneficiaries
- Enforcer, appointment by attorney general
- Termination; court (trust) – as per Charter (foundation)

# ESTATE PLANNING

- AVOID PROBATE AND ESTATE DUTY
- PLAN SUCCESSION
- PROVIDE FOR PERSONS WHO ARE NOT HEIRS
- KEEPING THE FAMILY JEWEL/ BUSINESS CONTINUITY
- ACCUMULATION OF INCOME FOR FUTURE GENERATION
  - MUST BE EXPRESSED
  - CANNOT EXCEED 25 YEARS WHERE TRUST PROPERTY INCLUDES IMMOVABLE PROPERTY IN MAURITIUS
  - NO RESTRICTIONS IN CASE OF FOUNDATION

# PROTECTIVE OR SPENDTHRIFT TRUST

- INTEREST OF A BENEFICIARY SUBJECT TO DIMINUTION, SUSPENSION OR TERMINATION IN THE EVENT OF THE BENEFICIARY BECOMING INSOLVENT OR HIS PROPERTY BECOMING LIABLE TO SEIZURE
- AFTER DETERMINING EVENT OCCURS THE TRUSTEE CAN PAY TO BENEFICIARY OR SPOUSE OR CHILD OR ANYONE WHO WOULD BE ENTITLED TO THE ESTATE
- POWER TO ADD OR REMOVE BENEFICIARIES
- RESTRICT ACCESS TO INFORMATION



CONFIDENTIALITY	FOUNDATION	TRUST
<b>Inspection of Documents</b>	<p>Person duly authorized by secretary or FSC may inspect file at Registrar</p> <ul style="list-style-type: none"><li>• name of the Foundation</li><li>• registered address</li><li>• name and address of</li><li>• the founder, secretary, members of Council</li><li>• the date of registration</li><li>• duration/life;</li><li>• such other matter as may be prescribed or considered appropriate by the Registrar.</li></ul>	Confidential

CONFIDENTIALITY	FOUNDATION	TRUST
<b>Rights of Beneficiary to information</b>	<ul style="list-style-type: none"> <li>• information about fulfilment of the objects of the Foundation;</li> <li>• inspect and have a copy of</li> <li>• the charter</li> <li>• the Articles, if any;</li> <li>• any audit report, including any special audit report and books of account;</li> <li>• any report on the financial position of the Foundation and the annual accounts;</li> <li>• minutes of proceedings of</li> <li>• Council meetings</li> </ul>	<p>information as to the state and amount of the trust property and the conduct of the trust administration where the terms of the trust so authorises</p>

CONFIDENTIALITY	FOUNDATION	TRUST
DISCLOSURE	<p>officer, a protector or a member of a Council can not use or disclose to any person, except</p> <ul style="list-style-type: none"> <li>• for the purposes of the Foundation;</li> <li>• as required by law;</li> <li>• where authorised by the charter or Articles, if any;</li> <li>• with the express approval of the Council; or</li> <li>• where required to do so by the Court</li> </ul>	<p>Except where ordered by the Court or a Judge in Chambers for reasons specified in section 33(3), a trustee shall keep as confidential any information to the state and amount of the trust property;</p> <ul style="list-style-type: none"> <li>• the conduct of the trust administration;</li> <li>• the trustee's deliberations;</li> <li>• the reason for any particular exercise of such power or discretion</li> <li>• the exercise of such power or discretion.</li> </ul>

## OLIVIER VIGNAUD v TEMPLE CORPORATE SERVICES (2011) SCJ 153

The husband of a deceased settlor applied to the Judge in Chambers for an order directing the trustee to disclose a copy of the trust deed.

The learned Judge considered Section 33 of the Trusts Act as well as the position in England.

Under common law in the absence of any provision in the trust deed, a beneficiary had a proprietary right see trust documents (O'Rourke v. Darbishire [1920] AC 581)

However, subsequently in the case of Schmidt v. Rosewood Trust Ltd [2003] UKPC 26 the Privy Council held –

“... Although a beneficiary’s right to seek disclosure of trust documents could be described as a proprietary right, it was best approached as one aspect of the court’s inherent and fundamental jurisdiction to supervise and if appropriate in the administration of a trust, including a discretionary trust ...”

