

**LAW4170 TRUSTS**

SEMESTER 1 2020

EXAM NOTES

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## TOPIC 2: CREATION OF EXPRESS TRUSTS

Three certainties are required to validly create an express trust. Heydon and Crennan JJ in *Byrnes v Kendle* affirmed Dixon CJ, Williams and Fullager JJ's statement in *Kauter v Hilton* that 'in order to constitute a trust the **intention** to do so much be clear and ... it must also be clear what property is **subject** to the trust and reasonably certain who are the **beneficiaries**'. The onus is on the party claiming that a trust exists (in this case [PARTY]) to prove these elements.

The purpose of creating a trust would like to be for [family uses/tax minimization /flexibility /investment and superannuation].

X must also comply with the formalities under ss 53-55 of the *Property Law Act*.

### CERTAINTY OF INTENTION

In order for the clause to be valid, the settlor must have manifested an irrevocable and immediate intention to depart with their beneficial interest in the trust property (*Harpur*). The rationale for requiring intention is because trust obligations carry a high degree of responsibility, and a trust should only be recognised where the creator of the obligations wants to impose that degree of responsibility on a title holder of property.

In *Byrnes v Kendle*, the High Court overturned the majority decision (with Isaacs J dissenting) in *Jolliffe* that "we know of no authority...which would justify us in deciding that by using any form of word of trust could be created contrary to the real intention of the person to have created it". After *Byrnes v Kendle*, the current position is that intention should be determined by an objective test, based on asking "what is the meaning of what the parties have said" per Gummow and Hayne JJ.

In *Byrnes v Kendle*, the court accepted Mason CJ and Dawson J's approval in *Bahr v Nicolay* of Parcq LJ's traditional view that 'unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention'.

### Words used

The words [on trust/as trustee/as beneficiary] clearly indicate an intention to create a trust to a reasonable person (*Harpur*). Therefore, there is no need to go beyond the text.

### Surrounding circumstances

Any remaining ambiguities should be resolved by considering what a reasonable person would understand the intention to be based on surrounding circumstances.

- It is not necessary to use language of trust because a layman cannot be expected to know and use trust language (*Paul v Constance*).
- The use of the term 'trust' in some clauses but not others could indicate a lack of intention (*Re Williams*).
- The phrase "the money is as much mine as it is yours" created an intention in *Paul v Constance* because both Paul and Constance could access the account and a third party (bank manager) knew of the intention to share the funds even though they were in a private account.
- The mention of son's names in the receipts in *Re Armstrong* showed intention to leave the capital remainder to the sons. The bank manager also knew of this intention.

- ...is reminiscent of the poor family relations in *Chang*, where the husband asking his son to hold money from a mistress required something more enforceable because the volatile relationships within the family meant that the settlor couldn't rely on the fact that the son would follow through with his obligations.
- Verbal affirmation of holding the benefit for another (*Paul v Constance*).

Extrinsic evidence cannot be used to change a clear intention of trust, unless there is a sham or some vitiating factor (*Byrnes; Lewis*). A party asserting that a sham exists must establish on the balance of probabilities that the transaction was artificial and intended to deceive or mislead others.

[PARTY] will argue that even though [TRUST PURPOSE] appears to be a sham, [PARTY] did not act contrary to that intention and therefore there is still an intention to create a trust (*Lewis v Condon*).

#### *Commissioner of Stamp Duties v Jolliffe 1920 HC*

- Mr Jolliffe opened a savings account for his wife for the sole purpose of procuring interest not payable by the bank if the account stood in his name alone.
- If it was the wife, the husband would have to pay death duties on her property. Even by using the words trust, the court had to look behind the words to the real intention, which was that he did not intend to create a trust, he just wanted to earn interest.
- A subjective rule was applied.

#### *Byrnes v Kendle (2011) 243 CLR 253*

- A couple purchased a house in the husband's name for the purposes of securing a loan.
- The husband signed a deed stating that he held a half share in the house on trust for his wife, using unequivocal language.
- The house was leased to the husband's son from a previous marriage. The husband Kendle failed to collect rent from the son, which would constitute a breach of trust.
- Kendle argued that he had never intended to create a trust for the wife even though the words 'on trust' had been used.
- Held: the deed objectively showed that the husband intended to create a trust.
- "Jolliffe should not be regarded as retaining any authority it otherwise may have had for the proposition that where the creation of an express trust is in issue, regard may be had to all the relevant circumstances not merely to show the intention manifested by the words and actions comprising those circumstances".

#### *Lewis v Condon*

- Whether investment trust was intended to be a sham.
- Trust held by the company to keep her asset hidden from husband, family court, avoid tax.
- In 2005 Colleen altered trust - daughter appointed her instead of the company.
- She borrows money using the property as security, then goes bankrupt. Was the trust a part of her assets (not a real trust).
- Court found primary purpose was to hide property and use trust as a sham. For policy reasons, the court should not be too quick to find that there was trust.
- Resulting trust or discretionary trust?
- Colleen's bad objective is not inconsistent with the trust. One way she could hid property is by actually giving it away. The problem was that she wanted to resume rights when the proceedings were over. Therefore, it was discretionary trust.
- Trustees using property as if it is their own.
- Considered it a breach of trust. Existence of breach doesn't show absence of intention