

Express Trusts

1. Formal requirements:

- inter vivos trusts for land must be evidenced by writing and signed s53(1)(b) Property Law Act (can also be done by his agent)
 - Acknowledge s53(1)(a) is not relevant for our purposes, (b) takes precedents otherwise it would be otiose (*DSS v James*)
 - *DSS v James*: There is no requirement as to the form of writing; terms of the trust must be manifested and proved by written evidence. Oral evidence can clarify written terms.
 - Writing can occur after the trust is created or declared and can use a combination of documents (*DSS v James*)
- disposition of subsisting equitable interest in land or personalty must be in writing signed by owner s53(1)(c) Property Law Act
 - When a beneficiary wants to assign trust to someone else – a sub-trust
 - If a client's assignation of an existing trust would fall for informality, argue a new trust of the same subject matter (Professor Ford)
 - This section only applies only to dispositions of trusts subsisting at the time of disposition. Can argue that the trust is in fact new and a different one to the existing one.
- Exception: Equity will not allow a statute to be used as an instrument of fraud:
 - *Last v Rosenfeld*: Can't rely on unenforceability to defraud the beneficiary. → note the special circumstances of the case, close relationship and confidence

2. Certainty of Intention

- Rule: Settlor's intention to create a trust must be clear (*Paul v Constance*) and is to be ascertained objectively (*Byrnes v Kendle*).
 - Need intention to hold property for the benefit of another. (*Paul v Constance*)
- Language used: Do not need to use the legal language or concept of ET to create an ET. Language required is very flexible. (*Paul v Constance*)
 - 'The money is as much yours as it is mine' + use of the bank account as if it were joined. + He asked how she could access the account + other features of the relationship = intention to create an express trust. (*Paul v Constance*)
 - Note with *Paul v Constance*: de facto in the 1977 – told not appropriate to have a joint account and bank teller was a witness to the desire to have a joint account.
- Objective intention: Subjective intent of parties is inadmissible. (*Byrnes v Kendle*)
 - Even when settlor still alive look to the objective intent. (*Byrnes v Kendle*)
 - An intention objectively expressed, is not subject to later declarations of contrary subjective intention: it is an 'expression of intention that is final and beyond recall. (*Byrnes v Kendle*)
 - *Byrnes v Kendle*: Husband – deed that holds half a house for wife on trust, later breakup and he says he never meant it.
- Precatory (wishing) words do not create a trust: (Re Williams)
 - *Re Williams*: W leaves estate to wife and 'Full confidence that she will leave his and hers life insurance policy to their daughter' – not sufficient intent to create a trust. Only a wish, no command.
 - Words such as 'trust', 'confidence', 'hope', 'wish' do not necessarily create a trust. Question is objective intention.

3. Certainty of Subject Matter:

- Rule: Trust cannot be enforced unless trust property can be clearly identified.
 - Subject matter of the trust must be legally recognised property – real or personal, or specifically enforceable choses in action (bank funds, shares etc.). (For example, not information like in *Farah Constructions*)
 - ‘bulk of my residuary estate’ is not clear enough (*Palmer v Simmonds*)
- If shares in play:
 - *Hunter v Moss*: percentage of shareholding is sufficiently certain to constitute the subject matter of a trust. Specific number and company indicated.
 - 950 out of 1000 shares in a company, one type only. M agreed to give 5% to H and did not. Was held to be specific enough. The company was specified and only one type of share.
 - *White v Shortall*: 220 000 shares of Unitract shares held on trust – specific enough. The shares were not numbered and held as an unspecified bundle of shares. Do not need to identify each share. (but they were all the same, query if it would be so if different classes of shares).

4. Certainty of Objects:

- Guiding quotes:
 - In a sentence, there is no trust over which the court cannot assume control. – Lord Hudson in *McPhail*
 - It is the Court’s duty to find and uphold the parties’ expressed intentions if at all possible without doing violence to the language. – Lord Upjohn in *Gulbenkians*

i) What kind of trust is it?

- **Fixed trust:** Where beneficiaries and amounts to be distributed to them are fixed (no discretion on the part of Trustee).
 - List certainty
- **Discretionary trust:** Where the trustee is able to distribute to whichever beneficiaries they choose in whatever proportions they choose
 - I) **Trust power:** Trustee **MUST** distribute to whomever in whatever proportions she chooses. → criterion certainty and loose class requirement
 - **Note:** Wilberforce in *McPhail*: Trust powers may require a higher standard of searching for beneficiaries than mere powers given the stronger obligation.
 - *McPhail*: ‘The trustees shall apply the net income of the fund in making at their absolute discretion grants...in such amounts and at such times and on such conditions as they think fit’ to “employees and officers” → Trust power – because ‘shall apply’ is separated from the ‘absolute discretion’. The discretion is about how much and to whom (in *Gulbenkian* it was an absolute discretion)
 - II) **Mere power:** Trustee **MAY** distribute to whomever in whatever proportions she chooses. → criterion certainty
 - *Gulbenkian*: ‘Trustees “shall” “at their absolute discretion” “pay all or any part of the income of the property → ‘shall’ but it had ‘absolute discretion’ → that offsets the ‘shall’. The absolute discretion qualifies the shall.