

Equity Notes

The requirements of an express trust

- Fundamental principles: express trusts arise from the express intention of the party who created the trust -> the judges will try to uphold a trust if they can; the settlor's intention to create a trust should be respected -> *McPhail v Doulton*: a trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out

- Intention to create a trust:

-> Capacity to create a trust: an intention will be valid only if the settlor or testator had the capacity to create a trust -> a settlement made by a child is voidable -> a settlement made by a mentally incapacitated person is void

-> Certainty of intent:

- Essential test: to consider whether the creator of the trust wanted somebody to hold property for the benefit of another person, so that they are under a duty to do so
- Use of the word 'trust': is needn't be used to create a trust -> even if the word trust is used, it doesn't mean that a trust has been created
- Substance of intention: words that involve a request are described as precatory words -> if the creator says they desire, wish, request or are confident that the other party receiving the property will hold it for somebody else -> this lacks the necessary element of requiring the other party to do so
- Objective assessment: rather than being concerned with what the creator of the trust actually intended, we are concerned with what the reasonable person would conclude that the creator of the trust intended

Re Adams and the Kensington Vestry: "I give, devise, and bequeath all my real and personal estate and effects... unto and to the absolute use of my dear wife... in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease" -> held that this created an absolute gift to the wife and did not impose any legal obligations on her to hold the property on trust for the children

In some cases the fact that particular words are used in a settlement or a will that have previously been recognized as being sufficient to create a trust is strong evidence that a trust was intended, especially where the document is drafted by a lawyer

- Interpretation of intent: in cases of ambiguity, the court will need to make sense of the expressed intent
- Self-declaration of trust: where a person purports to hold their own property for the benefit of another

Jones v Lock: A father returned from a business trip without a gift for his son. When the family told him off, he put a £900 cheque in the baby's hand, and said

“ look you here, I give this to baby; it is for himself and I am going to put it away for him, and will give him a great deal more along with it. ”

The wife said the baby might tear it, and the father said, 'it is his own, and he may do what he likes with it'. He locked it in the safe and died six days later. It was argued that although there was never an outright transfer, because he had not actually endorsed the cheque by signing it, there was no trust of the cheque for the baby. -> it was held that he hadn't made an effective gift of the cheque, because being payable to himself, it needed to be endorsed to the baby by adding his own signature, but neither had he intended to declare a trust of the cheque

- Commercial context: whether there is an obligation to segregate property

R v Clowes: The court considered appeals from criminal convictions including theft in the course of which it was necessary to consider whether the defendants were trustees of monies passed to their company for the purpose of investment in a particular fund. -> held that the money was intended to be held on trust rather than simply creating a relationship of debtor and creditor -> a requirement to keep money separate is normally an indicator that a trust was intended

- Intention to make a gift: if there is an intention to make a gift, but legal title to the property is not successfully transferred, this transaction cannot be saved by treating it as a trust -> the intention to make a gift contradicts any intention to declare a trust
- Testamentary trusts: the focus should be on the identification of the meaning of particular words with reference to their natural and ordinary meaning, the overall purpose and other provisions of the will -> the judge should ignore evidence of the testator's intention and other extrinsic evidence -> the only exception to this is where section 21 of the Administration of Justice Act 1982 applies -> it enables extrinsic evidence to be taken into account to assist in the interpretation of the will, but only where part of the will is meaningless or the language used is ambiguous

-> Sham trusts: cases in which the settlor appears objectively to have intended to create a trust but in which, on closer inspection, this intention is not genuine since the settlor has an ulterior motive to create a different set of rights and obligations -> the sham trust is void and unenforceable -> Diplock LJ: it means acts done or documents executed by the parties to the sham which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations which the parties intended to create -> a number of principles:

1. there must be an intention to create a false or misleading appearance that a trust has been created
2. a trust may be a sham even if it is not declared with any dishonest or fraudulent motive
3. where the settlor purports to declare a trust with somebody else as trustee, the trust will be treated as a sham only if both the settlor and the trustee intend it to be so
4. a trust that was not a sham when created cannot be made a sham subsequently -> however, a trust that was a sham when it was created can be converted into a genuine trust
5. a declaration of trust can also be set aside by statute

