

EQUITY AND TRUSTS

CREATION OF EXPRESS TRUSTS

I: Is there certainty of intention?

Process of construction of the language of the trust instrument to determine the settlor's intention: *Bahr v Nicolay (No 2)*.

- **Intent:** Equity looks to intent rather than form and there are no special words required to create a trust: *Bahr v Nicolay (No 2)*
- **Imperative:** The language must be imperative and in words of legal restriction: *Hayes*
 - “trusting to her” did not create a trust: *Dean v Cole*
 - “hope, confidence, wish, belief” do not create a trust: *Hayes*
 - “in full confidence that she will do what is right” is not imperative: *Re Adams*
- **Objective intent:** inferred from the words used, and is not subjective: *Byrnes v Kendle*
 - **Ambiguity:** the surrounding circumstances will be relevant: *Byrnes v Kendle*
- **Intent inferred from relationship:** a trust can be inferred where this reflects the relationship the parties are likely to have intended: *Bahr v Nicolay (No 2)*
 - If the parties intended to protect a third-party interest, and a trust is an appropriate way of protecting that interest, then it should be inferred a trust was intended: *Bahr*
 - A trust will not be inferred merely because it would be preferable, the language must evince an intention to create a trust relationship: *Korda*
- **Intent inferred from conduct:**
 - a loan may co-exist with a trust relationship, where loan money is quarantined in a separate account to pay creditors: *Quistclose*
 - a ‘Quistclose trust’ will not be inferred where it would be inconsistent with the contract: *Fishy Bite*
 - if a company is in financial difficulty, establishing a separate account to quarantine customer funds (thereby making creditors beneficiaries under a trust): *Re Kayford*

II: Is there certainty of subject-matter?

- any property may be the subject of a trust, but the beneficiaries must be able to identify the trust property (and their precise entitlement if fixed trust).
- A declaration of trust of 5% of shares of one class in one company is sufficiently certain: *Hunter v Moss*
 - Would lack certainty if the settlor owned shares in different companies with different classes of shares (and did not specify)
- A declaration of trust of 220, 000 shares of a total share capital of 1.5m shares is sufficiently certain. The beneficiary is entitled to an ‘appropriate proportionate part’ of the dividend, representing the 220, 000 shares on trust for the beneficiary: *White*
 - This is a trust of a fund, there is no need to discern which shares of the total 1.5m are on trust for the beneficiary/settlor (Campbell J)

III: Is there certainty of objects?

Is this a trust for persons or purposes?

- There must be someone in whose favour the court can decree specific performance; trusts for purposes other than charitable purposes are invalid: *Morice*.
 - There are anomalous exceptions (i.e. burials: *Re Endacott*, animals: *Murdoch*)
 - Trusts for purposes ‘directly or indirectly for the benefits of ascertainable beneficiaries’ are recognised in England, but not Australia: *Re Denley*

Is this a fixed or discretionary trust?

Fixed trusts and ‘list certainty’:

- A list of the possible objects must be compiled or be capable of compilation: *Broadway Cottages*
 - If it is practically impossible to create a complete list, it will be sufficient if a substantial majority of the beneficiaries can be identified and that no further reasonable enquiries could be made: *West v Weston*
 - *West* concerned trust for descendants

Discretionary trusts and ‘criterion certainty’:

Is the criterion certainty test satisfied?

- It must be possible to determine whether any claimant falls within the description of the class of beneficiaries: *McPhail v Doulton*
 - the court is concerned with ‘conceptual/semantic certainty’ and not with evidential certainty: *McPhail*
 - *Re Barlow's Will Trusts*, held “friends” was not conceptually uncertain as in this context there may be an irreducible core of friends who are indisputably within the class.
 - In *Re Baden's Deeds Trust (No 2)*, classes of “employees, officers, ex-officers and ex-employees” were conceptually certain. Classes of “dependent” and “relatives” were also conceptually certain, even though there may be evidential uncertainty.

Is this a trust for a valid charitable purpose?

- **(1) Does the purpose fall within one of the charitable ‘heads?’:** (i) relief of poverty, (ii) advancement of education, (iii) advancement of religion and (iv) trusts otherwise for the public benefit: *Pemsel*
- **(2) The purpose must be for the public benefit:** *Pemsel*
- **Is this for the advancement of religion?:** religion is given a very wide meaning and requires a belief in a supernatural being, codes of conduct to effect that belief and the religion need not be monotheistic: *Church of the New Faith*
 - Includes scientology: *Church of the New Faith*

Is the purpose charitable under head (iv)?

- The purpose must be beneficial to the public and fall within the spirit of the preamble to the *Statute of Elizabeth 1601*: *Pemsel*
- **Administration of justice:** Law reporting by a not for profit company in is a charitable purpose for the public benefit within the spirit of the preamble as it supports the administration of justice: *Incorporated Council of Law Reporting*
- **Political purposes:** In England, a ‘political purpose’ is not charitable: *Bowman*.

