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TRUSTS LAW

JOYCE LIEW MOUAWAD

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Indexing by Terence Halliday

Fink Publishing Ltd

E-mail: hello@revise4law.co.uk

www.revise4law.co.uk

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In the SQE assessment, you may expect a question on whether a particular gift meets the three certainties. Another possible type of MCQ could be a given scenario on whether the testator's words and/or actions resulted in the creation of a trust.

Bear in mind that a valid trust must satisfy all three certainties as well as the formality requirements and must be completely constituted (see Chapters 2 and 3). Remember to read this topic in conjunction with formalities and constitution of trusts.

■ WHAT DO YOU KNOW ALREADY?

Have a go at these questions before reading this chapter. If you find some difficult or cannot remember the answers, make a note to look more closely at that area during your revision.

- 1) True or false: An express trust can only be created in a written document.

[Introduction to express private trusts, page 3]

- 2) True or false: The settlor must use the word 'trust' in order to demonstrate certainty of intention to create a trust.

[Certainty of intention, page 4]

- 3) True or false: A person of means must watch what they say to others as any statement they make regarding their property will be regarded as an intention to hold the property on trust for another.

[Certainty of intention, page 4]

- 4) Daisy is seeking your advice: she owns 1,000 shares in Google Inc. and would like to leave most of it to her sister Billie in her will. In which of the following is there certainty of subject matter?

- a) The majority of my shares in Google Inc. to my sister Billie.
b) 800 of my shares in Google Inc. to my sister Billie.

[Certainty of subject matter, page 10]

- 5) In which of the following examples is there conceptual certainty?

- a) I leave all the money in my account at Lloyd's Bank on trust for my best friends.
b) I leave all the money in my account at Lloyd's Bank on trust for my Facebook friends.

[Certainty of objects, page 13]

INTRODUCTION TO EXPRESS PRIVATE TRUSTS

Before we get to the substantive law on the three certainties, here is a quick reminder of the basics of trusts law:

- All non-charitable trusts are **private trusts**.
- An express trust is intentionally created by the **settlor**.
- The creation of a trust can be **inter vivos** or **testamentary**.
- When dealing with a will, the settlor is referred to as the **testator**.
- The settlor can act as trustee or they can appoint others to act as **trustees**.
- The trust must also have **beneficiaries**.

Key term: private trust

A private trust is any trust that is not charitable. The trust is said to be an express trust when the settlor intentionally created it.

Key term: settlor

The settlor is the person creating the trust.

Key term: inter vivos

During the lifetime of the settlor.

There are many ways a settlor can create a trust:

- In writing, either formally by executing a trust instrument or in a will; or by letter or a written note.
- By words or conduct.

It is a question of construction whether or not a trust has been created. The court will look at the words in the document (if written) or the words and conduct of the settlor (if not in writing) when deciding whether a valid trust has been created.

Key term: testamentary

A testamentary creation of trust is a trust created in a will.

Key term: testator

The testator is the person who created the will.

Key term: trustees

The trustees hold the legal title of the trust assets and are under a duty to administer the assets for the benefit of the beneficiaries.

Key term: beneficiaries

The beneficiaries are entitled to benefit from the trust and they hold the equitable title to the trust assets. The beneficiaries are said to have the beneficial interests.

For the SQE assessment, you should bear in mind that when ascertaining whether a valid trust has been created, you must consider all the relevant requirements. These requirements are explained in this chapter, as well as in Chapter 2 and Chapter 3.

THE THREE CERTAINTIES

To create a valid trust, the settlor must ensure that all three certainties are present:

- Certainty of intention
- Certainty of subject matter
- Certainty of objects

Let's look at each in detail below.

CERTAINTY OF INTENTION

To create a valid trust, it must be clear that the settlor, by their words or conduct, had the *intention* to create this trust. That is why the certainty of intention is sometimes referred to as the certainty of words. There is no set form of words to use, so long as it is clear that the settlor intended to create a trust.

Revision tip

Remember the maxim (principle) 'equity looks to the substance rather than the form'. When ascertaining a person's intention, the court looks beyond that person's words to include their conduct and any factors the court considers to be relevant.

Take, for example, the following clause in John's will: 'My house to my partner Sam so that she can continue to look after our children'. This could be construed as:

- An absolute gift to Sam (if the court found that John had no intention of creating a trust), or
- A trust where Sam is the trustee holding the house for the children (if the court found that John had the intention to create a trust).

In the rest of this topic, we are going to explore common scenarios where the court must decide if there was certainty of intention.

