

EQUITY AND TRUSTS

EXPRESS TRUSTS

FORMAL REQUIREMENTS:

Starting point is that equity looks to intent and not to form: therefore there are no formality requirements for the creation of a trust. HOWEVER, if there are formalities, we know they are going to be statute (Statute of Frauds 1677)

Ying definition of express trust: Express trust is created by, or responds to, the unilateral, proper manifestation of positive intention by the settlor.

TRUST BY SELF-DECLARATION: Settlor (original owner) declares self to be trustee of property for beneficiary.

- For personal property: Trust can be declared orally only, and it is still valid
- For land: The declaration of trust must be evidence by something in writing signed by the settlor (**s 53(1)(b) Property Law Act 1958(Vic)**).
 - o a declaration of trust respecting any land or any interest therein must be **manifested and proved** by some writing signed by some person who is able to declare such trust or by his will; (later writing suffices: DSS v James)

TRUST BY TRANSFER: Settler transfers property to trustee to hold on trust

- For land: Trusts of land created by transfer must be evidence in writing (s 53(1)(b) PLA).
- For personal property: Trust can be declared orally only and it is still valid.
- Perfecting the transfer of legal ownership: requires
 - (1) **A declaration of trust:** The declaration must establish that the recipient of the property was intended to take the property in the capacity of trustee and not beneficially. The words used by the settlor in transferring the property will be construed in the context of the transfer itself.
 - (2) **A valid transfer of the intended trust property to the intended trustee:** The transfer will be valid if it complies with the common law or statutory formalities required to transfer legal or statutory title.

Secretary, Department of Social Security v James per Lee J: Appropriate level of writing necessary under s 53(1)(b) PLA (Case involving application for age pension and whether for the purposes of application, respondent had declared an intention to hold unit on trust for daughter- writing requirements satisfied)

- Does not mean that the declaration of a trust (declaring intention, terms) must be in writing (can be entirely oral).
- Need not be contemporaneous with the 'declaration' (formation of intention), **can be after the fact**.
- Substance over form (do not need to use the word 'trust', no technical language is needed).
- Need not be in a single document, can be multiple documents and an interpretation of the net effect/upshot.
- Not consistent with a gift.

EXCEPTIONS TO STATUTORY WRITING REQUIREMENTS:

- **s 53(2) PLA** exempts **resulting, implied and constructive** trusts from having to comply with the Statute of Frauds writing requirements.
- The principle that **equity will not allow the statute to be used as an instrument of fraud** prevents a party from establishing that a trust of land is unenforceable for want of statutory writing (**Last v Rosenfeld**).
 - o Hope J: The circumstances are such that the defendants' reliance upon the plaintiff's claim constitutes fraud, and the plaintiffs are entitled to establish the defendants' obligation, and the court to enforce it, despite the lack of writing.

Case: *Last v Rosenfeld* [1972] 2NSWLR 923

Facts:

- Plaintiffs and defendants joint tenants of a house
- Plaintiffs transferred their interests in the house to the defendants at cost price
- Had previously orally agreed to transfer their interests to the defendants in return for the promise that the interests would be transferred back to the plaintiffs, also at cost price, if the defendants did not personally occupy the house within 12 months
- Instead of occupying the house, the defendants sold the house to a third party who took a mortgage from the defendants

Here there was reliance by the plaintiffs: so the constructive trust responds to the informal agreement plus the reliance = constructive trust. Reliance confers advantage...responds to informal agreement + advantageous reliance

Decision: court held oral agreement was enforceable, applying the principle that equity will not allow a statute to be used as an instrument for fraud.

- Defendants ordered to pay the plaintiffs half the proceeds of sale of the house.

Hope J:

- I think that it can be properly said that upon the failure of the defendants to reside in the property within twelve months, they held the property as to a one-half interest therein upon trust to transfer the same to the plaintiffs, subject to the obligation of the plaintiffs to pay the agreed sum to the defendants, but whether the defendants' obligation can properly be described as a trust or not, I think that the circumstances are such that...

CERTAINTY OF INTENTION

STATE: All trusts, whether or not they also have to satisfy writing requirements, must be sufficiently certain in order to be enforceable. An express trust must be certain in three respects.

FIRST: The settlor must have intended to create a trust of her property, as opposed to making a gift of it or lending it to another.

- NB: Resulting and constructive trusts will NOT satisfy certainty of intention (resulting and constructive trusts are judicially imposed rather than created by the settlor).

