

CHAPTER 4

**REQUIREMENTS FOR ESSENTIAL VALIDITY OF
EXPRESS TRUSTS****1. THE REQUISITE INTENTION TO CREATE A TRUST****Certainty of words**

- 4-03** NOTE 8. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), Chaps 15 and 28. FOR THE REFERENCE TO *Williams on Wills*, SEE NOW (9th edn), Vol.1, Chaps 50, 53 and 82.

Inferred or “precatory” trusts

- 4-04** NOTE 13. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), §§ 28-020 to 28-026.

Directions as to maintenance of children

- 4-05** NOTE 18. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 28-027. FOR THE REFERENCE TO *Williams on Wills*, SEE NOW (9th edn), Vol.1, § 82.5.

Conditions construed as trusts

- 4-09** NOTE 43. AT THE END ADD: See *Re Lehman Brothers International (Europe) (in administration)* [2009] EWHC 3228 (Ch) at [177]–[179] (reversed in part on appeal on other grounds [2010] EWCA Civ 917; [2010] All E.R. (D) 15 (Aug)) on the distinction between the creation of a charge and the creation of a trust.

NOTE 45. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 29-002. FOR THE REFERENCE TO *Williams on Wills*, SEE NOW (9th edn), Vol.1, §§ 34.1 and 34.4.

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Trusts of the benefit of contracts*No intention to contract as trustee*

- 4–15 NOTE 77. AT THE END ADD: *Fluor Australia Pty v Engineering Pty Ltd* [2007] VSC 262; (2007–08) 19 V.R. 458.

2. TRUSTS HELD TO BE SHAMS**General principle**

- 4–19 NOTE 86. AT THE END ADD: See Conaglen (2008) 68 C.L.J. 176.

NOTE 91. AT THE END ADD: a passage approved in *Goldstone v Goldstone* [2011] EWCA Civ 39; [2011] 1 F.L.R. 1926 at [37], [66].

The shamming intent

- 4–20 NOTE 94. AT THE END ADD: The position in Canada is different. There is no requirement of tortious deceit and it is enough that the parties to a transaction present it as being different from what they know it to be: *Antle v R* [2010] FCA 280; (2010–11) 13 I.T.E.L.R. 591 at [15]–[22].

The trustees or other parties to a declaration

- 4–22 NOTE 7. AT THE END ADD: It has been said that a common intention is required, but that reckless indifference on the part of the trustee will be taken to amount to the necessary intention: *A v A* [2007] EWHC 99 (Fam); [2007] 2 F.L.R. 467 at [52]. In *Re Reynolds* [2008] NZCA 122; (2007–08) 10 I.T.E.L.R. 1064 at [38], reference was made to recklessness or ignorance on the part of the trustee as being tantamount to intention, but ignorance would not be tantamount to intention unless it involved a wilful shutting of eyes.

The effect of finding a sham

- 4–23 NOTE 12. AT THE END ADD: That dissent was treated as representing Australian (as well as English) law in *Byrnes v Kendle* [2011] HCA 26; (2011–12) 14 I.T.E.L.R. 299 at [13]–[18], [60]–[66] and [116], where the statement of the law in this paragraph was approved.

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Settlors retaining powers, interests and control

- 4–25** AFTER THE FIFTH SENTENCE ADD NOTE 17a: Settlor control may often occur with the view of benefiting the beneficiaries and thus be quite consistent with the existence of an intention on behalf of the settlor that the trust be operative: *Re Reynolds* [2008] NZCA 122; (2007–08) 10 I.T.E.L.R. 1064 at [127].

NOTE 18. AT THE END ADD: *Antle v R* [2009] TCC 465; (2009–10) 12 I.T.E.L.R. 314 at [73]–[74] (agreeing with submissions relying on the statement in the text, affirmed without comment on these submissions [2010] FCA 280; (2010–11) 13 I.T.E.L.R. 591). Evidence of poor administration of a trust is insufficient to establish a sham, although it may show a breach of trust: *Re Reynolds* [2008] NZCA 122; (2007–08) 10 I.T.E.L.R. 1064 at [92], [125].

Further practical considerations in the trust context

- 4–27** NOTE 25. AT THE END ADD: See too *Re Exeter Settlement* [2010] JRC 012.