The use of precatory words

As you can see from the example in John's will above, people do not always make their intent clear and use what the courts consider to be precatory words.

Key term: precatory words

These are words expressing confidence, wish, belief, desire, hope or recommendation, eg 'It is my wish', 'I sincerely hope', 'I have no doubt', etc.

The use of precatory words is unlikely to result in the creation of a trust. The case examples in Table 1.1 give examples of this and will help you see how it can be applied in practice.

Revision tip

The case law mentioned in the table below is useful for aiding your understanding of the law and you may encounter a similar scenario in your SQE assessment. However, you will not be required to memorise the case names.

Table 1.1: Case examples of precatory words

Case example	Ruling
<p><i>Re Adams & The Kensington Vestry</i> [1884] 27 Ch D 394</p> <p>'Unto and to the absolute use of my wife ... <i>in full confidence</i> that she will do what is right as to the disposal thereof between my children ...'</p>	<p>In this case, the words 'in full confidence' were precatory in nature and were considered not to be sufficiently imperative to show an intention to create a trust.</p>
<p><i>Comiskey v Bowring-Hanbury</i> [1905] AC 84</p> <p>'Absolutely <i>in full confidence</i> that she will make such use of it as I would have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit <i>and in default to be divided among my nieces</i>'.</p>	<p>In this case, although precatory words were used, the testator also included a gift over in default of appointment. This imposed a mandatory obligation. The court was able to find an intention to create a trust here as the settlor made it clear in the whole context of the will that a trust was intended by including instructions for the nieces to acquire a benefit in any event.</p>

Key term: gift over in default of appointment

Where a settlor has created a trust which gives the trustee a discretion on distribution of the trust property, the settlor may sometimes include an alternative gift in the event of a failure to distribute the property.

Take a look at **Practice example 1.1** below in relation to precatory words.

Practice example 1.1

Your client is a personal representative of her brother's estate. Her brother, a widower, died recently leaving two adult daughters. His will had the following clause, 'All my savings in my bank account for my only sister in full confidence that she will do right by my children'.

Your client wishes to know if she is entitled to the money or whether she is to hold it on trust for her nieces. What is the court's likely approach?

The words used are precatory in nature and are unlikely to impose a mandatory obligation on your client. In the absence of any contrary intention in the will, the court will most likely find this to be an absolute gift to her.

To summarise, the use of precatory words would generally not create a trust unless it is clear from the whole context of the document that the testator intended to create a trust.

What if the settlor included the word 'trust'? Do you think that demonstrates certainty of intention?

The use of the word 'trust'

Inclusion of the word 'trust' may not necessarily create a trust if there was no genuine intention on the part of the settlor to do so.

For example, if a father's will reads: 'I leave my whole estate to my only daughter; I *trust* she will make good use of it to continue to love and care for my beloved grandchildren'. Did the father intend to make his daughter a trustee holding for the benefit of the grandchildren? Or was the use of the word 'trust' merely precatory and this was an absolute gift to the daughter?

Based on what we know of the court's approach to the use of precatory words, this is likely to be construed as an absolute gift to the daughter despite the use of the word 'trust'.

Practice example 1.2

Mr and Mrs W are joint legal owners of a matrimonial home. Mr W executed a declaration of trust of the house in favour of his wife and children. He placed the trust deed in his safe. He later obtained a business loan from a bank using the house as security, the bank was unaware of the trust. When his business went into receivership, Mr W produced the trust deed. The creditors are claiming the house. Can the wife and children rely on the trust and thus prevent the creditors from claiming the house?

These are the facts of *Midland Bank plc v Wyatt* [1994] EGCS 113, where the court found Mr W's declaration of trust to be a sham and therefore voidable. This case established that a declaration of trust does not automatically result in the creation of a valid trust. The court will look beyond the words used by the settlor to determine their true intention.

Next, we will consider whether the settlor's informal words and actions can create a trust.

Informal words and actions

A written document is unnecessary so long as the settlor shows sufficient intention to create a trust. Informal words are acceptable if the intention to create a trust is clear; there is no need to use the word 'trust'.

The case of *Paul v Constance* [1977] 1 WLR 527 is a good example of the informal words and actions of Mr Constance demonstrating his intention to create a trust. He had left his wife and moved in with Mrs Paul. He opened a bank account in his sole name (instead of joint names) to avoid embarrassment due to the fact that they were unmarried. Constance had frequently told Paul that the money in the account is 'as much yours as mine' and any joint bingo winnings were paid into that account. The court found that Constance intended to create a trust of the money in his bank account for Paul through a series of declarations and conversations on his part. However, the court acknowledged that this was a borderline case and awarded Paul half of the money in the account with the other half going to Constance's wife. Had this not been considered a borderline case, Paul would have been awarded all the money in the account.

