

UNIT 2: CREATING A TRUST



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UNIT 2: LEARNING OUTCOMES

- Understand the core components for creating a valid private express trust
- Differentiate between fixed and discretionary trusts
- Define the role of the settlor in trusts
- Explain the certainty of intention and certainty of subject matter rules with reference to key sources
- Apply knowledge to factual scenarios
- Plan for effective collaboration

INTRODUCTION

- Difference between law and equity
- The range of tools which equity used to modify harshness of common law
- Administration of law and equity fused by Judicature Acts 1873–1875
- Justice is at heart of equity
- Trust is one of the tools used in equity to remedy injustice
- Distributed ownership: legal and equitable
- Equity and trusts engrained in modern society – switching between legal and equitable tools in managing property
- Deliberately create equitable/trust relationships: express trusts
- But trusts can also be implied or imposed
- As developed via courts, sizable body of precedent

CREATING A TRUST

Private express Trust

- Trust is expressly and consciously created
- Express evidence of intention
- Does not need to use the word 'trust'
- All needed is intention to hold property for someone else

Implied Trust

- Exist despite lack of intention to create a trust
- Can arise in various ways
- Law may imply a trust, e.g. two people buy a house together
- Resulting and constructive trusts

WHEN ARE TRUSTS USED?

- Enabling property to be held for persons who cannot (or should not) hold it directly themselves (for example, minor children).
- Allowing someone to make provision for others privately (because while they are in trust, the assets are held in the name of the trustees, not the beneficiaries).
- Preserving property for future generations.
- Protecting property from claims brought against any of the beneficiaries.



PRIVATE FAMILY TRUSTS

- Aka Private Client trusts
- Common in modern life
- Either created:
 - during lifetime (*inter vivos*)
 - after death (by will or testamentary)
- Pass on family wealth between generations
- Avoid inheritance / capital gains tax
- Huge variety in form (though influenced by tax law)
- Usually professionally drafted but need not be



COMMERCIAL TRUSTS

- Used in various settings
- Substantial shareholdings in private or public companies often held in trust
- Finance transactions, e.g.:
 - Secured syndicated loans, specific purpose loans, equitable mortgages
 - Bonds
- Insolvency
- Employee benefit trusts
- Pensions
- Unit trusts: investment – portfolio with small stakes



FIXED V DISCRETIONARY TRUSTS

Fixed or Interest in possession Trust

- Beneficiary is entitled to some form of **fixed** right to receive income or capital
- Exact distribution is fixed

Discretionary Trust

- Pool of potential beneficiaries
- Trustees have discretion to decide:
 - which of the potential beneficiaries should benefit, and/or
 - how they should benefit: in what share and/or according to what frequency.
- Until discretion exercised in prospective beneficiaries favour – no right to trust property *Vestey v IRC (No 2)* [1979] 2 All ER 225
- Useful where facts may change between set up and distribution or if some control over property needed, e.g. if risk of irresponsible

THREE CERTAINTIES

- Private express trusts are only valid where intentionally created
- Three elements must be certain for a private express trust to be valid – *Knight v Knight* (1840) 3 Beav 148
- Evidence of settlor's intention to create an enforceable relationship, specifically a trust over another type of relationship, e.g. a gift or contract

Intention

Settlor intended to create a legally enforceable trust

Subject matter

Trust property

Objects

Identity of who will benefit

Common mistake: students confuse subjects and objects. The beneficiaries benefit from the effect of holding the property in trust, so, grammatically, the beneficiaries are the objects, and the property is the subject.

TRUST FORMALITIES

- **Inter vivos** trusts do not need to be created in writing – spoken words or even actions are enough (if they demonstrate 3Cs) ***Paul v Constance* [1977] 1 WLR 527**
- Trusts of land: **Law of Property Act 1925, s 53(1)**
- Wills and testamentary trusts: **Wills Act 1837, s 9**
- But: absence of formalities does not necessarily mean trust fails
 - equity will not allow a statute aimed at preventing a fraud to be used as an instrument of fraud – as such may impose constructive trust despite no valid express trust – ***Rochefoucauld v Bousted* [1898] 1 Ch 550** and **LPA 1925, s53(2)**
 - It might draw on estoppel to prevent denial of trust
- 3Cs are not independent – doubt over one can cause doubt over another – e.g. identity of trust property can give doubt over whether settlor intended to set up trust

TRUST PARTIES

Same party can occupy more than one role

Settlor
(Testator for will)

The party that creates the trust. Original property owner.