AT THE END OF THE TEXT ADD: An ‘alter ego’ trust, where a person establishes a trust over the trustee of which he has control, is not, by virtue of this fact, a sham nor does the person with control of the trustee thereby have a beneficial interest in the trust.^{26a}

3. CERTAINTY OF OBJECTS OF THE TRUST**Certainty of objects***Fixed trusts*

- 4–30** NOTE 32. AT THE END OF THE SECOND SENTENCE ADD: *Pascoe v Boensch* [2008] FCAFC 147; (2009) 250 A.L.R. 24 at [22].

Intermediate or hybrid powers

- 4–32** NOTE 39. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 8.86 to 8.88. AT THE END ADD: See too the discussion of powers of

^{26a} *Public Trustee v Smith* [2008] NSWSC 397; (2007–08) 10 I.T.E.L.R. 1018 at [119]–[120]. See also *Re Reynolds* [2008] NZCA 122; (2007–08) 10 I.T.E.L.R. 1064 at [70]–[72] (alter ego arguments may provide evidence of a sham).

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addition in *Tam Mei Kam v HSBC International Trustee Ltd* [2008] HKCFI 696; (2008–09) 11 I.T.E.L.R 246 at [242]–[249]; affirmed [2010] HKCA 197; [2010] 4 H.K.L.R.D. 69 at [88]–[90]; point not taken on final appeal [2011] HKCFA 34 (but validity of relevant provisions affirmed at [45]).

Conditions

- 4–33** NOTE 40. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), §§ 29–012 and 29–013. FOR THE REFERENCE TO *Williams on Wills*, SEE NOW (9th edn), Vol.1, § 34.10.

Administrative unworkability

- 4–34** NOTE 43. AT THE END ADD: See too the discussion of administrative unworkability in *Tam Mei Kam v HSBC International Trustee Ltd* [2008] HKCFI 696; (2008–09) 11 I.T.E.L.R 246 at [275]–[286]; point not taken on appeal [2010] HKCA 197; [2010] 4 H.K.L.R.D. 69; nor on final appeal [2011] HKCFA 34 (but validity of relevant provisions affirmed at [45]).

Testamentary delegation

- 4–36** NOTE 44. DELETE THE WORDING AFTER THE SECOND SEMI-COLON AND REPLACE BY: following *Re Abrahams' Will Trusts* [1969] 1 Ch. 463 at 474–476; applied *Tam Mei Kam v HSBC International Trustee Ltd* [2008] HKCFI 696; (2008–09) 11 I.T.E.L.R 246 at [222]–[241]; affirmed [2010] HKCA 197; [2010] 4 H.K.L.R.D. 69 at [88]–[90]; point not taken on final appeal [2011] HKCFA 34 (but validity of relevant provisions affirmed at [45]).

AT THE END OF THE TEXT ADD: The general rule against testamentary delegation, in the context of fiduciary powers conferred by wills, was a chimera, a shadow cast by the rule of certainty, having no independent existence.^{44a} In Australia, however, the general rule against testamentary delegation strikes down powers of appointment, other than general powers of appointment and special powers in favour of a defined class.^{44b} Similar considerations may

^{44a} *Re Beatty*, above, at 1509.

^{44b} *Tatham v Huxtable* (1950) 81 C.L.R. 839, Aus. HC; *Lutheran Church of Australia South Australia District Inc. v Farmers Co-operative Executors & Trustees Ltd* (1970) 121 C.L.R. 628, Aus. HC; *Horan v James* (1982) 2 N.S.W.L.R. 376, NSW CA; *Gregory v Hudson* [1997] NSWSC 140; (1997) 41 N.S.W.L.R. 573; affirmed [1998] NSWSC 582; (1998) 45 N.S.W.L.R. 300, NSW CA. *Tatham v Huxtable*, above, was considered but not followed in *Re Beatty*, above, at 1509.

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apply in Canada.^{44c} But even in Australia there is no objection, on the ground of testamentary delegation or uncertainty, to a testamentary gift to a pre-existing lifetime discretionary trust, valid in accordance with the rules of certainty applicable to lifetime trusts.^{44c} Such a gift has also been upheld in Hong Kong,^{44d} and it is thought that in England too there is no objection to such a gift on the ground of testamentary delegation or of uncertainty so long as the trust is adequately identified by the terms of the will.

4. TRUSTS FOR NON-CHARITABLE PURPOSES AND UNINCORPORATED NON-CHARITABLE ASSOCIATIONS

The beneficiary principle

4–38 NOTE 45. AT THE END ADD: *Re Exeter Settlement* [2010] JRC 012, where a settlement with no beneficiaries was rectified to name a charity as a beneficiary (but note that the test for rectification in Jersey differs from that in England); *Equity Trust (Jersey) Ltd v GS* [2010] JRC 013.