Exam warning

In the SQE assessment, if you are required to ascertain whether a valid trust has been created, remember to consider not just the settlor's words and actions but also all the other relevant information included in the question.

Have a look at Practice example 1.3 on the effect of a person's words or conduct:

Practice example 1.3

Mr Jones returned home after being away for business and was criticised for failing to bring a present for his infant son. He flourished a cheque for £900 payable to him and said, 'I give this to baby for himself', placing the cheque in his son's hands. He then took back the cheque and declared, 'I am going to put it away for him'. Jones died soon after and the cheque was found amongst his papers. What do you think of Jones' actions? Did his second declaration show certainty of intention to hold the money on trust for his son?

These are the facts of *Jones v Lock* [1865] 1 Ch App 25, where it was argued that Jones' words, 'I am going to put it away for him' showed an intention to hold the money on trust for his son. However, the court held that there had been no valid declaration of trust, explaining that it would be 'of very dangerous example if loose conversations of this sort ... should have the effect of declarations of trust'.

This practice example reinforced the principle of substance over form when considering a settlor's intention to create a trust. With that in mind, we will look next at how the settlor's conduct alone can demonstrate intention.

The settlor's conduct

So far, in all the examples above, the court had the settlor's words, whether written or oral, to consider when construing the settlor's true intention. What if the settlor never spoke of their intention? Or if there was no document recording their intention? Can conduct alone be used as evidence of an intention to create a trust? Consider Practice example 1.4.

Practice example 1.4

A mail order company where customers paid in advance opened a separate account into which all money received from customers whose goods had not been delivered were paid. The account was named 'Customer Trust Deposit Account'. Money was only taken from that account once the goods had been dispatched. The company went bankrupt and the liquidators sought a declaration as to the ownership of the money in that account.

Who do you think is entitled to claim the money in that account? The customers who had yet to receive their goods, or the liquidators?

These are the facts of *Re Kayford* [1975] 1 WLR 279, where the court held that the separate account was evidence of intention to create a trust. The money in the account belonged to the customers.

Use the summary in Figure 1.1 to help you remember the salient points on certainty of intention.

