

EXPRESS TRUSTS

(1) Three certainties; (2) Formalities; (3) Complete constitution; (4) No invalidating factors.

(1)a CERTAINTY OF INTENTION

X must have objectively intended to create a trust (*Byrnes*). This is a 'question of fact', based on the 'construction of the relevant text or oral dealings in their context' (*Korda*). No specific wording is necessary (*Armstrong*).

Can be unilateral on part of settlor: Even without consent.

Can be inferred: Intention is inferred where 'parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of ... giving effect to the intention' (*Bahr*). Is it appropriate to enforce settlor's wishes in law via a trust? (*Korda*).

Imperative: Settlor must convey an obligation on the alleged trustee in a manner that is sufficiently imperative. Imperative = demands, obligations (understanding). Precatory = requests (confidence, trusting)

Re Adams: 'I give ... all my real and personal estate to the absolute use of my dear wife, Harriet ... in full confidence that she will do what is right as to the disposal thereof between my children.'

- Does not bind H. Ordinary meaning suggests a *moral* obligation. Does not impose an obligation. No trust

Dean (HCA): 'trusting to her that she will ... divide in fair and just and equal shares between my children all such part and portion of my estate as she may be in the use and enjoyment of' + money at 'absolute disposal' of wife.

- Majority (3): Not imperative. Read doc with internal consistency: trusting to her v. *absolute disposal*. 'Trusting to her' = 'testator's confidence that his wife would make a just ... division of the property'.
- Minority (2): Imperative. 'trusting to her that she will ... divide' = 'in trust to divide'.

Hayes: Estate to daughter 'on the understanding that' she include in her will that shares be sold and donated.

- Look at context. 'On the understanding that' followed by 'a restrictive direction'. This is 'words of legal restriction', not merely a 'request or ... moral obligation'. 'no request: the testator has directed'.

Extrinsic Evidence: can be used to clarify ambiguous language in a trust (*Byrnes*). Show ambiguity.

An unambiguous objective intention cannot be countered by a secret intention known only by the person creating the trust (*Byrnes*).

Byrnes: H and W entered a document called 'acknowledgement of trust'. H testified that there was no trust.

- Document consistently used the language of a trust. Secret intention cannot defeat this. Trust created.

Jolliffe: J created bank account on trust for wife to receive benefit. Claimed he did not actually intend a trust.

- Held: Subjective intention matters, no trust created. Overruled by *Byrnes*.

Intention Solely Inferred by Conduct — Quarantine Assets in case of Insolvency

Quistclose trust refers to factual context, seeking to quarantine property if the recipient goes insolvent. (*Theatre*).

Quistclose: RR owed dividend. Written loan with Q, stated that the money can only be used to pay dividend. RR had overdraft with bank. Money placed in separate account to prevent setting off. RR -> liquidation. Bank set off. RR argued that money was held on trust for shareholders.

- The 'mutual intention' of Q and RR was to advance a sum to pay the dividend.
- Words 'only' and 'exclusively' indicate primary trust to pay the shareholders, and a secondary trust to pay Q. Words indicate money not beneficially owned by RR.

Qns: 'Mutual intention', does this exclude unilateral trusts inferred only by conduct? Lecturer thinks not.

Re Kayford: K was mail order company. Created account: 'customer's trust deposit account'. Only deposits from customers in acc. Withdrawn when goods delivered. Was K trustee for customers who hadn't received goods?

- 'The sender may create a trust by using appropriate words when he sends the money'
- 'the company may [create a trust] by taking suitable steps on or before receiving the money'
- 'Payment into a separate bank account is a useful [but not] conclusive...of an intention to create a trust'.

Fishy: R entered into partnership with F, a company controlled by A. R contributed 400k in exchange for 35% share of assets and profits. A used 400k for own benefit. R argued F held 400k on trust for the purpose of the partnership

- No trust. The mere fact property is held for a purpose does not create a trust.
- Nothing in agreement to indicate a trust. In *Kayford*, money was held separately first, indicating trust.

(1)b CERTAINTY OF SUBJECT MATTER

The assets of the trust which are to be managed must be identified with certainty.

Cannot be an expectancy: eg. 'the share of my father's estate that I will receive when he dies'.

Hunter: M promised to give H 5% shareholding in MBL. MBL had issued 1000 shares. M owned 950 of the 1000.

- Subject certain. Company only had 1000, 5% is 50. Only one class of shares.
- Criticism: Does not sit well with rules relating to sale of goods. See *White*.

White: S wrote to W saying that he held 222k shares in U on trust for W. S owned 1.5m shares in U.

- Certain. It is sufficient to know how many shares are appropriated, rather than which ones are.
- Not a single or discrete item held on trust. Thus we do not need to identify a particular item.

(1)c CERTAINTY OF OBJECTS

If the objects are linguistically or semantically uncertain, the trust is void (*McPhail*). Cannot be multiple interpretations of the class. Mere evidential uncertainty does not invalidate a trust (*Re Gulbenkian*).

In obiter, *McPhail* noted 'administrative uncertainty', where class is 'so hopelessly wide'. This is also fatal.

Purposes

Do not need to identify particular individuals. Purpose will be certain if it:

(1) Anomalous Exception: Not challengeable. (1) Care of pets; (2) Maintenance of grave.

Re Endacott: Will established trust to make a memorial for himself.

- No trust: Grave means a place where your remains are kept. The memorial was not associated with this.

(2) Charitable Purpose — Only A-G can enforce.

(1) Intention is to carry out a purpose or confer a benefit upon a class of individuals

(2) Is the purpose considered by the law as charitable?

Pemsel (UK): Charitable categories: (1) Poverty; (2) Education; (3) Religion; (4) Otherwise for the public benefit.

Religion:

New Faith: For something to be a religion: (1) must be a belief in supernatural being, thing or principle; (2) acceptance of some principles of conduct to give effect to that belief; (3) does not need to be monotheistic.

Otherwise for public benefit:

Chester (HCA): Public benefit if: (1) it's a 'public utility' 'essential' to society; or (2) analogues to *Charitable Uses Act*

- Held: Breeding carrier pigeons does not fit in these categories.

CUA: Old and poor people; care of soldiers; education; repair of bridges, ports, churches, highways; support and aid to tradesmen; relief for prisoners.

Law Reporting: Publication of law reports is essential to common law society and thus for public benefit.

- Profit is ok, so long as it is going back into the charitable purpose.
- Here, 'advancement of legal learning by publishing reports' is a public utility.

Bayside: Independent organisation of medical practitioners for the care of Melbourne. Funded by the cth.

- Organisation more than an agency of the cth. Independent management and concerned with the charitable purpose of medical treatment and care. Thus, legitimate charitable institution.

Bowman (UK): Political objectives are not for public benefit, eg. changing defn of marriage. Cf. Greenpeace:

Greenpeace (NZ): Political purpose not always invalid. Depends on end advocated and means to promote. Look at this to assess whether within the spirit and intent of the 1601 statute.

Aid/Watch: Body set up to investigate impact of Aus Aid.

- No general doctrine against political objectives. *Lange* means that purposes promoting freedom of political discussion and other constitutional doctrines are for the public benefit.
- Fact that trust performed outside Aus did not mean not for the public benefit.

McMullen: While promotion of sport does not qualify, if it is incidental to school or education it is saved.