

Express trusts

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Express trusts

Formalities

1. Is there a declaration of trust respecting land?

PLA s 53(1)(b): 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

- a. May be satisfied by a combination of documents capable of being read together (*DSS v James*)
 - i. Informal writing
 - ii. Correspondence from third parties
 - iii. An affidavit
 - iv. Answer to interrogatories
- b. Date of creation is not material – may come into existence at any time after declaration (*DSS v James*)

Exception: Statute cannot be relied on as an instrument of fraud (*Last v Rosenfeld*)

- c. Maxim that equity will not allow a statute to become an instrument of fraud
- d. D's reliance upon the absolute nature of the written contract and transfer, and the lack of writing to defeat the P's claim constitutes fraud (*Last v Rosenfeld*)
- e. Thus, P entitled to establish the D's obligation and enforce it despite the lack of writing

2. Is there a declaration of a subtrust?

PLA s 53(1)(c): a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will

- a. Applies only if creating a sub-trust is a disposition – if it isn't a disposition, apply s 53(1)(a) or s 53(1)(b)

Certainty of intention

3. Was there an intention to create a trust?

Rule: There must be manifested an objective intention to create a trust (*Byrnes v Kendle*); Language cannot be precatory, expressing merely a wish – particularity does not supply the want of imperative language (*Re Williams*)

- a. Technical terms do not need to be used (*Paul v Constance*)
 - i. Dealing with 'simple' people (*Paul v Constance*)
 - ii. Higher standards for professionals/'non-simple' people
- b. Can look to the relevant evidence and circumstances (*Byrnes; Re Williams*)
 - i. Conduct: Use of joint bank account, joint deposits and withdrawals (*Paul v Constance*)
 - ii. Time: If the property is immediately transferred, this might suggest that it is a gift
 - iii. A delay between conduct/words and receiving the property may suggest otherwise (*Paul v Constance*)
 - iv. Language: 'The money is as much your as mine' (*Paul v Constance*)
 - v. Bank manager gave evidence that the man wished to open a joint account but had been advised by the manager that it was inappropriate (*Paul v Constance*)
- c. What is the meaning of what the parties have said? (*Byrnes – Gummow and Haye JJ*)
 - i. Not answering the question what did the parties mean to say
- d. What did the settlor do? (*Byrnes – Heydon and Crennan JJ*)
 - i. Not what they intended to do
- e. Intention is an intention to be extracted from the words used, not a subjective intention which may have existed but which cannot be extracted from those words (*Byrnes – Heydon and Crennan JJ*)
 - i. It is as true of alleged trusts which are not wholly in writing as it is of alleged trusts which are wholly in writing
- f. Subjective intention is relevant only in relation to trusts when the transaction is open to some challenge or some application for modification but irrelevant to question of whether a trust exists and its content (*Byrnes – Heydon and Crennan JJ*)
 - i. An equitable challenge for mistake or misrepresentation or undue influence or unconscionable dealing or other fraud in equity, a challenge based on non est factum or duress defences, an application for modification by reason of some estoppels, an allegation of illegality, an allegation of sham, a claim that some condition has not been satisfied, or a claim for rectification
- g. Maxim that equity looks to the substance rather than form (*Byrnes – Gummow and Hayne JJ*)

Certainty of subject matter

4. Can the subject matter of the trust be identified?

Rule: Trust cannot be enforced unless the property held on trust can be identified (*Hunter v Moss*)

- a. A trust of a percentage of a shareholding was sufficiently certain to constitute the subject matter of a trust (*Hunter v Moss*)
 - i. Percentage of fungible property (property, such as cash or shares, which is identical to, and interchangeable with, property of the same description) is sufficiently certain
 - ii. Shares were all identical in one class – also only one class of shares in the company
 - iii. Would be insufficient if merely declaring to hold '50 of my shares on trust for B' without indicating the company
- b. Didn't matter that it was not possible to identify individual shares held on trust (*White v Shortall*)
 - i. Shares were in any event not numbered and held undifferentiated
 - ii. Given the nature of shares in a company, perfectly sensible to talk about an individual having a beneficial interest in 222,000 shares out of a parcel of 1.5 million
- c. Mere expectancy, such as the expectation of receiving property under a will of someone who has not yet died cannot be the subject of a trust (*Re Rules' Settlement*)

Certainty of object

Rule: A matter of construction whether the power is a mere power or a trust power (*Re Gulbenkian – Lord Upjohn*)

Rule: Beneficiary principle requires express trusts to have identifiable persons as their object, primarily so that there is someone with sufficient standing to enforce the trust in court (*Morice v Bishop of Durham*)

5. Is it a fixed trust?

Fixed trust is one where the T must distribute to the Bs in the proportions set out in the express trust – no discretion or choice

Rule: At the time of distribution the trustees must be able to draw up a list of all the beneficiaries entitled to a share of the trust property (list certainty) (*Kinsela – HCA*); Involves both evidential and linguistic certainty