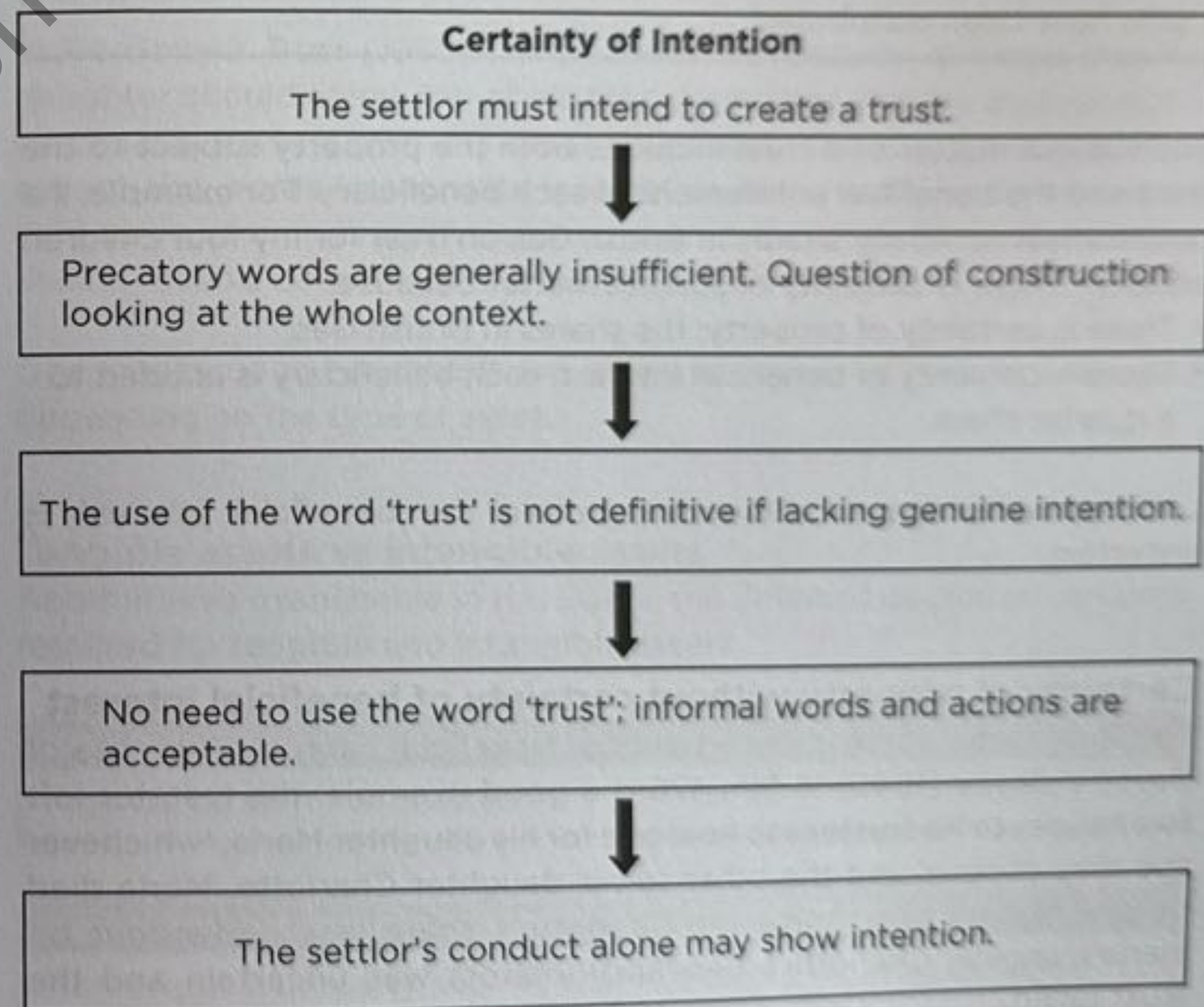


Figure 1.1: Certainty of intention

CERTAINTY OF SUBJECT MATTER

A trust must have assets; in other words, the trust property or the subject matter. The property subject to the trust must be described with sufficient certainty, otherwise the trust fails, as you can see from Practice example 1.5.

Practice example 1.5

A testator's will has the following clause: I leave on trust 'the bulk of my residuary estate'. Is there certainty of subject matter?

This phrase was used in the case of *Palmer v Simmonds* [1854] 2 Drew 221, where the court held that the subject matter was insufficiently certain due to the word 'bulk'. There is no valid trust.

Key term: residuary estate

The residue is everything that is left in a deceased's estate after all debts and taxes have been paid and all specific and non-specific gifts have been distributed.

The subject matter of a trust includes both the property subject to the trust and the beneficial entitlement of each beneficiary. For example, if a testator leaves 'All my shares in British Gas on trust for my four children equally'. There is certainty of subject matter because:

- There is certainty of property: the shares in British Gas.
- There is certainty of beneficial interest: each beneficiary is entitled to a quarter share.

Let's consider the consequences where the beneficial interest is uncertain.

Certainty of property without certainty of beneficial interest

The trust fails if there is uncertainty of beneficial interest. The case of *Boyce v Boyce* [1849] 16 Sim 476 is a good example: the testator left two houses to his trustees to hold one for his daughter Maria, 'whichever she may choose' and the other to his daughter Charlotte. Maria died before making her choice. As Charlotte's share was dependent on Maria's choice, Charlotte's beneficial interest was uncertain and the trust failed.

Exam warning

Be aware that the property subject to the trust and the beneficial interests may not always be the same as illustrated in *Boyce v Boyce*. Make sure you know how to identify the trust property as well as the beneficial interest. Start by identifying the trust property; then identify how much each beneficiary is entitled to.

Where appropriate, the court can save the trust if they are able to objectively assess a beneficiary's entitlement.

Objective assessment by the court

It is common practice for a settlor to leave property on trust for their child with a direction that the child is to receive a reasonable income from the property. The property subject to the trust is certain assuming it has been clearly identified. The issue is whether there is certainty of beneficial interest. The child is to receive a 'reasonable income' but the amount was not specified. Is this considered certain?

In *Re Golay's Trust* [1965] 1 WLR 1969, the testator directed that his daughter should enjoy one of his flats during her lifetime and receive a reasonable income from his other properties. The court was willing to accept the words 'reasonable income' as being sufficiently certain as they can make an objective assessment of the amount the beneficiary should receive based on the circumstances of the case.

One final issue to consider is the different degree of certainty required depending on the type of asset.

