

I. EXPRESS TRUSTS

How was the trust created?

- Testamentary (aka in a will)?
- *Inter vivos* (ie via a trust deed or an oral agreement)?

Were all formalities satisfied?

- If the trust deals with land then it must be in writing (s53(1) *Property Law Act*)
 - Must be manifested and proved by writing, signed etc
 - Can take the form of notes from third parties that the settlor signs
 - Need not be *created* in writing (
- If the beneficiary is dealing with their interest under a fixed trust then it must be created in writing (s53(1)(c) *Property Law Act*)
 - Applies to land and personal property
 - Some controversy over whether a sub-trust must be created in writing
 - Is B making a new trust or dealing with the subsisting/head trust?
 - If new trust then it comes within the requirements of (b)
 - Need writing only for land
 - If its a disposition of an existing equitable interest then it falls under (c)
 - Requires writing for land and personal property
 - If the trustee of the head trust is administering the sub-trust then it might be the same trust
 - However if the formal requirements are being used as a 'cloak' to commit fraud against someone then that person will be excused from having to satisfy the formal requirements (*Last v Rosenfeld*)

NOTE: No writing requirements for the creation/operation of resulting, implied or constructive trusts
--

What kind of trust or power is it?

- Fixed trust?
 - The Trustee has no discretion as to how to distribute the trust property – determined by the trust instrument
 - The interests of the beneficiaries are fixed
 - The beneficiaries even before the distribution is made has an equitable/proprietary interest in the trust asset
 - The interest arises as soon as the trust has been created
 - They can deal with that property interest in the market and elsewhere
 - They can write a will and will it away
 - The beneficiary has an equitable right to complain to the Court if the trustee fails in their duties
- Discretionary/trust power?
 - The trustee must distribute the property but has a discretion on how to distribute
 - The trustee is not dictated to as to how to distribute the trust property

- Mere/bare power?
 - The trustee has the power to decide how to distribute AND whether to distribute
 - Taker in default: if the trustee doesn't distribute then X gets the trust property
 - The beneficiaries have no vested property right only a mere expectancy
 - Any discretionary trust can be used as protective trusts because any beneficiary doesn't have a vested property right, they only have expectant interest
 - If a beneficiary becomes bankrupt then the trustee can in their discretion elect not to give anything to that beneficiary
 - If the trust property has not been divided but the trustee has declared how it will be divided then the creditors will gain an interest

NOTE: It is a matter of construction whether something is a trust power/discretionary trust or whether it is a mere/bare power (Reid and Upjohn LJ in *Re Gulbenkian's Settlement Trusts*).
If it is uncertain discuss both.

A. Requirements for validity

a. Fixed Trusts

Is certainty of intention satisfied?

- There is no particular type of language that needs to be used (*Paul v Constance*)
- Don't need to use the word trust – General words and circumstances can show that a trust was intended (*Paul v Constance*)
 - 'This is as much yours as mine'
 - Joint deposits and withdrawals from the bank account
 - Discussion with the bank manager
- What matters is objective intention not some secret intention (*Byrnes v Kendle*)
 - The court is going to prefer the objectively manifested intention rather than the settlor's subjective intention
- If there is explicit written intention no evidence to contradict the intention manifested will be admitted – what is expressed to the world is clear
 - The text is the intention of the author
- Is it an intention to create a trust or is it 'precatory words'? (*Re Williams*)
 - Need 'imperative language' not just a wish/desire for something to happen (Lindsey LJ)
 - Language needs to be looked at in the context of the whole document/will
 - Question of interpretation – in this case the court decided that it fell on the precatory words side

Is certainty of subject matter satisfied?

- Can the property that is the subject matter of the trust be identified with sufficient certainty?
- Proprietary interests and even future proprietary interests can be held on trust

- Future property is not property but an agreement to declare a trust of future acquired property for consideration is specifically enforceable and this gives rise to an equitable proprietary interest
 - The specificity creates a proprietary interest which can be held on trust
- Equitable proprietary interest (property) can be held on trust – Happens when a beneficiary in a head trust holds their equitable interest in a sub-trust for X
- Is the trust for a charitable purpose? See Charitable Purpose Trusts

Is certainty of object satisfied?

