

C. The Three Certainties

✚ Exam Note:

- Answer the Q as to its own terms. If you think one of the certainties fails → ack → but then say ‘the certainty could be valid if...’
 - Say how the trust can be fixed/chaned.
- **3 certainties inform each other** – If certainty of subject matter is uncertain → then

In order to create a valid express trust, three certainties must be satisfied:

(i) CERTAINTY OF INTENTION

✚ **Settlor must have certainty of intention to create a trust.**

- Not concerned about what settlor wanted to do (i.e. what was in their mind), but what they actually did.

✚ **Does the settlor’s language or conduct (what they said, wrote down) evinces a sufficiently clear intention to create a trust?**

- **Imperative words** to demonstrate certainty of intention.
 - Expressing a wish/hope/desire/request/recommendation that a person hold property on benefit for another are words of precatation.
- Words used must impose a **legal obligation** *not a moral obligation*.
- **Can be inferred from conduct.**

✚ **Re Adams & Kensington Vestry** (1884) – **No Trust** – ‘**in full confidence** that she would do what was right as to the disposal thereof b/w my children’.

- **Held** – ‘**expectation, confidence, hope, etc**’ are *not imperative words* → no certainty of intention.

✚ **Lambe v Eames** (1871) – **No Trust** – Testator gave estate to his widow ‘**to be at her disposal in any way she think best, for the benefit of herself and her family**’.

- **Held** – Precatory words → no certainty of intention.

✚ **Comiskey v Browning-Hanbury** (1905) – **Yes Trust** – ‘**Absolutely in full confidence** that she will make such use of it as I should have made myself...and in default of any disposition by her, I direct that all my estate **shall** at her death be equally divided among the surviving nieces’.

- **Held** – ‘**in full confidence**’ → *not imperative words*.
- **Objective Test – Court looks at whole doco rather than individual clauses on their own – interpret words in context.**
 - However, ‘**shall**’ is an imperative word that expresses an intention to create a trust.
 - Gave explicit instructions on who to give property to if something doesn’t work (nieces) = trust.

Is the word ‘trust’ positively determinative?

✚ ***Byrnes v Kendle** – **Rejected** **CSD v Jofelle** – **Once ‘trust’ is stated, there is certainty of intention to create a trust.**

- Real/subjective intention is irrelevant, it is **about what you did (objectively)**.

- ✚ ***Associated Alloys** (2000) HCA – AA supplied steel on credit to M (M owed AA money for the steel). **Clause in agreement that if M used that steel to make products and then sold them, the ‘proceeds’ of sale would be held on trust for AA up to the amount that M owed them.**
 - M became insolvent and AA claimed amount owed to it on basis that clause created a ‘trust’ in its favour.
 - Issue 1– Did use of word ‘trust’ mean there really was a trust?
 - Fact that proceeds weren’t kept separate suggest it wasn’t a trust?
 - Held 1- Where existence of a trust is explicit, one of the hallmarks is segregation of trust property.
 - **But where the existence of a trust is explicit, the absence of an express obligation to keep trust moneys separate does not deny the trust.**
 - Issue 2 – Was this a charge (AA is charge, M is charger) or is it a trust (M is trustee, AA is beneficiary)?
 - Held 2 – **It was a trust expressed *only to cover the amount owing in the original debt***
 - **‘Proceeds’ could be confined to actual monies paid by 3rd party = trust.**
 - Referred only to amounts that had actually been paid by 3rd party, and not to book debts.
 - **M [trustee] held money on trust for AA [beneficiary].**
 - Trust did not require registration, meaning AA had priority on money if M went bankrupt.
 - **If the buyer was obliged to keep both the money and the book debts as ‘proceeds’ for the seller, then the clause = ‘charge’.**
 - **However, AA made redundant by PPSA** – Whether something is a charge or trust, if the purpose of arrangement is to secure the performance of an obligation (debt) then it is a security interest → requires registration.