Conlagon has argued that the doctrine of sham trusts is a distinct doctrine from that involving certainty of intent, since the focus is on establishing the true subjective intent of the person declaring the trust -> Douglas and McFarlane argue that there is no distinct doctrine of sham trusts since the focus is simply on establishing the objective intent of the settlor to determine whether the settlor didn't intend the trust to take effect on the terms which were set out in the trust deed

-> Absence of certainty of intent: no valid trust will have been created

- Identifiable subject matter

-> nature of subject matter: trusts can be declared over all kind of property

-> description of subject matter: a declaration of trust can be valid only if the subject matter of the trust has been described with sufficient clarity -> 'the remaining part of what is left', 'such parts of my estate...' 'all my other houses' have failed for uncertainty

-> Identity of subject matter: the property must be identifiable -> eg if Angela declares that she hold 20 of the 100 sheep that she owns on trust for Brian, it is not clear which 20 sheep in the flock are held on trust for Brian, so the trust will fail

Hunter v Moss: Mr Hunter was entitled, under his contract of employment with Mr Moss, to claim 50 shares out of 950 shares in a specific company. Although this showed an intention to create a trust, Mr Moss did not identify which shares were the subject of this arrangement (he did not segregate 50 shares for Mr Hunter from the 950 shares he held). Mr Moss later sold the 950 shares and kept the proceeds of sale for himself. Mr Hunter claimed a proportion of these proceeds. The central issue was whether, in these circumstances, Mr Hunter could assert beneficial rights over 50 shares under a trust.

- Types of share
- Chattels in a bulk
- Tangible and intangible property: a trust of part of a mass will not fail for uncertainty where there has not been an appropriation of any specific part of the mass for the beneficiary, as long as the mass itself is sufficiently identified and as long as the beneficiary's proportionate share of the mass is not uncertain
- Intention to create a trust from a particular fund: even where the subject matter of the trust is intangible, a trust will not be created from a fund if the settlor did not intend part of that fund to be held on trust

-> Certainty of division of beneficial share: if an express trust is purportedly declared, but it is unclear what proportion of the whole each of the beneficiaries has, the trust will be void for uncertainty

-> Future certainty: a trust will not fail for uncertainty as to subject matter merely because the subject matter is, at present, uncertain, if the terms of the trust are sufficient to identify the subject matter in the future -> floating trust

-> Absence of certainty of subject matter: where the identity matter is unclear, there is nothing to which any trust can attach

Certainty of object

- Distinguishing trusts from gifts: 3 scenarios:

-> the typical gift involves two parties -> the donor transfers all rights to property to the donee without any obligation attached -> the donee consequently receives the property absolutely

-> the typical trust: the trustee hasn't received the property beneficially, therefore, it cannot be considered to have been given to them -> since the beneficiary hasn't received the property absolutely, there has been no gift to them either, although once the trust has been terminated and the beneficiary receives the property absolutely, it can be seen that there has been an effective gift of the property to the beneficiary via the mechanism of trust

-> when property is transferred subject to a condition -> whether these transfers constitute gifts or trust will depend on the intention of the transferor, objectively determined by the courts -> once the condition has been satisfied, the donee of the property receives the property absolutely

Attorney General v The Cordwainers' Co: the testator had left an inn to the Cordwainers' Company on condition that it paid annuities to certain relatives of the testator and made some payments for charitable purposes. Over the years, the rents obtained from the inn increased, so that there was a substantial surplus and the question for the court concerned who was entitled to it -> held that the original devise of the inn constituted a gift to the Cordwainers' Company subject to a condition rather than a trust, hence the company should receive the inn absolutely as a gift subject to the continued performance of the condition

Comparison with *Re Frame*: although the testator has used the word condition, he had actually intended to create a trust for his children

- Interests under a will or intestacy: where a testator dies, their property will pass to executors, who will receive the property absolutely, but subject to a fiduciary duty to ensure that it is transferred to those entitled under the will -> a beneficiary under a will has neither a legal, nor an equitable interest in any of the deceased's property until the executors have discharged all of the deceased's debts -> until then the beneficiary cannot claim any property from the estate for themselves and has only an expectation of the property being distributed to them, which is characterized as a mere equity