- The objects of the trust must be defined with sufficient particularity so that the trustee knows how to exercise proper discretion when distributing
- The test is List Certainty – the Trustee must be able to make a list of the beneficiaries
- Evidence is key – evidence that a person belongs within the class of beneficiaries
- Provided that a substantial majority of the beneficiaries have been determined and no reasonable inquiry could adduce further names then the relevant test for this trust will be met (Young CJ in *West v Weston*)
 - Criticised by Creighton and hasn't been followed since
 - Under a fixed trust the Bs have a RIGHT to the trust – the CJ is essentially condoning and encouraging breach of trust against those Bs that didn't make on to the list

If one or more of the requirements are not satisfied then the property remains with the settlor

- In situations where the settlor has transferred the property to the trustee on trust for the beneficiary (in readiness of the trust), the property will result back to the settlor (settle back on resulting trust)
 - The trustee holds the property on beneficial trust for the settlor

NOTE: Requirements of certainty of intention and subject matter for trust power/discretionary trusts are the same as for fixed trusts

b. Mere Power

Is the certainty of object satisfied?

- The test is Criterion of Certainty (*Re Gulbenkian's Settlement Trusts*)
 - The class of beneficiaries must be defined with sufficient particularity to enable the Court to determine whether a particular person is or is not, on the facts of a particular time, a beneficiary
 - If the Court cannot determine whether a particular person is or is not a beneficiary, then the power will be void even when a particular person that comes before the Court is clearly within the class
 - Even when a person exists that is clearly within the class doesn't end the inquiry
 - However the power will not be void merely because it is difficult to determine the beneficiaries
 - Even if the T has to go to Court every time someone comes forward provided the Court can determine whether or not the person is within the class

- The validity of the power is determined as soon as it comes into existence
- The criterion of certainty test is mostly about the linguistic certainty of way the clause/class of beneficiaries are described
- The test for certainty of object for a mere power is not as strict as it is for a fixed trust
- The Trustee must undertake a systematic survey in order to determine who the beneficiaries are
 - Determination of the extent of the power but the survey doesn't have to be as systematic or rigorous as for trust powers

C. Trust Power/Discretionary Trusts

Is the certainty of object satisfied?

- The test is Criterion of Certainty and possibly Loose Class requirement (*McPhail v Doulton*)
- The Trustee must undertake a more systematic survey in order to determine who the beneficiaries are for trust power than for mere powers
- Criterion of Certainty: The trust is valid if it can be determined whether a person is or is not a member of the class of beneficiaries
 - Depends entirely on the linguistics used
- Linguistic and semantic uncertainty
 - There is no difference between the linguistic and semantic certainty that needs to be satisfied when it comes to trust powers
 - Distinction between linguistic/semantic uncertainty and evidentiary uncertainty
 - Evidentiary uncertainty doesn't invalidate a trust while a linguistic/semantic uncertainty might
- Loose class requirement: the meaning of the class is clear but the definition of the class is so wide that the trust is administratively unworkable
 - What's 'hopelessly wide'?
 - Where is the line drawn?
 - Loose class requirement is a requirement (*Re Blyth* – Queensland Supreme Court)
 - First time a Court said that the English tests are Australian tests
 - In *Re Blyth* the judge assumed that the loose class requirement existed but in *Horan v James* the Court implied that there is no loose class requirement because the trust was held to be invalid for wills reasons not trusts reasons
 - Uncertainty as to whether loose class requirement is an actual requirement in Australia – mention 'If there is a loose class requirement then this clause fails it but if there is no loose class requirement this clause is valid' if

NOTE: Usually if a part of clause is invalid then the whole clause fails – unusual to sever within a clause (unless it is a charitable purpose trust)
 The intention of the settlor is changed – 'violence' is done to the clause and intention