

CREATION OF EXPRESS TRUSTS	
<p>Overview:</p> <p>_____ will have created a valid express trust over _____ by declaration/ transfer in favour of _____ if the certainties of (1) intention, (2) subject matter and (3) objects are satisfied.</p> <p>➤ The contention here is certainty of _____</p> <p>A trust must also be lawful and comply with any legal formalities</p>	<p>Separate bank account:</p> <p>Not conclusive evidence that a trust is created but consideration for inference</p> <p><u>Re Australian Elizabethian Trust</u> Quistclose trust is not unique kind of trust, it relies on standard trust principles being applied to a particular context Gummow J</p> <p>- <u>BB</u>: bank account showed an intention to quarantine the amount which is consistent with intention to create a trust</p> <p><u>Re Kayford</u>: created a separate bank account called ‘customer’s deposit trust account.’ Any deposits for orders were received in the bank account which was separate from the General Account. Money was only drawn from this account when customers received their goods. Q: was C a trustee for customers? Trust was found</p>
<p>1. CERTAINTY OF INTENTION - question here is whether the settlor intended to create a trust</p> <p>Can be inferred through conduct ‘if the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or giving effect to the intention, then there is no reason why an intention to create a trust should not be inferred’ (<u>Bahr v Nicolay</u> – Mason CJ and Dawson J)</p> <p><u>Korda</u>: company in receivership claim sums owing were held by receivers on trust for investors. What was said in <u>Bahr</u> should not be misconstrued. It is a ‘intention is a question of fact and should be imputed from construction of the relevant text or oral dealings in their context. A trust is not to be inferred simply because a court thinks it is an appropriate means of protecting or creating an interest’ (French CJ).</p> <p>Language must be imperative and not precatory – language must impose an obligation</p> <p><u>Re Adams</u>: Husband gives estate to wife ‘in full confidence that she will do what is right as to the disposal thereof between my children’ No trust, ‘trusting to her’ does not impose an obligation upon her – has precatory meaning only</p> <p><u>Haynes</u>: ‘on the understanding that she write into her Will, that, at Her death, these shares are to be sold and the capital received and divided in equal parts among 3 named charities’</p> <ul style="list-style-type: none"> - a trust – testator has spoken in terms of legal restriction (‘on understanding that...’). He laid down a concrete scheme as to what was to happen with the shares – you can be a beneficiary as well as a trustee – here the daughter was the beneficiary but with a restriction and a duty to retain the shares for life 	<p>2. CERTAINTY OF SUBJECT MATTER</p> <p>Trustee must be able to identify the assets. Does not need to be itemised/ defined in detail – can be a category</p> <p>Must be a presently-existing right – expectancy cannot be held on trust ‘eg the share of my father’s estate that I will receive when he dies’</p> <p><u>Hunter v Moss</u>: M promised to give plaintiff H ‘5% shareholdings in MEL. Total issued share capital = 10000 shares. Defendant owned 950 shares so 5% shareholdings calculated as 50 ordinary shares</p> <ul style="list-style-type: none"> - Held that subject matter was certain as there was only one class of shares and defendant owned at least 5% so can be any 50 of those shares. This decision was criticized as it is not consistent with principles of contract/sales of good <p><u>White v Shortall</u>: Domestic relationship breakdown. Male write to female: hold 222k shares in UniTract on trust for her. He owned 1.5 million shares in total</p> <p>Says decision in H&M was correct - all that matters here were the proportions being identified. ‘A trust of this kind is not analogous to a simple trust, where a single and discrete item of property is held on a bare trust for a single beneficiary’ – if it was a bare trust, then we must identify exactly what shares are to be transferred</p>
<p>The use of extrinsic evidence</p> <p>If language is ambiguous then we can look at surrounding circumstances</p> <p><u>Byrnes v Kendle</u>: husband = registered owner of house. There was a document named ‘Acknowledgement of Trust’. Document declared that husband hold ‘undivided half interest as tenant in common’ and wife hold other ‘undivided half interest as tenant in common.’ After separation, husband claimed that he never intended to create a trust</p> <ul style="list-style-type: none"> - The document had the effect of creating a trust – the rules for construction of contracts also apply to trusts - Intention is ‘extracted from the words used, not a subjective intention’ (Heydon and Crennan JJ) – we must search for intention revealed in words and ‘surrounding circumstances are material to the questions whether the words used created a trust and what its terms are.’ Here, the words used were unambiguous words of trusteeship - Later extrinsic oral evidence of a ‘secret intention’ is inadmissible - Intention to create a trust is assessed objectively 	<p>FORMALITIES → only relevant for transfer/declaration of land</p> <p>Equity looks to intent rather than form. There are no writing requirements at general law BUT</p> <p>Trust by will: writing, signature by testator and signature by 2 witnesses – s 9 <i>Wills Act ACT</i></p> <p>Inter vivos trust: <i>Conveyancing Act 1919</i></p> <ul style="list-style-type: none"> - IF <u>transfer</u> of interest in land: transfer must be in writing and signed by transferor or agent – 23C(1)(a) - IF <u>declaration</u> of TRUST over interest in land: must be ‘manifested and proved’ in writing by the settlor – 23C(1)(b) <ul style="list-style-type: none"> o Declaration to third party = sufficient evidence of requisite intention per 23C(1)(b) o Can be oral declaration, provided intention to create trust is later evidenced in writing (<i>DSS v James</i>) o Documents can be written any time after declaration of trust (<i>DSS v James</i>) o Multiple docs can be read together (<i>DSS v James</i>) - IF <u>disposal</u> of equitable interest: must be in writing and signed by transferor or agent – s 23C(1)(c) <ul style="list-style-type: none"> o Applies to disposal of trust over land or personal property (subsisting equitable interest) o If B of trust directs T to henceforth hold B’s interest on trust for X, this direction must be in writing (<i>Permanent Trustee of Maradona</i>) <p>Transfer: where settlor (legal owner) transfers legal title to trustees for objects → complete constitution relevant</p> <p>Declaration: trustee already legal owner and legal owner simply declaring they are trustee of certain objects</p>
<p>Intention inferred from conduct</p> <p><u>Barclays Bank v Quistclose Investments</u>: Company Rolls Razor was in financial difficulty. RR had overdraft facility with Barclays Bank. RR also negotiated a loan with Quistclose for the sole purpose of payment of dividends and pending payment of dividends. RR later drafted a letter which recorded these conditions and Quistclose deposited money into a separate bank account. RR then went into liquidation and BB used the amount in the second account with Q to offset the overdraft account. Question was whether the money was held for RR on trust and therefor B could not use</p> <ul style="list-style-type: none"> - Mutual intention was that the sun advanced should not become part of the assets for BB but exclusively for a particular class of people, the shareholders. For any reason the dividend could not be payed, there was a secondary trust in favour of Q - Arrangement was a primary trust to pay shareholders and a secondary trust to repay Q – this means at all relevant times, RR was holding the money on trust for someone else – no point in time where RR was the beneficial owner <p><u>Raulfs v Fishy Bite Pty Ltd</u>: F was running fish and chips shop. R agreed to enter into a partnership agreement. R would contribute 400k in exchange for 35% share in assets of partnership and would attain 35% of profits. F did not undertake what he was meant to do. R attempted to argue the principal in <i>Barclay</i> and money was held on trust</p> <ul style="list-style-type: none"> - There was no intention to create a trust in agreement. The money was immediately to become asset to FB and R would get assets in exchange. Not a Re Kayford situation where money was in suspension until order was fulfilled - The mere fact that property is handed over for a particular purpose does not automatically amount to a trust. There needs to be something more to show intention to create trust <p>‘Quistclose recognises that sometimes there can be a trust whose terms are that the trust property is to be paid to particular people and if it is not paid, it is to be held for someone else.’ This is not a separate legal institution(Campbell</p>	<p>COMPLETE CONSTITUTION</p> <p>Trust will only be created after there is effective transfer/assignment to the trustee (complete constitution). It is sufficient that the transfer/ assignment is effective in equity and capable of being completed at law.</p> <p><u>Milroy v Lord</u>: settlor intended to create trust and there was a process to transfer shares in company constitution.. Process was not fully complied with Milroy did not sign the transfer form.</p> <ul style="list-style-type: none"> - Complete in equity when transferor when there is nothing else transferor needs to do – Lord needs to sign the transfer document - Attempted argument that even if there was not a completely constituted trust by transfer, there could still be a trust, as if the settlor was holding on trust to M (declaration) Rejected – if settlor intends to create a trust by transfer, then settlor is stuck with that <p>Exceptions: specific performance – if intended beneficiary give consideration for trust or in marriage settlements</p>
<p>ILLEGALITIES</p> <p>Inherently illegal: <u>Diocese of Newcastle v Ebbeck</u>: testator gave property to son on condition that each of the 3 sons and their wives possessed the protestant fate. 2 of sons were already married. Held that trust interferes with institution of marriage/family and conditions were void as they contravened public policy. Obiter: may be okay if gift conditional on future marriage</p> <p>Part of an illegal scheme/ for illegal purpose: <u>Nelson v Nelson</u>: mother signed false stat dec and transferred house to daughters to defraud the Commonwealth. Courts ruled that loosing property would be a disproportionate penalty and pointed to other penalties which resulted – if she repaid Cth, she could maintain trust over both properties</p>	