

Intention

- “Trite law” (OA v Wilson) Three certainties
 - **Intention** to create a trust
 - **Subject matter** (the property in respect of which a trust is imposed)
 - **Objects** (the beneficiaries)

Q: What accounts for Equity’s insistence on these certainties?

- Need certainty of intention because disposition of property – decision to give property away or person transferred property to bound by trust.
- Trust binds legal title holder so they cannot use property however they want to and court only give effect to a trust if clear that was the intention of the settlor. Do not give effect to trust if not intended by person with power to dispose of property
- as trustees need to know what is the trust property is & who to make distributions to

Q: What motivates the assertion of a trust?

- To defeat competing claims
- *Paul*; against the legal wife (who would take under the applicable intestacy rules)
- trust claims are *often* invoked where the *alternative* position is that the claimant is (only) an ordinary creditor of person who is insolvent - Eg *Korda*; *Goldcorp*
- “*That’s my property* – it should not go into the pool of assets that are available to satisfy all the other creditors.”
- Gives the beneficiaries a proprietary right against the property
- trustees cannot use trust property to satisfy personal claims against trustees
- Two variations:
 - (1) A transfer of property to the Trustees to act as Trustees and who accept it as such (i.e. to hold on trust beneficiaries)
 - (2) Manifestation of an intention by the owner of the property that s/he holds it as trustee for beneficiaries (*Paul v Constance*) – no property transfer
 - Self-declaration; or [Clayton: express declaration]
 - inference of a declaration of trust from acts showing that the person has constituted himself as a Trustee. [Paul: loose words]

Paul v Constance

- Had Mr Constance declared a trust over the bank account (b/ac)?
- **“the money is as much yours as it is mine”**
- Plan was to open bank account together; allows Mrs Paul to draw money from b/ac; pay joint bingo winnings into b/ac
- Q: what was the intention of the person who ‘owned’ / had disposing power over the ‘property’
- Jones and Richards: trust or imperfect gift?

<p>Facts:</p> <ul style="list-style-type: none"> • Mr and Mrs C married but Mr C living with Ms P. Mr C received £950 for injury. • Mr C dies, Mrs C gets property first as administrator of estate. • Ms P claimed an express trust over estate 	
For an intention to create a trust	Against an intention to create a trust
Ms P: simple people unaware of subtleties of equity but understand own domestic situation.	Mrs C: No intention to create a trust in the absence of written trust deed or express declaration to form a trust. Quote Snell’s Equity
Focus on Mr C’s intention i.e. declaration of trust as settlor: mentioned money as much yours as mine many times after money in bank account	^Court: stilted lawyer’s language
Could not open a joint bank account where legally owned by Ms P and Mr C as bank manager realised they were unmarried. Mr C had account under his name but Ms P could withdraw money with Mr C’s signature	Mrs C: meant to be an absolute gift. Jones and Lock – a gift i.e. absolute transfer of property rights from one to another but ineffective as have not done enough for a transfer of legal title. Court will not impose a trust instead.
Joint venture where Ms P and Mr C played bingo and shared winnings in account	^Court: rejected, situation was intended to be a trust
Spent money from account for shared purposes	
<p>Result:</p> <ul style="list-style-type: none"> • Trust in circumstances based on what was said and on person who knows their own affairs and what they want to do with others. • Difficult to determine specific point of time when trust arose but when Mr C died, there was an intention to create a trust. • Can create a trust without using the word “trust” and when people involved do not know what a trust is provided they understood notion of one person holding property for the benefit of another 	

Objective approach: *Byrnes v Kendle* [2011] HCA 26

Gummow and Hayne JJ

[53] the expressed intention of the parties is to be found in the answer to the question, "What is the meaning of what the parties have said?", not to the question, "What did the parties mean to say?"

- Can create a trust in informal situations
 - Overturns subjective approach to intention under Joliff, which was also rejected by Glazebrook J in *Wilson* [only look at subjective intentions when asserting a sham].
- [55] Megarry J put it, "is whether in substance a sufficient intention to create a trust has been manifested". The point was made by Lord Millett in *Twinsectra Ltd v Yardley*:
"A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them."
- Subjective intentions irrelevant if objective intention to create a trust
 - Eg. Mr Constance did not understand what a trust was but based on what he said and did, he objectively intended to set one up

Heydon and Crennon JJ

[113] ...in both English and Australian law the surrounding circumstances are material to the questions whether the words used created a trust and what its terms are. Accordingly, Conaglen was correct to say:

"The court's focus when construing the terms of [a] bilateral arrangement [creating a trust] is on the objective meaning that those terms would convey to a reasonable person, just as it is when construing contractual arrangements."