(ii) CERTAINTY OF SUBJECT-MATTER

- ✚ **Subject matter of trust must be certain** – i.e. clear what the property is upon which the trust is to operate.
 - Need definite, clear description of property that is subject to trust.
 - Must distinguish b/w tangible & intangible property.
- ✚ **Palmer v Simmonds** (1854) UK – Someone tried to leave ‘bulk’ of estate on trust.
 - **Held** – **Trust property must be reasonably identifiable and ascertainable at the time of the trust’s formation.**
 - **‘Bulk of property’ = No certainty of subject-matter → no trust.**
 - Subjective words
- ✚ ***Re Golay’s Will Trusts** [1965] UK – **Exception** – Testator directed executors ‘to let T enjoy a flat during her life and to receive a *reasonable income* from me other properties’.
 - **Held** – **Rare for word of ‘reasonable amount/income’ to be sufficient certain for a trust.**
 - **However, there was a pre-existing relationship/history** – they had gone on holiday before and could objectively determine what a reasonable amount was.
 - Therefore certainty of subject matter.
 - **Remarks** – **NOT AUTHORITY that ‘reasonable’ is certain.** Usually uncertain, except here there was a history.

INTANGIBLE PROPERTY

- ✚ ***Hunter v Moss** (1994) UK – Owner of 950 out of 1000 issued shares in a company indicated that he would hold 5% of the issued share capital on trust for P (= 50 shares).
 - **Held** – Yes trust – **Since shares were all identical, intangible property, the lack of segregation did not invalidate trust for lack of certainty of subject matter.**
- ✚ ***White v Shortall** – Affirmed **Hunter v Moss** – ‘this letter is to confirm that I am holding in trust for you 222,000 untract shares’.
 - **Issue** – Whether you can declare yourself trustee of 222,000 out of 1.5 million share.
 - **Held** – Yes, although it wasn’t a share, it was pretty close to 1/6th.
 - **Intangible property can be expressed as proportions.**
 - Does not matter if shares are unnumbered.
 - **Principle** – Objective test & subjective test
 - **Objective test of intention – Where a trust is created as part of a contract with consideration.**
 - Purported trustee will not be able to later disclaim the trust by alleging that they never intended to create one if there is objective evidence that a trust was intended.
 - **Subjective test of intention** – Only used when **trust is created unilaterally – without consideration & without beneficiaries being informed.**
- ✚ ***Associated Alloys** – **Property in trust can be identified as a proportion of the proceeds.**
 - Valid
 - ‘half of money in bank account X’
 - 20% of money in bank account X
 - \$20 in bank account X
 - ‘All of the money in my bank account’
 - Valid if here is only 1 bank account.
 - Invalid/uncertain if more than on bank account.

TANGIBLE PROPERTY

✚ Tangible property subject to trust must be segregated.

✚ e.g.

- Actual Separation – wine in Aisle A is on trust for X; houses 1 and 2 for X, house 3 for Y.
- Abstract Separation – ask someone to choose the property – 3 houses held on trust for 3 daughters.
 - However, if trustee has discretion as to selection of houses each daughter get – subject matter is certain.
- 20% of grain in my barn - Invalid because beneficiary will want best grain whilst trustee will want to give 20% of worst grain.
 - However, stating that trustee owns 80% of grain and beneficiary 20% is valid.

✚ Exam:

- Explain why on its face value, the trust fails for (iii) certainty of subject matter because tangible property is not segregated.
- However, **maybe possible to construe the initial declaration as** (use this language and show why!!)...
 - 3 certainties in exam, easy to pass but hard to get high marks.

✚ Re London Wine – No trust – Seller sold wine to customers who were given CT, which described them as ‘beneficial owner’ of the wine. **But seller had not segregated the bulk of any wine to answer particular contracts – wine was unascertained.**

- Principle – **To create a trust, must be able to ascertain with certainty not only what the beneficiaries’ interest is, but what property the interest is attached to.**
 - A farmer who declares himself trustee of 2 sheep (without identifying them) does not create a trust.
 - **Must declare himself trustee of a specified proportion of his whole flock.**
- Held – **Wine was not segregated from the general stock → all individual trusts failed.**

✚ Re Goldcorp Exchange (1995) UK – Approved Re London Wine – Company sold gold and offered to store it for customers. Told customers that sufficient and separate stock of bullion would be kept for each customer, but this was a lie → company went into receivership → did customers own their gold?

- Claimant (i) – **Specifically identifiable holdings of Gold which Goldcorp had acquired physically to match customer’s orders** → Gold had been segregated and identifiable – certainty of subject matter = **trust**.
- Claimant (ii) – **Gold was not separated from bulk of bullion → unable to identify which gold belonged to who → no certainty of subject-matter.**
- Claimant (iii) – **Rare gold coin** – Claimant demonstrated that exchange would not have bought these coins for any other customer.
 - However, **since coins were not physically separated from other coins, they were unidentifiable** → no certainty of subject matter.