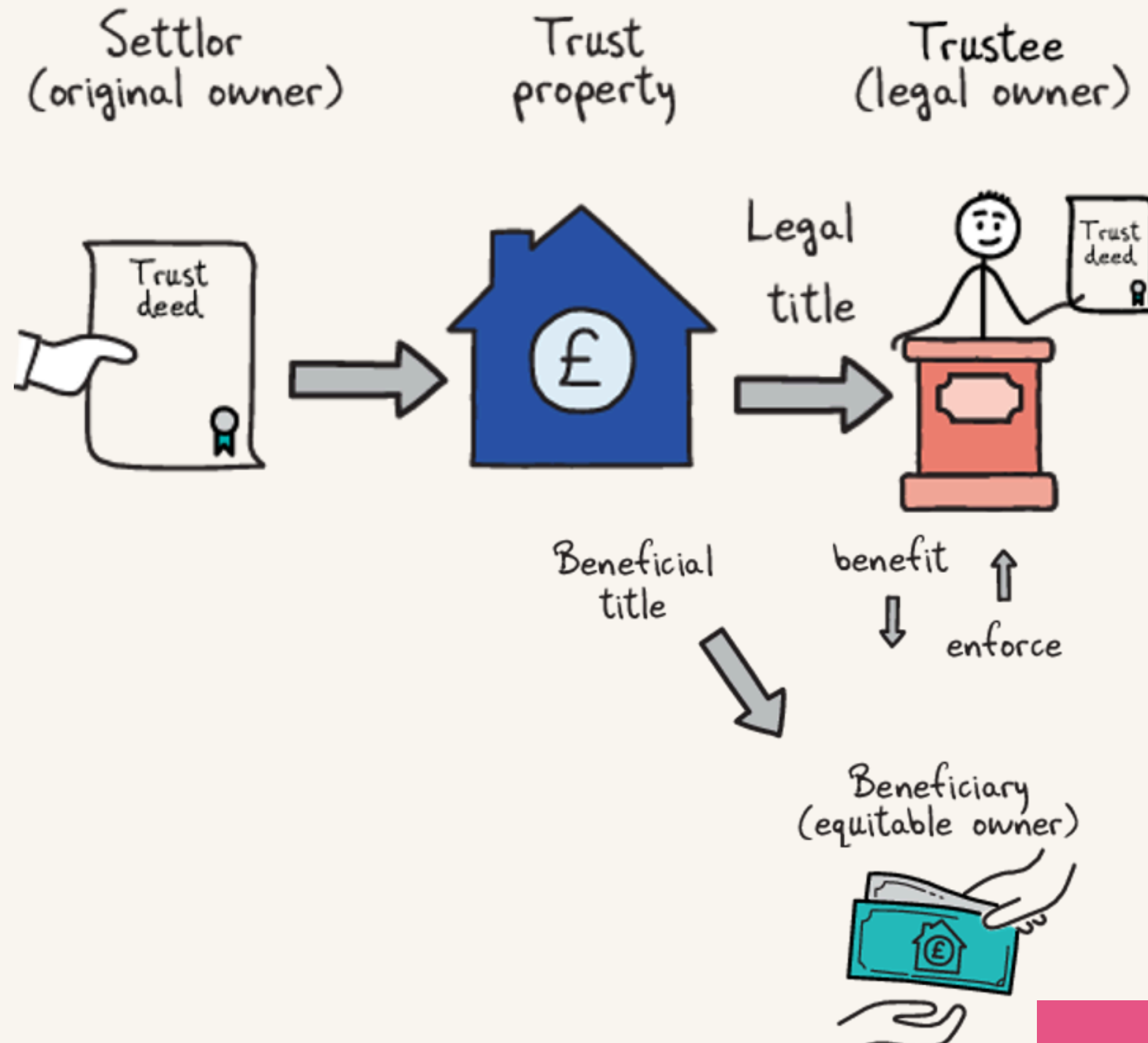
Trustee

Legal owner of the property while held in trust. Hold property for the benefit of beneficiaries. Manage per terms of trust.

