TOPIC 2: CREATION OF EXPRESS TRUST

To create a valid express trust, the following elements are required:

1. Certainty of Intention - to create a trust; 2. Certainty of Subject-matter; 3. Certainty of Object - either by identifiable beneficiaries or by having a valid charitable purpose; 4. Statutory Formalities - the trust must comply with relevant statutory formalities eg. some trusts must be created or proved in writing; and 5. Constitution - the trust must be properly constituted.

TOPIC 2A: CERTAINTY OF INTENTION

"[Settlor] must have shown an objective intention to immediately create a legal arrangement within the characteristics of a trust..."

What sort of intention must be found?

There must be an intention to impose on the titleholder an enforceable equitable obligation for the benefit of another person, or a charitable purpose. The test is "whether in the circumstances of the case and on the true construction of what was said and written, a sufficient intention to create a trust has been manifested" (Tito v Waddell, per Megarry VC).

Intention is discovered by looking at all the circumstances of the case. If explicit wording is used, the relevant intention is the intention manifested by the words. The omis of showing intention lies on the person alleging a trust arose (Byrnes v Kendall).

Informal Words: No particular word is necessary to create a trust. Even without use of the word 'trust', intention to create a trust might have manifested. Evidence of circumstances can be used to support ambiguous words or statement: Re Armstrong (Although the person need not say 'I declare myself a trustee', he must do something equivalent to it, and use expressions which have that meaning' (Hervey J, Re Armstrong)).

Oral Statements and Actions: When there are no written words, the Court looks at what was said and done to determine whether there was the requisite intention. Words, actions and characteristics which may be considered relevant:

a) Where the settlor affirms on several occasions to witnesses that property is being held on trust "the money is as much yours as it is mine";
b) Where the settlor lacks sophistication and knowledge of the trust concept, and therefore cannot be expected to use the word 'trust';
c) The way in which an account is used i.e. if there are various transactions, deposits made by both parties and drawings used for joint purposes, evidence suggests a trust (Paul v Constance).

NOTE: Paul v Constance is an anomaly. Evidence of actions later in time were used to prove intention at the outset. This is not usually the case.

IMMEDIATE INTENTION: Evidence after the event will not be used to demonstrate intention upon the event, because intention must be immediate upon creation.

Intention to create a trust in the future, or a trust which will only come into effect in the future, is not binding. In declaring a trust, a settlor must give away all their entitlement to the property immediately (Hapur v Levy).

Obligation v Intention: In determining intention, there must be an inherent obligation placed on one person to hold property. When imprecise words are used, the court will look at the context of the entire document to ascertain available options other than imposition of a trust, such as a mere wish (Countess of Bective): A gift does not have words which make words are mere wishes, it requires more than a moral obligation. Property transferred belongs to the trustee, who is under no legal obligation to hold or spend it on behalf of the beneficiary (Re Williams; Cobcroft).

2. A gift on legal condition - the trustee is under an obligation to perform the condition, using the trust property for beneficiary's benefit. If the obligation goes unperformed, the gift fails (Re Gardiner; Cobcroft v Bruce; Gill v Gilb).

3. A gift on equitable condition/change - the gift does not fail if the trustee fails to meet the condition, but failing the condition, the beneficiary has a right in equity to sue the trustee (Cobcroft v Bruce; Gill v Gilb).

4. A gift on trust - the trustee has no beneficial interest and must perform their trust obligation. NOTE: Trustee obligations are not ordinarily imposed on people who can be trusted to 'do the right thing' (Re Williams). The familial relationship is an important consideration to this end, BUT a trust will usually be imposed where familial relationships are fraught, and the settlor cannot rely on familial good to transfer trust property (Chang v Tjong).

Precatory Words: "Mildly, in the fullest confidence..." In determining whether words are precatory, the Court will look at the context of the entire document. However, courts will construe words as precatory when (a) the words are incongruous with an obligation when read in the document's context, (b) the settlor does not have the right to place binding directions over property (eg. where a settlor is assigning the rights under someone else's insurance policy), or (c) the words are weak, failing to convey imposition of an obligation (Re Williams).

Cf. Chang v Tjong: Clear unequivocal and emphatic directions are not precatory, and usually convey an express intention (eg. directions to use money in such a way, and to convey left over monies elsewhere).

Equitable Conditions: "...to do with as she in her absolute discretion sees fit, but otherwise on condition she ultimately gives to..." Words expressing trustee discretion followed by strong, conditional language are likely considered equitable conditions. Equitable obligations may allow a trustee to deal with trust property for a particular purpose (eg. their lifetime) on condition the remainder is left to beneficiaries.