# OLIVIER VIGNAUD V TEMPLE CORPORATE SERVICES

The learned judge held that “the court as part of its inherent discretion and general power to supervise the administration of a trust and the actions of the trustees, may authorise disclosure of the trust instrument itself or the relevant parts thereof where appropriate and subject to conditions it deems fit”

However, the application was set aside because the judge in chambers did not have jurisdiction to order disclosure under section 33(5) of the Trusts Act. Only the Supreme Court could do so

	FOUNDATION	TRUST
IMMOVABLE PROPERTY	<p>No restrictions</p> <p>Non-Citizens (Property Restriction) Act</p>	<p>Cannot hold leasehold interest whose unexpired term &lt;18 years;</p> <p>Non Charitable purpose trust cannot hold any immovable property in Mauritius</p> <p>where the trust property includes an immovable property situated in Mauritius, the accumulation period &lt; 25 years</p> <p>Prime Minister's approval under the Non-Citizens (Property Restriction) Act required for -</p> <p>(a) any transfer or vesting of an immovable property situated in Mauritius upon a trust of which a beneficial interest is held by a non-citizen;</p> <p>(b) the appointment of a non citizen as beneficiary of a trust the trust property of which includes immovable</p>

## IMHOF S. (MRS) & ANOR V BOOLAKEE I. (DR)2006 SCJ 232

- In 1985 Respondent contributed towards purchase of half the share of immovable property. He could not hold shares in his own name because he renounced his nationality to acquire German nationality. In 1996 upon resumption of his Mauritian nationality he sought to obtain the transfer in his name of his shares in the property.

**Trial judge** held that the parties intended that the land would be purchased in joint ownership and held in trust for Respondent until he resumes nationality

**Held on appeal** that the sister of the Respondent in fact held half share in the property in trust for the Respondent who was a non-citizen at that time which is prohibited by law.

## IMHOF S. (MRS) & ANOR V BOOLAKEE I. (DR)

The Court of Civil Appeal further held that title deed was a simulation and the real transaction was set out in the contre lettre. However, the agreement embodied in the contre lettre must not be prohibited by law (Cause illicite under Articles 1131 and 1133 of the civil code)

Provisions of the Non citizens Property Restriction Act cannot be circumvented by recourse to a trust or simulation.

Sale declared void. Curator directed to take possession of property and sell it!



# FORCED HEIRSHIP RULE

Restrictions on free disposal of property

- Disposable portion v/s reserved portion
- Indefeasible right to sue for fixed share
- Category of forced heirs:

➤ Descendants

Disposable portion =  $1/2$ ,  $1/3$  or  $1/4$

Surviving spouse:

- Same share as a child except if expressly excluded
- Usufruct rights on matrimonial home
- Personal assets (bien propre) v/s community

# FORCED HEIRSHIP RULE

- Determination of the estate
  - Addition of intervivos gifts into hotch pot
  - Time limitation: Germany 10 years, Japan 1 year
  - Valuation date: at donation or succession time
- Dispositions exceed disposable portion
  - pro rata reduction ; last out first in.
  - “*Préciput et hors part*” and special legacies.
- Waiver by heirs - e.g Germany
  - “*Pacte sur succession future*”

# FORCED HEIRSHIP RULE

Example: Settlor dies leaving 3 children and his wife.

Will: Rs 1,000,000 to each child and Rs 1,000,000 to stranger

Five years before death: transferred house worth Rs 2,000,000 on trusts for his mistress.

Value of house at time of death = Rs 4,000,000

Value of estate at time of death = Rs 8,000,000

Disposal portion =  $\frac{1}{4}$  of Rs 8,000,000 = Rs 2,000,000

Testamentary disposition to stranger is void.

Trustee must refund Rs 2,000,000 to the heirs.

# AUSTIN v BAILEY (1962)

Mauritian national residing in England by will left movables and immovable in Mauritius on trusts for benefit of children and grandchildren. Heirs attacked the will.

HELD:

The trust was valid so far as they related to the *quotité disponible* but null and void in so far as it relates to the *réserve* of the heir.

Lex Succession is:

Immovable assets      lex situs

Movable assets      lex domicilii

# NON CITIZEN SETTLOR

## ▶ Section 7(6) Trusts Act

(6) The transfer or disposition on trust of property situated outside Mauritius, which if it had taken place in Mauritius would constitute a valid transfer or disposition of the property under this act, shall not be declared void or invalid merely by reason that it contravenes the applicable law of the transfer or disposition, or the law of the transferor's domicile or nationality

# NON CITIZEN SETTLOR

## ➤ Section 8(4) Trusts Act

Notwithstanding any enactment, where a non-citizen transfers or disposes of property on trust, the transfer or disposition **shall not** be set aside, avoided, or otherwise declared invalid or ineffective by virtue of any rule or law of his domicile or nationality relating to inheritance or succession or any rule or law of a similar nature, or any rule or law restricting the right of a person to dispose of his property during his lifetime so as to preserve such property for distribution at his death, or any rule or law having similar effect.

