

The critically evaluate
the decision essay



**ASSIGN
BUSTER**

In the light of the statement above I am going to with reference to the decided cases explain the principles relating to certainty of subject matter and critically evaluate the decision in *Hunter v Moss*. Trusts developed in England during the 12th and 13th centuries. Trusts are widely considered to be the most innovative contribution to the English legal system.

There is no successful definition of a trust till date, even after many attempts, but it is easier to say what a trust is by description. According to common law a trust is an arrangement that can come in a variety of forms where by property, money or other belongings are managed by a person (or persons or organisations) for the benefit of another, but is owned by the trust. In the case of *Knight v Knight* Lord Langdale MR identified that in order for a trust to be valid the three certainties must be complied with namely, certainty of intention, certainty of subject matter and certainty of objects. This is needed so that a legal obligation is created as opposed to a moral one. 1 In certainty of intention, the settlor must intend to create a trust; there is no easy way of finding out whether a trust was to be created. Even if the word " trust" is used there is no guarantee that this will show a trust was intended to be created, refer to case *Midland bank v Wyatt* (1995)2.

In order to show that a trust was to be created more imperative words should be used in the Will or deed so that the trust does not become void. In certainty of objects, there has to be someone who can enforce the trust namely beneficiaries who are the object/objects of the trust i. e. the people to whom the trustees, are to owe a duty must be readily determinable. Certainty of subject matter basically means that the assets constituting the trust fund must be readily determinable.

The subject matter could be anything from interest in land, chattels to money. The requirement is that the property, which is intended to constitute the trust fund, should be segregated from any other property mentioned so that its identity is distinguishable. If the trust is not segregated sufficiently the trust will fail, as there is no certainty of subject matter and it would not be possible for the courts to know exactly which property was to be administered in accordance with the terms of the trust. The main problem in this area arises when trying to identify the property that constitutes the trust fund.

It would be easy to understand if a settlor stated, " I leave my second edition book of Gary Watt's Trusts and Equity to be held on trust for my husband". This trust would only be successful if the settlor had one copy of that book, as all the certainties would be completely clear. The problem would arise if she had owned two copies of that book, she would have to specify exactly which one was to be held for her husband. If she failed to identify which copy was to be held on trust the trust would be void. Complications are more common in money matters; say a settlor wanted to form a trust for his children, where he wanted to leave part of the money in his bank account to his children and the other part was to hold for himself, this trust would be void due to uncertainty of subject matter, the way around this could be if he opened another bank account and only put the money for the children in that account then there would be sufficient certainty of subject matter.

Another approach could be if he left the whole fund in one account for him and his children and gave the trustees the power to allocate which property goes to which beneficiary. The use of the trustee's power as opposed to a

general fund would resolve many of the problems that could arise due to uncertainty of subject matter. A similar situation did arise in *Hemmens v Wilson Browne*⁴, where a document was supposed to give Y the right to a payment of i?? 110, 000 at any time from X, this did not create a trust as there was no fund identified from which the money was to be paid from. This therefore reinstates the general rule that failure to segregate the intended trust property from all other property will lead to the trust being void due to the uncertainty of subject matter.

A straightforward example of this principle being used is in the case *Re London Wine Co.* ⁵ London Wine co were wine merchants they ran their business on the basis that wine ordered by customers was held on trust by them from the date ordered until the wine was delivered to the customers. The bottles in each order were not separated from the stock until delivery. In the case the creditors of the business wanted to claim that their contracts for the purchase wine should grant them proprietary rights in wine held in the cellars.

The court held that the only way in which the creditors could be entitled to assert claims as beneficiaries under a trust over any bottle of wine held in the cellar is if they could identify that the bottles had been segregated from the general stock and held separately to their account. There had been no such segregation and therefore there was no trust. This approach is known as the orthodox approach⁶. The London Wine case was followed in an appeal to the Privy Council in *Re Goldcorp*⁷.

The Goldcorp was concerned with the exchange of gold bullion, which went into insolvency. In the exchange customers acquired gold bullion, and were also offered an extra service in which it acted as a depository for the bullion customers asked to buy. So by contractual agreement the exchange would have to keep all the bullion the customer ordered in their vaults in case the customer asked for delivery. After the exchange fell into insolvency this practice slipped it only took delivery of as much bullion as it usually needed to satisfy a customer's daily needs. Therefore the contract with their customers was broken as they failed to buy all the bullion in the order.