Beneficiary

Benefits from trust, per terms. E.g. eventual transfer of ownership, profit etc.

TRUST PARTIES



COMPARING RELATIONSHIPS

Agent

- Similar to trust
- Principal appoints agent to work on their behalf
- Agent acts for principal and owes them their duty nobody else
- e.g. estate agent relationship
- Trustee owes no duty to settlor

Contract

- Parties act for their own benefit
- Valuable consideration needed
- Privity of contract applies – only parties to contract can enforce

SETTLORS

- Original property owner who creates the trust and outlines its terms
- Absolute owner (law and equity) before setting up trust **DKLR**
Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties
[1980] 1 NSWLR 510
- Role is to establish the trust through demonstrating 3 Cs
- If not taking on trustee role, they must complete all steps necessary to transfer the property – otherwise trustee cannot manage **Re**
***Rose* [1952] Ch 499**
- Not enough to simply vocalise intention
- Intention needs to be evidenced from action/conduct too for trust to be established ***Bizzey v Flight* (1876) 3 Ch D 269**



SETTLOR: CONSIDERATIONS

- A trust cannot be used to correct an incomplete or imperfect gift: as intent to make gift does not demonstrate intent to establish a trust ***Milroy v Lord (1862) 4 De GF and J 264***
- Limited exceptions: equity will compel transfer of property, e.g. if valuable consideration was given by beneficiary ***Lee v Lee (1876) 4 Ch D 175***
- Or detrimental reliance on promise (e.g. implied trusts for land)
- If settlor is appointed as trustee, transfer of legal property title not needed as already have title and can manage property as trustee
- But, conduct must show intention to create a trust, e.g. the start to manage the property in a trust like manner (for benefit of another)
- Unless the settlor is also a trustee or beneficiary, their role ends on creating the trust
- Settlers have no power to manage or enforce the trust once constituted

WHO CAN BE A SETTLOR?

- Anyone capable of owning property
- Children can be settlors for *inter vivos* trusts for personal property they own or have an equitable interest in ***Tierney v Wood* (1854) 52 ER 3.**
- Child cannot legally own land so cannot set up a trust for land: **LPA 1925, s1(6)**
- Child cannot write a valid will: **Wills Act 1837, s7**
- Must have capacity to understand nature and complexity of relationship established
- Voidable where child or adult did not understand ***Edwards v Carter* [1893] AC 360**
- Subjective test for understanding, tailored per individual settlor's understanding and complexity of the trust transaction ***Re Beaney* [1978] 1 WLR 770**
- **Mental Capacity Act 2005:** Law relating to making decisions for those who cannot, and includes property, sets out principles to guide

ACTIVITY 1: ESTABLISHING A TRUST (SBA)

A married couple separated several years ago. After the separation, the man entered a new relationship with another woman, and they eventually moved in together. Following a workplace injury, the man received compensation equivalent to around £10,000. He and his new partner discussed how to use the money and decided to put it into a savings account. Feeling awkward about still being married to his estranged wife while living with his new partner, the man opened the account in his sole name. However, he reassured his partner by telling her, "The money is as much yours as mine." Both the man and his partner enjoyed playing bingo, and over the following year, they deposited various bingo winnings into the same account. The man recently died intestate.

Who is entitled to money in the savings account?