Tangible assets vs intangible assets

Another area examinable in the SQE is the different degree of certainty required for tangible and intangible assets.

Key term: tangible assets

Physical property or chattels.

Key term: intangible assets

Non-physical property such as shares, patents, etc. This includes cryptocurrencies and non-fungible tokens.

Tangible assets

If a settlor created a trust of only part of their assets, for example, part of their wine collection, there is no certainty of subject matter unless the tangible assets are clearly identified, usually by segregating them from the larger stock as demonstrated in **Practice example 1.6**.

Practice example 1.6

A customer of a fine wine company just heard that the company has gone into liquidation. The customer is worried about their order of four cases of wine placed and paid for just before the company went into liquidation. Must the customer join the queue as an unsecured creditor or is the customer entitled to their order?

According to the decision in *Re London Wine Co. (Shippers) Ltd* [1986] PCC 21, the answer depends on whether the company had segregated the wine ordered by the customer. It must be clear that the segregated wine was meant for the customer. If so, the customer is entitled to the wine as the actions of the company demonstrated an intention to create a trust and the fact that the wine was kept aside would show certainty of subject matter.

If the order had not been segregated, the customer is considered an unsecured creditor.

Having looked at tangible assets, we will now consider intangible assets.

Intangible assets

Intangible assets are treated differently; provided the assets are similar, there is no need for segregation. **Practice example 1.7** provides a useful illustration.

Practice example 1.7

An employer agreed to give 50 of his 950 shares to his employee. The employer died before he could transfer the shares, nor did he identify the 50 shares. Is the employee entitled to the shares?

This was what happened in the case of *Hunter v Moss* [1994] 1 WLR 452, where the court had to decide whether the employer had the intention to create a trust, and if so whether there was certainty of subject matter. The court held that there was an intention to create a trust and as the shares were identical to each other, there was no need for segregation and the employee was entitled to the 50 shares.

This principle applies to investment funds: there can be a valid trust of client assets held in pooled accounts despite a lack of individual asset allocation. The Supreme Court confirmed that issues of certainty can be clarified later.

Summary: Certainty of subject matter	
Certainty of property	The trust property must be certain.
	Different degree of certainty for: <ul style="list-style-type: none"> • Tangible assets • Intangible assets
Certainty of beneficial interest	The entitlement of each beneficiary must be certain.
	The court can assist if the beneficial interest can be objectively assessed.

CERTAINTY OF OBJECTS

The objects of a trust are its beneficiaries. A trust without beneficiaries fails. Where there is more than one beneficiary, the **class of beneficiaries** must be ascertainable. The test to determine certainty of objects differ for **fixed trusts** and **discretionary trusts**.

Key term: class of beneficiaries

Where a trust has more than one beneficiary but the settlor has not identified each and every beneficiary but refers instead to a class, such as 'my grandchildren', 'my employees', etc.

Key term: fixed trust

In a fixed trust, each beneficiary is entitled to a specific share of the trust property.

Key term: discretionary trust

In a discretionary trust, the trustees have a discretion on whether or not to pay any member of a defined class of beneficiaries. The beneficiaries have no automatic right to payment, only the right to be considered by the trustees.

Table 1.2 gives some examples of fixed and discretionary trusts.

Table 1.2: Examples of fixed and discretionary trusts

Examples of fixed trusts:	Example of a discretionary trust:
a) On trust 'for A for life, remainder to B absolutely' - A has the life interest and B has the remainder interest. b) On trust 'for A, B and C in equal shares' - each beneficiary is entitled to 1/3 of the trust property.	'On discretionary trusts for the grandchildren of Alice' - the trustees may select who to pay out of Alice's grandchildren but have no obligation to pay something to each grandchild, or to pay in equal shares, or even to make any payments.

We will now consider the different requirements to establish certainty of objects for fixed and discretionary trusts. Make sure you pay particular attention to this in your revision as you may encounter a problem-based scenario in the SQE in this area.

Fixed trusts

For fixed trusts, the test for certainty of objects is the class ascertainability test. It must be possible to compile a *complete list* of all beneficiaries.

Practice example 1.8

A testator left a will with a following clause: '£1m on trust for all my grandchildren in equal shares'. Is this a fixed trust? If so, does it meet the test for certainty of objects?

This is a fixed trust as each beneficiary is entitled to a specific share of the trust property. There is certainty of objects as it is possible to compile a complete list of all the beneficiaries.