Equitable conditions are rights enforceable in equity. Cf. Legal Obligations, where full compliance with the gift's condition is necessary to vest the gift in the trustee losing the gift altogether (Cobcroft v Bruce; Gill v Gilb).

Legal Conditions: ‘...subject to my said son paying the sum of...’ The stronger the language used, coupled with factors such as time limits, the more likely an obligation is imposed (Re Gardiner). Conversely, weaker language is indicative of a non-legal obligation, but more a moral obligation (Re Williams). However, an obligation may be a legal condition, not a trust obligation. The relationship between the parties is relevant in determining whether trust obligations arise: testators are unlikely to impose trust obligations on people who can be expected to do the right thing (eg. family members) (Bective, Cobcroft cf. Chang).

NOTE: The court also considers the nature of the trust property to determine whether imposing a legal or trust obligation would be disproportionate (Gill v Gill - would have been disproportionate for the son to lose the whole farmland due to failure to provide the daughter with accommodation).

Written words - explicit, formal v. implicit, informal:

Formal declarations of trust, with multiple references to the term trust:

Where a trust is in writing, intention is manifested by the words used. The test is objective (cf. Jolliffe’s Case): if words are clear, formal and unambiguous, intention will be manifested. Extrinsic evidence is admissible (Byrnes v Kendall), if words used are inexplicit or informal, or the trust is orally created, the court will determine intention based on surrounding circumstances. Extrinsic evidence is admissible (Paul v Constance; Re Armstrong; Chang).

Sham Trusts: Sham trusts are trusts set up purely to defraud people. They are intended to have the appearance of a legally enforceable trust, but cannot be enforced. However, a 'sham trust' if it is intended to be a trust, albeit for an improper purpose (eg. using a trust to hide property in a Court dispute). A 'sham trust' will only be made out if it is proven, which is typically hard to prove (esp. in trusts by transfer). A settlor and trustee must have shown deceit (Lewis v Condony; cf. Jolliffe’s Case).

Contractual Terms: Trusts and contracts can coexist, but a trust cannot be interpreted in a way inconsistent with the terms of the contract.

Regardless, "the absence of a contractual intention that trust money be held in a separate fund is fatal to the imposition of a contractual intention to create a trust over said money" (Korda v Australian Executor Trustee, per Gageler J).
TOPIC 2C: CERTAINTY OF OBJECT

A trust must be in favour of definite beneficiaries, ascertainable or capable of ascertainment, or for a valid charitable purpose (Morice v Bishop of Durham). The clause ‘entitled to select such objects… as he wished’ was too broad to satisfy the test for certainty of object. There needs to be identifiable people, or a valid charitable purpose, so that there is someone with standing to sue (per Grant MR).

Trust Structures: The structure of a trust dictates the rules which must be complied with for certainty of object to be achieved. The principles below relate primarily to TRUSTS FOR PERSONS.

Fixed-interest/unit trusts: Trusts in which the beneficiaries and their shares in the trust property are specified at the time of trust creation.

Examples
1. ‘To be distributed in favour of my 3 children’ – if no more is stated, the court will assume in equal shares of 1/3rd each.
2. Paul v Constable: As nothing more was specified, the court assumed Mr and Mrs Moss equal shares.
3. Hunter v Moss: From the outset, Hunter was entitled to 5% of the shares.

Lord Wilberforce (per Lord Wilberforce)

Constable held the shares in the trust on behalf of himself and Mrs Moss in equal shares.

Test for Certainty
List certaint.
The trustee must be able to make a list identifying all beneficiaries at date of distribution

Re Bare Powers (McPhail v Doulton, Lord Wilberforce)

Rights of Objects/Beneficiaries
I) Enforcement: Court will enforce the exercise of a fixed interest trust.

II) Proprietary rights: Beneficiaries have equitable rights in the property, and can deal with their interest as they wish.

III) Standing: Beneficiaries always have standing to insist the trust is performed according to its terms.

Discretionary Trusts: Trusts in which the trustee has the power to choose between objects. A discretionary trust is achieved by the use of a power of appointment - the power to ‘appoint’ the property i.e. dispose of the trust property in favour of certain beneficiaries. The person with the power of appointment, usually the trustee, is known as the donee of the power; beneficiaries are known objects of the power; the settlor as the donor of the power; and the person who will receive the property is the power of appointment is not exercised is the taker in default (Re Hay's Settlement).