- a) the man's wife is entitled to the money as she inherits all assets under the rules of intestacy as his wife
- b) the man's girlfriend is entitled to the money as she inherits all assets under the rules of intestacy as his common law wife
- c) the man's girlfriend is entitled to the money as the man held the money in the savings account on trust
- d) the money should be divided equally between the women
- e) the money should be donated to charity

Key source: *Paul v Constance*
[1977] 1 WLR 527

CERTAINTY OF INTENTION

- Before creating a trust, the settlor is the absolute owner of the property ***DKLR Holding Co (No. 2) Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510 (p. 519)***
- Absolute owners do not hold divided ownership – they are the legal and equitable owner
- Absolute ownership exists as a whole and is not subdivided
- A trust derogates from absolute ownership
- As such: must evidence that in transferring property/setting up trust, the owner intended divide legal and equitable ownership
- This means: when transferring the property they did so intending that they would impose obligations on the recipient to hold the property for the benefit of others ***DKLR Holding Co (No. 2) Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510***
- For this reason – courts will not correct a failed gift through imposing a trust ***Milroy v Lord (1862) 4 De GF and J 264***

Inter vivos trusts: take effect when fully declared and constituted

Testamentary trusts: take effect on settlor's death

CERTAINTY OF INTENTION IN WORDS

- **Knight v Knight (1840) 3 Beav 148** – framed Certainty of Intention as certainty in words:
- Shift in approach within the case law regarding expressions of wish or request (precatory words):
 - **Malim v Keighley (1794) 30 ER 659** – ‘recommend’ was sufficient to imply a trust was intended
 - In **Re Diggles (1888) 39 Ch D 253** – ‘give all my estate to xx, but it is my desire that they...’ was held insufficient, but merely a wish
- Shift has been suggested due to social changes, from feudal society to greater liberation of market, and increasing property rights of women (i.e. not wishing to make widows simply trustees)

CERTAINTY OF INTENTION (HOLISTIC)

- Moved away from 'certainty of words' doctrine to more holistic requirement of certainty of intention
- As such failure to use the words 'trust' does not mean certainty of intention is not met
- Words used remain important source of evidence
- Court should ask **whether all evidence objectively** suggests that a trust was intended, irrespective of what may subjectively believe ***North v Wilkinson* [2018] EWCA 161; *Paul v Constance* [1977] 1 WLR 530**
- For example "in full confidence"
 - ***Re Adams and Kensington Vestry* LR (1884) 27 Ch D 394** (no trust)
 - ***Comiskey v Bowring-Hanbury* [1905] AC 84** (trust found: additional instructions on management supporting evidence)
- General reluctance to impose a trust in commercial insolvency case over private family trusts: because this would advantage certain individuals over other unsecured creditors : ***Re B A Peters (In Administration)* [2008] EWCA Civ 1604; *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch).**

SHAM TRUSTS

- Just as failing to use the words 'trust' does not preclude finding that a trust exists, using the word 'trust' does not guarantee a finding that the arrangement is a trust
- Courts are alert to 'sham trusts' – trusts established to give a false impression to others and are not truly intended to operate as trusts.
- ***Midland Bank PLC v Wyatt* [1995] 1 FLR 697**
 - In 1986 Mr Wyatt set up a trust, transferring his interest in the home to his wife and daughters (advised by solicitor). Deed stored in personal safe.
 - In 1991 Mr Wyatt's business faced financial trouble; creditors sought to recover debts by selling the house.
 - He claimed no equity in the property, producing the deed to protect the home from creditors.
 - Trust declared a sham: No genuine intention to transfer his interest; deed created solely to evade creditors.

Reflection point

Do you think the law is right to disapprove of 'sham' trusts? Is there a substantive difference between (unenforceable) sham trusts and (enforceable) trusts that are only declared to avoid tax liabilities?

CERTAINTY OF SUBJECT MATTER

- A trust cannot exist in a vacuum it must be attached to subject matter (property) also referred to as 'chose in action'
- This means the identity of the property which is subject to the trust must be clear
- Type of property can vary widely: tangible or intangible: land, cash, personal property/chattels, intellectual etc. – very few limits (though some additional formalities)
- Lack of clarity over the trust property however can result in trust failing.