Commissioner of Stamp Duties v Livingston: A testator had died domiciled in New South Wales and with real and personal property both in New South Wales and in Queensland. He left one-third of his real and personal estate to his widow absolutely. She then died intestate, also domiciled in New South Wales, but the husband's estate was not yet fully administered. -> it was held that she didn't have such an interest because administration of the estate wasn't complete -> on the husband's death, full ownership of the estate had passed to the executors

=> where is the beneficial interest? -> should be considered to be in suspense pending the administration of the estate

- Powers: trusts impose obligations that must be performed whilst powers are discretionary, so they may be performed

-> Fixed trust: the duty to distribute trust property to the beneficiaries must be discharged -> if not, the court will ensure that the duty is performed

-> Discretionary trust: the trustee can choose who is to benefit -> but this power must be exercised -> there is an obligation to appoint and the trustee has a discretion regarding who is to benefit from the appointment of trust property and by how much -> the trustee is subject to a duty to survey the class of beneficiaries -> if the trustee fails to do so, it will be executed by the court

-> Fiduciary power: a power of appointment that is given to a trustee in their capacity as a trustee -> the trustee is not obliged to exercise it at all -> but the trustee must consider whether or not the power should be exercised -> if the power is not exercised, it will lapse -> if there is a fixed trust and the trustee has a fiduciary power to distribute a proportion of the property as they might wish, if that power lapses, the property that could have been appointed by the exercise of the power will be appointed to the terms of the fixed trust

- 3 categories: general power (to appoint property to anyone the trustee chooses) -> special power (to appoint to a person from a selected group) -> intermediate power (to appoint property to anybody except certain people or certain group of people)

-> Power coupled with a trust: another category involving a power to make an appointment, but a trust arises if the appointment is not made -> this gives the trustee a discretion to determine whether or not to make an appointment

-> Mere powers: given to people who are not trustees or otherwise in a fiduciary relationship -> mere power is when a power is given in a personal capacity, rather than a trustee

-> Determining whether a trust or power has been created -> depends on the settlor's intent -> if a mandatory language is used, this suggests that there is a trust obligation (to be distributed eg) -> discretionary language suggests a fiduciary power ('may appoint')

McPhail v Doulton: Bertram Baden established a fund for the benefit of the staff of Matthew Hall & Co Ltd. He died in 1960 and the executors of his trust claimed that the trust was invalid for uncertainty of objects. It was, therefore a power not a trust. -> On appeal, the Court of Appeal ruled that: 1. Clause 9 (a) constituted a trust because the word 'shall' combined with a power of selection created a trust for the distribution of income; 2. The test for certainty of objects was similar to that applied to powers: if it can be said with certainty that any given person is or not a member of the class, the trust will not fail only because it is impossible to ascertain every member of the class. Through this decision, McPhail constitutes a turning point because it changed the certainty requirements for discretionary trusts.

Certainty of objects

- the objects of the trust must be defined with sufficient certainty to enable the trustees to execute the trust according to the testator's intention -> 6 matters need to be considered: 1. The essential test of certainty -> 2. Whether it is possible to define with sufficient certainty the description of the class known as conceptual certainty -> 3. The ease of proving that somebody is an object, known as evidential certainty -> 4. Ascertaining where an object of the class is located -> 5. The size of the class -> 6. How sensible the testator's was, known as the test of capriciousness

- Fixed trusts:

-> the essential test of certainty: the trustees have no discretion as to which people are to benefit from the trust and in what proportions -> 'complete list test' -> a list can be compiled of all beneficiaries at the time when the trust property is to be distributed -> if it is not possible to draw up a complete list of objects at the time of the distribution, the trust will be void from the start

-> conceptual certainty: a fixed trust for the settlor's friends will be void for conceptual uncertainty

-> evidential certainty: if Angela creates a trust of 1000p to be divided equally amongst the people who were in the school football team with her, this will be conceptually certain -> but the school may no longer have any records of who played in the school team, so the trust will fail for evidential uncertainty

