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Equity and Trusts

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Equity and trusts

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Conditions attached to gifts

The test for certainty of objects where there is a condition attached to a gift differs from where there is a trust.

You may find it helpful to use the way in which Emery (1982) distinguishes between:

- a gift to the eldest son of A *if that son* shall be a member of the Church of England and an adherent to the doctrine of that church, as in *Re Allen* (we can call this Situation A); and
- a gift to the eldest son of A *who shall* be a member of the Church of England and an adherent etc. (we can call this Situation B).

In the first case the gift can only go to the eldest son of A. The test is simply whether he fulfils the condition and this is the same situation as in the above example of the gift to Mary. In the second case there is a different situation: it is a gift to the eldest son who fulfils the condition. The court will then have to decide what the term 'doctrine of the Church of England' means in order to decide who will receive the gift. We are then back to the familiar issues of certainty, as in *McPhail v. Doulton*.

It is the distinction between Situation A and Situation B which the court failed to recognise in *Re Barlow* (1979), although the fault line may be traced to Denning MR who, in *Re Gulbenkian*, stated that *Re Allen* was authority for saying that where there is a condition attached to a gift, even where this is uncertain or imprecise, it is still valid so long as at least one beneficiary comes within it.

In *Re Barlow* a testatrix directed her executor 'to allow any member of my family and any friends of mine who wish to do so' to purchase paintings belonging to her. This is a Situation B case but the court held that the trust was valid, even though the words 'family' and, more particularly, 'friends' may have been uncertain. The reasoning was that this was not a discretionary trust, where trustees had to 'survey the field' but merely a case of conditions being attached to individual gifts. Thus a gift to a person who did come within the meaning of 'family' or 'friend' would not be invalidated by uncertainty as to whether another person does come within these terms.

It may, however, be objected that this begs the question: the issue remains that the word 'friends' is uncertain. This was not a case of a gift to one person but a class gift. Suppose that the executors thought that the testator had few friends and so allowed the first three claimants to have all the paintings. It then turned out that the testator had many other friends who were therefore deprived of the chance of acquiring any paintings. Surely the trustees should 'survey the field' and, if so, what would their yardstick be?

Take note

A trust may contain a power to cure uncertainty, especially certainty of objects, but any yardstick laid down should itself be measurable.

Power to cure uncertainty

Where the objects of the trust do not satisfy the tests for certainty of objects then there may be a clause in a trust where trustees, or a third party, may be given a power to decide whether a particular individual is a beneficiary.

APPLICATION

John leaves £10,000 in his will to be held on trust by his wife Anne to be distributed at her discretion amongst 'my old friends'. This is a discretionary trust and so the individual ascertainability test applies: 'Can it be said with certainty that any given individual is or is not a member of the class?' You will almost certainly decide that it does not as the term 'old friends' is conceptually uncertain. This means that the £10,000 will be held by Anne on a resulting trust for John's estate.

Suppose though that John had included in his will the phrase: 'In case of doubt Anne knows who my old friends are'. Will this make a difference?

Is the question one of fact? If so then a power to cure uncertainty may work. In *Re Tuck's Settlement Trusts* (1978) any dispute as to whether a person was of the Jewish faith was to be determined by a chief rabbi and that was held to validate the trust. However, this may help only where the problem is one of evidential uncertainty. Where there is conceptual uncertainty then it is submitted that the defect is incurable and the gift would fail. Thus the gift to 'my old friends' in the example would probably not be saved by allowing trustees to decide who they were. Nor would it help if the gift stated that 'in case of doubt my wife Anne knows who they are'. Anne may indeed know but how could the court measure her actions if a person alleged that she was a friend but that Anne had excluded her? The result is that in the above example the clause allowing Anne to decide would not save the gift and so the £10,000 would still go on a resulting trust to John's estate.

INTERSECTION

It is probable, although not decided, that the test in *McPhail v. Doulton* will apply also to objects in purpose trusts of the kind held valid in *Re Denley's Trust Deed* (1972) (see Chapter 12).

This chapter has taken the view that the beneficiaries need to be defined with at least reasonable precision in order for the court to be able to control the trust and this is the generally accepted view.