(iii) CERTAINY OF OBJECT

- ✚ **Objects of trust must be identified with sufficient certainty** (beneficiary principle).
- ✚ Requisite level of certainty depends on whether trustees are obliged to:
 - Distribute to a class of beneficiaries (fixed trust)
 - Or have a discretion to select beneficiaries within a class to whom distributions are to be made (discretionary trust).

Fixed Trusts

- ✚ **Objects must be defined with sufficient precision to satisfy the 'list certainty' (complete list) rule.**
- ✚ IRC v Broadway Cottage Trusts (1955) UK – Beneficiaries must be identifiable so court can make a list of all EIs.

Discretionary Trusts

- ✚ **Trustee has discretion to choose beneficiaries.**
- ✚ **But Class of Objects of discretionary trust must be defined with sufficient certainty.**
- ✚ ***Re Gulbenkian's Settlement Trusts** (1970) UK – Gulbenkian conferred on trustees power to appoint as beneficiaries 'any person in whose house or in whose control Gulbenkian may from time to time be residing or employed'.
 - Issue – Is this class of potential beneficiaries is uncertain?
 - Principle – **CRITERION CERTAINTY TEST** – **Does the discretionary trust say with sufficient certainty that any given individual is or is not a member of the class.**
 - **If class of beneficiaries are *not* defined with sufficient particularity to enable Court to determine whether a particular person is within a chosen class of beneficiaries = uncertain object.**
 - Does not fail – just because it is difficult to determine the class of beneficiaries.
 - Just because it is difficult to determine the class of beneficiaries does not make it bad.
 - Because it is impossible to ascertain every member of the class.
- ✚ ***Re Badens Deed Trusts (No 2)** (1973) UK – Trust for 'The benefit of any of the officers and employees or ex-officers or ex-employees of company or to any relatives or dependants of any such persons'.
 - How is a relative defined? Each person has a diff idea of what constitutes a relative.
 - Issue – What did 'any given postulant' mean.
- ✚ **3 Different interpretations of 'CRITERION CERTAINTY TEST' – *Re Gulbenkian's – whether it can be said with certainty that any given individual is or is not a member of the class (any given postulant test)**
 - **Megaw LJ** – Liberal View – As long as it can be said with certainty that at least a **substantial number** of objects fall within the trust (even if others are uncertain).
 - With the **borderline people**, let the trustee decide honestly (beneficiary to prove whether they are in or out).
 - **Sachs LJ** – Middle View – Need conceptual, but not necessarily evidential certainty
 - 'Relative' was conceptually but not evidentially certain.
 - **Stamp LJ** – Strict View – **must be able to say with certainty whether an individual is a member of the class** (definite yes or no to person).
 - **If that cannot be done, then descriptor is uncertain and therefore void.**
 - Held – 'relatives' did not satisfy the test because it cannot be said with certainty whether they fit into class or not.
- ✚ Remark – Still an unsettled area of law

- ✚ Hypothetical – Money on trust for tall people. 6’5” is tall, 5’4” not tall, but is 6’ tall?
 - **Megaw LJ** – as long as a substantial number of people fall within the class, then the borderline 6’ will be fine. Up to trustee to decide whether they constitute being tall.
 - **Stamp LJ** – because it cannot be said with certainty whether someone who is 6’ is tall or not, the trust will fail for lack of certainty of object.

- ✚ ***Parkview Old v Commonwealth Bank of Australia** [2013] NSWCA – Principal (Fortia) entered into liquidation, the contractor (Parkview) sought access to retention moneys held in F’s account with BankWest. However, F did not set aside a separate trust fund containing retention moneys – therefore no assets that P could get.
 - Argument/Held – P argued that BW, by virtue of its conduct during the project, was trustee for money.
 - (i) BW played an active role in project – dealt with P.
 - No – BW was merely acting as a lender.
 - (ii) BW retained custody over ANZ guarantee.
 - No – BW had not asserted a right to possession of doco.
 - Therefore nothing suggests that BW had any obligations to P consistent with role as a trustee.