

**Trusts & Equity – Law 463**  
**Fall Term 2024**

**Lecture Notes No. 6**

**IV. THE CREATION OF AN EXPRESS TRUST: ‘THE THREE CERTAINTIES’**

An **express trust** must display all of the following features:

- (a) *certainty of intention* on the part of the settlor *to settle a trust*;
- (b) *certainty of subject matter*; that is, the trust property;
- (c) *certainty of objects*; that is, the precise identification of the beneficiaries and their interests in respect of the trust property.

A common theme running through this area is the reluctance of the court to recognise a trust that it cannot enforce. In *Morice v Bishop of Durham* (1804), 9 Ves 399, 405 (Ch.), Sir W Grant held that would the position be otherwise, the court would not know who has what powers, over what, and for whom which would put it in an impossible position in respect of supervision. The same policy holds as true today as it did 200 years ago.

The casebook features an example of the problem in the context of a Will which seems alternatively to create a gift with conditions or possibly a trust:

**Re Walker**  
**(1925), 56 OLR 517 (C.A.); cb, p.210**

The testator died leaving a Will in which he gave his property to his wife with the added proviso that should she die still possessed of that property, that property should be divided amongst certain people whom he named in the Will. The executors of the estate were uncertain as to their obligations and the widow's interest in the property and applied to the Court for directions.

In the Court of Appeal, it was held that **overall concern of the court is to ensure precision in respect of the disposition of property, both to give intent to the settlor's intention and to ensure that the court can fulfil its supervisory function to the beneficiaries**. In this case, the 'dominant intention' of the testator was to gift (vesting all rights in the wife) and not to create a trust (in which the wife would hold a limited beneficial interest).

**(a) Certainty of Intention**

- 1) There is no requirement that technical words must be used to set up a trust, consistent with the maxim *Equity Looks To The Intent Rather Than The Form*.**

This maxim is not intended to allow a dispensation with statutory rules but seeks to mitigate the rigid application of common law or procedural rules in respect of effecting certain transactions. For trusts, this means that the particular form by which the settlor evidences his or her intent to trust is less important than the intention itself.

- 2) The issue is a question of fact rather than of law - i.e. the private construction of the words used by the settlor of an *inter vivos* trust or the testator setting up a testamentary trust, as the case may be.**

Thus, the proper approach is for the court to decide whether the settlor intended to make a gift to the trustee accompanied by a wish, recommendation, hope, etc. (so-called 'mere precatory words' in the instrument setting up the conveyance) or intended to settle a trust. Thus,

- where the testator gave his residuary estate to a parish council 'for the purpose of providing some useful memorial to myself' the words were construed as an intent to trust (but an issue thereafter arose as to whether the trust was a pure 'purpose trust'; that is, an impermissible trust for a non-charitable purpose rather than a person): *Re Endacott* [1960] Ch 232.
- where the testator gave property to his widow 'absolutely, with full power to dispose of the same as she may think fit for the benefit of my family having full confidence that she will do so', there was no trust; *Re Hutchinson and Tenant* (1878), 8 Ch D 540.
- where the testator gave his estate to his widow, her heirs, etc. absolutely 'in full confidence that she would do what was right as to the disposal thereof between his children, either in her lifetime or by will', there was no trust; *Re Adams and Kensington Vestry* (1884), 27 ChD 394.
- **where the settlor opened a bank account in his name alone, with his common law spouse having a right to withdraw or deposit such that their joint bingo winnings were paid in and their joint Christmas expenses were withdrawn, there is a trust where settlor said to the common law spouse / beneficiary 'the money is as much yours as mine' - these were simple people who the court found intended a trust obligation; *Paul v Constance* [1977] 1 WLR 54; cb, p.186, fn. 2 (which we'll read later).**

- where a company declares itself trustee of customer's money pending an order being shipped there is a trust; *Re Kayford* [1975] 1 All ER 604 [nb: this seems to defeat the insolvency rules].

**Johnson v Farney  
(1913), 20 OLR 223 (S.C.); cb, p.188**

The introduction to the will read:

'I leave all my real and personal property to my dear wife.'

Then, towards the end, it read:

'I also wish if you [the wife] die soon after me that you will leave all you are possessed of to my people and your people equally divided -- that is to say, your mother and my mother's families.'

In a codicil to the will, the testator referred to real estate purchased after the date of the Will:

'Property known as the William McGuire property to go to my wife to do as she sees fit with it ... If she my wife die intestate divide what is left of it equally among my brother and sisters and her brothers and sisters ...'

The testator died; seven years later, his wife died. They had no children. In her will, she left everything to her family.