When the exchange went into insolvency it did not stock as much bullion as needed to satisfy the customers' orders even though they had taken their money. There were three types of customers who wanted to claim off the exchange saying, that the bullion by contract was held on trust for them. The first type of claimants had proprietary rights in specifically identifiable bullion that the exchange had acquired physically after their order's there claim was successful as the bullion was segregated from all the other bullion that was stored in the vault, therefore the claimants satisfied the requirement of certainty of subject matter. The second type of claimants didn't have their bullion separated from the rest in the vault so their claim failed, as they were not able to identify what belonged to them, so they acquired no rights under the trust. They tried to argue the case on many grounds even trying to say there should have been proprietary estoppel but Lord Mustill held that the property was unidentifiable.

All they could show was the contractual agreement of the bullion they were entitled to, bearing a specific monetary value. The third client ordered to buy

a large amount of rare maple gold leaf coins that the exchange does not carry a large stock for. The claimant tried to show that the coins in the vault must be held for him. His claim failed because the coins were mixed with other coins as well as with the bullion. This therefore shows that not only does the property have to be identifiable but also it has to be segregated for the purpose of subjecting it to the trust arrangement. 8 After looking through the usual principles relating to the certainty of subject matter, there's a contentious issue of whether the rule applies to intangible property as it applies to tangible property.

There is a distinction between properties that can be identified without segregation, such as fungible property such as sugar, flour or liquids and therefore it cannot be separately identified and intangible property such as patents and shares. The issue raised from this is that there is no reason why both tangible and intangible property should not follow the orthodox approach. 9 A different view was seen in the case of *Hunter v Moss*¹⁰ by the court of appeal. In this case an employee of a company was entitled to 50 shares from a number of 950, held by his employer by an employee contract. No attempt was made by the employer to transfer the shares to the employee or identify the shares that were to go to the employee. The issue in the case was about whether or not the employee could assert proprietary rights over the 50 shares.

If the precedence from the *Goldcorp* case were to be followed then there would be no valid trust, because you cannot identify which 50 shares out of the 950 were to be held on trust. Dillon LJ took a different approach in this case compared to the one in *Goldcorp*; he held that there was a valid trust.

There were two reasons for this decision; the first one was that it would comply with the employment contract. The second reason for this decision was that it made no difference, which 50 shares were subject to the trust as there was no qualitative difference between the shares; this only works if the shares are of the same type, class and in the same company. The court of appeal concluded that it is not always necessary to segregate property if it is intangible property.

The judgement was seen too have three features. The first feature was seen how Dillon LJ justified the possibility of creating trusts if the property is identical. He stated that " it is plain that a bequest by the defendant to the plaintiff of 50 ordinary shares in MEL would be a valid bequest on the defendant's death which his executors or administrators would be bound to carry into effect".¹¹ Having established that there was no rule that stated a trust couldn't be formed without segregation he felt empowered to find a trust from the facts before him. The argument to oppose his reasoning was that an executor has a different position compared to an inter vivos trustee.

The executor would have legal title to all the deceased's property whereas an inter vivos trustee would only have a legal title in the assets the settlor made subject to the trust so he would not be able to say which property falls under his remit. Due to this fact uncertainty of subject matter cannot be used in this instance.¹² In the second feature Dillon LJ, distinguished *Hunter v Moss* from the London wine case so that he is entitled to uphold Moss's rights on the facts before him. He stated that the London Wine case was concerned with allocation of title in chattels whereas this case was concerned with a declaration of trust over shares.

From this there is an obvious conclusion that Dillon LJ tried to make a distinction between tangible and intangible property. It was therefore held that a trust was valid; there was no uncertainty of subject matter and no need for segregation. 13 The third feature is that Hunter is a court of appeal authority showing that there are circumstances where it is not necessary to segregate property for a trust to be valid. By contrast the Goldcorp case is used as a persuasive authority only, being a decision by the Privy Council. There are a number of problems with the decision in Hunter v Moss that is why it appears to be an unsatisfactory authority. Firstly it ignores the matter that in English property law a specific and identifiable property is the subject of the property right.

Looking at shares it is no less important to identify which property is held in the trust and which is not. Secondly the Court of Appeal could have decided there is valid trust in Hunter v Moss as there was enough shares to satisfy the claim, it could not be the same in Goldcorp as there were more claims than there was property to satisfy them. Also there is no reason why there should be any different rules between tangible and intangible property.

There would have been a better distinction between cases where legal owners of the property is solvent or insolvent. Where the property is solvent it would be possible to argue that it does not matter if the property is segregated as long as there is some legal obligation between the parties.

Where the property is insolvent issues regarding unsecured creditors arises. Therefore if a distinction has to be made it should be between solvent and insolvent trustees. 4 In conclusion it can be seen that no trust can be formed

unless it complies with the certainties. Where there is no certainty of subject matter, there can be no trust.

The property would then remain with the settlor or if dead will pass by will or the intestacy rules. The trust fund must be identifiable so should be segregated from other property. However it appears there is no need to segregate if the property is intangible, segregation is only necessary in tangible property.