

### Certainty of Subject Matter

- The trust fund/property must be identified with sufficient particularity
- For fungibles: the property must be ‘segregated’ from the trustee’s other property
- Problems arise when have fungibles, interchangeable identical items of property.  
When person owns a pool of fungibles i.e. 10,000 in bank account and each dollar is fungible, how to identify hold some of the property on trust or not
- Want to declare trust over some property but have not identified which is subject to the trust and which can they do what they want to
  
- Easy to get certainty of subject matter eg. trust over 1000 out of 10,000 in bank account, can withdraw money and make good claim against the bank for the money. Can segregate property by transferring to trustee.

### Q: What is the risk if the law were *not* concerned with identifying the property with certainty?

#### Examples

- *Palmer v Simmonds* “the bulk of my residuary estate”
- *Sprange v Barnard* “the remaining part of what is left, that he does not want”
- *Boyce v Boyce* “one of my three houses of her choosing to Maria, and the other two to Charlotte”

#### What about ‘fungible’ property

- Some property is held in ‘pools’ where each part is effectively identical to any other part
  - Wheat in a silo
  - Gold ingots in a bank vault
  - Money in a bank account
  - Shares
  
- *Re Goldcorp, sub nom. Kensington v Liggett*
  - Claimants with identifiable gold segregated from the bulk were able to claim that a trust was superimposed over the particular gold being held for them – although this was later mixed with the defendant’s general bullion\*
  - Claimants w/o segregated/identifiable gold were unable to claim this. Allegation of a trust failed, because there was ***no certainty of subject matter***.
  - Mr Liggett: even though it may look like his Maples were earmarked, they were not treated by the company as ‘his’ coins – segregated from the general assets of the firm for his exclusive benefit

#### Liggett v Kensington (CA) & re Goldcorp Exchange (PC)

##### Facts:

- Goldcorp deals in bullion – brochure offers investors non-allocated certificate bullion where it is kept in safe storage. If investors want the gold to be delivered, they then need to give Goldcorp 7 days’ notice.
- Auditors ensure there is enough gold in vaults to meet commitments
- However, Goldcorp in financial troubles, takes money from investors and places it in their own bank account rather than purchasing gold.
- Goldcorp becomes insolvent and receivers discover a shortfall of 4 million worth of gold. Not enough gold to meet non-allocated claims and investors could not say the

remaining gold added up to a security interest. Bank had a security interest which means remaining assets will be used to pay the bank rather than investors

- Similar to Korda – asserting a trust in an insolvency where people with a personal claim can also maintain that the company held items for it in equity which cannot be used to pay other creditors.
- Investors needed a proprietary claim via trust. HC: no claim.

- CA: (majority) & Cooke P – mistaken payment allowed investors to set contract aside and receive property i.e. money paid back as did not receive ownership over gold.
- Fiduciary obligation on Goldcorp when it took the money from and held gold for the investors as investors had to trust Goldcorp actually purchased the gold.
- Fiduciary Goldcorp received money from non-allocated claimants from the moment of payment upon trust.
- Express trust (Quistclose) where receive money which can only be used for a particular purposes i.e. finance the setting aside and holding of sufficient gold for all claimants. If do not use money to purchase gold, then it has to be held on trust.
- Breach of trust to place purchase money from investors into an overdrawn bank account. Allowed Cooke P to treat remaining property in the vault as property of investors and non-allocated claimants.

PC:

Proprietary interest via sales contract

- Rejected Cooke P's idea that Goldcorp owed fiduciary obligations in a contractual situation and the mistake argument for creating property rights. Would only apply if the investors rescinded the contract, before the bank's security interest had crystallised. However, the investors insisted on their contractual rights at all points of time and claimed those rights included a trust.
- Proprietary claims fail due to a lack of certainty over subject matter, even if the PC did not reject CA on fiduciary duties, mistake or certainty of intention.
- Legal title & property rights can only pass at common law if its known what goods the title relates. Cannot transfer property unless identify what property is transferred.
- Non-allocated claimants cannot assert legal title had passed not because of legal technicality but because of the very nature of things. Same conclusion applies to any argument that title in equity was created by the sale.
- Impossible for the parties to intend to transfer title over goods whose identity is not known

Collateral Promises:

- Clear investors thought from collateral promises in sale brochures the property will be held for them when buying gold.
- Investors: A trust declared not only by strict contractual terms but collateral promises in the brochure which passed equitable title. Issue arises as to subject matter.
- Only possible answer is company's current stock of bullion in contractual description.
- PC: fundamental issue over subject matter, despite investors told gold held for them, there was no individual allocation which was foreshadowed in 'non-allocated' gold. Investors: willing to share the gold held on trust proportionally with other investors
- Sellers of goods sold ex-bulk can effectively declare themselves a trustee of the bulk in favour of the buyer i.e. supply claim from a particular stock such as 20/100 of sheep.
- However, Goldcorp and its collateral promises did not say it will hold all the gold which answers the contractual description for the investors on trusts.