-> Ascertainability: there property will be distributed amongst those who can be ascertained and the share of anybody who cannot be ascertained can be paid into court

-> Size of the class: there is no such concern for fixed trusts because trustees do not select from within the class -> instead they distribute amongst the whole class

-> Capriciousness: no evidence to suggest that this is of any relevance to the validity of a fixed trust

- Fixed trusts subject to a condition:

-> the essential test of certainty: must be certain as well -> varies depending on whether the condition is a condition precedent (needs to be satisfied before the property can be distributed) or a condition subsequent (if the condition is satisfied, a beneficiary will no longer be entitled to the trust property)

- Condition subsequent: will be valid only if it can be known with certainty from the start the exact event that will result in the defeat of the beneficiary's interest

Re Jones: half the money held on trust for the testator's daughter was to be forfeited if she had a social or other relationship with a named person -> held to be void for uncertainty

=> it is only needed to consider whether the condition subsequent is conceptually certain

- Condition precedent: will be valid if it can be said of just one person that they satisfy the condition

Re Barlow's Will Trust: Miss Helen Alice Dorothy Barlow, the testatrix had a large collection of pictures. She specifically bequeathed some. For the remainder, she declared them to be held by her executor on trust to sell them, but that her 'family and friends' could buy them first at 1970 valuations or at the probate value, whichever was lower. The proceeds would go to the residuary estate. The executors asked the court whether the direction about family and friends was void, given its uncertainty, and if it was valid, who the family and friends were. -> in this context it was sufficient that one person undoubtedly fulfilled the condition and it didn't matter that it was difficult to say whether or not anybody else did -> anybody wishing to exercise the option bore the burden of proving that they were a friend and so satisfied the condition

-> Conceptual certainty: conceptual uncertainty wouldn't render the condition precedent void

-> Evidential certainty: evidential uncertainty wouldn't invalidate the condition

-> Ascertainability: if an object cannot be ascertained, this will not invalidate the condition, since the object needs to establish that the condition has been satisfied -> if no object cannot be ascertained, however, the condition will lapse

-> Size of the class: difficult to conceive that a fixed trust subject to such a condition will be administratively unworkable from the perspective of the trustee, by virtue of the size of the class

-> Capriciousness: if the condition can be characterized as capricious, the condition should be disregarded

- Discretionary trusts:

-> the essential test of certainty: the trustees are given the discretion as to which objects are to be benefited by the distribution of trust property and in what proportion -> it is essential that the trustees know from the outset who the potential beneficiaries might be -> the same complete list of beneficiaries was used to both types of trust -> however, discretionary trusts could involve many more objects -> in *McPhail v Doulton* the HL rejected the fixed list test of certainty for objects for discretionary trusts -> it is not totally irrelevant but will be applicable only where it appears that the settlor's intent is that, if the trustee does not make a selection from the objects, there will be division among them all, whether equally or in different proportions -> Lord Wilberforce's test is used instead: it was sufficient that it could be said with certainty that any given individual was or wasn't a member of the relevant class, and it was not necessary to ascertain everybody who was in the class -> refers to anybody at all who might be considered to be a potential object

-> conceptual certainty: the test of certainty of objects will not be satisfied if it is not possible to define the description of the class with sufficient clarity -> Sachs LJ considered that the description of an object as 'someone under a moral obligation' was not conceptually certain, whereas 'first cousins' would be

-> evidential certainty: 3 judges all agreed that the discretionary trust was evidentially certain but used different tests to reach this conclusion

- Sachs LJ: the courts will never be defeated by evidential uncertainty -> once the meaning of the class was clear, it was simply a question of fact on the evidence whether a person fell within that class -> if a particular person were not proved to be within the class, then they should be considered outside it
- Megaw LJ: it was not necessary to show that a particular person either was or wasn't a member of the class -> it was enough that it could be shown of a substantial number (matter of common sense) of objects that they were within the class
- Stamp LJ: it was not enough to be able to show that one person fell within or outside the class -> the test of evidential certainty required it to be shown of any given person that they either were or weren't within the class -> it would be enough to show of anybody who might potentially be an object that they were not an object, but if there were uncertainty about any one person, the trust would fail
- Stamp LJ's approach is most consistent with the test propounded by Lord Wilberforce -> it is also preferred because this removes evidential certainty as a means of invalidating trusts