# NON CITIZEN FOUNDER

## ➤ Section 4(3) Foundations Act

(3) Notwithstanding any other enactment, where a non-citizen endows property to a foundation, the transfer shall not be set aside, avoided or otherwise declared invalid or ineffective by virtue of any rule or law –

(a) of his domicile or nationality relating to inheritance or Succession or any rule or law of a similar nature;

(b) restricting the right of a person to dispose of his Property during his lifetime so as to preserve the Property for distribution at his death, or any rule or law having similar effect

# NON CITIZEN SETTLOR

## ► Section 11 Trusts Act

Notwithstanding any rule or law relating to enforcement of judgments given by the court of another jurisdiction, where the law of Mauritius is the proper law of a trust, the court shall not vary it or set it aside or recognise the validity of any claim against the trust property pursuant to the law of another jurisdiction or the order of a court of another jurisdiction in respect of –

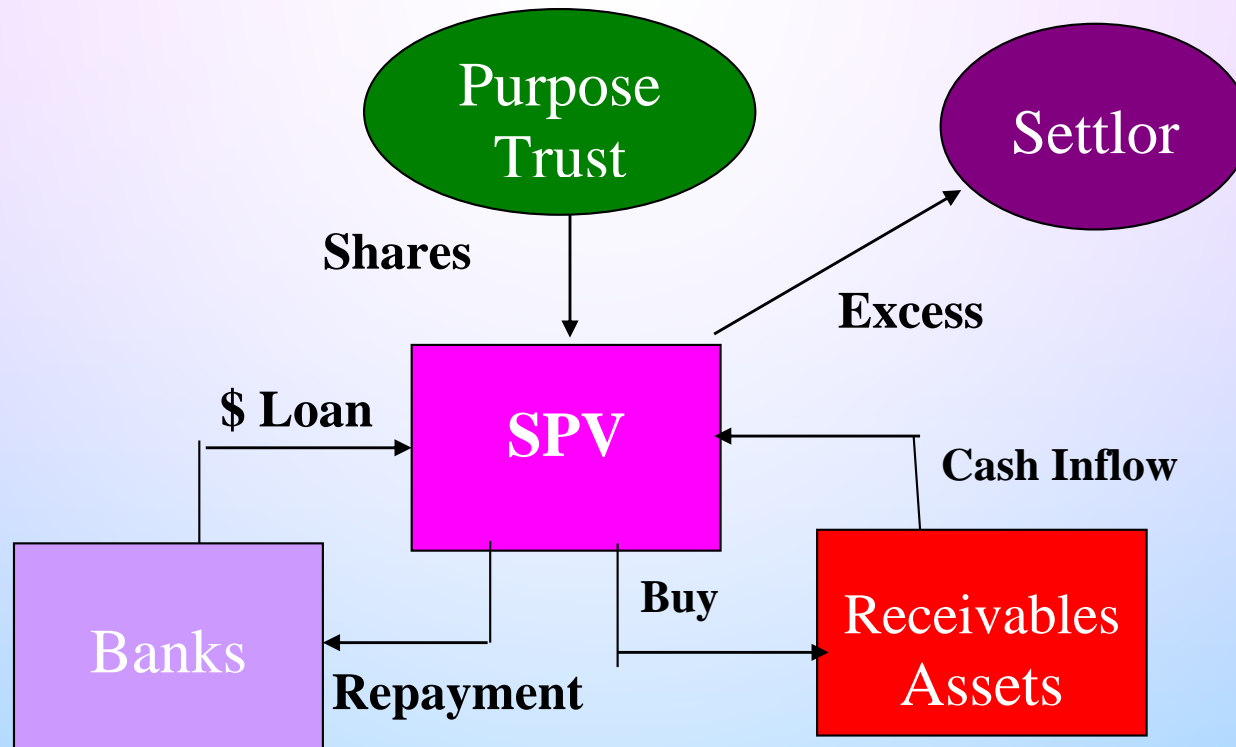
- (a) the personal and proprietary consequences of marriage or the dissolution of marriage;
- (b) succession rights (whether testate or intestate) including the fixed shares of spouses, ascendants and descendants or relatives; or
- (c) the claim of creditors in an insolvency