- This approach is rejected in Australia, as it is an incident of our system of representative and responsible government: *Aid/Watch*
- Advocating for a change in the law (i.e. foreign aid) has a public benefit: *Aid/Watch*

Is the purpose for the 'public' and is there a discernible 'benefit'?

- **Is the class sufficiently "public"?:** if the class is linked by blood, contract, family, association membership or employment they do not constitute the public or an important class of the community: *Oppenheim*
 - This question is construed narrowly, given the wide benefits/exemptions given to charitable institutions (Lord Simonds)
- **Is there a capricious limitation?:** a trust subject to unreasonable/artificial limitations is not for the public benefit as it would lead to absurdity: *Davies v Perpetual Trustee*
- **Flexible approach to poverty:** poverty is an exception to *Oppenheim*; a trust for the aid of impoverished company employees is charitable: *Dingle v Turner*
- **Advancement of education:** a trust for the education of children at a Masonic school is not sufficiently public: *Thompson*
 - A trust for educational research is valid: *Hopkins*
 - Endowments are valid: *Yates*
- **Making of profits:** this does not prevent the purpose from being charitable, if profit is used solely for the charitable purpose: *Word Investments*

Is the non-charitable purpose incidental or capable of severance?

In NSW, a trust for both charitable and non-charitable purposes is saved by s 23(1) *Charitable Trusts Act 1993 (NSW)* if the charitable/non-charitable purposes are severable.

- **Severance:** the non-charitable purpose may be severed from the trust: s 23
 - Whether severance is possible, depends on whether the trust pursues singular or multiple objects: *Leahy*

- A 'benevolent or charitable' purpose was void for uncertainty (although saving legislation may have led to different outcomes): *Chichester*
- A trust for the 'order of nuns' was too uncertain to be a charitable purpose, but was saved by s 23: *Leahy v A-G (NSW)*

At common law, a trust for both charitable and non-charitable purposes is invalid (*Morice*), unless the non-charitable purpose is incidental to a valid charitable purpose: *McMullen*.

Incidental: a trust for the promotion of sport was incidental to the advancement of education: *McMullen*

- The incidental purpose must be ancillary to the dominant purpose: *Centrepont*

Does the cy-pres jurisdiction apply?

- If the purpose of the charitable trust is impossible, impracticable or illegal, the funds may be applied by the court to objects as near as possible to the settlor's original intention: *A-G v Perpetual Trustee*
- **General charitable intention:** the property can only be applied cy-pres if the settlor expressed a general charitable intention;
 - this intention is presumed, unless there is evidence to the contrary: s 10(2)

IV: Is the trust completely constituted?

Statutory Writing Requirements

- **Wills:** A trust may be created by will if made in writing, signed by witness: s 9 *Wills Act 1968 (ACT)*
- **Interest in land/already existing equitable interest:** may be created inter vivos: s 23C *Conveyancing Act 1919 (NSW)*/ s 201 *Civil Law (Property) Act 2006 (ACT)*:
 - S 23C(a)/ s 201(1) requires dispositions of an interest in land to be signed and in writing
 - A disposition of an interest in land is effective if it can be 'manifested and proved' in writing: s 23C(b)/s 201(2): *Sec Dept of Social Security v James*
 - A disposition of an equitable interest in realty or personalty already in existence

must be in writing and signed by the settlor: s 23C(c)/ s 201(3): *PT Ltd v Maradona*

- A partly performed oral contract for the sale or transfer of land may be enforceable in equity.
- *All* other trusts may be created orally.

Rule in *Milroy v Lord*

- The transfer is effective in equity if the settlor has done everything, which according to the nature of the property, was necessary to be done *by the settlor* to complete the trust: *Milroy v Lord* as modified in *Corin v Paton*.
 - If the beneficiary has given *consideration* for the settlor's promise to settle property on trust, then equity will grant specific performance of that promise
- In *Milroy v Lord*, the trust failed as the transfer of shares was not effective under the company constitution. It was argued the trust was also effective as a declaration of trust—if the trust was intended to operate as a transfer, cannot operate as a declaration.

V: Is the trust void for illegality?

A trust which contravenes the policy of the law is invalid: *Ebeck*

- A trust which disturbs the sanctity of marriage: *Ebbeck*

Property under a trust for an illegal purpose which has not been carried into effect can be recovered: *Wright*

- An intention to defeat creditors which has not resulted or defrauded any creditors did not prevent recovery: *Wright*

Property under a trust for an illegal purpose can be recovered if the claim can be substantiated without pleading the illegal purpose: *Nelson v Nelson*

- In *Nelson*, the presumption of advancement was rebutted notwithstanding the illegal purpose to cheat a housing scheme. Given the statutory context, Mrs Nelson was ordered to repay the subsidy to the Cth and could be liable for other offences.