Lack of linguistic certainty:

settlor did not use clear enough language for trust property to be identified. 'bulk of residuary estate' ***Palmer v Simmonds***

(1854) 2 Drew 221

Lack of clarity around the specific property being identifiable, e.g. segregation

SEGREGATION: A PART OF A WHOLE



Re London Wine Co
[1986] PCC 121



Hunter v Moss
[1994] 1 WLR 452



Re Goldcorp
Exchange Ltd
[1995] 1 AC 74



Ruscoe and Moore
v Cryptopia
Limited (in
liquidation) [2020]
NZHC 728

CERTAINTY OF OBJECTS

- The final certainty requires certainty as to who should benefit from the trust (and how if not discretionary).
- Certainty of objects shall be explored further in the unit on beneficiaries

ACTIVITY 2: CERTAINTIES (SBA) 1

A settlor established a trust to benefit members of their sports club. Under the terms of the trust, the settlor provided that some of their estate should be made available to any members of their sports club in need, need defined by the trustees.

Which of the following statements best describes the validity of this trust?

- a) The trust would likely fail for lack of certainty of objects.
- b) The trust would likely fail for lack of certainty of subject matter.
- c) The trust would likely fail for lack of certainty of intention.
- d) The trust would not fail. This is a discretionary trust as such it is at the discretion of the trustees to decide upon how much of the settlor's property should be made available for the benefit of the trust.
- e) The trust would not fail. This is a validly constructed fixed trust.

ACTIVITY 2: CERTAINTIES (SBA) 2

A parent arrives back at the family home after a week away at a work conference. The grandmother and the child are at the dinner table, and the grandmother berates the parent for never being there for the child. The parent pulls a gold engraved necklace from their pocket and puts it down on the table in front of the grandmother stating, 'Here, you can look after this for the child until she is 18, then it will be hers'. A week later, the parent writes a note stating 'I give my gold engraved necklace to my mother to hold on trust for my daughter until she is 18'.

Has the parent demonstrated an intention to create a trust?

- a. No, there is no intention to create a trust. The placing of the necklace on the table was a reaction to criticism for not being there for the child.
- b. Yes, there is an intention to create an express trust. The intention was expressed orally, and then a week later, after having time to reflect, it was evidenced in writing.
- c. No, there is no intention to create a trust. The giving of the necklace was a spur-of-the-moment decision, and the intention expressed in the letter was similarly a reaction to criticism.
- d. Yes, there is an intention to create an express trust. The intention was evidenced as soon as the necklace was placed on the table and the words were spoken.
- e. No, there is no intention to create a trust. An express trust of a valuable object has to be evidenced in writing at the time it is established.

ACTIVITY 2: CERTAINTIES (SBA) 3

A man establishes an express trust for the benefit of the local Church youth group. He goes to the local vicar and explains that he is giving a minibus and a snooker table to her to hold on trust for the youth group. He also explains that he is giving her a big barn on his land to hold on trust for the group. That same day, she receives a letter signed by the landowner confirming the trust. All three certainties are satisfied to establish an express trust.

Are the formalities for the establishment of a trust of all the property satisfied?

- a. No. The landowner needed to evidence the trust in writing at the time he spoke to the vicar. It does not matter that he later sent a signed letter confirming the trust.
- b. Yes. There was a trust of personalty as soon as the landowner orally declared the trust to the vicar. The personalty consists of the minibus and the snooker table. There was a trust of the realty on the date of the oral declaration as soon as the trust was confirmed in writing.
- c. Yes. There was a trust of personalty as soon as the landowner orally declared the trust to the vicar. The personalty consists of the minibus and the snooker table. There was a trust of the realty on the date the trust was confirmed in writing.
- d. No. There was a trust of personalty as soon as the landowner orally declared the trust to the vicar, but the trust of realty needed to be in writing, signed and witnessed by two independent witnesses.
- e. Yes. There was a trust of personalty and realty on the date the letter was received. The personalty consisted of the minibus and snooker table. The realty consisted of the barn.