Classifying the Powers of Appointment: There are various types of powers of appointment. Each can be classified by the class of objects they are directed to, and the type of power

I) Class
1. General - the power to appoint to anyone in the world, including the donee/trustee. Is virtually indistinguishable from a gift.
2. Hybrid - the power to appoint to anyone in the world, except for a class of, or named, individuals.
3. Special - the power to appoint to anyone within specified class of individuals.

II) Typa
1. Bare/Mere Power (aka Non-Exhaustive Discretionary Trust) - the donee has the power to appoint, but is under no obligation to do so. If they exercise the power, they have discretion as to who to distribute to (within a specified class). Is 'non-exhaustive' because the trustee is under no obligation to exhaust/use up the trust fund. EG: 'S gives T land to hold on trust for such of T's children as T sees fit, and in default of appointment for the Red Cross'.
2. Trust Power (aka Exhaustive Discretionary Trust) - the donee is under an obligation to appoint the property, but has the discretion in appointing. Is 'exhaustive' because the donee must exhaust/use up the trust fund. EG: 'S transfers land to T to hold on trust and appoint within 5 years to such of S's children as T sees fit'.

Trust Powers v Bare Powers:

III) Validity -

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<thead>
<tr>
<th>Bare/Mere Power</th>
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<tbody>
<tr>
<td>General</td>
<td>Invalid</td>
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<tr>
<td>Hybrid</td>
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</tr>
<tr>
<td>Special</td>
<td>Valid</td>
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IV) Identification - how to determine whether a clause creates a trust or bare power:

1. Language used - this is the fundamental difference. The stronger (weaker) the language used, the more (less) likely an obligation is being imposed, and thus more likely a trust power. A trust power is imperative (must be exercised), a bare power is permissive (do not have to be exercised).

2. Presence of a taker in default - is conclusive of mere power: the settlor has considered the fact that the trustee might not complete the appointment, and has made provision for such circumstances. This indicates the trustee's power is permissive (Re Hay's Settlement). However, absence of a taker in default is not indicative of a trust power.

3. Time limits on appointment - generally indicates an obligation i.e. trust power. If there is no taker in default, time limits may be conclusive of trust powers. However, if there is both a time limit and taker in default clause, the taker in default clause trumps the time limit clause - takers in default are conclusive of a mere power.

4. Choice - trust powers: trustee must exhaust the fund, but will have a choice with respect to how much and to whom; and fixed-interest trusts: the trustee has no choice with respect to dispensing of trust property.

Rights of Objects/Beneficiaries - Discretionary Trusts

I) Enforcement: a) Bare power - the Court will not enforce the exercise of a bare power, but will insist the trustee periodically consider exercising. If they choose to do so, they must (a) act in good faith, (b) upon real and genuine consideration, and (c) in accordance with the purpose for which discretion was conferred and not an ulterior purpose. A trustee does not have to give reasons, but if they do, these must be examined (Kategori). b) Trust power - the Court will enforce the exercise of a trust power.

II) Proprietary rights: Beneficiaries have an initial expectancy (no rights until the trustee decides to appoint). Once the trustee appoints, beneficiaries have equitable rights and can deal with the property as they wish (assign it, sell it, declare a sub-trust etc) (Kennon v Spy, per Heydon J).

III) Standing: a) Trust power - beneficiaries have standing to insist the trustee exercise their power, but cannot insist on distribution being made in their favour. However, beneficiaries can compel the trustee to consider whether to make a distribution, and have a right to enforce proper administration of the trust (Kennon v Spy, per French CJ). b) Bare power - beneficiaries do not have to standing to enforce the exercise of the trustee's power, but have standing to insist that, if exercised, the power is exercised properly.

Obligations on Donees
a) Bare power - if the donee/trustee is a non-fiduciary holder (eg. where the trustee holds property but another person exercises discretion), they have no obligation to exercise their power, but if they choose to do so, must keep their exercise with good faith. If the donee/trustee is a fiduciary holder, they have no obligation to exercise their power, but must periodically consider whether to exercise, keeping in mind the class of objects and appropriateness of appointment; b) Trust power - donees/trustees are under a duty to survey the class of objects and adopt a strategy for selection (McPhail v Doulton, per Lord Wilberforce).