- Argument fails because Goldcorp did not set aside property as bulk and subject matter of the trust. It was using the gold as if it owned it and not acting as if it held a particular amount of gold on trust for investors.
- Nor did Goldcorp declare via the collateral promises that it is a trustee of the constantly changing, undifferentiated bulk of bullion.
- Trust is feasible in theory where the company is required to separate out the bulk held on trust but not what the scheme actually did.
- In practice, the company's assets were not individually identifiable or held as a bulk on trust proportionally to what the investors put in. Goldcorp did not intend to create an interest in its general stock of gold which would have inhibited any dealings with it otherwise than for the purpose of delivery under the non-allocated sale contracts.

Result:

- Proprietary claims fail as:
  - No segregation of trust property from the company's own property
  - No identification this was the subject matter of the trust
- Goldcorp: need proper identification and certainty of subject matter.  
Need to clearly treat identical things which the company holds as trust property differently from other property owned by the company.
- Investors lose all their investment despite valid personal claims which are worth nothing given the insolvency of the company and the absence of a trust.

#### Liggett v Kensington

- Liggett purchased Canadian maple coins from Goldcorp
- Some delivered to him and identification that they were clearly his.
- Places massive order worth hundreds of thousands, but did not receive them i.e. not identified for him. Placed him in the same situation as other non-allocated claimants.
- Liggett: his order was different as Goldcorp purchases a large amount of maple coins after his order. There is certainty of subject matter because trust property are maples which is the exact thing bought when he ordered them, distinctive and segregated from separate property of Goldcorp.
- PC: claim fails because Goldcorp had not identified maples for Liggett despite enough maples to answer Liggett's claim. Not certain that the maples belong to Liggett. Goldcorp also did not act as if maples were held on trust for Liggett.
- Strict principle that subject matter must be clear, insufficient for claim to succeed on the basis that there is enough to satisfy the amount wanted by the beneficiary or the amount on hand matches the amount held on trust.

To create a trust it must be possible to ascertain the specific property by which a beneficiary's interest is to attach. Eg. a farmer declaring himself to be a trustee of two sheep without identifying them does not create a trust, regardless of contractual obligations or if he had flock of sheep by which he could satisfy the interest. – re London Wine Company.

*White v Shortall*

- Ex partner's *trust* claim was (in essence): "Mr Shortall held 222,000 of the 1.5M shares on trust for me."

*Hunter v Moss* [1994] 1 WLR 452

Declaration by the principal shareholder of the company that he held 50 (of 950) shares on trust for a key employee. *Held by the Court of Appeal that this constituted a valid trust.*

**Q: How will Mr Shortall respond?**

- Did not follow *Re Goldcorp*
  - Bases for distinguishing *Re Goldcorp*
  - When an estate passes to a personal representative, there is no problem about gifts such as: 25% of my shares in X Ltd to each of my four children
  - The executor identifies the property to be held on trust

Other bases for distinguishing *Re Goldcorp*?

"intangibles are different": *Re Harvard Securities*

- Theory advanced by the court [211]:
  - Mr Shortall declared himself trustee of the total shareholding *for the benefit* of himself and Ms White, in the proportions described in the letter of 17/03/03.
  - *As Trustee*, Mr Shortall now owed a number (fiduciary) duties to Ms White vis-à-vis *her* beneficial entitlement in the fund
- Followed by the Court of Appeal in *Lehman Brothers International* [2011]

White v Shortall

Facts:

- During relationship, Mr Shortall had 1.5 million in shares in Unitract and said he will look after his wife and her children by declaring a trust over the shares
- Found certainty of intention and objects for Ms White, but question over subject matter
- Mr Shortall did not want to give effect to the trust by claiming there was no certainty of subject matter as trust property not adequately identified by saying 222,000 out of 1.5 million shares will be held on trust
- Mr Shortall: certainty of subject matter means it is necessary to identify which 222,000 shares were held on trust and which of the remaining shares were not held on trust. No segregation of trust property into a separate account
- Issue around which shares held on trust because some of the shares could be sold at different times, creating difficulties in determining if it was trust property or the trustee's own property which was sold.
- Unsold shares plummeted in price despite White asking the shares to be sold as a beneficiary and money paid to her but trustee did not do it.