ACTIVITY 2: CERTAINTIES (SBA) 4

A testator's will appointed her sister as trustee. The will stated that the sister would hold £1000, a large diamond wedding ring and half the testator's wine cellar on trust for the testator's grandchildren living at the time of her death and who attain the age of 18, in equal shares. At the time of writing the will, the testator had one grandchild. She died two years later leaving £2000 in her bank account and 501 bottles of wine in her wine cellar. It was appraised that 51 bottles were worth £1000 each, and the rest were worth £20-£30 each. At the time of her death, the testator had two grandchildren.

Are the three certainties satisfied so as to constitute an express trust? Which of the following statements is correct?

- a. Yes, there is a trust by will. There is certainty of intention because the testator has written a will evidencing her intention in words. There is certainty of subject matter because the will lists personal property that can constitute the trust fund, namely £1000, a large diamond wedding ring and half the wine cellar. There is also certainty of objects because the trustee can ascertain who the grandchildren are at the time of testator's death. An express trust will be created of the property.
- b. No. Although there appears to be a trust by will, only two of the certainties are satisfied. There is certainty of intention because the testator has written a will evidencing her intention in words. Also, there is certainty of subject matter because the specific items in the trust fund are listed in the will. But, there is insufficient certainty of objects. It is not possible to ascertain exactly what shares each grandchild will take.
- c. Yes, there is a trust by will. There is certainty of intention because the testator expresses the intention to create a trust in the will. There is certainty of objects because the beneficiaries are those grandchildren living at the time the testator dies. There is certainty of subject matter because money in an account is an intangible asset, and £1000 can be taken from the total of £2000 in the bank account. The wine cellar can be halved to place in the trust fund, one bottle over does not affect this.
- d. Yes, there is an express trust of some of the trust property. There is certainty of intention and certainty of objects. There is certainty of some of the subject matter. The £1000 can constitute valid subject matter, and there is a valid express trust of that. Neither the wine nor the diamond ring can constitute valid subject matter of the trust because it is not possible to ascertain which bottles of wine fall into the fund, and the ring cannot be halved.
- e. Yes, there is a valid express trust created by the will. There is certainty of intention expressed on the face of the will. There is certainty of subject matter because the will lists everything that goes into the trust fund. There is certainty of objects because the trust fund will be applied in equal shares to those of the grandchildren living at the testators' death.



WORKING TOGETHER

UNIT 1: PRINCIPLES OF EQUITY AND TRUST

ASSESSMENT 1

- Collaboration is a vital skill for lawyers – subject benchmark
- Assessment 1: legislative drafting for law reform
- As a group agree upon **one** aspect of the law relating to trustees' duties to be reformed and make suggestions for reform which will ensure that the law better reflects the founding principles and values of equity.
 - To achieve this, as a group, you will need to:
 - •Agree upon one aspect of the law to be reformed
 - •Undertake research collaboratively to understand the challenges associated with this aspect of the law, sharing the findings of your research with your group
 - •Draw on this research to make suggestions for reform, agreeing on the structure and wording of your recommendations.

ACTIVITY 3: WORKING TOGETHER

In your groups, answer the following questions:

1. What experience have you had of undertaking collaboration?
2. What are the challenges of collaboration?
3. What are the rewards of collaboration?

ACTIVITY 3: TEAM ROLES

1. Working on your own have a look at the description of Belbin's team roles and decide which one you think most represents you.
2. Working as a pair share with each other why you chose that team role.
3. Working as a group consider why it might be helpful to understand different personality types.

PUTTING A PLAN TOGETHER

- Who, what, why and how of coming together as a team
- Negotiating team agreements
- Top tips for collaboration and teamwork

Assign roles- who will be responsible for which part of the project.

- Agree a team agreement.
- Agree how you will communicate- WhatsApp, email etc.
- Set up meetings to check progress and agree next steps.
 - Use shared documents.
 - Agree deadlines.
- Check in with the team to let everyone know how you are getting on and let people know as soon as you can if you can't do something or there is going to be a delay.
 - If you meet in Adobe Connect if you can switch your camera on so you can see each other.
- Everyone has their own work style recognise and accept that.
 - Be kind and support each other.