Discretionary trusts

For discretionary trusts, the test for certainty of objects is the *individual ascertainability test* as explained in the case of *McPhail v Doulton* [1970] 2 All ER 228: the trustees must ask 'can it be said with certainty that any given individual is or is not a member of the class?'

The test is less stringent than for fixed trusts, as there is no need to draw up a complete list of beneficiaries. **Practice example 1.9** demonstrates the flexibility of this test.

Practice example 1.9

A settlor, who owned a company, established a discretionary trust for the benefit of 'my employees and ex-employees, and any relatives of such persons'. Are the objects of this trust certain?

You have been told that this is a discretionary trust and therefore must apply the individual ascertainability test. All the trustees need to do is apply the test to each person in turn rather than to render a complete list of all beneficiaries falling within the description. As you can see, it is much easier to determine whether an individual was an employee, ex-employee or a relative of such a person. The trust is valid.

Summary	Test for certainty of objects
Fixed trust	Class ascertainability: trustees can compile a complete list of all beneficiaries.
Discretionary trust	Individual ascertainability: can it be said with certainty that any given individual is or is not a member of the class?

Exam warning

If the SQE exam question requires consideration of whether the object of a trust is certain, remember to first check whether the trust is a fixed or a discretionary trust before applying the appropriate test.

Issues arising when ascertaining certainty of objects

There are four important issues to remember when looking at certainty of objects. These are:

- Conceptual uncertainty
- Evidential uncertainty
- Administrative unworkability
- Gifts to individuals answering a particular description: the one-person test.

We will now look at each in turn.

Conceptual uncertainty makes a trust void

There is conceptual uncertainty where the words used by the settlor to describe the beneficiaries are too vague for the courts to apply. Case law provides some guidance on whether the following popular terms are conceptually certain:

- The term 'friends' is considered conceptually uncertain.
- The term 'relatives' is considered conceptually certain. Similarly, the term 'family' is also certain.
- The term 'dependants' is conceptually certain; 'dependants' being persons wholly or in part dependent upon the means of another.

There is no conceptual uncertainty if:

- The settlor gives meaning to phrases so the trustees can identify the class: 'To my trustee to hold on trust for my Facebook friends'.
- The settlor left the discretion to someone to decide who falls within the class: 'To my trustee to hold on trust for my friends as determined in his absolute discretion'.

Evidential uncertainty

If the settlor included a clear description of the beneficiaries, there is conceptual certainty, but if the trustees are unable to determine exactly who fits the description, due to lack of evidence, there is evidential uncertainty. For example, 'to the former employees of my now defunct company' is conceptually certain but may be evidentially uncertain if there are no records of the employees.

Extrinsic evidence is admissible to clear up any evidential uncertainty. So in our example, evidence might include employment contracts, pay slips, etc.

Key term: extrinsic evidence

Facts or information outside of a written document like a will or a trust deed.

Exam warning

Candidates tend to conflate the concepts of conceptual and evidential certainty so make sure you know the difference. Remember that conceptual uncertainty renders a trust void but evidential uncertainty can be remedied by the admission of extrinsic evidence.

Administrative unworkability

A trust fails for administrative unworkability where the description used by the settlor is clear but the definition of beneficiaries is too wide to form a class.

A good example of this can be found in *R v District Auditor ex Parte West Yorkshire Met County Council* [1986] RVR 26, where a trust for the benefit of the inhabitants of West Yorkshire (population: 2.5m) was held to be void for administrative unworkability.

Gifts to individuals answering a particular description: the one-person test

At times, a testator may include a bequest in their will where each beneficiary is entitled to a similar gift and the number of beneficiaries does not affect the size of each gift. For such bequests, conceptual certainty is not required so long as at least one person meets the criteria.

For example, consider the following clause in a will: '£50 to be paid by my trustees to any of my family or friends who has supported my business over the years'. Every person who meets the description is to be given £50; the number of people who meet the description is irrelevant. For clarification, see **Practice example 1.10**.

Practice example 1.10

A testator's will left paintings for 'any members of my family and any friends of mine who wish to do so' to purchase at a reduced price. Is this valid for certainty of objects?

This was the bequest in *Re Barlow's WT* [1979] 1 WLR 278, which was held to be a series of individual gifts. As such, there was no requirement to establish all the members of the class, only that any person wishing to buy a painting was indeed 'family' or 'friend'. Thus, there was no need to decide if 'friends' was conceptually certain. This gift was valid because any uncertainty regarding the class of beneficiaries does not affect the 'share' of anyone who can prove that they qualify.

Figure 1.2 provides a summary of what happens when each certainty is lacking.