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Creation of Express Trusts

1. Certainty of Intention. Bahr (No 2): Need 'legally enforceable obligation' idea to be conveyed.

Trust can be inferred from intention don't need the 'trust' word. Hayes: Distinguish between imperative (must do) and precatory (request/wishful). ambiguous term was used, but the testator spoke in words of 'legal restriction' and the terms laid a concrete scheme as to what should happen to the property, so the ambiguity was resolved on the concreteness of the proposal by the testator.

There was a significant restriction on how she could deal with the property, so not full beneficial ownership. Had some beneficial ownership because property was shares via dividends, but just couldn't sell them and had to deal with in a specific way in her will. Possible to be both trustee and beneficiary under same trust as long as they are not sole beneficiary or trustee. If they are they become a merger and trust ceases. Re Adams and the Kensington Vestry: Too much discretion, no real obligation, used words like "in full confidence she will do what is right as to the disposal...".

Dean v Cole: No trust.. words must be read consistently with the context. 13k was to be invested into child, but earlier clause said the 13k was at the absolute disposal of wife. So to maintain consistency, no trust. Hayes:. Korda: Trust cannot be inferred simply because court thinks it is an

appropriate means of protecting or creating an interest, court must figure out what was actually said or done by the relevant parties (French CJ) It is a question of fact whether the relevant intention exists (Gageler J). Byrnes v Kendle: The trust document had unambiguous language so a trust unquestionably existed, the husband cannot then go into the witness box and say he did not intend to create a trust. If there is unambiguous language to suggest a trust, cannot look at extrinsic evidence to suggest otherwise, but if it's ambiguous language then u can use extrinsic evidence.

Barclays Bank v Quistclose: Involved inferring intention from conduct. Money was given to RR who were in financial difficulty and had a debt to shareholders (dividend) and were overdraft with bank. RR obtained loan from Q on the condition it was used to pay dividends + money held in a separate account to prevent paying overdraft. RR went into liquidation, loan wasn't spent and B tried to take money. Court held the moment money left Q, RR was holding onto money on trust and it was agreed the loan would not become assets of RR. If cannot be used to pay dividend, the money was to be returned to Q. Once primary trust failed, a secondary trust arises for RR to return money to Q. Re Kayford: Company that let u order things from a catalogue by sending in a cheque, money was held in a separate account. K went into liquidation, the money in separate account could not be claimed by creditors, it was held on trust. Paying money into a separate bank account supports an inference of trust but is not conclusive. Re Elizabethan Theatre: Quistclose trust is an example of the particular operation of principle upon which the facts were found, not a new type of trust. Found not to be a trust, it was bequest to...it was wealthy people making gifts, it was unconditional gift, the patrons could express preference but that was not a 'only spent for a purpose' and for tax purposes it had to

be unconditional gift. Aspiration or motive not enough to give rise to trust, must be certain and explicit intention. Raufts v Fishy Bite: Found to be a business agreement and not a trust. R paid money to become part of partnership and get 35% shares and the money became part of the partnership's assets, no intention for it to be held on trust. Mere fact that money is handed over for a purpose does not establish a trust, the agreed terms of transaction were inconsistent with intention to create trust, thus no trust.

2. Certainty of Subject Matter. Hunter v Moss: declaration of 5% of share, they know the total number of shares and they were all of the same class and value, so any 5% would suffice. Person also owned necessary amount of shares Different classes may lead 5% to be ambiguous. *Critique*: should be able to identify exactly which individual shares. White v Shortfall: affirms Hunter approach, it is enough to id the number of shares because they are all the same. They are not single discrete items of property on bare trust. If bare trust, then u need to id particular asset.

3. Legal title to the trust assets must have been vested in the trustee (Complete Constitution). Not required of trustees who are also the settlor. Milroy: it will be considered complete at equity if it can be completed at law without any further action by the settlor. **Exception to incomplete constitution**: if the beneficiaries have given consideration for the settlor's promise to settle property upon trust, equity will grant specific performance of the promise. Marriage is considered consideration because it is a detriment.

