

TOPIC 2 – EXPRESS TRUSTS CHECKLIST

Remember your general framework: 1) Is there a trust?
2) Has there been a breach? 3) Remedies for breach of trust?

Step 1 – Formalities

Rule

- **Section 53(1)(b)** - Under this section of the *PLA*, a declaration of a trust respecting any land or any interest must be manifested and proved in writing, and signed, to be valid
 - Trust need not be created in writing → it can be created orally but in some point in time, it has to be reduced to writing to be valid
 - Writing must be signed by some person who is able to declare such a trust
 - Land includes house, pls!
 - *'The disposition meets the formalities requirements under s.53(1)(b)'*
- If not land → No writing necessary!
- **Section 53(1)(c)** – Under this section, a **disposition** of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person
 - This section will only apply if the disposition relates to an equitable interest which existed prior to the deposit
 - E.g. if declaring a trust over a pre-existing interest in a house or bank account – you have a right in equity in declaring that trust

Reminder: If you are dealing with a will/testamentary trust, relevant point in time considering what the will says is when X dies. Things that took place after the will was drafted and before they died can be taken into account.

CERTAINTY OF INTENTION

Rule: Certainty of intention will be met if X, **by his/her words and conduct**, manifested a sufficiently clear intention to create a trust to benefit Y at the time that the trust was declared (*Byrnes v Kendle*; *Paul v Constance*).

- Court will consider the words and conduct of the parties in light of the context of the transaction (*Paul v Constance*)
- Substance over form inquiry, focus on the intention of the settlor objectively ascertained (*Paul v Constance*)
 - *Paul v Constance* – Case tells us sufficient evidence: the unsophisticated character of C, the words he repeated ('the money is as much yours as mine'), conversation with the bank manager and joint use with Ms Paul → There appears to be a declaration of trust
- **NB – Hypo example:** if you find a note contradicting the will – Consider this from the perspective of whether or not X had already given his interest to Y at the time he/she died, such that it should not have been given to Z (and that trustees would have been in breach of trust by doing so)

✓ Language

- No need to use the word 'trust'

- **Paul v Constance** – ‘the money in that account is as much yours as mine’ was reiterated by Mr Paul to Ms Constance for years
- Imperative words with clear command are strong – ‘to X on trust’, ‘money to be placed in trust account’
- The most recent HC authority, **Byrnes v Kendle**, states that subjective intention is irrelevant (cf. *Joliffe*)
 - *Byrnes* does not just apply to a written trust document – applies to any declaration of trust (e.g. oral declaration)
 - *Byrnes* essentially overrode *Joliffe’s case* – French CJ approved of Isaac’s dissent in *Joliffe* who stated that ‘An open declaration of trust...is an expression of intention that is final and beyond recall’
 - Objective intention refers to what the terms would convey to reasonable person having all the background knowledge of the surrounding circumstances
 - Q: do the terms that were used by the settlor convey to a reasonable person that a trust was intended to be set up?

✓ **Conduct**

- **Paul v Constance** – use of joint bank account

✓ **Surrounding context**

- Characteristics of parties
- **Paul v Constance**: ‘They were simple people’ who did not know the law
- There may be a higher standard suspected of lawyers or business savvy persons might be more difficult to convince a trust has been validly created if you purposely don’t use those terms such as ‘trust’. However, recall it is substance over form

CERTAINTY OF SUBJECT MATTER

Rule: For certainty of subject matter to be met, it must be possible to clearly identify the property which is the subject matter of the trust (**Palmer v Simmonds**; **Re Golay’s**; Dal Pont)

- If trustee/court need to undertake certain inquiries, that is okay! Subject matter just has to be ascertainable
- The only thing we cannot have – Expectancies

If there is an issue as to subject matter:

- Is it fungible? (**Hunter**)
 - E.g. if not → ‘The subject matter is not fungible, therefore Salvatore needed to specify which house he intended to give (**Hunter**).’
 - NB: *Hunter v Moss* has been inconsistent with GE Dal Pont. Problems can still arise with certainty of subject matter when dealing with intangibles such as shares, money or debts
- Is there any “yardstick” that the Trustee/s or the Court could apply? (**Re Golay’s**)
 - ☺ ‘Receive reasonable income’ satisfied certainty of subject matter (**Re Golay’s**)
 - The phrase reasonableness is often assessed by the courts – a court would have no difficulty in quantifying reasonable income

- No difficulty if the words used are capable of being interpreted with certainty by the court – e.g. where objective criteria for the calculation of the quantum are available (*GE Dal Pont*)
- Usually a requirement that a quantum of trust has to be able to be objectively assessed
- ☹️ ‘The bulk of my residuary estate’ was NOT sufficient to ascertain the subject matter (*Palmer v Simmonds*)
 - My residuary estate would have been fine, residue is sufficiently ascertainable
 - ‘Substantial’ is most likely problematic, can’t attach a meaning
- If there is a statement as to the intended subject matter – state ‘*The precise position in trust law of what use we can make use of this kind of evidence is unclear. This may be evidence that the court might take into account in determining that X is supposed to be the disposed trust property.*’

CERTAINTY OF OBJECTS (BENEFICIARIES)

Rule: Where a trust is for persons, the persons whom the trust is for must be known with sufficient certainty before it can be said that the trust is valid.

