Revision Box Questions: Guidance for approach

Revision Box Chapter 3

What can we learn about the fundamental nature of the trust by looking at how certainty requirements relating to intention and to trust property can be satisfied, and what happens when they are not?

Here, you will need to link your study of certainty back to the study of the essence of trusts in Chapter 2 and explain:

- what is meant by the requirement of certainty;
- the function of the certainty of intention requirement within certainty more broadly;
- the key factors underpinning certainty-of-intention rules;
- how trust property becomes significant in the light of what is meant by the requirement of certainty;
- what the rules relating to satisfying certainty in relation to trust property actually are; and
- what the consequences of failing to satisfy certainty in relation to trust property will be and why this is different from the outcome of failure to establish certainty of intention.

Certainty rules in trust creation are there to ensure that it is sufficiently certain that an owner of property does wish to create a trust rather than undertake some other course of action in relation to it. This ‘sufficient certainty’ must be shown in relation to his intention to create a trust, the property he wishes to settle on trust, and those whom he wishes to benefit from this, and together these ‘rules on certainty’ are embodied in the so-called ‘three certainties’. Together they reflect the implications of creating a trust in terms of how this will strip an original owner of his entitlement to the property, and create new rights and obligations for others which are enforceable, and so it is important to establish that this is what is intended at all; and once this has been so, what property is subject to a trust, and thus subject to enforceable obligations; and who is in a position to enforce what has been put in place. Meeting certainty of intention requirements clusters around showing that what was intended was a mandatory arrangement which must be carried out, and which gives rise to obligations to ensure that this happens. It must be clear that this was intended, rather than an out and out gift, and bearing in mind that in both situations an owner will lose entitlement to property, there is also the question of whether an owner of property does wish to deal with his property in such a way at all. If he does, it needs to be clear from what an owner says or does that he can no longer use the property, and the person whom is vested with title to it understands that they are not entitled to the property. Where there is no certainty of intention there is no trust, and the holder of legal title to it is its absolute owner.

Once this is clear, it must also be sufficiently certain what of the owner’s property is and is not to be regarded as property. The implications of this is that property which is not subject to a trust can be dealt with freely by the person holding legal title to it, whilst property which is subject to a trust must be dealt with in furtherance of a beneficiary’s entitlement to it. There are two elements to be satisfied here. Firstly whether it is clear that
all the property specified or a clear or certain part (proportion) of it is intended to be
property subject to obligations; an secondly whether the share of it to be received by a
beneficiary is clear and certain. The courts are very strict about the first element but have
been criticised for being less so about the second. There is no trust created where there is
no certainty of subject matter, and the precise outcome will depend on whether a transfer
of legal title has already taken place or not, and where the latter has happened, then there
will be a presumption of what is termed a resulting trust, allowing equitable title to return to
the original owner-cum-settlor.

Where there is certainty of intention and certainty of subject matter, it must be clear who is
to benefit. This is to help conscientious trustees who are duty bound to ensure
beneficiaries receive the property as intended, and also to ensure that it is clear who can
come to court to enforce a trust should a trustee refuse to carry it out. Where it is not
sufficiently certain who the intended objects of a trust are, it cannot be valid. What is
actually required depends on whether a fixed or discretionary trust is being created, but
where this is the only ‘certainty’ which hasn’t been satisfied, then a presumption of a
resulting trust will arise.

2. What is the significance of Re Baden’s Deed Trusts (No. 2) [1973] Ch 9 in the
context of certainty of objects?

- Read the submission to the Court of Appeal by John Vinelott QC, counsel for
Baden’s estate, and summarize the main points of his arguments on why the
disposition should fail on grounds of absence of certainty of objects.
- Ensure that you understand why, had Vinelott’s core argument succeeded, the
implications for the McPhail v Doulton [1971] AC 424 ruling would be considerable
and indeed unacceptable. (NB McPhail’s treatment of IRC v Broadway Cottages
[1955] Ch 20 is central here.)

This is the case where litigation which had led to the formulation of the test in McPhail v
Doulton was returned to the Court of Appeal for application of this test to the facts of the
Baden. Central here were the terms ‘relatives’ and ‘dependants’ used in Bertram Baden’s
will. It was the term ‘relatives’ which led to the Court of Appeal being unanimous in its
rejection of the argument advanced by John Vinelott QC that it could not be shown that
any person definitely was or was not within the class, as required by the Gulbenkian test.
As Megaw LJ observed, it would have meant a virtual return to the rejected class
ascertainability test – the ratio of IRC v Broadway Cottages, but avoiding that outcome
was really the only unanimous feature of the judgment – apart from the unanimous view
that Baden’s next of kin should not be permitted to take the case to the House of Lords.
Sachs LJ avoided the difficulty by emphasizing that the court was concerned only with
conceptual certainty, so that it should not be fatal that there might be evidential difficulties
in drawing up Vinelott’s list, effectively destroying the argument. Sachs LJ focused on the
onus of proof of someone seeking to establish they were part of the settlor’s chosen class,
with Megaw LJ’s test being a rather vaguer one involving a substantial number of objects.

3. Explain what is clear and what is less so about the significance of ‘administrative
unworkability’ in determining the validity of express trusts.

Administrative unworkability as it was advanced by Lord Wilberforce in McPhail sets out
for us that even a discretionary trust able to satisfy certainty of objects requirements may
still be invalidated on grounds it is administratively unworkable. What isn’t clear is what actually amounts to administrative unworkability, and specifically whether this might relate to the size of a class of objects or its breadth and diversity, or combination of the two. What’s problematic here is that what was said in McPhail was little and highly caveated, and that much of the case law relates to powers rather than trusts, with the West Yorkshire case which does deal with trusts being far from definitive.

4. Drawing together your thoughts for all these questions and perhaps Q1, consider how certainty rules can be analysed using Langbein’s classification of trusts law rules as ‘mandatory’ rules, and explain why this might be the case.

Classifying certainty rules as mandatory rules sets them out as rules which cannot be negated or varied by the settlor in the creation or operation of an express trust. These particular rules relate to trust creation, and can be analysed as rules which exist to ensure that only arrangements which are intended as trusts, and can properly function as trusts will ever become valid trusts at all, with the implication that once they do so, they give rise to enforceable rights for someone other than the one-time owner of property and impose duties on those who have no entitlement to benefit from the property.