

### 3 CERTAINTIES

Knight v Knight, Lord Langdale MR : To create a trust, there must be certainty of **intention**, **subject matter**, and **object matter**.

#### 1. Intention to create a trust

- Settlor intended to place the holder of the trust assets (trustee) under an enforceable obligation to use those assets for the benefit of another (beneficiary)

- ✖ Obligation binding in conscience alone : Imposition of a moral (non-legal) obligation is not sufficient
- McCormick v Grogan, Christian LJ : 'The real question is, what did the settlor intend to be the sanction? Was it to be the authority of a court of justice, or the conscience of the devisee?'

- Re Vandervell's Trusts (No. 2)

- Megarry J : 'The mere existence of some unexpressed intention...does nothing, there must at least be some expression of that intention before it can effect any result.'

- Re Adams & Kensington Vestry

- Testator left estate to wife 'in full confidence' that she would do what was right as to the disposal between their children, either in her lifetime or by will
- Wife attempted to give some of the rights away outside her immediate family
- Held : Only a moral obligation, not a legal one. No intention to impose any legally enforceable obligation on her, instead left to her 'conscience'. It is an absolute gift for the wife.

- Lambe v Eames

- 'at her disposal in any way she may think best'
- Held : no trust.
- James LJ : 'In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed.'

- Comiskey v Bowring-Hanbury

- 'in full confidence that...she will devise it to one or more of my nieces as she may think fit'
- Held : Intended to give those nieces some rights in that property under a trust. Property was held on trust for wife for life and then in remainder to her nieces equally. There is a trust.

- Re Hamilton

- 'wish'
- Held : no trust.
- Lindley LJ : the approach that ought to be used by the court should be to 'take the will you have to construe and see what it means, and if you come to the conclusion that no trust was

intended you say so, although previous judges have said the contrary on some wills more or less similar to the one you have to construe’.

- Re Diggles

- ‘desire’
- Held : no trust.

- Re Johnson

- ‘request’
- Held : no trust.

- Re Steele’s Will Trusts

- ‘request’
- Held : There was a trust.

- Mussoorie Bank v Raynor

- ‘feeling confident
- Held : no trust.

- Jones v Lock

- Father handed a cheque to his infant son saying he was giving this to him, and had contacted his solicitor later, expressing the intention to invest the money and more for the benefit of the child, but died before he was able to do so
- Held : the declaration was merely a declaration that he could and intended to provide for his son; there was no intention that he intended to deal with the money as a trustee, only as the full owner.
- Cranworth LC : ‘I cannot come to any other conclusion than that he did not [intend to make a declaration that he held the right in trust for the child].’

- Paul v Constance

- Mr C and Mrs P were cohabitants, and they both drew upon an account under Mr C’s name to play bingo
- Mr C had declared to Mrs P several times that ‘the money is as much yours as mine’
- Held : A trust had been declared in equal shares for both of them. An informal declaration of trust is possible. (this is an express trust, not a constructive trust)

- T Choithram Int SA v Pagarani

- A wealthy businessman wanted to give his fortune to a ‘foundation’, but no such body was ever formed
- Legal advisors drew up the documentation for a **trust**
- He executed a deed that created a ‘foundation’ (the trust) that had seven directors (trustees), he himself included; some other directors signed it

- He later declared that all his wealth was to be given to the 'foundation' but no transfer to the other trustees was ever made
- Held (by Privy Council) : When one of several intended trustees had the trust rights vested in him, he is bound by the trust and under the duty to transfer the rights into the names of all the trustees. The deceased had not vested the rights to all the trustees, but he had appointed himself to be a trustee. There is a trust.
- Not an exception to the rule that equity will not perfect an imperfect gift, but merely finding a self-declaration of trust

- 'Equity looks to intent, not form'

- Not even the word 'trust' is necessary, nor is it necessary for the settlor to know that technically he is declaring a trust

- Re Kayford

- A separate account was created with the intention to protect the company's customers (Customers' Trust Deposit Account), but they later used an old account with a different name for that purpose
- General rule : customers were mere creditors unless a trust is created
- Held : Valid trust. Money was segregated, and there was a clear intention.
- Megarry J : 'I feel no doubt that here a trust was created... The whole purpose of what was done was to ensure that the money remained in the beneficial ownership of those who sent them, and a trust is the obvious means of achieving this... Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements... Different considerations may arise in relation to trade creditors, but here I am concerned with members of the public, some of whom can ill afford to exchange their money for a claim to a dividend in the liquidation... In cases concerning the public, it seems to me that where money is being paid in advance for the future supply of goods or services, it is entirely proper and honourable to start a trust account.'
- J.E. Penner : 'Under insolvency law such a declaration [inferring or finding such a unilateral declaration of trust] appears to be an illegitimate preference of the company favouring some creditors over others. Should the court recognise a company's intentions if they have this result?'

