

The three certainties



Trust The Three Certainties An express trust will not take effect unless the three certainties are present . These certainties are (1)Certainty of words (2)Certainty of objects (3)Certainty of subject matter . It is therefore important to prove all three elements in the given scenario to prove that a trust exists . If any of these certainties are not present the trust fails and the donee of the property which is sufficiently defined , takes the property as an absolute gift .

If the words are imperative and thus raise a trust and the objects ascertainable but the property is not specified in terms of identity , then there will be no trust , for there would be nothing to hold and administrator of a trust property . This rule applies for all three elements , there would be no trust without one or more of the elements not being present . The issue in the first scenario is; Whether all three of the certainties exists? Firstly certainty of words, this principle is that an expressed trust is created where the settlers shows an intention to do so .

It is therefore important to show settlers intention rather than moral obligation. Before 1830 proprietary words were construed by the courts of having the force to create a trust . The Common Law allowed an estate being disposed of to be vested in the execution . However after 1830 the law was changed by the executing act which provided that disposition of property should not go to the executor and the courts stopped construing precatory words as having the effect to create a trust. The words “ I bequeath” and “ I would like” is used in the given situation.

The words of I bequeath \$200, 000 to my dear friend can be contrasted with that of Re Codrington where the testator’s wishes were carried out where he

bequeathed two of his plantations in Barbados to the society for the propagation of the Christian Religion. The main question was whether the will created a binding trust or not as the testator went on to use the word desire. It was held that a binding trust was created as Douglas CJ looked at the language in accordance with the law and intention.

It is therefore necessary to look at the language intention and the law in this scenario. The words I would Like can amount certainty of words. The case of *Lambe v Earnes* (1871) held that precatory words in a gift and did not mean that the donor intended the donee to hold the property for trust. This has been enforced as trust, gifts accompanied by precatory words. For example "Feeling Confidence" or in "Full confidence" in *Re Adams and Kensington*. It is not however an absolute rule that a trust can never be created where precatory words are employed.

On the contrary if the instrument as a whole or the context in which precatory words are used, indicates that a trust was intended, the courts are quite prepared to give effect to the trust, for example like *Re Hamilton* and *Re Steel*. If the words I would Like in this situation was intended to create a trust rather than a mere obligation then it can fall within the scope of certainty of words. Secondly, Certainty of subject matter. There are two aspects for the requirement of subject matter (1) Certainty as to the property held upon trust (2) Certainty as to the beneficial interest which each beneficiary is to receive.

With respect to (a) The will or other instruments creating the trust must make it clear as to what property is to be bound by the trust. Can then "the remaining part of what is left in the first scenario constitute to that of subject

matter? The case of *Sprange v Bernard* a testatrix gave property by her will to her husband for the sole use and directed that at his death whatever is left that he does not want for his own use was to be divided between her sister and brother. It was held that there was no trust, since it was uncertain what would be left after the death of the husband.

How then could one know what would of if anything be left after the death of Nancy, Gloria's friend. The case of *Re Beadmore Trust* also went on to illustrate this as it said that the words of description in the latter case are of same interest and at the death, the remains part of what is left, that he does not want for his own wants and use. The courts held that no valid trust could be created in such vague words. The question of the existence of the three certainties are also asked in the second situation to create a trust. I bequeath " in this situation may amount to certainty of words as Gloria may have intended to create a trust. Equity however look at intent rather than form of words used. The case of *Re Codrington Agen* shows this. Another case would be that of *De Costa v Wilburton*, where intent is present there maybe no need for any precise technical expression to be employed. It is however left to the other two elements of certainty of objects and subject matter to create a trust. Certainty of objects " And in such times amongst such of the inhabitants of Grenada and as they shall in their absolute discretion think fit " The bjects of a trust are the person's who are to benefit from it, that is to say the beneficiaries. If the requirement for trust is clearly defined for example Aunty Angela, Uncle Mukesh then the requirement is clearly satisfied. When the beneficiaries are not clearly identified by the vagueness used to described them there would be no trust. The test for

certainty of objects differs accordingly to whether the trust is fixed or discretionary. A fixed trust is one which is beneficiary in allocating to a particular beneficial interest by the settler for example where \$100,000 is given to my aunts and uncles in equal shares.

