

**Trust Law**

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## Certainty of Intention, Subject & Object

**WRITE:** In order for the express trust to be valid, certainty of intention, subject and object must be established.

### Certainty of Intention

- An express trust cannot come into existence unless the would-be settlor intended it to, which is a question of fact (*Paul*). The relevant intention is **objective**, and can be express or inferred (*Byrnes*)
  - If not a trust, is it a gift; conditional gift; loan?
  - **Evidence of Subjective intention** is not relevant and cannot be admitted unless there are vitiating factors such as mistake, misrepresentation or unconscionable dealing with fraud.
- **Formal language is not required** (*Paul – Lay people*): Rather, the court will consider general words, the circumstances and conduct of the parties (*Byrnes*) – note that in *Paul* a combination of factors was needed, so question whether you have enough evidence!
  - For example, in *Paul* the court used a combination of elements:
    - **Words:** “*This is as much yours as it is mine*”
    - **Conduct:** Joint deposits and withdrawals from the account
    - **Circumstances:** Discussions with the bank asking for the account in joint names, however the bank refused as inappropriate
- Unless a settlor retains the right to revoke, property interest **cannot be reclaimed** from the trustee (*Mallot v Wilson*)

### Disposition under Will

- Language of a will must be clear enough to create an obligation to hold property under trust.
  - In *RE Williams*, the words ‘**absolutely, in fullest confidence**’ was taken to mean to express a wish that Lucy get the money unless his widow sees reasons otherwise. Not an obligation.
  - Quote: ‘*absolutely, in the fullest confidence she will carry out my fullest wishes*’

### RELATE CASES

- *Paul v Constance*: Widow claimed money in bank account through an intention of her husband to create a trust:
  - ‘this is as much yours as it is mine’ and attempts to create an account in a join name.
  - Court found that the % was half, getting around **certainty of subject**
- *Byrnes*: Husband signed a deed keeping half the house on trust for his wife. In a dispute he argued he had not subjectively intended to create a trust. Court considers this as irrelevant, **objective intention** is determinative
- *RE Williams*: A will showing the desire to leave life insurance money to his wife, on trust for his daughter was taken to be ineffective as the language was not strong enough to create an obligation to hold money on trust
  - ‘*absolutely, in the fullest confidence she will carry out my fullest wishes*’ – **created a desire, not an obligation**

### Certainty of Subject (the property)

- To be validly created the subject matter of the trust must be known with sufficient certainty.
  - “*Property ‘X’ is identified with the sufficient degree of certainty*”
- Property must be capable of valid disposition: for example property declared under a will is of no affect if the property is no longer owned by the estate.

% Shares of property

## Charitable Purpose Trusts

### Poverty, Education, Religion

**\*\*NOTE:** trust may survive as a **normal express trust** if there are identifiable objects (*Re Denleys*)

- **WRITE:** Charitable purpose trusts are an exception to the certainty of object requirement (the AG given standing to enforce the trust) and can continue in **perpetuity**.
- **WRITE:** To be valid, the trust must be for an identifiable charitable purpose, and satisfy the public benefit test:
  - **Assess the Organisation or Purpose:** If money is given to an organisation, then the organisation is considered as a normal express trust (has a legal personality). However, if money is given with an instruction to perform a charitable purpose, then the purpose itself is assessed.

#### **STEP 1:** Charitable Purpose - Heads of Charity

- The court will consider the **purpose** of the trust and assess whether it is consistent with the character of charity from the non-exhaustive preamble of the Statute of Charitable Uses, falling within one of the four recognised heads of charity in (*Pemsel*).
- *If needed:* Can look to what is **implicit** in the words used in the trust deed (*Downing*)
  - 1) **Relief of Poverty**
    - **WRITE:** The relief of poverty or benefit to people in some form of financial necessity is treated by the courts as a wide charitable purpose – those being helped need not be destitute. (*Downing*)
      - ‘*Amelioration of the condition of dependants*’ was a charitable purpose (*Downing*)
    - Does not require a public benefit test
  - 2) **Advancement of Education**
    - **WRITE:** Advancement of education is a valid charitable purpose if it actively advance education by disseminating information. (*RE Shaw*)
    - Examples:
      - Research and advertisement of the time and cost savings of a new alphabet were seen as propaganda aimed to **persuade** the public, not teach (*Re Shaw*)
      - However, it appears the advancement of **scientific research generally** is acceptable (Taylor v Taylor)
      - Funds to **find Shakespear manuscripts** was charitable education (*RE Hopkins*)
  - 3) **Advancement of Religion**
    - **WRITE:** The advancement is a valid charitable purpose – It requires the active dissemination of religious teaching, not merely arising from a connected to a religion (*Lawlor*)
    - 1. The institution must constitute a religion, defined by their honors in (*Church of New Faith*):
      - Murpy J held that any group that seriously claims to be a religion is validly so – the determination of such issues not being the dominion of the courts.
      - However, Mason and Brennan JJ requires the institution believe in **supernatural beings**, and follow **canons of conduct** to give effect to that religious belief.
      - The most stringent test was identified by Wilson and Deane JJ: An Identifiable group who sees themselves as a religion and adheres to their teachings, who’s practise involves the super natural and the relation to man’s nature.