SO:

- If a trust is the most appropriate legal mechanism for giving effect to the settlor's wishes, an inference will be drawn that the settlor intended to create a trust
- **Re Armstrong:**
 - o In Re Armstrong, shortly before his death, a father deposited 1500 for each of his two sons on a two-year term deposit at the bank, the title of the accounts being 'George Armstrong in re William Armstrong, and 'George Armstrong in re Bernard Armstrong'. When he died, before the deposit term expired, Herring CJ held that the father had intended to create a trust. A trust had been created even though the word 'trust' did not appear in the title of the accounts. The father did not intend to make an immediate gift of the money in the accounts to his sons because he intended to collect the interest on the accounts.
- **Paul v Constance:** 'This is as much yours as it is mine' Constance's intention was to create a trust of the money in the account, for himself and the plaintiff as beneficiaries.
 - o evidence shows that Mr Constance had intended to declare himself as trustee of the bank account to help him and Mrs Paul to have 50/50 (fixed trust). Therefore, what Mrs C was entitled to was 50% and Mrs Paul 50%
- Shows us that intention is **OBJECTIVELY ASCERTAINED**

The question is what is the meaning of what the parties have said, not what did the parties mean to say (Byrnes v Kendle per Gummow and Hayne JJ- see below).

- **Equity looks at substance rather than form.**
- **WRITING:** The parties' intentions are manifested in explicit, unambiguous writing. NB: where it is a disposition (must be in writing)
- **ORALLY:** Where the trust is created orally, the court looks to contextual evidence and surrounding circumstances (**Paul v Constance**).

Precatory language falls short of a clear intention: Words that express a hope or wish without intending to impose enforceable obligations on the recipient of the property

- See **Re Williams:**
 - o Anything that does not include '**imperative language**' will fall short of manifesting an intention to impose the kind of definite/stringent/demanding obligations consistent with a trust.
 - o He did not make an imperative statement that his wife must give the statements to Lucy, only said he has 'confidence' that she will (confidence is not the same as wanting to bind them to do something).

An intention to create a trust is an intention to impose on a property owner an obligation to apply the property for the benefit of the beneficiaries.

- **Re Armstrong:** Court was satisfied that the father did not intend to be absolute owner of the term deposits which he had bought, and held them as trustee. This imposed an obligation on his executor to have them applied for the benefit of his sons after his death.
- **Paul v Constance:** Constance had imposed an obligation on himself to apply half the money in the bank account for the benefit of the plaintiff.

CONSIDER SHAM TRUSTS:

STATE: A trust is a sham where the settlor deals with property otherwise than in accordance with the terms of the trust he has created, with the intention of deceiving third parties as to the settlor's real interest in the property (e.g., a trust may be created for the purpose of avoiding potential claims of creditors, Tax Office or Centrelink) (Snook v London & West Riding Investments)

- If such trusts are shams, subjective intention is relevant
- **Midland Bank v Wyatt:** Mr and Mrs Wyatt executed a formal trust deed over their house for their daughters. Kept it in a draw and didn't tell them about it (or anyone).
 - o Wyatt had not intended to act on the trust deed, executing it only in case it was later needed to defeat creditors (the Wyatts had no real intention to benefit their children).
- **Lewis v Condon:**
 - o Ms Lewis wished to hide her beneficial ownership of property to deceive the Family Court and her ex-husband.
 - o Held: Despite her improper intent, she did intend for the trust to take effect.
 - o An intention to deceive third parties existed, but that intent could only be carried out if the trust operated according to its terms.

Case: *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253

Facts:

- Couple purchased house in husband's name, as he was able to obtain a Defence Services loan on preferential terms
- Husband signed a deed stating that he held a half share in the house on trust for his wife – a deed of trust (is essentially a document that declares a trust)
- House was leased to the son from a previous marriage- after marriage broke down, husband failed to collect rent from the son- husband argued he had never intended to create a trust for the wife

Held: HC held that the deed objectively showed that the husband intended to create a trust

Gummow and Hayne JJ:

- Was there a trust?
- The 1997 deed was effective in its terms to vest in Mrs Byrnes as beneficiary a one undivided half interest as tenant in common in Rachel Street
- The question is 'whether in substance a sufficient intention to create a trust has been manifested'
- All he thought he was doing was promising to give her some money- said he didn't intend to create a trust
- "There is good sense in such a rule. Issues of the construction to be placed upon the words or actions of alleged settlors are apt to arise **long after the event**...Further, trusts give rise to proprietary interests, dealings which may engage **third parties** who are strangers to the original actors."

