‘The 3 Certainties’

*Knight v Knight* (1840) – valid express trust requires:

1. Intention to create a trust
2. Subject-matter (the property subject to the trust);
3. Objects (beneficiaries)

**Certainty of Intention**

- No formalities for declaration of a trust (except for formalities rules for trusts of land) (*Paul v Constance*)
- No need for words ‘trust’ or ‘confidence’

**Imperative and Precatory Words**

- Imperative = intention to be legally bound
- Precatory = hope or wish

*Re Adams and the Kensington Vestry VS Comiskey v Bowring-Hanbury*

- *Adams*: ‘in full confidence that she will do what is right as to the disposal thereof between’ his children in her lifetime or by her will
  - Wife takes estate absolutely = no indication of legally binding obligation on her.
- *Comiskey*: ‘in full confidence... And in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her [...] shall at her death be divided among the surviving said nieces’
  - Trust created due to intention of Comiskey in favour of nieces
- Follow earlier decision unless clearly wrong (*Re Steele's Will Trust*)

**Evidence of intention: words and conduct**

*Paul v Constance*

- Husband breaks from wife (not divorce); new partner, Mrs Paul
- Mrs Paul and man pay into same account, in his name
- He dies
- Judge ruled that man had set up trust, him as T, and him and Mrs Paul as B, in equal shares.

*Re Kayford* – no words needed for trust

- Mail-order company paid customers’ money into separate bank account to prevent them ranking as unsecured creditors if company went insolvent
- Segregation of funds = intention to create a trust over funds

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Certainty of Subject Matter

1. Certainty of property
2. Certainty of beneficial entitlements – what each beneficiary is entitled to or how this is to be determined

Certainty of property

Sprange v Barnard

- Trust creates rights and duties at moment of creation, **so subject matter must be certain at that moment too**
- ‘... for his sole use; and at his death, the remaining part of what is left that he does not want for his own want and use, to be divided between’ the settlor’s brothers and sisters
- Note: also not certainty of intention to create trust at all.

Palmer v Simmonds

- ‘the bulk of my estate...’ – not sufficiently certain property

Certainty of beneficial entitlements

Boyce v Boyce

- Testator leaves houses on trust for life to wife, remainder daughters
- Maria to choose first, all others to Charlotte
- Maria died in testator’s lifetime, so could not choose
- Therefore, no certainty of subject matter as Charlotte’s interest could not be determined
- = No trust!

Re Golay’s Will Trusts

- Pay beneficiary ‘reasonable income from other properties’
- Deemed an objective criterion for court to step in and enforce the trust
- Seems not to meet requirement that subject matter must be certain at moment of creation of trust
Property forming part of bulk

Tangible Property

- *Re London Wine Co (Shippers) Ltd*
- Buyers of wine to create trust over bottles not delivered when company enters insolvency
- **No trust as no segregation of particular bottles of wine**
- Ditto, even with tangible property of exactly the same kind (fungible), segregation is necessary for trust (*Re Goldcorp Exchange Ltd* – gold bullions)
  - Note: same situation here as in *Re London Wine Co*, with buyer-seller relationship on insolvency. Due to fluctuating amounts of stock in warehouse and potential to sell more than company actually owns, segregation necessary for trust!

Intangible Property

- *Hunter v Moss*
- Shares – **no need for segregation** of specific shares (e.g. 5% of shares is sufficient), as shares of the **same class** and therefore **fungible**

- Intangible v tangible distinction confirmed in *Re Harvard Securities*

Trust on insolvency vs Trust declared by settlor

- Buyer-seller relationship in case of insolvency and undelivered goods – segregation necessary for trust for tangible and intangible property
  - Tangible – *Re Goldcorp*
  - Intangible – *Re Kayford; Mac-Jordan Construction Ltd v Brookmount Erostin Ltd*
    - *Mac-Jordan*: trust funds must be separated from other funds in company bank account – there must be an identifiable bulk to which the trust relates
Certainty of Objects

- **The objects of a trust** (i.e. the beneficiaries, except in private purpose trusts) must be certain (*Morie v Bishop of Durham*).
- If trust property has been transferred to a trustee but fails for certainty of objects, the trustee holds property on **resulting trust** for the settlor.

**Fixed Trust**

- Complete list test – *IRC v Broadway Cottages Trust* – complete list of all the beneficiaries
- Class ascertainability test
  - E.g. ‘all my grandchildren living at my death’ – not yet possible to ascertain which grandchildren will be the beneficiaries, but no problem as this will be possible on death of settlor

**Powers of Appointment & Discretionary Trusts**

- ‘is/is not test’ = requires that we can say whether an individual is or is not a member of a class, not who all the members of the class are.
- Established for PoA in *Re Gulbenkian’s Settlement Trusts*
- Applied to DT in *McPhail v Doulton*

The three judges in *Re Baden’s DT (No 2)* agree that **conceptual certainty** (language used by settlor must be sufficiently precise) is required.

- ‘ Relatives’ = *Re Baden’s Deed Trusts (No 2)*
  - ‘trace descent from a common ancestor’ (Sachs LJ and Megaw LJ)
  - ‘next of kin’ (Stamp LJ).
- *Friend* is uncertain (for purposes of discretionary trust) (*Re Barlow’s WT, obiter*)

It is less clear whether **evidential certainty** (i.e. evidence allowing the trustees to decide if someone is an object of the trust) is required from *Re Baden’s Deed Trusts (No 2)*

- **NB:** not being able to find a beneficiary is not the same as not being able to define who the beneficiaries are. In this case, the trust will still be valid.

- Stamp LJ suggests the need for evidential certainty: if there are people for whom trustee cannot ascertain evidentially whether they fall inside or outside of a class, the trust fails.
  - APPLY – likely to mean trust fails.
- Megaw LJ states that there is no need for evidential certainty: if a ‘substantial number’ definitely fall within class, then there is a trust.
  - APPLY, but what is a substantial number?
- Sachs LJ (most practical) – no need for evidential certainty: it is up to individuals to prove that they fall within a class – if either they do not, or they cannot prove that they do, they will not be beneficiaries under the trust.
  - APPLY how this could be worked.
Conclusion: The approach of Sachs LJ is likely most practical as it avoids such restrictive and unnatural conceptual interpretation as required by Stamp LJ’s method and the subjectivity of defining ‘substantial number’ of definite beneficiaries under Megaw LJ’s approach.

Administrative unworkability:

- **DT**: wide class of beneficiaries (‘the inhabitants of West Yorkshire’) – no trust (*R v District Auditor ex p West Yorkshire Metropolitan County Council*)
  - Possible to have excepted class, whereby trustee can add anyone except these people to defined discretionary class of beneficiaries
- **PoA**: does not apply, as donee has no obligation to exercise power (*Re Manisty’s Settlement*).

**Gift/Trust subject to a condition precedent**

- No obligation for trustee to choose amongst beneficiaries, so not a discretionary trust.
- No need for certainty of objects here to the same level as in DT (‘is/is not test’) – instead need that it is **possible to say of one or more persons that they qualify**, although it may be difficult to say of others whether they qualify or not (*Re Allen / Re Barlow*) = **any reasonable test** may be employed for a gift subject to a CP (*Re Allen*).
  - **Re Barlow’s WT**: Pictures held on trust for sale, subject to instruction that any of friends or family can purchase them at certain price ~ this is gift subject to CP that someone is family or friend.
  - **Friend** is uncertain (for purposes of discretionary trust), but does not matter, as some people can definitely be accepted as friends for the gift subject to a CP.