## 4: Resulting Trusts

### Resulting or Constructive Trust Argument?

- **Resulting Trust:** Considers monetary contributions and intention at the time of purchase only. Always institutional
- **Constructive Trust:** depute involves indirect/non-financial contributions over the time of the relationship. Remedial or institutional

### Resulting Trusts

#### FLAGS: When does it apply?

- **Transfer (gift) of property to a volunteer?**
- **Purchase made in the name of another?**
- **Unequal contributions to purchase price?**
- Where there is a **monetary contribution to purchases property in the name of another**, or in the name of himself and another jointly (*Calverly*)

#### What is the Presumption of resulting trust?

- The presumption of resulting trusts operates where parties intended to retain their contributions toward the purchase price of property, and is effected via a trust as tenants in common on shares equivalent to the contribution made by each party (*Calverly*)
  - In equity the resulting trust does not need to satisfy writing requirements – s53(2) PLA
- The equitable presumption may be **rebutted** by evidence of **contrary intention**, or if the presumption of advancement applies

#### What payments are counted toward contributions to purchase price?

- Direct contributions to the price at the time the property is purchase, including undertaking to mortgage liability, but does **not** include subsequent repayments of the mortgage (*Calverly*)
  - Subsequent mortgage repayments can be recouped by equitable accounting between the parties (*Calverly*)
- **NOTE WELL INVESTMENT PROPERTIES:** Mortgage repayments for an **investment property** *may* be **attributable** to the purchase price (*Block v Block*). *Distinguish from Calverly as it is not a home.*

#### What Evidence of contrary intention is **admissible to rebut the presumption?** No subsequent evidence rule

- The presumption of resulting trust may be rebutted by evidence of the contrary intention of the parties, evinced from words and conduct before the payment of purchase price (*Calverly*), or so immediately after as to form part of the transaction (*Cummins*)
  - eg the building of the property after purchase.
  - Eg Attempt to defraud Social services is evidence to rebut too! See Illegality (*Nelson*)
- Subsequent self serving **words** are not admissible, however subsequent self serving **acts** may be admissible (*Cummins*)
  - After (*Cummins*) mortgage repayments may be admissible as subsequent acts demonstrating a contrary intention to rebut the presumption of resulting trusts.

#### Illegality?

- If granting the resulting trust would **undermine the policy or object of the statute**, then it will be withheld on discretionary grounds (*Nelson*) – Equity will not assist those who come with ‘dirty hands’

- *From (Baden)* – NOTE must not be applied in a formulaic or strict category setting (*Grimaldi*)
  - 1) Actual Knowledge
  - 2) Wilful shutting of eyes to the obvious
  - 3) Reckless failure to make inquiries
- Constructive Knowledge:
  - 4) Knowledge of circumstances which would indicate facts to an honest and reasonable person (**reckless** failure to inquire)
  - 5) Knowledge of circumstances which would put an honest and reasonable person on inquiring (**negligent** failure to inquire)

### **RELEVANT Receipt CASES**

- *Farah*: Joint venture to purchase and develop a new property between Farah and Saydee. Council declines permits as property was too narrow, advises purchase of neighbouring land. Farah became aware the neighbouring property is for sale and purchased in **in the name of wife and daughter**. Factual dispute over whether Saydee was invited to join, and whether wife and daughter had received trust property. HC held Farah had fully disclosed – **no breach of FD**. However:
  - **Knowledge**: Wife and daughter did not meet the threshold of being a dishonest and fraudulent breach.
  - **Must Assist**: must forward or advance the primary breach, mere passive acquiescence is insufficient.
  - **Corporate Alter Ego**: Director can be personally liable where it can be seen that the corporation was merely the 'alter ego' of the controlling director

## Proprietary Remedies

### Tracing - Breaching Trustees

#### What is tracing?

- Tracing is neither a remedy nor a cause of action. Rather, it is a process to show what has become of property. Thus the rules for tracing are the same at law and equity (*Foskett per Lord Millet*)
- **Follow**: considers the asset/property itself as it exchanges hands. You following the asset as it changes hands.
- **Tracing**: Identifies the value new asset that that was substituted for the trust property. Considers the **value** that was taken from the trust. Even when the property is exchanged for other property, you follow the value.

#### Hypo Steps/Checks for Tracing

- 1) **Is there a fiduciary relationship?**
  - The existence of a Fiduciary Relationship has been a long standing prerequisite to tracing in equity
  - In *Saleh Einstein J* said that 'the better view' was that tracing protects property rights, rather than enforcing fiduciary relationships.
  - While both *Lord Millett and Lord Steyn* in *Fosket* were **critical of the precondition to tracing of a fiduciary relationship**, their comments fell short of removing the requirement (*Foskett*)
- 2) **Trustee is presumed to have acted innocently in dissipating their own funds** before trust monies, while profitable investments are credited to the beneficiary - Equity enforces the fiction that the trustee intends to benefit the beneficiaries (*Halletts; Oatway*)
  - **Halletts**: funds remaining in the fiduciaries account were taken to be the beneficiaries
  - **Oatway**: funds used first in time for successful investments were ruled as belonging to the trust, and later dissipation of monies was debited to the fiduciary.