The question is what the settlor or settlors did, not what they intended to do.

[114] ...the "intention" referred to is an intention to be extracted from the words used, not a subjective intention which may have existed but which cannot be extracted from those words.

[115] As with contracts, subjective intention is only relevant in relation to trusts when the transaction is open to some challenge or some application for modification

- Applying same approach found in interpretation of commercial documents.
- In determining whether there was a trust, the question is what in the circumstances a reasonable person would have understood the document to mean

Korda v AET

- Forestry investment – rights and obligations set out in contractual agreements
- Forest Co owns and manages forests .Milling Co fells, mills, markets and sells trees
- Investors (“covenant holders”, CH) invest money and enter into covenants [contractual rights] with Fco
- AET is the corporate trustee for the investors

What were the covenants / provisions?

Investors entitled to:

- Interests in relation to areas and plantings
- Net proceeds from sales of timber
- Payment reflecting increase in land value between becoming a covenant holder and when land was logged

Fco would:

- Not sell land, or encumber without consent
- Deposit Certificates of Title with AET
- Pay into a maintenance fund
- Indemnify AET and CH against claims and outgoings - Covenant holders pay for investment and nothing further

<p>Facts:</p> <ul style="list-style-type: none"> • AET – Australia Executor Trustees were trustees for covenant holders who were told it was a safe investment. AET monitored what forestry companies were doing. Required under statute that a trustee acts for investors • Gunn purchased enough shares in companies to replace directors so to provide company assets as security for a loan to ANZ. Companies later became insolvent • Covenant holders argued property held on trust so can reclaim their investment • Unequivocal trust exists in addition to covenant and contractual relationship between covenant holders and companies which makes AET a trustee. Money AET gets from companies is trust property. Whether companies trustees for covenant holders • ANZ given security over whole value of property companies held when insolvent. Money would be distributed to only ANZ unless trust claim succeeds. 	
For an intention to create a trust	Against an intention to create a trust
Trust existed before security was granted. Have trust property in companies' assets.	Trust deed only names AET as a trustee for the beneficiaries. Companies still owned millions in their account but had not been contractually handed over to AET that its clearly held on trust for beneficiaries
Prospectuses indicated investors had an interest in land which is proprietary	French CJ: no reason to suppose concept of interest used in prospectus should be understood as referring to a proprietary interest in land or trees in equity. Discussed contractual interests and rights to payments
Clear contractual obligation for money made by companies to be passed to AET. Holding property as a separate fund means conforming to certainty of subject matter, as treating certain money separate from general funds indicate an intention to create a trust.	French CJ: companies not required by agreements to keep sale proceeds intact as a fund.
	Tax mitigation scheme was a selling point under the prospectus which could only succeed if investors did not have a proprietary interest i.e. a trust. French CJ: Not determinative but tended against imputation of an intention to create a trust. No other clear indication of a trust would counter advertised benefit of the scheme
Trust deed expressly says AET is the trustee for the beneficiary.	Explicit provision for the creation of the trust highlights the absence of any such provisions for the companies to be held on trust.

	No implicit intention of a trust as no intention expressed from companies when AET and covenant holders form trust deed.
AET: flexibility of equity, cites Cardozo J	French CJ: no express or impliedly manifested intention to create a trust.
AET: to find a trust would further commercial purpose of parties	French CJ: did not amount to a commercial necessity where a court would infer a term in the contract. "But that which is commercially desirable for one party is not, on that account, a commercial purpose of both.
Safe investment	Actual intention of parties was AET would be a trustee. Not the intention of the parties that the companies would be a trustee given documents.
	French CJ: Trust would be favoured by covenant holders and many investors in commercial undertakings. Advantages of a trust which enhances desirability of the investment does not support an inference that the creation of the trust would have reflected the joint intention of promisors and promisees
Should not be reluctant to impose a trust merely because commercial parties or contractual obligations are involved	"To eschew an historical reluctance is one thing. To construct intention out of straws plucked from textual and contextual breezes, some blowing in different directions, is quite another."
<p>Result</p> <ul style="list-style-type: none"> • French CJ: no express trust as no certainty of intention between companies and covenant holders. • Necessary intention can be explicit or inferred. Need to look at written instruments and determine if an intention to create a trust is evidenced • Give effect to intention as set out in documents and hold parties to what they agreed to 	