-> Ascertainability of objects: the fact that it cannot be established where a particular object is, or even whether they are still alive, does not invalidate the trust

-> Size of the class: if the class of objects is so wide, that it cannot be considered to be anything like a class, the trust will be considered administratively unworkable

R v District Auditor, ex parte West Yorkshire Metropolitan County Council: The council wished to create a discretionary trust of £400,000 to be applied for a list of purposes 'for the benefit of any or all or some of the inhabitants of the county of West Yorkshire.' -> this principle was used for the first time to invalidate a trust -> it has been recognized that a class of hundreds of thousands is not inherently defective but a class of millions is clearly too big

-> Capriciousness: such a trust may also be considered as void on the ground of capriciousness -> no discretionary trust, however, has been invalidated for capriciousness

- Fiduciary powers:

-> Essential test of certainty: these powers are held by trustees and other fiduciaries -> no obligation on the trustee to distribute among the objects but they must consider the exercise of the power

Re Gulbenkian's Settlements: Calouste Gulbenkian made a settlement in 1929 that said the trustees should 'in their absolute discretion' and while his son Nubar Gulbenkian was still alive, give trust property to 'Nubar Sarkis Gulbenkian and any wife and his children or remoter issue for the time being in existence whether minors or adults and 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 Nubar Sarkis Gulbenkian may from time to time be employed or residing'. It was argued this was too uncertain to be enforced. -> the test was met if it could be determined that any individual was or was not a member of the class

- > Conceptual certainty: in the above case, the objects of the power included those with whom a particular person had been 'residing' -> this was held to not be conceptually uncertain
- > Evidential certainty: the same test of evidential certainty applies to fiduciary powers as that which applies to discretionary trusts
- > Ascertainability: the fact that a particular person is an object, but their whereabouts or existence cannot be ascertained, cannot defeat the validity of the power
- > Size of the class: such a power cannot be struck down for being administratively unworkable simply because of the breadth of the class
- > Capriciousness: may be invalidated by virtue of being capricious
- Resolving uncertainty:
 - > Trustees as arbiter: the creator of the trust might give to the trustees an express power to resolve uncertainty relating to the identity of objects -> there is a need to balance two conflicting principles: the principle against excessive delegation to the trustee by settlor vs the principle that the settlor's intention should be respected -> trustees are able to be arbiters about questions of evidential certainty but not conceptual certainty
 - > Third party as arbiter: Lord Denning recognized that conceptual uncertainty could also be resolved by a third party -> a difficult balancing act between respecting the intention of the creator of the trust and ensuring that the supervisory jurisdiction is not ousted
 - > Severance: where a discretionary trust is established for two classes, one of which satisfies the test of certainty and the other doesn't, the certain class should be severed
 - > Wide definition of beneficiaries: mechanism of intermediate power, whereby the trustees have the power to appoint property to anybody in the world other than a small class of excluded people
 - > Letter of wishes: a means of communication by a settlor to the trustees of non-binding requests to take certain matters into account when exercising their discretionary powers
- Absence of certainty of objects: what should happen to the property that will have been transferred to the trustee? The trustee wouldn't receive the property absolutely -> the trustee would hold the property on trust for the settlor -> if the trust were a testamentary trust, the trustee would hold the property for the benefit of those entitled to the deceased's residuary estate

Beneficiaries:

- Nature of a beneficiary's rights: equitable rights, which may be both proprietary and personal -> the beneficiaries can disclaim their interest by declining it -> silence is treated as acceptance -> to disclaim it, they must do so actively, within a reasonable time, and show unequivocally that they reject it -> the nature of the right that is enforceable would depend on the nature of the trust that has been established
- > Fixed trusts:
 - Proprietary rights: can be vested or remote -> where there is an interest in remainder following the death of a person with a life interest, the remainder interest is treated as vested even whilst the life tenant is