However, it is not the only view. Gardner (2011) points out that the courts have increasingly tried to uphold the facilitative aspect of the law of trusts. This means that, wherever possible, their role is to uphold the wishes of the settlor as expressed in the trust, and he gives as instances of this approach both *Re Tuck* (above) and *Re Tepper's Will Trusts* (1987). In line with this view Gardner has no difficulty with *Re Barlow* holding that, as long as a description has a recognisable core meaning, it is valid. 'Old friends', he feels, has a large grey area but also a core meaning and, on this basis, the term is sufficiently certain.

REFLECTION

Effect of uncertainty of objects

The property will be held on a resulting trust for the settlor or his estate.

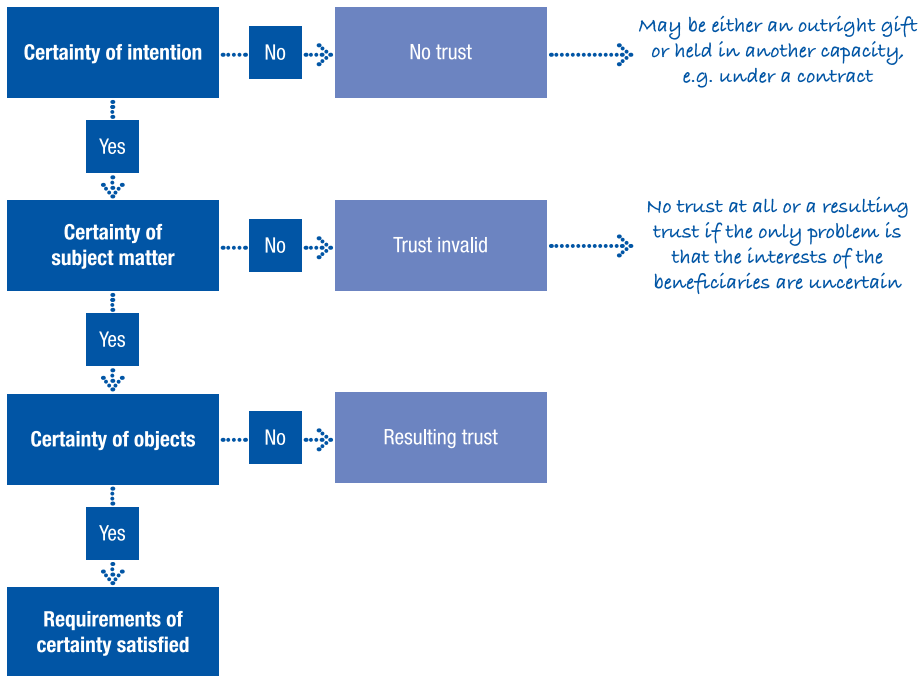


Figure 4.3 Summary of the three certainties

TRUSTS AND THE RULES CONCERNING REMOTENESS OF VESTING

When questions of certainty of objects arise it is also important to ask if the trust will meet the requirements of the law on remoteness of vesting in the objects.

The law has always taken the view that property should not be tied up for too long a time. This has led to the following rules which not only apply to interests under trusts but also to other interests in land. As the Law Commission points out (Report No. 251, 1999), the justification for these rules is ‘the need to place some restriction on how far one generation can control the devolution of property at the expense of generations to follow’.

CONTEXT

The rule against remoteness of vesting

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Remoteness of vesting

The rule against remoteness of vesting is directed at the tying up of property for too long a time.

- (a) **The common law rule.** A general statement of the rule is that 'an interest must vest, if it vests at all, within some life or lives in being or twenty-one years thereafter'. The following examples show the operation of the rule:

APPLICATION

Property is left on trust for Kate if she qualifies as a barrister. This is valid because, if Kate is to qualify, she must do so within a life in being (her own here).

APPLICATION

Property is left on trust for the first child of Kate to qualify as a barrister. This is void under the common law rule because Kate may have a child born after the date of the execution of the trust instrument who may qualify as a barrister more than 21 years after the date of Kate's death, Kate being the life in being. This may be highly improbable, but the point is that it is possible.

As you can see, these rules were highly restrictive and they have been modified. Unfortunately the statutes which have modified them are not retrospective and so you need to learn them both.

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Remoteness of vesting – statutory provisions

There are two statutes, either of which can apply to cases involving remoteness of vesting: the Perpetuities and Accumulations Act 1964 and the Perpetuities and Accumulations Act 2009.

