

1. EXPRESS TRUST

1. [X] may hold (property) on express trust for [Y]. In order to create a valid express trust, the trust must satisfy the 'three certainties': intention, subject matter and objects (*Kauter*). Where these are not satisfied, the trust fails. To be enforceable the trust must also meet any formal requirements. On the facts, the most contentious issues will be _____.

2. Formalities

2.1. Declaration of an interest:

2.1.1. s 53(1)(b) PLA requires that a creation of a trust the property of which is land must be manifested and proved by some writing and signed. On the facts, this requirement (is/ is not met – analyse)

2.1.1.1. It need not be created in writing.

2.1.1.2. Wording suggests that even if the manifestation is written later, the trust came into existence when it was declared (even if by parol)

2.1.2. If not land: no writing necessary

2.2. Disposal of an interest:

2.2.1. [X] wants to dispose of his/her beneficial interest in the (primary fixed trust property). s 53(1)(c) PLA provides that disposition of trusts (including equitable interests) in land or personalty (property) must be in writing signed by the owner. (is this requirement met? - analyse)

2.3. Formalities not met:

2.3.1. Because the required formalities are not met, even if the trust is meets the three certainties and is thereby valid, it is unenforceable. Nevertheless, [X] cannot then rely on the lack of formalities to avoid enforcing the trust:

Rochefoucauld

1.1 Certainty of intention

1. Certainty of intention requires that **[X]** have an intention (expressed or inferred) that **(the property)** be held on trust for the benefit of **[Y]**: **Paul**. This intention is assessed objectively: **Byrnes**.
 - 1.1. **Trust deed:** here, there is a trust instrument that clearly uses the language of trust – **(e.g. put in relevant text)** ‘to X on trust’; ‘money to be placed in trust account’: **Byrnes v Kendall**. Therefore, certainty of intention is easily satisfied.
 - 1.2. **No trust deed:** Because there is no trust deed, the court will consider the words and conduct of the parties in light of their context: **Paul**. No particular form of expression is necessary for the creation of a trust, if on the whole it can be gathered that a trust was intended: **Paul**.
 - 1.2.1. **Language:**
 - 1.2.1.1. No particular form of expression necessary
 - 1.2.1.2. The focus is on the ‘substance and effect’ of the words in context: **Paul**
 - 1.2.1.3. **Yes:**
 - 1.2.1.3.1. **Paul v Constance:** ‘the money in the account is as much yours as mine’ (last years of relationship, Constance a simpleton)
 - 1.2.1.3.2. Imperative words ‘to X on trust’, ‘money to be placed in trust account’ (**Byrnes v Kendall**)
 - 1.2.1.3.3. ‘I have full confidence’: **Palmer**
 - 1.2.1.4. **No:**
 - 1.2.1.4.1. Precatory words with no clear command – ‘understanding’, ‘request’, ‘recommendation’, ‘hope’, ‘belief’, ‘desire’ etc. tend not to give rise to an intention (unless circumstances show that it does). Is it a legal obligation imposed or a moral one?
 - 1.2.1.4.2. **Jones v Lock:** ‘I give this to baby’ – intention to give gift. An imperfect gift will not be deemed to be a trust: **Paul**
 - 1.2.2. **Conduct:**
 - 1.2.2.1. **Paul v Constance:** use of joint bank account
 - 1.2.2.2. Separate account for trust moneys: **Quistclose**
 - 1.2.3. **Surrounding context:**
 - 1.2.3.1. Characteristics of persons

1.2.3.1.1. The Court will be generous in construing [X]'s statement because he/she is a simpleton: *Paul*

1.2.3.1.2. High standard possibly expected of lawyers and business people

1.2.3.2. Elements of transaction: immediately transferring the property suggests gift, delay between conduct/words and receiving the actual property might suggest not gift

1.3. On balance, certainty of intention most likely is/is not made out.

1.4. If intention is not made out, the transfer may be construed as a gift or it may re-vest on resulting trust to the settlor

1.2 Certainty of subject matter

1. No trust can come into existence unless the something that it is a trust of is known with a sufficient degree of certainty. Certainty of subject matter requires that the property of the trust be identified with sufficient precision: *Palmer*.

1.1. **Clear trust property:** here, the (trust property) is clearly the trust property. The trust subject matter is sufficiently certain.

