

Express Trusts

generally, judges will try to uphold a trust so as to respect S's intention: *McPhail v Doulton* at 450

1. establish “the three certainties”: *Knight v Knight (1840) 3 Beav 148* (per Lord Langdale MR at 172-3)

- i. **certainty of intention** - S must intend to confer the benefit of rights which she holds to B, by imposing a legally binding obligation on T to hold said rights for B's benefit.

NOTE that in the case of a self-declaration, S must intend that she herself will be subject to the legally binding obligations of a trustee: *Richards v Delbridge* (Jessel MR)

- a. intention is assessed objectively (words and conduct): *Twinsectra Ltd v Yardley [2002] 2 AC 164*, *Challinor v Juliet Bellis & Co (a firm)*;
- b. language
- generally, the courts make a distinction between the use of precatory and imperative words: *Lambe v Eames (1870-71) LR 6 Ch App 597* (the property was ‘to be at her disposal in any way she may think best for the benefit of herself and her family); the former express a hope, a wish, or a moral obligation (=> gift), while the latter express a command—a duty to do something (=> power/trust).
 - the word ‘confidence’ (property left in ‘full confidence’ that donee would do the right thing) may be indicative of a trust but only if the surrounding context also supports such a conclusion: *Re Adams and the Kensington Vestry (1884) 27 Ch D 394*
 - BUT the presence of precatory words will not necessarily prevent the court from finding that a trust exists, as long as it is satisfied that this was the intention of the donor: *Comiskey v Bowring-Hanbury* (c.f. default provision).
 - NOTE the distinction between trusts & powers of disposition: *Re Weekes' Settlement [1897] 1 Ch 289* AND trusts & powers of appointment: *Re Hay's ST [1982] 1 WLR 202*
 - use of the word “trust” not conclusive: *Re Kayford [1974] 1 WLR 279*, aff'd *Charity Commissioners for England & Wales v Framjee*;

- a general donative intention does not suffice: *Jones v Lock* [1865] 1 Ch Ap 25 (a father placed a cheque for £900 in his infant son's hand and said "I am going to put it away for him". the father then took the cheque and locked it away, but died six days later)
- distinguish between intention to create trust and clarifications as to who gets the property: *Hilton v Cosnier* [2018] EWHC 2728 (Ch) ('I have bought it [the property] for you to live in for the rest of your life but I am not going to give it to you - it is to go to my grandchildren'; no trust bc S had never told anyone about the "trust" and he acted inconsistent with it)
- c. conduct: *Paul v Constance* [1977] 1 WLR 527 ('the money is as much yours as mine')
- d. segregation of assets: *Henry v Hammond* [1913] 2 KB 515, *Re Kayford Ltd (in liquidation)* [1977] 1 WLR 527, *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 514 (the separation of customers' money in a different bank account sufficient to demonstrate an intention to create a trust, c.f. purpose of separation);
 - NOTE *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567: a trust arises where an asset is given to somebody for a specific purpose and if, for whatever reason, the purpose fails, the transferor may take back their asset;
- e. no certainty of intention => trust fails *ab initio*.
- ii. **certainty of subject-matter** - trust property must be well-defined and identifiable; 'property' is widely interpreted, re: includes money, goods, land, shares, covenants, debts, etc.: *Swift v Dairywise Farms* [2000] 1 WLR 1177; AND the proportionate amount of each B's share in the trust property must be identifiable: *Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch).
 - a. vague or general description of the property do not suffice: *Palmer v Simmonds* (1854) 2 Drew 221 ('the bulk of my estate')
 - NOTE *Re Golay's Will Trusts* [1965] 1 WLR 969 (ChD): reasonable income from my other properties' sufficiently identifies subject-matter (the court is used to working out what 'reasonable' means)
 - b. trusts for part of property
 - goods — subject-matter uncertain unless (1) bulk is identifiable and (2) trust property is earmarked: *Re London Wine Co* [1986] PCC 121, *Re Goldcorp Exchange Ltd* [1995] 1 AC 74.

NOTE Sale of Goods (Amendment) Act 1995, s.1(3): a purchaser of an unascertained part of the bulk acquires property rights in that bulk.

- money — where money is not segregated, it is not sufficiently certain: ***MacJordan Construction Ltd v Brookmount Erostin Ltd [1992] BCLC 350*** (NOTE: does this make sense when compared with the case below? is money not fungible too?)
- shares — subject-matter sufficiently certain: ***Hunter v Moss [1994] 1 WLR 452***; NOTE that if the question relates to a portion of shares where the shares are of different types or relate to shares in different companies, the rule in ***Hunter v Moss*** will not apply and the trust will be void if there is no further identification of the relevant property: ***Re Harvard Securities Ltd (in liquidation) [1998]***

NOTE: this could be taken to mean that where the trust property is of part of a fungible bulk of intangible property, it does not require segregation or specific identification to satisfy the certainty of subject matter requirement.

NOTE: Briggs J in ***Pearson v Lehman Brothers Finance SA [2010] EWHC 2914 (Ch)*** — (i) trust of fungible mass, (ii) the mass is sufficiently identifiable, (iii) B's proportionate share in the mass is sufficiently identifiable. (the principle is that such a trust creates a beneficial co-ownership share in the identified fund, i.e. S makes a trust out of the whole of the bulk, e.g. 50 shares held on trust for B and the rest of the share bulk impliedly held on trust for S themselves (equitable tenants in common);

^ in a PQ, ask whether the trust instrument may be interpreted as creating a beneficial interest in an interest in the *whole* of the fund.