- (b) **The effect of the Perpetuities and Accumulations Act 1964.** This Act only applies to dispositions coming into effect *after 15 July 1964*. In the case of such a disposition one must first look at the common law rule (see (a) above). If the disposition is void under the common law rule then one considers whether it can be saved by the application of the rules in this Act.
- (i) Section 1 of the Act allows a settlor to specify a perpetuity period of a maximum of 80 years rather than the common law period.
 - (ii) Section 3(1) of the Act provides that where a disposition is void under the common law rule then rather than declaring it void one must 'wait and see' whether in fact the interest does vest outside the common law perpetuity period. If so, it will of course be valid; if not, it will be valid.

The effect of this Act is shown by the following example which should be contrasted with the examples in the Application boxes above showing the operation of the common law rule.

APPLICATION

Property is left on trust to the first child of Kate to qualify as a barrister. Under the 1964 Act one must wait and see whether in fact a child of Kate does become a barrister within the perpetuity period rather than simply declaring the gift void because of the perhaps remote possibility that it might not do so. Alternatively the settlor could have specified a period of 80 years in which case one would have simply waited 80 years. If so then after 80 years if a child of Kate has not qualified as a barrister the gift will fail.

- (c) **The effect of section 5 of the Perpetuities and Accumulations Act 2009.** This provides for a period of 125 years which overrides any different provision in the trust instrument. The Act applies to instruments such as trusts which take effect on or after the commencement day of the Act, which was 6 April 2010. Where a will is executed before that day the Act will not apply even though the testator dies and so the will comes into force after this date. Here the former rule will apply which provided that a period of 80 years could be specified.

Take note

Do remember the date 6 April 2010 as this will decide which law is applicable to ascertain if the trust satisfies the rule on remoteness of vesting.

Also remember this tip: people trusts must comply with the rule on remoteness of vesting; purpose trusts must comply with the rule against inalienability.

APPLICATION

Let us return to our familiar example where property is left on trust to the first child of Kate to qualify as a barrister. Under the 1964 Act the settlor could have specified a period of 80 years in which case one would have simply waited 80 years. This is now 125 years provided that the will was executed on or after 6 April 2010. The difference between the two Acts is not only in the longer period but also that the 2009 Act overrides any other period specified in the trust instrument. The 1964 Act allowed the settlor to specify a period of *up to* 80 years.

INTERSECTION

Note that there is another rule, the rule against inalienability, which is designed to prevent the tying up of capital and income for an excessive time. It applies to non-charitable trusts and you can find details in Chapter 12. These two rules are together known as the rules against perpetuities.

KEY POINTS

- There must be certainty of intention to create a private trust, the trust property (subject matter) must be certain and the objects (beneficiaries) must be certain.
 - Where there is a fixed trust then it must be possible to list all the beneficiaries.
 - Where there is a discretionary trust then the individual ascertainability test applies: 'Can it be said with certainty that any given individual is or is not a member of the class?'
- Conditions attached to gifts
- Power to cure uncertainty

CORE CASES AND STATUTES

Case	About	Importance
<i>Re Adams and the Kensington Vestry</i> (1884)	A testator left his property to his wife absolutely 'in full confidence that she will do what is right as to the disposal thereof between my children . . .'. Held: The words 'in full confidence' did not show sufficient intention taken in the context of the rest of the words.	Certainty of intention to create a trust.
<i>Sprange v. Barnard</i> (1789)	The will gave property to the testatrix's husband 'for his sole use' and then provided that 'the remaining part of what is left, that he does not want . . . to be divided between' members of his family. Held: 'The remaining part of what is left' did not identify the trust property with sufficient certainty.	Certainty of subject matter in the creation of a trust.
<i>Re London Wine Ltd</i> (1986)	There was no trust of wine that had been sold to customers but remained at a warehouse as it had not been set apart for individual customers.	Certainty of subject matter where the goods are not ascertained.
<i>McPhail v. Doultton</i> (1971)	The trustees were directed to apply the net income of a fund in making at their absolute discretion grants to the following beneficiaries: 'the officers and employees or ex-officers or ex-employees of a company or their relatives or dependants'. Held: The words 'officers and employees or ex-officers or ex-employees of a company or their relatives or dependants' satisfied the test of certainty of objects in discretionary trusts.	Certainty of objects in the creation of a trust.