No subjective intention

Case: *Re Williams* [1897] 2 Ch 12

Facts:

- Dr Williams left his estate to his wife 'absolutely, in the fullest confidence that she will carry out my wishes.' (testamentary trust)
- Wished for insurance policy for their daughter etc.
- When Mrs Williams died, her will bequeathed the 300 to Lucy, but bequeathed Mrs Williams' insurance policy proceeds to someone else- Dr Williams' executors asked the Court to determine whether Mrs W was obliged to leave her life insurance policy for Lucy

Did Dr Williams intend to impose the obligations on his wife? Or was the money essentially a gift?

Decision: Court held that the will did not create a trust of the proceeds of the insurance policy for Lucy

- He was merely expressing a wish and not imposing a command

Lindley LJ:

- I have arrived at the conclusion that the testator has not used language sufficiently clear to impose upon his widow an obligation to leave either policy to his daughter...

CERTAINTY OF SUBJECT MATTER

STATE: The subject matter of the trust must be specific with reasonable certainty (must have some legal or equitable property as its subject matter).

STEP 1: the subject-matter of the trust (trust property) must constitute legally recognised property

- Property:
 - Real or personal tangible property eg; land or painting
 - Intangible property eg; a patent or the right to enforce a debt (choses in action)
 - Equitable property or legal property
- Settlor must have present property rights (a mere expectancy cannot be held on trust as it is not property).

STEP 2: the quantum (amount) of property to be held on trust must be clearly defined

- **Palmer v Simmonds:** The testator left 'the bulk of my estate' to be held on trust. The trust failed because the word 'bulk' did not clearly indicate how much of the testator's property was to be held on trust
- **Re Golay:** 'allow T to enjoy one of my flats during her lifetime and then to receive a reasonable income from my other properties' → Held sufficiently certain because the executors could just work out which one of his flats
- **Hunter v Moss:** A portion of shares of the same class in the same company is sufficiently certain to constitute the subject matter of a trust
- **White v Shortall:** per Campbell J (Australian approach): The trust operated over the declarant's entire shareholding, in certain proportions for himself and for his former partner.
 - o WRITE: Within a single class of shares, those shares are fungible. Per Hunter v Moss, all shares within the same class are identical and this will not pose a problem. In contrast, Campbell J in White v Shortall says that it is a single trust over the person's entire shareholding and it is up to the trustee to elect which of the shares are held on trust. The balance of the shares are held on trust for the original owner. Campbell J's approach is perhaps to be preferred as the Australian approach and it was approved by the Full Federal Court in Ellison v Sandini. In either case, as long as the shares are of the same class, the trust will be valid.

Does it need to be segregated?

- Depends on whether it is fungible vs non-fungible (meaning replaceable)
- Money is fungible- if dealing with the value- not the physical paper
- Rule:
 - o When the property is non-fungible, must segregate (Re Goldcorp Exchange 1995)
 - o So, the court knows where to attribute liability when something goes wrong etc or where the money is not clean for example

Case: Hunter v Moss [1994] 1 WLR 452

Facts:

- Moss owned 950 of the 1000 issued shares in Moss Electrical Limited – hunter was employee
- Moss orally agreed to give Hunter a 5% shareholding in the company – later Moss refused to transfer the shares to him
- Moss appealed, partly on the basis there was insufficient certainty of subject matter for a valid trust

Decision: the CoA held that a trust of a percentage of a shareholding was sufficiently certain to constitute the subject matter of a trust

Case: White v Shortall (2006) 68 NSWLR 650

Facts:

- During the breakdown of their de facto relationship, the defendant wrote to the plaintiff, confirmed that he held 222,000 of 1.5 million Unitract shares in trust for the plaintiff
- Was unable to transfer them directly to the plaintiff- as they were still in escrow- later disputed the validity of the trust, claiming lack of intention to create it, and uncertainty of subject-matter

Decision: Court held that a valid trust of the 220,000 shares had been created for the plaintiff

Campbell J:

- Held on trust for the plaintiff
- In the present case, one can identify the property that is subject to the trust (the entire shareholding), one can identify the trustee (the defendant), and one can identify the beneficiaries (the plaintiff as to 220,000 shares, the defendant as to the rest). That is all that is need for a valid trust.
- Testamentary considerations are not the same as inter vivos considerations
- Supported by *Ellison v Sandini* 2018

CERTAINTY OF OBJECTS

STATE: Thirdly, the beneficiaries of the trust must be sufficiently identifiable. Where a trust is for persons, the persons whom the trust is for must be known with sufficient certainty before it can be said that the trust is valid.

