

## TOPIC 2: CREATION OF EXPRESS TRUSTS

A trust exists when the owner of an interest is bound, in equity, to hold it for the benefit of others or for an object or purpose permitted by law. X must prove elements on BoP (**Herdegen**, Gummow J).

### REQUIREMENTS:

- 1) The three certainties:
  - a. Certainty of intention to create a trust
  - b. Certainty of subject matter (trust property)
  - c. Certainty of object (ID beneficiary/ charitable purpose)
- 2) Constitution – prop must be properly transferred to trustee, or there must be consideration for the transfer (no issue where trust created by declaration or will)
- 3) Formalities under PLA ss 53–55

→ If testamentary trust fails, property disposed of by rest of will, or intestacy.

→ If trust by declaration fails, settlor remains owner of the property.

→ If trust by transfer fails: if prop has been transferred to trustee, trustee holds it on RT for settlor. If transfer itself has failed, settlor continues to hold prop.

### 2.1 Consequences of creating a trust

- If a valid trust has been created, beneficial interest passes to Bs, and there are **IMMEDIATE and BINDING consequences** → too late for settlor to change mind/trustee to refuse (**Mallott v Wilson**)
  - Only exception is a right to revoke in the deed (rare)
  - Court will not fail trust for want of a trustee – Mallott as settlor became default trustee.
  - *Significant consequences re split in title + arduous obligations on T – hence need +ve intention!*
- Settlor loses all rights and interests in the property unless: a) they make themselves the trustee (in which case they keep the legal title); b) they are a beneficiary (so they keep some of the equitable title); or c) they expressly reserve a right to revoke the trust.

### 2.2 Certainty of intention

#### STEP 1. Introduction

For [instrument] to be a valid ET, [settlor] must have manifested an objective intention to create an immediately operative trust per **Byrnes v Kendle**, overturning **Jolliffe**.

- 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**). *NOT GIFT OR LOAN!*
- No need for precise terms/particular words. Just need a general intention to impose on the titleholder an OBLIGATION to hold the property for the benefit of B → characteristics of a trust.
- Imperative language such as ‘**provided that**’, ‘**on condition that**’, or ‘**on trust**’, are indicative, but the facts of case must be taken into account.
- A voluntary promise to create a trust at a future time creates no enforceable rights (**Harpur v Levy**).
- Subjective intention relevant if alleged trust is a sham (**Byrnes**).

#### STEP 2. Manner of Creation

##### UNAMBIGUOUS TRUST DEED – EXPLICIT WORDS

1. [Settlor] used the explicit written words [phrase] in the trust deed, a formal document.

→ E.g. in **Byrnes v Kendle**, trust was a formal doc, executed as a deed, which made multiple references to ‘trust’ + used the technical language of a trust.

2. This is likely to amount to a clear unambiguous intention to declare a trust over [property], rendering **surrounding circs superfluous** per **Byrnes v Kendle**, overruling **Jolliffe’s Case**, preferring Isaacs J dissent.

→ Objective intention needed (c.f. subjective intention per **Jolliffe’s Case** Majority)

→ French CJ: If you have a document that says 'I hold on trust', cannot look to extrinsic circumstances to determine the contrary. Gummow and Hayne JJ: It is an objective measure. Intention is the meaning of the words the parties employed. Must be an outward expression of a trust.

**Exception:** Courts can look to surrounding circumstances if the validity of the trust is challenged, e.g. affected by undue influence/some other vitiating factor or sham trust. (*Byrnes v Kendle*)

### AMBIGUOUS TRUST

1. [Settlor / Clause] stated [facts]. This is **ambiguous** and the context/document is **informal** because [facts: alternative interps].

2. The **court may look to evidence of surrounding circumstances** to determine [settlor's] objective intention per *Byrne v Kendle*; *Paul v Constance* if oral; *Armstrong* if written.

- *Armstrong*: evidence of circs used to support ambiguous, informal **written words** ("George Armstrong in re William/Bernard Armstrong" x 2) → valid trust, as: GA didn't put in names of sons straight away (so not gift), but did name them for reason; bank manager's ev re GA's intention to hold + sons to get interest.
- *Paul v Constance*: Court held there was a manifest, demonstrated intention to create a trust for de facto lady over **bingo winnings** put in man's name. Ev = man said several times in front of witnesses to de facto **'the money is as much yours as mine'**; bank manager gave ev of trying to set up joint acct; both made payments into acct + any withdrawals used for **joint purposes** (furniture) (LATER conduct).
  - NB: Evidence after the fact may be used as was in *Constance*, although HCA has not directly supported/rejected this. Is unusual, but Court allowed as weren't any express or written words.
- NB. If no manifest intention through words/conduct, may be merely precatory words or an intention to create something else – watch out. Can be obligations without a trust!

### SHAM TRUST

1. [X] may argue the trust is a sham. Namely, transactions which appear legally effective but were not intended by the parties to have apparent legal consequences. (*Lewis v Condon*)

- Set up to intend to defraud people – meant to look like a legally enforceable trust but is not going to be enforced as one.