Discussion:

- Considered *Re Goldcorp* where there can only be certainty of subject if there is segregation and a means of identifying which shares belong to the beneficiary and the trust from the trustee's own property of the same type
- Considered *Hunter v Moss* where there was a valid trust when someone held 50 out of 950 shares on trust despite the absence of identification.
- However, *Hunter* and *Goldcorp* are not binding on the SC of NSW.
- *Hunter* criticised by academics eg. Peter Birks: one inference from *Goldcorp* is that *Hunter* must be wrong.
- If followed *Goldcorp*, there would be no valid trust as have not identified which specific shares have been held on trust out of a bigger pool.

- Can distinguish Goldcorp as intangibles are different. Not the most robust distinction for most people and seemingly trying to apply Goldcorp to a different situation. Distinction was applied in Re Harvard Securities
- Did not follow Goldcorp which would have required identifying exactly which of the 222,000 shares were trust property and that the shares were segregated into a different account, otherwise there would be no trust.
- Rejected reasoning in Hunter which had a different rule for intangibles and the notion that it was perfecting an incomplete gift. Hunter discussed that there could be certainty in a trust formed by a will where the executor has the power to parcel shares to different beneficiaries. Also rejected argument that certainty of subject existed because other cases concerned transfer of title over chattels whereas declaration of trust is somehow different. Unclear why the difference leads to a different legal outcome.

Result:

- Ms White as beneficiary prevails
- Justice of the situation where man tells his relationship partner that he will hold shares on trust for her only to later renege on the basis that there was no certainty of subjects. Need to give effect to the creation of an express trust, despite Goldcorp and Hunter.
- Campbell J: trust property is over all the shares of the relevant type. Trust where person who declared the trust holds 220,000 of the shares on trust for the beneficiary while the balance on trust for themselves.
- One trustee and two beneficiaries. Beneficiaries have a fixed interest and the trust property is all the shares. Trustee also clearly intended to provide a benefit to Ms White, hence he could not encumber, sell or otherwise threaten the value of 220,000 of the shares and impinge her rights. This is because the trust covers the entire shareholding, hence it is not necessary for the trustee to point to a particular share and say "That share is mine".
- Escapes problem in Goldcorp where could not identify which fungible property belonged to the trustees and the beneficiaries.
- Important to give effect to an intention to hold 220,000 shares on trust which is appropriate to the type of property discussed. Shares in a company are identical.
- MB: However, there is no evidence from the trust deed etc which demonstrated that the trustee would also be a beneficiary for the rest of the shares while the 220,000 belong to Ms White as a beneficiary under trust. Mr Shortall would not have thought of that.
- Court found a clear intention to create a trust which informed the finding of a certainty of subject. Equity stepped in to ensure the trustee's conscience is bound by something that he intended to be bound by.
- Objective approach to interpreting trust intention very clear and therefore what must have been the intention as to the application of trust property.
- MB: if going to establish a trust objectively in identifying the trust property, unless the trustee thought about these considerations, then he did not intend for himself to be a trustee and a beneficiary.
- MB: problematic to say all the shares are trust property and that the trustee can act for his own benefit with shares provided he does not endanger the other beneficiary's property rights when either there is a sale when the shares price is high or the share price plummets. Whether allow trustee to decide and announce he had sold his own shares and not the beneficiary's shares.
- Can solve difficulties over subject matter with tracing which can identify the beneficiary's property where it has been mixed with the trustees'

- MB: notion in Goldcorp where if there is a mass held on trust for beneficiaries in respect of shares that there may be a trust, but did not decide the point as there was no bulk. Court exploited this by stating that the bulk is everything.
- Mr Shortall held shares and not dealing with them, hence it is easier to say that he held them on trust for himself as beneficiary and for Ms White.
- In Goldcorp, it could not be argued that the bulk is everything held on trust (applying the analysis in White) as Goldcorp in no way acted as if the gold was held on trust notwithstanding what was said in brochures.