- Fixed trust: Trustee has no discretion to select who is to receive trust property or how much they are to receive
- Trust power: trustee is given a discretion to select amongst beneficiaries → 'shall'
- Mere power: trustee is given a discretion to appoint property amongst potential beneficiaries, but is under no obligation to do so.
 - o E.g. Settlor settles 1M on trust, which the trustee may distribute to any of the settlors children as they consider appropriate

FIXED TRUST: LIST CERTAINTY TEST

STATE: The test for certainty of objects for a fixed trust is the list certainty test. A full and complete list of all beneficiaries of the trust is required to satisfy the list certainty test. (Must be capable of exhaustively listing out the beneficiaries from the outset of the trust's constitution). The definition of the beneficiaries must be certain enough to allow identification of each and every beneficiary (Ying def). (cite *IIC v Broadway Cottages* for List Certainty)

TWO questions:

- 1) Have the beneficiaries been described in a way where the **language used is objectively certain**?
 - **'Dependants'** held to have sufficiently clear definitions (anyone who was dependent on an employee or former employee of the company) (*McPhail*).
 - **'Relatives'** is not sufficiently certain for this test BUT see below
- 2) If we are going to make a full list, are we sure we can actually list everyone? Can we be sure the list is actually complete?
 - **'Inhabitants'** is too wide to be sure that the list is actually complete.
 - *Re Blyth*: Thomas J severed the valid part of the trust power (organisations working for the elimination of war) from the invalid part (organisations formed for the purpose of 'raising the standard of life throughout the world' – ambiguous concept).
 - BUT NOTE Controversial application of the criterion certainty principle as it would defeat the intention of the settlor to enforce a trust power for some, but not all, of the class of beneficiaries they had specified
 - Term issue is conceptually certain enough: but does not fulfill list certainty test as one cannot be certain all the issues have been identified. Therefore, test modified to "substantial majority test" – so long as a substantial majority of beneficiaries can be identified: is valid (*West v Weston 1998*). (BUT, unlikely to be followed)

MERE POWER: CRITERION CERTAINTY TEST

STATE: We apply the criterion certainty test to objects of a mere power. The trust is valid if the trustees can say with certainty at the outset that any given individual is or is not a member of the class of objects of the power (*Re Gulbenkian*). On a case by case basis...

NB: Criterion certainty test is a strict test [even if you can find a beneficiary or some beneficiaries who would be in the class, that is NOT enough to satisfy that the test is met → Must ensure that ANYONE who comes before you can be determined whether they are in the class or not.]

Conceptual uncertainty = invalid (do not need to be able to list everyone out, just decide whether or not someone falls within a class)

STATE: A power which is conceptually uncertain is invalid since insufficient information has been given to allow the trustee or the court to exercise the power

- E.g. A trust for 'my old friends' (Gulbenkian per Lord Upjohn)

Evidential uncertainty = valid

STATE: Evidential uncertainty does not invalidate a trust power as application can be made to the court, if necessary, to resolve any ambiguity.

- Eg; 'Residence', 'employed' and 'care and control' are evidentially uncertain but not conceptually uncertain (Gulbenkian)
- **Difficulty in determining** whether or not a particular person would be within the description of the class would not defeat the trust (Kinsela). Such evidential uncertainty could be resolved by a court.

TRUST POWER: CRITERION CERTAINTY TEST AND POSSIBLY THE LOOSE CLASS REQUIREMENT

Administrative unworkability: IF class is large (discuss all of this: say who knows what the answer is)