A discretionary trust is one that trustees have a discretion as to which members of the class of beneficiaries are to benefit from the trust property and in what shares for example where \$20,000 is transferred to trustee upon trust such as my employees or employers. Discretionary trust in the Old list test before 1970 was that as the same as fixed test where all the beneficiaries had to be named. The case of *IRC v Broadway* came up with the reasons for the Old test. One of the reasons for the old test was that (1) the court could not substitute its discretion for that of a trustee.

There came a New test for Discretionary Trust. The House of Lords in *McPhail v Dutton*, concerns a discretionary trust in favor of a certain Mr Bedens employees and ex employees preferred in *Re Gestoneer* and *Re Gulberkan* whether the words employed in describing the discretionary class are such that it can be said with certainty that the individual is /is not a member of that class. As illustrated in *McPhail* case it was not possible to assert the possible beneficiaries. It may also be impossible for Gloria's trustee to proceed upon the subject of certainty of object matter relating to the inhabitants of the Island of Grenada.

The third scenario given also has to prove all three elements in order to illustrate that a trust exists. Firstly certainty of words "I bequeath" in this scenario may have amounted to certainty of words as Gloria may have intended to create a trust. Equity however looks at the intent rather than

forms of the words . Gloria goes on to say in “ the expectation of” The case of Cary v Cary “ When a testator , having the power to dispose of property , expresses a desire as to the disposition of the property , and the objects to which he refers are certain , the desire so expressed amounts to a command .

The cases are clear on this subject , that where the property and the objects are certain , any word intimating a wish or desire , raise a trust , if the objects be not certain , a trust can no more be raised upon words of desire or request , then upon words of actual devise . ” This words in expectation of may amount to certainty of words as it is an expressed desire my Gloria for her cousin Ann Marie to dispose her property (Wine). Secondly In Re London Wine Co (Shippers)It was held that before any trust could be said to attach to and tangible assets comprise within the class of assets , the particular assets have to be identified .

For example His Honour Oliver J. stated a former who declares himself (without identifying them can be said to have created a preferred and complete trust whatever rights he may confer by such declaration of a matter of contract . But the mere declaration that a given number of criminals would be held upon trust could not create an interest . The example by Oliver J was in respect of trust of tangible assets in the nature of cases of Wine . The trust in Re London Wine Co was held invalid partially on the principle that this failure to segregate th wine to be held a trust rendered the subject matter of the trust uncertain .

In Hunter v Moss (1993) the C. O. A. declined to apply the principle in Re London Wine Co in upholding that a trust is valid on the basis of intangible

assets . This concept of intangible assets have not been sufficiently certain as to give rise to a valid trust , It may therefore be left up to the courts to decide whether this situation amounts too certainty of subject matter . Lastly Certainty of Objects . Ann Marie in expectation will divide the contents of Gloria's wine cellar to her old friends and in cases where there is doubt her trustees are responsible to designate who her old friends are.

Where a trust would ordinarily fail because the class of beneficiaries is defined by conceptually inaccurate terms , would such a trust be rendered valid where a third party id left to determine the meaning of the ascribed terms ? This scenario related to third parties , Academicopinion is divided in this matter . Martin author of Hansbury and Martin asserts that conceptual uncertainty may in some cases be cured by providing that the opinion of the third party is to settle the matter .

On the contrary author said as Halton suggest if the concept is my far relatives or my old friends or my good business associates and the trustee are given the power to resolve any doubt as to whether a person qualifies the court can resolve the uncertainty. Re Track St (1978) Lord Denning saw no reason why a trust instrument should not provide that any dispute or doubt should be resolved . Re Bourogh v Philcox (1840 states that the test for powers /discretionary trust will at the oral determine whether the class is sufficiently certain.

Gifts are expressed to be subject to a condition . The Applicator test was showed in Re Allen (1953) it states that such a trust will not fall for uncertainty of objects once it is possible to say at least one person that he/she satisfies the description of old friends . The effect of uncertainty of

objects is that the resulting trust arises in favor of the transfer. It can therefore be said that the above scenario can amount to certainty of objects as may or may not be present according to the third party involved .

Kate and Sierra may not know who Gloria's old friends and good neighbors are and the gifts expressed may or may not result in favor of a class which fails for uncertainty of objects under the comprehensive list test. In Conclusion The first scenario did not include certainty of objects therefore a trust cannot be created, The Second scenario did not include certainty of subject matter a trust cannot also be created , However the last situation entailed all three elements given case law and the relevant situation it may be left up to the courts to decide .