- c. no immediate trust of future property, i.e. no trust for property that does not yet exist: ***Re Ellenborough [1903] 1 Ch 697***
 - NOTE ***Pearson v Lehman Brothers Finance SA [2010] EWHC 2914 (Ch)***: a trust will not be void for uncertainty bc the subject-matter is, at present uncertain, if the terms of the trust are sufficient to identify the subject-matter in the future.
- d. 'anything that is left' of the testator's estate sufficiently certain: ***Re Last [1958] P 137***.
- e. 'whatever is left' of the TP after trustee dies not sufficiently certain: ***Sprange v Barnard (1789) 2 Bro CC 585*** BUT "floating trusts" may be allowed if the terms are taken to mean that the "trust" crystallises only on T's death: ***Ottaway v Norman [1972] Ch 698***.
- f. no certainty of subject-matter => trust fails *ab initio*.

iii. **certainty of objects** - certainty of objects test is different for fixed trusts and discretionary trusts:

- a. fixed trusts — the 'complete list' test = whether it is possible to identify all the beneficiaries: ***IRC v Broadway Cottages Trust [1955] Ch 20***;

- e.g. *OT Computers Ltd (In Administration) v First National Tricity Finance Ltd & Others [2003]*, an attempt to set up a trust to protect monies owed to ‘urgent suppliers’ of a struggling company failed because the meaning to be given to the adjective ‘urgent’ was not made clear, making it impossible to draw up a full list of beneficiaries.
- b. discretionary trusts — the ‘is or is not’ test = whether it can be said with certainty that any given individual is or is not a member of the class: *McPhail v Doulton (Re Baden’s Trusts (No 1)) [1971] AC 424*
- c. powers — the ‘is or is not’ test: *Re Gulbenkian [1970] AC 508*
- d. conceptual uncertainty vs. evidential uncertainty:
 - conceptual certainty relates to the certainty of the *class*; evidential certainty relates to the issue of whether or not an *individual* can be found or proven to be a member of the class.

conceptual - focus is on meaning, re: is description of the class of persons whom S intends to benefit sufficiently clear?

e.g. a trust for ‘my children’ is sufficiently clear BUT consider e.g. a trust for ‘my sons’ in circumstances where I have biological sons and stepsons.

evidential - focus is on proof, re: to what extent does the evidence allow specific persons to be identified as members of the relevant class?

e.g. a trust for ‘those who graduated from UCL with a law degree in 1973’ but UCL’s paper records destroyed in a fire and no computer records: *Re Sayer [1957] Ch 423* (trust for employees and ex-employees of a company but no records to prove who was working or had worked for the company)
 - if a class is conceptually uncertain, the trust will be void, but evidential uncertainty will not defeat a trust.
 - NOTE **gifts subject to conditions precedent** = the donee will not be entitled unless they satisfy the condition, for example ‘£10,000 to each of my children who graduate from university’; a condition precedent will be valid if at least one person can be said to satisfy the condition: *Re Barlow’s WT [1979] 1 WLR 278* (testatrix provided her painting could be sold at a discount to “to any members of my family and any friends of mine”).

^ this may be construed as a fixed trust of a series of individual gifts subject to a condition precedent: the trustee is obliged to distribute the property to any individual who satisfies the condition. the onus is on the object to how that they satisfy the condition.

- NOTE a **gift** to ‘friends’ may be valid as a gift subject to a condition precedent, BUT a **discretionary trust** for ‘friends’ will be void for uncertainty, as it is impossible to define friends so that it could be said that *any* individual *is or is not* within the class.
- NOTE different approaches to the application of the **‘is/ is not test’** to discretionary trusts (esp. regarding evidential certainty) in ***Re Baden’s Deed Trusts (No 2) [1973] Ch 9***, c.f. deed provided that a fund was to be held on trust in favour of the staff of Matthew Hall and Co Ltd and their relatives and dependants.

conceptual certainty: “relative” conceptually certain (descendants from a common ancestor (Sachs & Megaw LJJ) or next of kin / nearest blood relations (Stamp LJ)), “dependants” conceptually certain (someone who was financially reliant on an employee of the company)

evidential certainty:

Sachs LJ — once the class is conceptually certainty, it becomes a question of fact to be determined on evidence whether any postulant has on inquiry been proved to be within it: if he is not so proved, then he is not in it; where a given object cannot prove they are a member of the class, the law will simply presume that they are outside of the class (i.e. high tolerance for evidential uncertainty)

Megaw LJ — trust valid if a substantial amount of people can prove they are the objects of said trust (i.e. moderate tolerance for evidential uncertainty)

Stamp LJ — whether **any (so basically every)** individual could be said that “is or is not a member of the class” (i.e. 0 tolerance for evidential uncertainty)

- e. ascertainability - the location or continued existence of a beneficiary / object;
 - immaterial if it cannot established for fixed trust: ***Gulbenkian [1970] AC 508*** (Lord Upjohn) and for discretionary trusts: ***McPhail v Doulton*** (Lord Wilberforce).
- f. administrative unworkability - a trust may be void if the class to benefit is *so hopelessly wide* as to not form ‘anything like a class’ so that the trust would be administratively unworkable, for instance Lord Wilberforce’s example of a trust for all the residents of Greater London in ***McPhail v Doulton***.