Recall beneficiary principle: There always has to be someone to enforce the trust.

Framework: The requirements for certainty of objects depends on the type of trust.

STEP 1: What type of Trust?

- Fixed trust or discretionary trust?
 - Fixed trust → List certainty
 - List certainty → Conceptual and evidentiary uncertainty
 - Discretionary trust → Criterion certainty
 - Criterion certainty → Conceptual and evidentiary uncertainty

STEP 2: If you meet either list certainty or criterion certainty → Go onto other reasons why the trust might be in trouble: Secondary tests like administrative unworkability or capriciousness

- Secondary trusts could hypothetically apply to fixed trusts but unlikely
 - Capriciousness won’t
 - Creighton says administrative unworkability never a problem for fixed trusts
- If you’re dealing with criterion certainty for discretionary trusts – the two tests will apply but they will apply differently if you have a trust power or mere power

Step 1:

- ✓ If fixed trust (trust in which each share of each beneficiary is to receive is set out by the trust) → List certainty rule is applied (affirmed by HC in *Kinsela v Caldwell*, with *West v Weston* as an outlier) – Trustees must be able to make a complete list of beneficiaries for a fixed trust to be valid
 - Potential problems:
 - Conceptual uncertainty: Criteria of eligibility can be so vague, impossible for trustee to determine who should be on the list → TRUST WILL FAIL

- Evidential uncertainty: Practical problems in constructing list. Trustee won't immediately know first, but they will be able to take steps → (As long as there is conceptual certainty) lack of evidential certainty will usually not be fatal to a valid trust
 - E.g. Trustees can apply to court for assistance in dealing with evidential uncertainty
 - ☹ Example where it's too difficult to find everyone – list of all blood relations
- ✓ If discretionary trust (trustee has discretion on how to distribute to beneficiaries) → Criterion certainty rule
 - Rule: Criterion certainty - Class of beneficiaries has to be defined with sufficient particularity to enable the trustee or the court to determine on the facts, at any particular time, whether a person falls within a particular class (*Re Gulbenkian's*; *McPhail*)
 - Unnecessary to be able to compile a list of all members of the class (*McPhail*)
 - Potential problems:
 - Conceptual uncertainty: Criteria of eligibility can be so vague, impossible for trustee to determine who should be on the list → TRUST WILL FAIL
 - Evidential uncertainty: Practical problems in constructing list. Trustee won't immediately know first, but they will be able to take steps → (As long as there is conceptual certainty) lack of evidential certainty will usually not be fatal to a valid trust
 - E.g. Trustees can apply to court for assistance in dealing with evidential uncertainty
 - ☹ Example where it's too difficult to find everyone – list of all blood relations
- Is it a trust power or mere power?
 - Trust power – T must distribute to whoever they choose in what proportions they choose.
 - In *McPhail* – Donation stipulated that '*The trustees shall distribute*' – indicates that disposition must be made; '*at their absolute direction*' relates to how they distribute
 - Mere power/bare power – T may distribute to whoever they choose in what proportion they choose, no obligation to distribute.
 - Trust powers
 - Rule: There is now a body of authority in intermediate courts to suggest the acceptance of the *McPhail* test in Australia (that only criterion certainty is needed), even though the HC has not said so.
 - *Horan v James* (NSW CoA) – 'Anybody in the world except my ex wife' – court unanimously agreed that the trust power was not uncertain, Glass and Mahoney expressly applying *McPhail*. Hybrid trust

- *Re Blyth* (Supreme Court of Qld) – ‘Such organisations as...in the Public Trustee’s opinion are working for the elimination of war and...such organisations as in the Public Trustee’s opinion are formed for the purpose of raising the standard of life throughout the world’
 - Thomas J found first part as valid – criterion sufficiently certain to say of any organisation whether it was in the class or not
 - Found second sub-class lacked conceptual certainty, and would have failed on either test
- ☹️ *Re Gulbenkian’s* – “My old friends” insufficiently certain