AT YOUR FIRST TEAM MEETING

Who

When you first meet it is good to start with a 'coffee' style chat where you introduce yourself and share a bit about yourself.

What

Think about the task you have been set, what does it involve, what are the milestones. It is important to listen and get everyone's input.

Why

Knowing the why is important so you have a shared vision. Is this an assessment task, a group project- why is it important to you.

How

How are you going to work as a team, how are you going to collaborate, how are you going to overcome challenges.

TEAM AGREEMENTS

- **Questions you might want to think about**
- How will we share information ?
- How will we communicate with each other?
- What response times do you expect?
- How will we know what's being worked on?
- When/how will we meet?
- How will we give each other feedback?

Draft team contract

Participation: We agree to....

Communication: We agree to...

Meetings: We agree to....

Conduct: We agree to...

Conflict: We agree to...

Deadlines: We agree to...

Signed:

ACTIVITY 4: HOW ARE YOU FEELING ABOUT LEVEL 6?

- You've now had a few days of life at level 6, and getting the feel of what level 6 involves. Draft a short letter to yourself, which you will read at the end of semester 1
- Once you have written your letter, places this in the envelope provided and seal it.
- Write your name on the envelope
- Your letter is entirely confidential, only you will see it.
- I will not read it! This is about your reflection. If you identify things that you want help with, let me/your tutors know!

Dear [your name],

I have now completed my first week of lectures at level 6.

As I look forward to studying at level 6 and completing assignments on this year I feel confident in my ability to..... [think of about three points you might say here – what are the things (knowledge or skills) you are confident you can draw on when studying this year]

I am concerned about... [identify any thing you are concerned about in studying at level 6]

To succeed, I will need to work on.... [challenge yourself to identify up to three things you will work on to maximise your success on the module]

Best wishes,
[your name]

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RECAP

UNIT 2: READING MATERIALS

- You can draw on the following chapters of your textbooks to deepen your understanding of the topics discussed in this unit.
 - Watt (2023) chapter 3
 - Ramjohn and Bray (2024), chapter 2–5
 - Barr and Pearce (2022) chapters 5–7

EXPLORING FURTHER

- You may find the following sources of interest to you in exploring the topics discussed in this unit further. You are not expected to read these to pass the module, they are provided should you wish to explore the topics further.
 - Cooper, G. (2021) 'Virtual property: trusts of cryptocurrencies and other digital assets', *Trusts & Trustees*, 27(7), pp. 622–631.
 - Hayton, D. (1994) 'Uncertainty of subject-matter of trusts', *Law Quarterly Review*, 110(3), pp. 335–340.
 - Hudson, A. (2014) *Great debates in equity and trusts*. London: Palgrave Macmillan.
 - Martin, J. (1996) 'Certainty of subject-matter: a defence of Hunter v Moss', *Conveyancer and Property Lawyer*, May–June, pp. 223–227.
 - Low, K. (2021) 'Trusts of cryptoassets', *Trust Law International*, 34(4), pp. 191–214.
 - Villiers, T. (1998–1999) 'Certainty of subject-matter in trusts: the controversy continues', *King's College Law Journal*, 9, pp. 112–116.
 - van Beynen, M. and Sherwood, S. (2020) 'Cryptopia account holders win battle over assets worth \$140m', *Stuff*, 8 April. Available at: <https://www.stuff.co.nz/business/120913953/cryptopia-account-holders-win-battle-over-assets-worth-140m> (Accessed: 25 May 2023).

ACTIVITY 3: SOLVING PROBLEMS

- You will produce your team agreement next week
- This week:
 - Take the list of challenges you identified and identify potential solutions
 - Create a template for your work log (your audit trail) – this will need to be submitted with your assessment, and it will need to:
 - List the different activities you have undertaken,
 - Indicate who has contributed to what and when
 - Signed by all members as evidence of the team's contribution
 - Think about what tasks you will need to do: planning, researching, drafting, feedback, reviewing etc.