CERTAINTY OF OBJECT - Test for Discretionary Trusts (Trust + Bare Powers)

Criterion Certainty: The trustee must be able to say whether a person is inside or outside of a class described (McPhail v Doulton; Gulbenkian), and amongst whom they are entitled to select. There are 2, sometimes 3, aspects:

1. Semantic/Linguistic certainty - the meaning of the words must be clearly understood i.e. described in a way ascertainable of objective meaning (McPhail v Doulton). A trustee cannot exercise subjective discretion - there must be guidelines sufficient to allow for reasoned determination. For example, 'to all my friends' or 'to those of my friends who are worthy of my bounty' - fail this test. Failure of this first step is fatal: Trusts by declaration - invalid. By transferring - resulting trust; By will - reverts to Estate.

2. Evidentiary certainty - where it is difficult but still possible for a trustee to determine whether a person falls within a specified class (eg. 'all passengers who caught the no. 48 tram in July'), the clause will not be invalid. In such cases, the Court will inform the trustee of the evidence they can rely on (McPhail v Doulton).

3. Administrative unworkability (re Trust Powers) - where a class is semantically and evidently certain, but is so hopelessly wide or big that it cannot be considered anything like a class (eg. 'all citizens of Richmond, past and present'), the clause will be invalid (McPhail v Doulton, per Lord Wilberforce; District Auditor). The court cannot appear arbitrary or capricious in their decision making (District Auditor). Re Bare Powers: Administrative unworkability only applies to trust powers, as the Court only has to administer such powers. However, a truly capricious mere power might be void, even if it isn't administratively unworkable i.e. where the settlor has no discernible link of association with the class - eg. 'I give my trust property to anyone in the world with red hair') (Re Mussey's Settlement, per Templeman J).

Examples, per McPhail v Doulton: 'Former and current employees and officers of a firm' = sufficiently certain; 'Dependants' = someone who is financially independent and who, pursuant to an evidentiary test, is sufficiently certain; 'Relative' = blood relative; sufficiency certain; NOTE: McPhail v Doulton has never gone before the HC, but has been applied several times by superior courts and is now accepted as good law.
**Statutory Formalities** - because equity does not require writing for the formation of a trust, looking at intent as opposed to form, equity only requires the '3 certainties'. Therefore, so long as no illegality is involved, it is possible to declare a trust without writing under equity. BUT, statutory overlay requires that some trusts be created or evidenced in writing to protect against fraud, as per the **Statute of Frauds**. If the Statute is applicable and not complied with, the trust is either void or unenforceable. If it does not apply, a trust can be created orally. Current statutory formalities in Australia are as follows:

s. 53, **Property Law Act** - **Trusts**: The PLA explicitly states that it does not apply to trusts created by wills (s. 55). S. 53 only applies to the creation of express, inter vivos trusts, created of 2 ways: by self-declaration, or by transfer -

<table>
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**s. 53(1)(a) - Creation and Disposition of an Interest in Land**: Refers to interests brought into existence by granting a new interest, or disposing of an interest by moving it from one holder to another. Applies to both legal and equitable interests in land. All trusts by transfer must also meet the writing requirements of 1(a) (Adamson v Hayes, DSS v James).

**s. 53(1)(b) - Declaration of Trusts** (Manifested and Proved by some Writing): Trusts by declaration do not have to be created in writing, but can be ‘manifested and proved’ by some form of written evidence (eg. documents), signed by the trustee or their agent (Hagarty v Waterhouse). ‘Manifestation’ requires that the terms be obvious from the documents - that is, the essential terms: the 3 certainties. These can be gathered from various documents (essential terms: the 3 certainties).

**s. 53(1)(c) Dispositions of subsisting equitable interests in land**: The PLA explicitly states that it does not apply to trusts created by wills (s. 55); or (b) applying s. 53(1)(c) would permit fraud (eg. “I must request you… to pay these named charities”). Thus, it applies to (a) a beneficial interest in a trust, (b) a partnership interest, and (c) an equitable mortgage over land: (Adamson v Hayes, per Walsh & Steven JJ). This includes declarations of trust by will (eg. “I must request you… to pay these named charities”), as per Walsh & Steven JJ. Hence, the PLA does not apply to trusts created by wills (s. 55); or (b) applying s. 53(1)(c) would permit fraud (eg. “I must request you… to pay these named charities”).

**s. 53(2) Resulting, implied & constructive trusts**: “This section shall not affect the creation or operation of resulting, implied or constructive trusts.”

**s. 53(3)(a) - Creation and Disposition of an Interest in Land**: Refers to interests brought into existence by granting a new interest, or disposing of an interest by moving it from one holder to another. Applies to both legal and equitable interests in land. All trusts by transfer must also meet the writing requirements of 1(a) (Adamson v Hayes, DSS v James).

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