- MacJordan Construction v Brookmount Erostin

- Amount owed to the sub-contractor was not put in another account, but in the general one
- Held : No trust. Segregation into a new bank account was needed as it was intangible property (money in a bank account).

- Re Multi Guarantee

- Premiums paid into a separate account from which funds could only be withdrawn with consent from both parties

- Held : No sufficient intention to create a trust; it was not decided what was to be finally done with the money in the account. No trust.
- Nourse LJ : 'whether in substance a sufficient intention to create a trust' was manifested by the settlor

- Burrough v Philcox

- Will held that if the testator's son and daughter died without issue, the living child will have the power to dispose of his estates amongst his nephews and nieces or their children, either to one of them or as many of them as the surviving child thinks proper
- Held : Property was held for nieces and nephews and their children in equal shares.
- Lord Cottenham LC : 'Where there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class... and in such case, the Court will not permit the objects of the power to suffer by the negligence of the donee, but fastens upon the property a trust for their benefit.'

- Midland Bank v Wyatt

- Neither the wife nor daughter, or the wife's solicitors knew about the purported trust for their benefit
- Held : Sham trust with the intention to put the property beyond the reach of creditors, therefore ineffective to divest him of the entire beneficial interest in the house.

- Brazzill v Willoughby

- Financial institution (KSF) was ordered by the Financial Services Authority to set up a separate account to protect clients if they went into insolvency
- The arrangement was described as a trust, but it was unclear which deposits nor which customers were protected and which were not, leading to issues whether there was a trust given this lack of clarity
- Held : Valid trust. Putting the sums into a separate account constituted voluntary intention to create a trust, even though it was following orders from the FSA. Customers who were to benefit were also identified.

- Mills v Sportsdirect.com Retail Ltd

- There is a 'repo' transaction – a transfer of securities, ordinarily done without the seller retaining property rights over them (no trust)
- OTF : because claimant was worried about the financial position of KSF, it was agreed that they would transfer shares outright to KSF and KSF will pass the legal title in those shares to a nominee which would then hold the shares on trust for the claimant (different structure from an ordinary repo transaction)
- Held : Valid trust. There was an appropriate intention to create a trust when putting the money aside in a separate account.

“The law of trusts is frequently to do with the passions, greed and expectations of ordinary human beings. It cannot always be reduced to rigid legal principles. The beauty of equity lies in its ability to deal flexibly with such circumstances.” – Alistair Hudson

## 2. Subject matter

- If the intention to create a trust is certain but the property subject to the trust is uncertain, it will become a resulting trust

- Issues :

✓ Property must be identified

✓ Beneficial interest must be ascertained

### (a) Property must be identified

- Palmer v Simmonds

- Residuary estate was left to the testatrix's husband, but upon his death subject to a trust of 'bulk' of residuary estate to four named relatives
- Held : No trust. Conceptual uncertainty.

- Sprange v Barnard

- Money left to her husband for his sole use, and 'the remaining part of what is left' to be equally divided between her brothers and sisters .
- Held : No trust.

- Re Kolb Wills Trust

- Testator had directed trustees to invest in 'blue chip' stocks in his will.
- Held : No trust.
- Cross J : Insufficient power had been given to the trustees to decide what was meant by 'blue chip'.

### (b) Beneficial interest must be ascertained

- Boyce v Boyce

- Property was certain – 2 houses, one each for the two daughters. One died before a house could be selected.
- Held : No trust for the other daughter. Was uncertain as to which house was to be held on trust for her.
- Where the settlor fails to make the beneficial interests plain, that property will be held on resulting trust for the settlor.

- Re Steel Wills Trust

- Testator directed that his residuary estate was to be divided between legatees who had only received 'small amounts'

- Held : Valid gift. (Generous judgement)
- Megarry VC : The words explained the testator's motives and ordered the residue to be divided between all the legatees equally whatever the size of their legacies.

### (c) Exceptions

#### (i) Initial gift is absolute

##### - Hancock v Watson

- Where there is an absolute gift of property in the first instance but subject to some trust which has failed, the legatee takes the property absolutely.

#### (ii) Initial gift with limited interest

##### - Re Last

- Testatrix left property to her brother on trust for life, and 'anything that is left' that came from her was for specified people
- Property is not ascertained ('anything'); brother does not have absolute interest (only a life interest)
- Held : Valid trust.
- Justification : Testatrix only intended to confer a limited interest on the initial beneficiary.

#### (iii) Reasonable construction

##### - Re Golay Morris v Bridgewater and others

- 'reasonable income' was to be provided out of a trust fund
- Held : Valid trust which did not fail for uncertainty. Possible to assess objectively what constitutes a reasonable income (what beneficiary is used to, national wage income, etc.)

#### (iv) Floating trust

##### - Ottaway v Norman

- Brightman J : a trust suspended during the donee's lifetime and only attaching to the remaining property on the donee's death. Unclear whether the floating trustee has any obligations to preserve the property during his life.