2. There is a presumption against a trust being a sham, so [X] must prove on BoP that the transaction was artificial + a shared (all parties) subjective intention to deceive (*Lewis v Condon*)

- Despite **improper motives** of [facts: tax evasion/hiding assets from husband + Family Court in divorce], as [Y] intended the trust to operate according to its terms, evident by [facts], it is not a sham per *Lewis v Condon*.
- E.g. in *Lewis*, the Mum intended to set up trust for her kids; was not a sham. C.f. *Joliffe's Case*, would be sham as J never intended to take effect as a trust... opened acct. under X to get extra acct only.

3. A sham does NOT create a trust as there is no intention to create a trust (*Lewis v Condon*).

### PRECATORY WORDS (i.e. mere hope/wish – c.f. impose an obligation?)

1. [Clause / settlor] stated \_\_\_\_\_ [facts].

2. These are **precatory words** and may not create a trust over [property]. Examples:

- *I leave my house to B trusting that she will pay for the children's education.*
- *I leave my antiques collection to B on condition that she pay \$50,000 to Z.*
- *I leave my house to B in full confidence that she will look after my nieces. (No imperative lang.)*

ISSUE = whether the words of hope are merely words expressing a wish, or whether they are a command but expressed in a non-imperative fashion. → ASK: A) was an enforceable obligation intended?

B) if yes, what is the nature of the obligation?

Consider:

- ✓ In each case court construes the particular provision in the **context of the whole document** (*Williams; Cobcroft*)
- ✓ It is also relevant to consider the identity of the recipient, the identity of the third party, and the nature of the property (i.e. would the result be disproportionate, e.g. losing whole farm in *Gill*).
- ✓ Nature of relationships – Wouldn't impose trustee obligations on X if X couldn't be trusted to do the right thing by B. Familial r/s was important in *Countess*. If person is NOT a blood relative/ family member, pushes towards trust obligations (like in *Chang* and *Codcroft*, c.f. *Countess*)

### STEP 3. Was an enforceable obligation intended?

**NO OBLIGATION – PRECATORY WORDS:** (mere hope or wish of the settlor/testator)

- 'Absolutely, **in fullest confidence**' she will leave proceeds of 2 insurance policies to daughter Lucy (*Re Williams*) → words merely precatory + weren't imposing obligation on wife to do X (NO TRUST)
  - Same intention re both items, but Dr W cannot give directions for wife's prop – suggests words are merely expressing a wish. Also, "in fullest confidence" are **WEAK words**, c.f. stronger imperative language like "trust" or "condition" (look more like obligation)
  - Wife had already been granted property. Only precatory. A wish. Also – **had used 'to hold on trust' elsewhere in will**. Expressio unius est exclusion alterius etc.

Other examples:

- 'it is my express wish...' – *Re Alston*
- 'trusting that she will divide equally between the children... at her absolute discretion' – *Dean v Cole*
- 'feeling confident that she will act justly to our children in dividing the same when no longer required by her' – *Mussourie Bank v Raynor*.

### OBLIGATION:

- Equitable obligations can be imposed "by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the court to ascertain what the precise obligation is and in whose favour it is to be performed." (*Re Williams* per Lindley LJ)
- "Look after her after I am gone" ... "use \$ from home unit for her" ... if any left over for Roy (illegitimate child) and mistress (*Chang*) → Palmer J held **unit held on express trust** for father with **obligations** on son to pay capital and income for mother for life, then for mistress.
  - Due to a '**clear, unequivocal and emphatic direction**' in father's letters (*despite being informal*).
  - C.f. *Countess*, cannot expect son to do the right thing by mistress + family – unlikely father would have relied on son's goodwill to pay mistress, hence achieve father's wishes by **imposing TRUST**.
- Also *Paul v Constance* and *Re Armstrong* – sufficient intention (see above).
- *Cobcroft v Bruce*: I give to my wife shares '**to deal with as she in her absolute discretion thinks fit, but otherwise on condition** that she ultimately gives those shares or the remainder thereof to my nephews'. → equitable condition per Young J.
  - Wife either had to give the shares away in her lifetime OR go to nephews upon death.
  - Can deal with shares (hence not trust obligation – opposite of trust unless she's a beneficiary), BUT "otherwise on condition" is strong language.
  - NB. Direction was to leave to HIS nephews not hers – points towards obligation c.f. precatory words as no blood relation. Can't trust her to do the right thing!

NB: **Contractual terms** (*Korda v AET*) → Gageler J: fiduciary r/s must be consistent with terms of the K (*Hospital Products*). If K says prop held on trust, it will be. If parties don't use explicit declaration, a trust will be imputed only if necessary to give legal effect to the r/s.

In *Korda*, the K said proceeds of sale could be mixed + used – opposite of a trust! Absence of K intention to keep \$ separate fatal to contractual intention to create trust.