

The Three Certainties; ***Certainty of Subject Matter***

Trusts Act 1973 (Qld) s5;

Trust property-

(a) – Property settled on any trust, whether express, implied, resulting, bare, or constructive; and

(b) – Property subject to a trust or direction for sale, however arising; and

(c) – Land which is lawfully vested in any person for an estate for the person's own or any other life, or for a term of years determinable on life not being a mere lease at rent, or for any greater estate not being a fee simple absolute; and

(d) – Land in respect of which any person has, by virtue of any will, a personal licence to reside for the person 's own life, or for the life of any other person or persons, offer any lesser period.

The trust property must be certain and identifiable.

Note: If it is held to be invalid, the property will return to donor via a resulting trust.

Can the property be held on trust?

A trust can be declared for both legal or equitable, future or existing, interests where the subject matter can be reduced to a property interest. That is, the law must recognise proprietary rights in this object. If the law does not recognise proprietary rights in respect of a particular physical thing or if the rights recognised are inalienable, then they are not *prima facie* capable of constituting the subject matter of a trust.

Test

Certainty with respect to subject matter is to be determined objectively. That is, the Court ought to be able to ascertain;

- (i) what is being held on trust (identification by description); and
- (ii) in what quantity (identification by quantification).

It is sufficient for the purposes of certainty if the Court is able to ascertain what is held on trust by reference to objective standards.

In re Gohay Trusts.

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Facts; A trust of reasonable income was established by a will for the beneficiary from the income of the settlor's property.

Issue; Did the trust fail for uncertainty due to lack of clarification with respect to what constitutes a reasonable income?

Held; The gift was upheld as the court deemed that they could determine what was objectively reasonable.

C.f. *Palmer v Simmonds* - Court held that a disposition of 'the bulk of my estate' failed for uncertainty of subject matter.

The Problem of Unspecified Shares

Hunter v Moss

Facts: D was registered as the holder of 950 shares in a company with an issued share capital of 1000 shares. He orally declared himself a trustee for P, an employee of the company, for 50 shares.

Issue: Did the trust fail for want of appropriation?

Held: This was a valid trust. There was no uncertainty of subject matter as all shares were of the same class and type – that is, they are fungible.

The subject matter may be a specified number of shares of a certain class without specifying which particular shares are held on trust.

Normally, the constitution of trusts requires that trust property is to be segregated from non trust property for the trust to be valid, as in *Re London Wine Co.*

Hunter has been doubted and not followed within Australia.

White v Shortall;

Facts: The parties entered into a contract whereby D was to declare a trust over a total holding of 1 500 000 shares such that the claimant would acquire an equitable interest in 222 000 of those shares. There had not been any segregation of shares.

Issue: Did this create a trust?

Held: *Hunter v Moss* was not followed.

However, the Court reached the same conclusion following a different path. By construing the declaration of trust there as being a declaration of trust over the declarer's whole shareholding, which he held in the applicable proportions for himself and the intended beneficiary.

A more classical approach to the problem...

Re Wait;

Facts: W bought 1000 tonnes of wheat and sold 500 tons to a sub-purchaser. W went bankrupt after sub-purchasers had paid but before an issue of contract.

Issue: Did this create a trust?

Held: There was no valid trust, as it was in want of appropriation.

Note; The sub-purchasers would not have any recognised interest in the property. As such, a relief may be an action in personam for the dividend.

Re Goldcorp Exchange;

Facts: Goldcorp purchased and sold gold. Individuals would purchase gold and receive a promise that upon notice, GoldCorp would provide the purchased gold within seven days.

Held: NZ CoA decided that ANZ bank, which had a secured mortgage over all Goldcorp's assets, as the secured lender, was bound by the statements made by GoldCorp. The Privy council overturned this decision. As no gold had been appropriated, there was no beneficial interest in that property.