- a. Conceptual difficulty: E.g. What is a 'blood relation'? What does 'living in Melbourne' mean? Give an example of different senses of how the meaning of the word can differ to show you understand.
- b. Evidentiary issues: When collecting evidence, how can you be 100% certain? Is it possible compile this list with further research?
 - i. Evidentiary uncertainty can be resolved by a court – difficulty in determining whether a person would be within the description of the class would not defeat the trust (*Kinsela*)
- c. Requisite certainty is not precluded by the possibility that there would be no member of the class (*Kinsela*)

Exception? The rule will be satisfied if within a reasonable time after the gift comes into effect, the court can be satisfied on the balance of probabilities that the substantial majority of the beneficiaries have been ascertained and that no reasonable inquiries could be made which would improve the situation (substantial majority test) (*West v Weston – NSWLR per Young J*)

- d. Test unlikely to be followed – criticised by **Creighton**

e. *West v Weston*

- i. Testator left his estate to be divided equally among such of the issue of his four grandparents as were living at the testator's death and attained the age of 21 years
- ii. No conceptual uncertainty – accepted that issue meant descendants
- iii. No evidential uncertainty
- iv. Obstacle to validity lay in tracking down all the members of the class
- v. Trustees undertook years of genealogical research
- vi. Trust would have failed if *Kinsela* was followed

Creighton

- f. Obvious difficulty in measuring objectively what constitutes a 'substantial majority' of the beneficiaries
- g. It is difficult enough to say what is a substantial majority of a finite number of persons
- h. Problem is even greater when, as here, the total number in the class is not and cannot be known
- i. To institute a test for certainty couched in uncertain terms is not merely ironic; it invites contentious and inconsistent application
- j. Test undermines the essential nature of a fixed trust, namely that the trust instrument fixes the

- quantum of a beneficiary's share
- k. The trust could only be carried into effect by the court authorising what would otherwise have been a breach of trust
- l. Distribution among those issue who had been identified, where it was probable that they were not the only beneficiaries, would breach the duty to distribute equally among all the issue
- m. Although the facilitative, pragmatic approach adopted by Young J has its merits, it must also have its limits
- n. It is suggested that to uphold a trust that can only be executed by authorising a departure from its terms is to exceed these limits

See Creighton Article pg 23

6. Is it a discretionary trust with trust powers?

T must distribute to whomever they choose in whatever proportions they choose – expressed in mandatory terms

Rule: A trust is valid if it can be said with certainty that any given individual is or is not a member of the class (*McPhail v Doulton* – UK)

Also potentially a loose class/administratively workable requirement (*McPhail v Doulton* – Lord Wilberforce)

- a. I.e. Definition of the beneficiaries to not be so hopelessly wide as to not form anything like a class such that the trust is administratively unworkable or one that cannot be executed (e.g. All the residents of Greater London)
- b. No clear HCA authority – body of authority suggesting acceptance of criterion certainty as per *McPhail* in Australia (*Creighton*, pg 26)
- c. Distinguished between linguistic uncertainty which if unresolved renders the gift void, and the difficulty of ascertaining the existence of whereabouts of members of a class, a matter with which the court can appropriately deal on an application for directions (*McPhail*)
- d. Court in *Horan v James* (NSWCA) applied *McPhail* for trust power, **but** did not consider administrative unworkability
 - i. Trust was in favour of all the world other than the testator's wife
 - ii. Court found that wills should be treated differently to trusts
- e. Court in *Re Blyth* (QLDSC) applied *McPhail* **criterion certainty test** and considered administrative unworkability
 - i. Trust was in favour of such organisations as in the Public Trustee's opinion are working for the elimination of war and such organisations as in the Public Trustee's opinion are formed for the purpose of raising the standard of life throughout the world
 - ii. Raising the standard of life – administratively unworkable – means different things to different people – but more so a problem of conceptual uncertainty rather than administrative unworkability (*Creighton*, pg 28)
 - iii. Strange decision – severed the second sub-class (severance usually only for charitable purposes)
- f. *McCracken v AG (Vic)* – suggested that a trust power in favour of Christian organisations and societies might be so wide as to be administratively unworkable
 - i. Administrative workability is a requirement
- g. Courts more willing to intervene (*McPhail*)
 - i. May do so by appointing new trustees or by authorising and directing representative persons of the class of representative persons of the class of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute
- h. A wider and more comprehensive range of inquiry is called for in the case of trust powers than in mere powers (*McPhail*)

7. Is it a discretionary trust with mere powers?

T may distribute to Bs in whatever proportions they choose

Rule: A class is certain where its description allows the trustee or court to say whether a person was inside or outside the class described (criterion certainty) (*Re Gulbenkian* – UK)

- a. 'My old friends', without some admissible evidence that the donor has some special dictionary meaning, is too uncertain (*Re Gulbenkian* – Lord UpJohn) – conceptual uncertainty
- b. Evidential uncertainty may not cause a power to fail – e.g. 'residence', 'employed', and 'care and