- We apply the criterion certainty test to trust powers. There is possibly also a loose class requirement where a trust will be void for administrative unworkability (McPhail per Lord Wilberforce). However, there are mixed views amongst the lower courts as to whether this is part of the law of Australia and the application has been inconsistent.
 - o IF SMALL CLASS → WRITE: This class is small and manageable. We do not need to consider administrative unworkability.
- HOWEVER, there may also be the **additional loose class requirement** where the definition of the beneficiaries is **so hopelessly wide as to not form anything like a class**, so the trust is **administratively unworkable** (McPhail per Lord Wilberforce). (e.g., 'all the residents of greater London' (McCracken v AG: such Christian organisations and societies as my Ts shall selected)
- Too numerous? (*Ex parte West Yorkshire*: Inhabitants of West Yorkshire: 2.5m)- so it is actually about the numbers
- **Horan v James** (NSW): "hybrid" trust not administratively unworkable? Held: trust was valid ('all the world excepting specific named persons') → Court does not consider the issue of administrative unworkability (Indicated that the issue of administrative unworkability not part of law in Aus.
- **Cf McCracken v Attorney-General** (Vic): Judicial commentary that even should the trust have satisfied the criterion certainty test, it would have been void for administrative unworkability.
 - Held: 'a trust for such Christian organisations and societies as my trustees shall select' failed to satisfy the criterion certainty test and was void anyway.
- The **criterion certainty test** for trust powers is that a trust will be valid if it can be said with linguistic or semantic certainty that any given individual is or is not a member of the class of beneficiaries. However, evidentiary uncertainty does not invalidate a trust power (McPhail per Lord Wilberforce).- discretionary trust
- **RELATIVES** passes the criterion certainty test: (persons descended from a common ancestor OR 'next of kin' or 'close relatives') (McPhail).- 'descendants from a common ancestor'- courts happy to say passes criterion certainty test

Rule: If a trust deed **expressly** provides that the trustee or a third party **who is qualified** can provide an opinion to resolve uncertainty, then it is valid.

- Re Tuck's Settlement Trusts 1978:

NB: if can't tell the difference between trust power and mere power: note Lord Wilberforce said it is difficult to determine anyway.

NB (IMPORTANT): if we have good and bad bits in a clause or 2 clauses: e.g. 'discretion to distribute my children and my friends'- cannot sever one part- whole thing fails as cannot spot settlors intention. BUT in Re Blyth (judge severed bad bits and left good bits in: Ying things this is justified based on charity law BUT should not stand for a wider proposition).

CAPRICIOUS trusts and powers: A trustee may, however, be unable to exercise her fiduciary duties properly if the terms of a trust or fiduciary power are arbitrary or capricious. A trustee is under a duty to consider exercising her discretion in good faith and upon a proper consideration of all relevant factors. (TB says should not apply as it involves second-guessing S's intentions)

Case: *McPhail v Doulton* [1971] AC 424

Facts:

- Baden established a discretionary pension fund for the employees of Matthew Hall & Co
- When he died, his executors challenged the validity of the trust instrument. (If the trust was invalid, property settled on the trust would form part of the Baden estate.)
- The relevant clause described the class of potential beneficiaries as '**any of the officers and employees or ex-officers or ex-employees of the company or . . . any relatives or dependants of such persons.**' The initial question was whether the clause gave the trustees a mere power or a trust power. If the clause created a trust power, the class described would have failed the 'list certainty' test, as it would be impossible to construct a list of '**relatives**' of such persons.
- The clause might, however, satisfy the 'criterion certainty' test, if the terms '**relatives**' and '**dependants**' were linguistically certain.

Decision: held that the trust power would be valid if the objects satisfied the criterion certainty test

Lord Wilberforce:

- Assuming, as I am prepared to do for present purposes, that the test of validity is whether the trust can be executed by the court, it does not follow that execution is impossible unless there can be equal division.
- The test for the validity of trust powers ought to be similar to that accepted by this House in *Re Gulbenkian's Settlement* for powers, namely, that the trust is valid if it can be said with linguistic or semantic certainty that any given individual is or is not a member of the class or beneficiaries.

Case: *Re Gulbenkian's Settlement Trusts* [1970] AC 508

Facts:

- Calouste Gulbenkian made settlements intended to benefit and protect his son, Nubar
- Impugned trust empowered the trustee to 'at their absolute discretion, pay all or part of the income of the trust fund to any person or persons in whose house or apartments or in whose company or under whose **care or control** or by or with whom the said N may from time to time be **employed or residing**.
- A clause conferring on the trustees a special power to appoint income to Nubar and persons with whom he had associated was poorly drafted, and 'did not make sense' according to Lord Reid

Was the class of potential beneficiaries so uncertain that the trustees would be unable to perform the trust?

Decision: held that the special power was valid since, in spite of the poor drafting, it was possible for the trustees to say of any person under consideration that the person either did or not come within the terms of the power

Lord Reid:

- I think it is reasonably clear that this clause is a result of carelessly telescoping two separate clauses-
- (1) any person by whom Mr G may from time to time be employed, and
- (2) any person in whose house or in whose company or under whose care or with whom he may from time to time be residing
- The test for certainty in this case is not list certainty but criterion certainty: If the beneficiaries are not defined with sufficient particularity to enable the court to determine whether a particular person is or is not, on the facts, at a particular time, within one of the classes of beneficiaries, then the power must be bad for uncertainty