### *Lehman Brothers*

- LBIE held securities (shares etc) purchased by other Lehman affiliates
- LBIE did not segregate securities into different accounts for each affiliate
- LBIE was able to deal with the securities by selling them and making profits; the securities it held are not those it was provided by the affiliate, and there may even be none
- Trust found, applying *Hunter v Moss*(?)

#### Lehman Brothers

##### Facts:

- Insolvency in relation to financial securities held on trust by Lehman Brothers in Europe LBIE. LBIE acted as a hub for other LB subsidiaries i.e. LBA, LBB, LBF who invested money into it. LBIE placed the purchased securities into one account for each type at a brokerage. LBIE and the subsidiary's securities were mixed in that account.
- LBIE buys and holds securities in own account at brokerage.
- Clear intention to create a trust – LBIE was trustee and subsidiaries were beneficiaries
- Securities purchased by the parent company was the alleged trust property

##### Discussion:

- A trust which is a part of a fungible mass does not fail for uncertainty of subject provided the mass is sufficiently identified and the beneficiary's proportionate shares is not uncertain. Sounds like Hunter.
- Analysis in White where all the account formed the trust property and the trustee was a beneficiary. Once know everyone's claim, can divide the property proportionally using tracing rules.
- Alasdair Hudson: no certainty of subject in Lehman hence subsidiaries do not have a proprietary interest in securities. LB different as there was a shortfall where it could not satisfy all the claims in an insolvency, whereas in White there was no insolvency. Consequently courts should be more strict with certainty of subject as LB subsidiaries can access LB's assets on trust, which is problematic for other creditors of LB if assets do not belong to LB
- Hudson: cannot have certainty of subject even if accept Hunter and White that there was a trust over all the securities held in the accounts because –
- LBIE used the shares as their own because title passed to them, creating a question over certainty of intention. It would lend, buy and dispose of securities in deals. In doing so, there was no sense it had to act in the best interests of the beneficiaries. Unusual in a trust for the trustee to be freely able to use the trust assets for its own benefit.
- This is despite retaining the personal obligation to account for the securities back to its subsidiaries. Sounds like Goldcorp.
- Difficult to decide which of the assets are trust property when LB goes insolvent
- Hudson: no segregation of trust property from the trustee's own property.

- Parties challenging the trust accepted White and Hunter but where supposed trustee uses the trust property as they please and mixed with their own property, there is no certainty of subject matter.

Result:

- Court accepted there was certainty of subject.
- MB: question whether there was any actual intention to create the trust given the absence of subject – like in Korda where a problem of lack of certainty of subject leads to a lack of intention to create a trust.
- Common objective that it was a trust whenever securities enter into LBIE's account. Clear from the nature of the transaction that a trust was intended, despite LBIE as trustee could use the trust property for its own purposes to the extent no trust property was held in its account.
- LBIE as trustee were more limited in its duties than ordinary trustees because it did not need to keep its assets segregated like White and could not only mix trust property with other assets which had a different beneficial ownership but could deal with it for its own benefit on a short-term basis.
- Complex commercial transaction and can understand what the trust property is
- Goldcorp – certainty of subject matter was an issue because the company never treated the gold as trust property. It was not kept as a segregated pool and Goldcorp used the property for its own purposes. No intention in recognising trust property. Seemingly the same case in LB which uses the money from the subsidiaries however it wants.
- Difference between LB and Goldcorp – there is a clear certainty of intention to create a trust from the onset compared to White or Hunter. LBIE can use the trust property for its own purposes despite the trust property being mixed with its own property in a complex commercial transaction. Certainty of subject seemingly arises because the beneficiaries knew what they were signing up to.
- LBIE knew what the trust property was even though looked similar to Goldcorp where it used the property for its own purposes. Clear everything in account was held on trust.
- MB: Certainty of subject supposed to be a fundamental limitation where need to know what property is in order to enforce the trust. Does not clarify what the trust property is.
- Anything in the account is trust property. Beneficiaries knew possibly nothing in the account but if there was anything in the account it would be held on trust for them.
- Court gave effect to a strange trust where clear certainty of intention and subject matter over anything in the account. Could be a threshold where a court only gives effect to the subject matter if it is clear anything in the account is trust property.
- Court has to be able to enforce the trust, can determine via tracing or accounting rules how to divide the remaining assets between the beneficiaries.
- The initial principle in Goldcorp where trust property has to be held in a separate pool from the trustees' own property is being diminished. On one hand, good the court wants to uphold a trust