# ASSETS PROTECTION TRUSTS

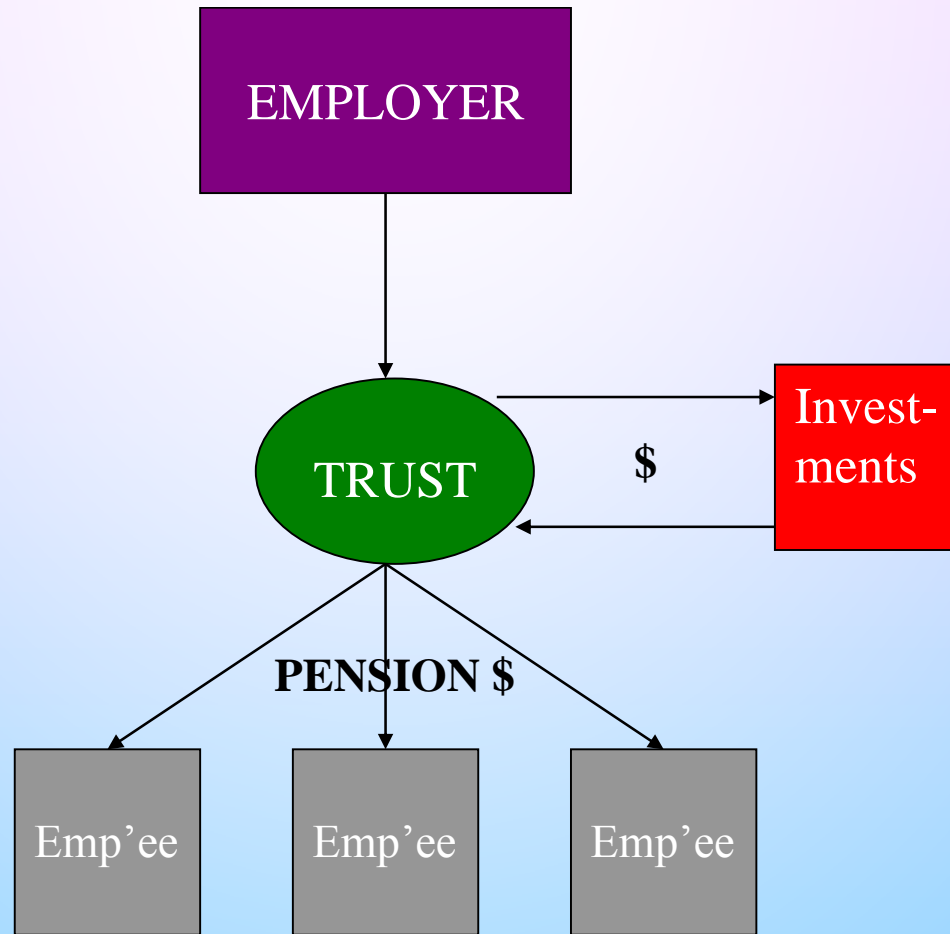
- Trust assets separate from settlor's assets
- Protection against attack from creditors and spouse
- Trust may be avoided if settlor become insolvent
- Court may declare trust void if trust made with the intent to defraud creditors of the settlor at the time when trust property vested in trustee. Action must be brought within 2 years of the date of transfer or disposal where the settlor is non citizen not domiciled in Mauritius (Section 11 Trusts Act)
- No comparable clause in Foundations Act
- Must be planned carefully. *Federal Trade Commission v affordable media LLC and other* (the “Anderson case”)

# STRUCTURED FINANCE



- **Off Balance Sheet**
- **Bankruptcy Remote**

# PENSION TRUSTS STOCK OPTION SCHEME



# CHALLENGES

- Is there a true trust in form and substance?

Did settlor retained full equitable ownership?

Is the trust a sham?

Letters of wishes

Drafting


Section 8(2) Foundations Act

Charter can reserve rights and powers for the founder

# UNDER ATTACK

- FINANCIAL ACTION TASK FORCE
  - Grey list
  - Beneficial Owners
- BASE EROSION AND PROFIT SHIFTING (BEPS)
- FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA), COMMON REPORTING STANDARD, EXCHANGE OF INFORMATION





Better safe  
than sorry



*Thank You*