**Per Boyd C.:**

As said in one of the later cases, the husband may have thought that the influence of an express wish would be sufficient to induce the wife to apply the property in the way suggested, but it was not put upon her as a duty, a mandate, or a legal obligation. He did not mean the second stage of the transfer to be under his will, but to be bestowed under the influence of his expressed wish and by the testamentary act of the wife. **His words, taken literally, would cover all the possessions of the wife, however acquired, and this shews that he did not seek to control her free action**, but only to give evidence, as he does in so many other parts of the will and codicil, which need not be quoted.

The earlier cases on precatory trusts have been departed from, and a stricter rule now obtains, which may be thus expressed: **an absolute gift is not to be cut down to a life interest merely by an expression of the testator's wish that the donee shall, by will or otherwise, dispose of**

**the property in favour of individuals or families indicated by the testator.**

A wish or desire so expressed is no more than a suggestion, to be accepted or not by the donee, but not amounting to a mandate or an obligatory trust...

I, therefore, declare that there is no trust attaching to the provisions of the husband's will, and that the wife held the property absolutely as her own.

There is no hard and fast rule – just the usual rules for the construction of private documents and an inquiry into the meaning of any ambiguous words with reference to the circumstances of the settlor to determine the meaning of the disposition in question based on the settlor's intention.

### ***Sham trusts:***

#### **Antle v. Canada**

**2010 FCA 280 (Fed. C.A.); cb, p.197, fn. 8**

This was a sham trust which was never intended to be a real trust and thus failed.

#### **Per Noel J.A.:**

- [1] These are two appeals against the judgments of Miller J. of the Tax Court of Canada (the Tax Court judge), dated September 18, 2009, dismissing the appeal by Mr. Antle (the appellant) and quashing the appeal by the Renee Marquis-Antle Spousal Trust (the Trust) from assessments issued by the Minister of National Revenue (the Minister) under the [Income Tax Act, R.S.C. 1985, c. 1 \(5<sup>th</sup> Supp.\)](#) (the [Act](#)) in respect of their 1999 taxation year.
- [2] The two appeals were consolidated by order of this Court dated November 12, 2009. The reasons which follow dispose of both appeals and will be filed in docket A-428-09. A copy will be filed as Reasons for Judgment in docket A-429-09.
- [3] The assessments in question arise from a sale of shares by the appellant to a Canadian arm's length purchaser. In order to shelter the resulting capital gain from tax, the appellant embarked on a plan known in tax circles as a capital step-up strategy. **In summary, the plan was for the appellant to settle a Barbados trust in favour of his wife, to convey the subject shares to the Trust which would then sell the shares to his wife, who in turn would sell them to the arm's length purchaser. This series of transactions was to take place in sequence in the course of the same day so that the proceeds of disposition would find their way back into**

**the appellant's newly incorporated business the next day by way of a loan from his wife.** Documents purporting to give effect to this plan were executed on December 14, 1999 and the Trust was said to have come to an end in early 2000 upon payment of the trustee's account.

- [4] Based on the inter-play between certain provisions of the Act and of the *Canada-Barbados Income Tax Treaty* (the Treaty), both the appellant and the Trust took the position in filing their respective returns that no tax was payable in Canada as a result of these transactions. **It is common ground that, but for this plan, a taxable capital gain in the amount of \$1,299,821 would have been realized by the appellant on the sale of the shares to the arm's length purchaser.**
- [5] The first assessment issued by the Minister disregards the interim sale of the shares to the Trust on the basis, *inter alia*, that the Trust was not validly constituted, and levies the applicable tax in the appellant's hands on the assumption that the shares were sold directly to the arm's length purchaser. The second assessment was issued on the alternative assumption that the Trust did acquire the shares before they were sold to the arm's length purchaser, and is liable to the applicable tax.
- [6] **The Tax Court judge held that the Trust was not validly constituted because it lacked certainty of intention, certainty of subject-matter, and that in any event no transfer of the shares to the Trust had taken place.** He went on to express the view, in *obiter*, that the Trust was not a sham. In the alternative to his conclusion that the Trust was not validly constituted, he went on to find, also in *obiter*, that the result obtained was abusive of the Act and the Treaty and that accordingly, the sale of the shares to the Trust was to be disregarded based on the general anti-avoidance rule (section 245). Having so found, he confirmed the assessment issued against the appellant and vacated the one issued against the Trust.
- [7] In support of his appeal, the appellant submits that the Tax Court judge applied the wrong legal test to determine if the Trust had been validly constituted and that he incorrectly determined that there had been an abuse of the Act and the Treaty. The Trust likewise maintains that it was validly constituted and that the assessment issued against it ought to have been vacated solely because it had been dissolved at the time when the assessment was issued, and the [Act](#) does not empower the Minister to assess a Trust which no longer exists.
- [8] **It is not necessary to go beyond the Tax Court judge's conclusion that the Trust was not validly constituted in order to dispose of the appeals. The Tax Court judge said in this regard (Reasons, para. 49):**