### (d) Segregation of object matter from unsegregated funds

#### - Re London Wine Co (Shippers)

- Creditors argued that their contracts of purchase ought to grant proprietary rights to the wine

- Held : Creditors had to demonstrate that particular, identifiable bottles of wine had been segregated from the general stock and held separately to their account. No such segregation had been done, therefore there was no trust.
- Oliver J : 'I appreciate the point taken that the subject matter is part of a homogenous mass so that specific identity is of as little importance as it is, for instance, in the case of money. Nevertheless, as it seems to me, to create a trust it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property it is to attach.'

#### - Re Goldcorp

- Exchange company did not hold enough gold bullion to satisfy the orders of clients, even though it had taken their money
- Claimants that had proprietary rights in segregated bullion which the company had actually acquired had equitable property rights
- Claimants that could only show a contractual entitlement to an amount of bullion, but where the bullion was not segregated, acquired no rights
- A claimant who bought a large number of rare maple leaf gold coins could not acquire rights to his coins as they were not separated from the handful of coins which the exchange ordinarily held (rigid)
- L. Mustill : (with regards to the second category of claimants) 'There was no existing bulk [of bullion] and therefore nothing from which a title could be carved out by a deemed appropriation. There was never a separate and sufficient stock of bullion in which a proprietary interest could be created. What the non-allocated claimants are trying to achieve is to attach proprietary interest (on the non-existent stock) to wholly different assets; but the remaining stock, having never been separated, is just another asset of the company!'

#### - MacJordan Construction v Brookmount Erstin

- Under a building contract 3% was to be held on trust for the sub-contractor but the payments had only been paid into one large bank account (was unsegregated)
- Held : No trust. A trust over intangible property in the form of money in a bank account would require segregation for a valid trust. Being in a large bank account, the amount that was supposed to be paid to the sub-contractor was unable to be precisely ascertained, therefore there was no equitable interest.

#### - Hunter v Moss

- Under a contract of employment, the employee was entitled to 50/950 shares held by the employer, but the shares were not transferred nor identified
- Held : Valid trust. The finding of a trust enforces the terms of the employment contract, and it made no practical difference which 50 shares were subject to the trust, given that there is no qualitative difference between the shares.
- Dillon LJ compared the rights of the claimant with the position of an executor on a testator's death, that the executor is required to distribute the property, even if the testator had not indicated which beneficiary was required to acquire interests in which property. The

objection to this is that testators acquire legal title to all of the testator's property, whereas the inter vivos trustee only acquires legal title of the property subject to the trust.

- Alistair Hudson : 'The executor stands in the shoes of the deceased person with the power to distribute all the property...as though she were the deceased person. In essence it is always known which property is to be dealt with under a will trust; that is, all of the testator's property. Therefore, it is open to the executor to allocate title between items of property. The inter vivos trustee is entitled to exercise the rights of legal title only over that property which is subject to the trust. That is the heart of the problem : the inter vivos trustee cannot know which property falls under her remit, whereas the executor knows that she has title in the whole of the property, and so there cannot be uncertainty of subject matter in this instance.'
- Next, although Dillon LJ did not make any statement that there is a difference between intangible and tangible property when he distinguished *Re London*, it is the obvious conclusion to draw. What he actually held was that *Re London* was about the allocation of title in chattels whereas this is concerned with a declaration of trust over shares.
- Alistair Hudson : 'Although one might think that his lordship was trying very hard not to make that the distinction.'
- Jill Martin : 'fair, sensible and workable'
- Alison Jones : 'sensible, but creates difficult questions'
- Alistair Hudson : 'doctrinally, wrong and should not be relied upon.' Contradicts property law that requires specific and identifiable property; also, why should there be a distinction between tangible and intangible property? The distinction between cases should be whether the legal owner of that property is solvent or insolvent (whether there are sufficient shares to satisfy the claim).
- David Hayton : 'It must be suggested that the judgement of Dillon LJ should not be regarded as the last word on the subject, though the Lords have refused leave to appeal.'

#### - *Re Harvard Securities (Holland v Newbury)*

- The dealer who held securities as nominees for his clients was supposed to do so on bare trusts, but the securities were not numbered and were not segregated, and the customers could not identify which securities were held on bare trust for which client
- Held : Securities were intangible property and therefore did not require segregation; there was a valid trust (Followed *Hunter v Moss*).
- Neuberger J : Had the correspondence and internal records gone one stage further, the beneficial interest in the relevant shares would have been vested in the client. The only reason contending is because the precise shares were not identified.

#### - *White v Shortall*

- Supreme Court of New South Wales rejected the approach taken by Dillon LJ in *Hunter*.
- The trust is valid although there was no segregation – a single trust took effect over the entire holding and trustees have the power to elect shares held for the claimant. There was no need to segregate out a separate trust if the trustees had the power to split off shares from the valid trust.