4. Certainty of Objects: Morice: general description/class of objects is fine as long as persons who can benefit are identifiable, trust must have definite object in whose favour the court can decree performance. **(1) is the trust for persons or for a charitable purpose or anomalous exception?** **Anomalous exception**: apply to will for building of your own tomb or grave Re Endacott: testator sought to establish trust for memorial, but it's not tomb or grave so not exception. You must be buried there. Other exception is a trust created by ur will for care of particular animals. **Persons:** Leahy: gifting land to nuns, ruled that it was to the organisation and not the individuals (due to practicality issues and nuns not allowed to own property) so it's for the purpose of the nun organization. So must be charitable, but some nuns are not charitable, but direction was for executor to pick any order, so for both non-charitable and charitable which would usually fail the trust. But s23 of Charitable Trusts Act 1993 you can ignore non-charitable and trustee is obliged to apply to charitable nun orders only. **Is it a fixed trust?** Re Gulbenkian's Settlement trust List certainty test West v Weston: lowered the list certainty standard and held that the list certainty test will be satisfied if after a reasonable amount of time that on the balance of probabilities the substantial majority of the beneficiaries have been ascertained and no reasonable inquiries would improve the situation, with substantial majority meaning have u made ur best efforts to id everybody, have u done the best u can, it's not a literal quantitative amount; **Is it a discretionary trust?** --> criterion of certainty (conceptually or semantically certain of the class) and can be split into two kinds. **Mere Power**: trustee or donor is not obliged to distribute the assets to the individuals within the class of objects, members within the class do not have any right that the trustee must distribute all the funds, all they have is a right that the trustee consider from time to time whether or not to make a distribution to people in the class of objects. Re Gulbenkian: involved classes of people that may never come into existence, therefore mere power. This case also discussed criterion of certainty and that it's not a question of practical difficulties, there simply must be no question as to what the definition of the class is referring to (no ambiguity), we don't worry about evidential uncertainty just conceptual uncertainty. **Trust Power**: during the life of the trust, the trustee is obliged to distribute entire fund to people under the specified class of object. Each member will have right that the trustee distribute entire fund to somebody in the class of objects, no has the right to be chosen, but fund must be distributed. McPhail v Doulton: Not obliged to distribute the whole trust fund the year it was earned, so they could accumulate funds and then redistribute in future, but you still had to

distribute the whole of the income therefore trust power. *Lord Wilburforce*: difference between trust and mere is that a trustee with trust power would be obliged to make a wider and more systematic survey of possible object, more obliged to find the boundaries of the class compared to mere. Both are criterion certainty rule. Re Baden: Problem here is that the object extended to relatives, which included many people that they didn't know about so it was difficult to distribute to them. But the concept 'relative' was certain and unambiguous, don't care that the whole range of objects cannot be ascertained. Lempens v Reid: ambiguous class of objects, friends and old friends. It is said there are various levels of friendships, cannot be certain how the word friend is being used. May be certain to determine meaning via context e.g. friends I used to drink coffee with, there may be evidential uncertainty but there would be conceptual certainty because you can pinpoint the level of friendship they are talking about. **Purpose=Charitable**: Leahy: mix of charitable and non-charitable purpose, read s23 of the charitable trusts act where inclusion of non-charitable purpose will not invalidate trust, just have to interpret it so it only applies to charitable nuns. Pemsel: Four Heads of Charity 1) trust for relief of poverty 2)...advancement of education 3)...advancement of religion 4)... other beneficial purposes to the community. Public benefit 1) the purposes must be public in nature Verge: benefit for the community or appreciably important class of the community. Inhabitant of a parish or town but private individuals or fluctuating body of private individuals cannot be. Re Income Tax Acts [No 1]: Justice Lower: look at inclusiveness of group, can any member of the public join as opposed to private group that can exclude admission. IRC v Baddeley: trust to build bridge for impecunious Methodists. Not public because it is artificially restricted, no problem building a bridge for a small population as long as you don't limit who could benefit from it, anyone who is eligible to benefit from the purpose can benefit, no restriction. Oppenheim: trust for the education of employees and former employees. To benefit, you had to be related to an employee and that made it an exclusive group that not everyone can belong to. Trust where you have to establish blood relationship with an individual will not satisfy public aspect. Dingle v Turner: pension scheme to former employees of a named company who were subject to poverty. Lord Cross is taking a more lenient approach – says that in some cases a more private class might be a charitable trust whilst one which looks like it benefits a larger class of the public might not be a charitable trust. Relief of poverty tends to get a more favourable view from the court. Re Segelman: public benefit not construed as strictly for relief of poverty as long as the trust is construed as one for the relief of poverty amongst poor people of the particular description rather than a gift to poor persons with the relief of poverty being the motive of the gift. and 2) the purposes must confer a benefit. First three heads are presumed to be beneficial. **Poverty**: encompasses relief of poor, aged and impotent; **Education**: must be imparted knowledge, must have intrinsic merit, promotion of sport valid if linked to education, in this case they argued: encouraging activity is good for brain development and tends to promote the success of formal