I reach the inevitable conclusion that [the appellant] did not truly intend to settle shares in trust with [the trustee]. He simply signed documents on the advice of his professional advisers with the expectation the result would avoid tax in Canada. I find that on December 14th, he never intended to lose control of the shares or the money resulting from the sale. He knew when he purported to settle the Trust that nothing could or would derail the steps in the strategy. This is not indicative of an intention to settle a discretionary trust. Frankly, I have not been convinced [the appellant] even fully appreciated the significance of settling a discretionary trust, beyond an appreciation for the result it might provide. I conclude that his actions and the surrounding circumstances cannot support a conclusion that signing the Trust Deed, as worded, reflects any true intention to settle shares in a discretionary trust. I do not find that [the appellant] is saved by the language of the Trust Deed itself, no matter how clear it might be. It does not reflect his intentions. ...

[My emphasis]

- [9] **The appellant does not dispute that he never intended to grant the trustee control of, or discretion over, the shares. Nor does the appellant challenge the factual finding of the Tax Court judge that, when all surrounding circumstances are considered, there was a failure of certainty of intention in this case. The sole attack against the Tax Court judge's conclusion is that it is based on circumstances that are external to the trust deed which is otherwise clear and unambiguous. The contention is that this amounts to an error of law.**

#### **Sham Trusts – Red Flags:**

- There is no commercial logic to using a trust (as opposed to the transfer being a mere gift).
- The trust agreement post-dates the transfer of funds;
- There is no written trust settlement;
- There is no segregation of trust funds;
- Both spouses (trustee and non-trustee) had equal access to the funds allegedly held in trust;
- The trustee fails to keep proper accounts;

- The trust does not file income taxes;
- The trustee mixes the trust funds with other funds;
- The trustee pre-takes compensation;
- The trustee takes compensation and does not declare that amount as income;
- The trustee makes advances (especially to himself or herself) without documentation.

**(b) Certainty Of Subject-Matter**

The general rule is that the declaration of trust must relate to **specific property**, and that property must be **ascertainable** else the trust is void for uncertainty. Moreover, the beneficial interests in that property must themselves be certain.

**Ascertainability and quantification:**

The trust will be void where the trust property is divided by quantity and there are no specifics provided about which identifiable property is to go to a certain B.

- **There is no problem where the subject-matter of the trust is to be divided in some specific proportions between different beneficiaries but there is an uncertainty problem where the division is made in reference to a specific quantity of assets.** Thus, where the settlor declares a trust in relation to 20 out of 80 cases of wine, there can be no certainty of subject-matter as the transfer of title is prevented by the unascertainability of the goods in particular; ***Re London Wine Company* [1986] Palmer's CC 123; cb, p.201**
- But, conversely, a declaration of trust in relation to 50 of 950 shares was held to be valid in ***Hunter v Moss* [1994] 3 All ER 215; cb, p.202**
- [*Re London Wine Company* was preferred in ***Re Goldcorp* [1995] AC 74' cb, p. 201**, by the Privy Council. It was held that the problem with *Hunter v Moss* is that the court equated *inter vivos* and testamentary gifts. However, whilst one might be able to Will 50 of 950 shares and all shares pass to the executor in any case for distribution, the settlor still retains equitable ownership of the remaining 900 shares in the *inter vivos* case and thus *Hunter v Moss* seems to have wrongly distinguished *Re London Wine Company*.]

*'Anything Left':*

**Re Walker**

**(1925), 56 OLR 517 (CA); cb, p.210**

Conventionally, one can either gift (with or without conditions) or trust – but not both. Thus, a gift with a gift-over clause is one or the other. Here, it was a gift – thus the trust seemingly intended over that part of the funds given but not yet used at the death of the widow is void. [The better way to produce such a result would have been for a gift to the wife for life (i.e. life-limited interest over income) with an absolute power to encroach on the capital, and a remainder interest to the remainderman.

*Beneficiary's Entitlement:*

**Re Golay's Will Trusts**

**[1965] 1 WLR 969 (Ch.); cb, p.212**

Is there sufficient certainty where S settled a trust to pay "a reasonable income" to B?

The objection taken to the settlement was that S failed to provide guidance as to how the reasonableness of the income was to be determined. Thus, if this was simply a discretionary determination by the trustees, there would be no problem. The question faced by the Court was whether it could determine reasonableness on some articulable standard that would allow it to supervise the trust satisfactorily.

Per Ungood-Thomas J:

... the yardstick indicated by the testator is not what he or some other specified person subjectively considers to be reasonable but what he identifies objectively as "reasonable income." **The court is constantly involved in making such objective assessments of what is reasonable and it is not to be deterred from doing so because subjective influences can never be wholly excluded. In my view the testator intended by "reasonable income" the yardstick which the court could and would apply in quantifying the amount so that the direction in the will is not in my view defeated by uncertainty.**

Thus, a concept such as reasonableness may be elastic, but it lends itself to supervision of the court when construed objectively.