

## THE THREE CERTAINTIES

### STEP 1: CERTAINTY OF INTENTION

- Need not use the word trust: *Re Armstrong*
- Must have an intention to create an express trust
  - o Declaration or transfer?
- Intention is settled objectively: *Brynes v Kendle*
  - o Is there an explicit document?
    - Parole evidence may not be admitted
  - o Is the document ambiguous or are there no written documents?
    - Parole evidence may be admitted
- What intention must be proved?
- Are there precatory words?
- If no intention found, turn to resulting or constructive trusts.

### STEP 2: CERTAINTY OF SUBJECT MATTER

- Two requirements
  - o Subject matter must constitute legally recognized property; and
  - o The property to be held on trust must be clearly defined
- Is the trust public or private?
  - o Private: intended to benefit one or more individuals
  - o Public: intended for i.e. charitable purposes
- Subject must not be vague
  - o I.e. direction to remember certain persons: *Bardswell*
  - o Two ways to resolve vague statements
    - Common law rules of construction may apply; or
      - Armchair principle: *O'Brien v Smith*
    - Equivocation may apply
      - When there are two meanings to a statement
  - o If statement is still vague, two things may happen
    - If settlor alive: property reverts to settlor
    - If settlor dead: property reverts to residuary estate or if no will, next of kin
- Fungible property is acceptable
  - o I.e. shares, cash, wheat

### STEP 3: CERTAINTY OF OBJECTS

- Two main issues: objects are certainty defined and beneficiary principle adhered to
- Test for certainty of object
  - o If fixed trust: list certainty test
    - Complete list of all beneficiaries needed, but HC has held evidentiary uncertainty will not necessarily defeat trust: *Kinsela v Caldwell*
    - Less demanding test approved by NSW judge: *West v Weston*
  - o If discretionary test: criterion certainty test
    - Is there a mere power or trust power?
      - Mere power: discretion to appoint but not required to do so
      - Trust power: same as above but must exercise their discretion
    - **Test:** must be able to determine whether a person is or is not on the facts at a particular time within of the classes of beneficiaries: *Re Gulbenkian*
- If there is uncertainty, what type of uncertainty is it?
  - o Conceptual, evidentiary or administratively unworkable?