1.2. **Unclear trust property:** (trust property) may not be sufficiently certain. (analyse to other cases)

Insufficiently certain	Sufficiently certain
<ul style="list-style-type: none"> • 'What remains of it': <i>Sprange v Bernard</i> • An undifferentiated portion of a parcel of shares: <i>Herdegen</i> • An undifferentiated portion of a deposit in a bank account: <i>Re Appleby's Estate</i> • 'the bulk of my estate': <i>Palmer</i> <ul style="list-style-type: none"> ○ 'Bulk' has no legal meaning – popular meaning is 'greater part' • Mere expectancy 	<ul style="list-style-type: none"> • 'One of my flats': <i>Re Golay's Will</i> • 'Reasonable income': <i>Re Golay's Will</i> <ul style="list-style-type: none"> ○ sort of objective question court answers frequently • 5% of my shares: <i>Hunter v Moss</i> <ul style="list-style-type: none"> ○ Shares are intangible and fungible • Residuary clause: 'the rest of my estate' <ul style="list-style-type: none"> ○ Court can determine trust property by looking at disposition in context of previous dispositions: <i>Palmer</i> (obiter)

	<ul style="list-style-type: none"> • Future acquired property if promised for good consideration
--	---

1.3. On balance, (trust property) is most likely sufficiently/not sufficiently certain.

1.3 Certainty of objects

1. (** if purpose trust go to purpose trusts**)
2. Certainty of objects requires that the beneficiaries of the trust are certain: **Re Gulbenkian's**. Here, the trust is a ((i)fixed trust; (ii) discretionary trust; (iii) mere power) because (the trustee (i) does not have discretion; (ii) has discretion as to when payment will be made, who in a definite class of beneficiaries will receive it, and the amount of such payment, but he/she is bound to make the payment; (iii) has no obligation to exercise the power).

2.1. Fixed trust:

2.1.1. The test for a fixed trust is list certainty: whether the trustee can make a full list of the beneficiaries of the trust: **Kinsella**

2.1.1.1. This requires evidentiary certainty.

2.1.1.1.1. **Yes:** all people in my grade 6 class: everyone can be identified

2.1.1.1.2. **No:** all blood relations: can't list everyone

2.1.1.2. And conceptual/linguistic certainty:

2.1.1.2.1. **Yes:** all grade 6 class is certain

2.1.1.2.2. **No:** what is a 'blood relation'?

2.1.1.3. **West v Weston:** Young J softens test to 'substantial majority' where no reasonable enquiry can be made to ascertain more member.

Note the shortfalls of this test – if don't know how many, how can we know if we have a majority (see **Creighton**)

2.1.1.4. Mere evidentiary difficulty in ascertaining identity of members is not enough; courts are able to resolve difficulties: **Re Gulbenkian**

2.2. Discretionary trust:

2.2.1. **McPhail** decided that the test for a discretionary trust is ‘criterion certainty’.

Discretionary trusts may also be subject to ‘loose class requirement’, or administrative workability: **McPhail** per Lord Wilberforth

2.2.2. Criterion certainty requires that the class of objects is defined sufficiently to enable a court to determine whether a particular person is in or out of the class (**McPhail**)

2.2.3. Here, (**relevant class**) is like (**analogue to cases**):

Conceptually Ambiguous	Conceptually OK
<ul style="list-style-type: none"> • Old friends: Re Gulbenkian • All residents of Greater London: McPhail <ul style="list-style-type: none"> ○ Conceptually ok but would fail for administrative unworkability • Organisations for raising the standard of life: Re Blyth <ul style="list-style-type: none"> ○ Also administrative unworkability ○ ‘in the trustees opinion’ won’t save the trust 	<ul style="list-style-type: none"> • Employees, or relatives and dependants of employees: McPhail • Organisations for the elimination of war: Re Blyth • Any person who ‘housed G’, ‘taken care of G’, ‘employed G’, ‘lived with G’: re Gulbenkian <ul style="list-style-type: none"> ○ Even if a decision of the court is required for each and every beneficiary so long as the court can decide then the trust will be certain ○ Does not fail simply because it is impossible to ascertain every member of the class

2.2.4. On balance, a court **could determine/would have difficulty in determining** whether *any given individual* was inside the class

2.2.4.1. Note however in **Blyth** the uncertain class was severed.

Nevertheless, this decision has been highly criticised, not least because it did violence to the settlor’s intention. For that reason, it is unlikely that this would be followed.

2.2.5. The loose class/ administrative workability requirement may apply where the meaning of the class is clear but the class of objects is so hopelessly wide that it is not to form anything like a class: **McPhail** per Lord Wilberforce. Some decisions indicate that this requirement forms part of our law in Australia (**Blyth**) but **Horan** ignored it (obiter).

2.2.5.1. (**analyse – is the class too wide?**)

2.2.5.2. If it is part of our law, the effect may be _____. If not, then _____.

2.3. **Mere power:**

2.3.1. *Re Gulbenkian* stands for the proposition that criterion certainty is required of objects of a mere power— see above

2.3.2. **NOTE:** no administrative workability test (don't need wider and more systematic survey because power doesn't have to be executed)

3. For the preceding reasons, **[X]** most likely holds/does not hold (**property**) on trust for **[Y]**.