NOTE 46. FOR THE REFERENCE TO Picarda, *The Law and Practice relating to Charities*, SEE NOW (4th edn), Pt 1.

Trusts directly or indirectly for the benefit of identifiable persons

4–39 NOTE 54. AT THE END ADD: For a recent example, see *Grender v Dresden* [2009] EWHC 214 (Ch); [2009] W.T.L.R. 379.

NOTE 56. FOR THE REFERENCE TO Ford and Lee, *Principles of the Law of Trusts*, SEE NOW Vol.1, [5.12710] *et seq.*

^{44c} *Re Nicholls* (1987) 34 D.L.R. (4th) 321, Ont. CA (concerned with a general power of appointment) followed *Tatham v Huxtable*, above. And see *Daniels v Daniels Estate* (1992) 85 D.L.R. (4th) 116, Alb CA in which a disposition of residue “unto my executors to distribute as they think fit” was held to create a trust (not a mere power) which failed for certainty of objects (as would also have been the case in England having regard to the principles stated in § 4–35).

^{44c} *Gregory v Hudson*, above.

^{44d} *Tam Mei Kam v HSBC International Trustee Ltd*, above.

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Alternative methods*Statutory provision in other jurisdiction*

- 4–48** NOTE 96. FOR THE REFERENCE TO Cayman Islands Trust Law, SEE NOW (2011 Revision), Pt VIII. FOR THE REFERENCE TO British Virgin Islands Trustee Ordinance 1961, SEE NOW s.84 (as amended) and s.84A. AT THE END ADD: and Guernsey: Trusts (Guernsey) Law 2007, ss.12 and 13.

AT THE END OF THE TEXT ADD: It has also been held in Canada, on the basis of Canadian case law derived from the *Denley* principle, that non-charitable purpose trusts may be created there as long as there is some person with standing to enforce the trust.^{96a}

Gifts to non-charitable unincorporated associations*Gift to members subject to the contract between them*

- 4–51** NOTE 5. AT THE END ADD: In *Hanchett-Stamford v Att.-Gen.* [2008] EWHC 330 (Ch); [2009] Ch. 173 at [29], Lewison J. said that under normal circumstances a gift to an unincorporated association will fall into this second category. In *Re Sam Shui Natives Association* [2009] HKCA 232; [2010] 2 H.K.L.R.D. 649 at [16] this paragraph of the text was approved.

5. RECTIFICATION, RESCISSION AND CANCELLATION**The functions of the three remedies**

- 4–53** NOTE 21. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 14–007 and Chaps 15 and 16. FOR THE REFERENCE TO Pettit, *Equity and the Law of Trusts*, SEE NOW (11th edn), pp.689–710.

Development of rectification and rescission

- 4–55** NOTE 25. FOR THE REFERENCE TO *Chitty on Contracts*, SEE NOW (30th edn), Vol.1, Chaps 5–7. FOR THE REFERENCE TO Cheshire, Fifoot and Furmston, *Law of Contract*, SEE NOW (15th edn), Chaps 8 and 9.

^{96a} *Peace Hills Trust Co v Canada Deposit Insurance Corp* [2007] ABQB 364; [2010] W.T.L.R. 83 at [29].

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Rectification or rescission on the ground of ignorance or mistake*The nature of the mistake*

4–58 DELETE THE SECOND AND THIRD SENTENCES AND NN. 31 AND 32 AND REPLACE BY: In order to invoke this jurisdiction, there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction.^{30a} In addition, in rescission cases, the mistake must be of sufficient gravity as to render it unconscionable on the part of the donee to retain the property given to him.^{30b} There are two kinds of mistake which found the jurisdiction. The first is a mistake, which may be a mistake of law or fact, as to the legal effect of the transaction itself and not merely as to its consequences or the advantages to be gained from entering into it.³¹ The second is a mistake as to an existing fact which is basic to the transaction.^{31a} Note that the second category of mistake is limited to mistakes of fact,^{31b} and so a mistake of law which is basic or fundamental to the transaction, and which satisfies the gravity requirement, but which is not a mistake as to legal effect, does not suffice.^{31c} For cases within the first category, the important, and not always clear distinction, is that between ‘effects’ and ‘consequences’.³² That distinction has been firmly upheld by the Court of Appeal.^{32a}

NOTE 38: AT THE END ADD: See *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch); [2010] S.T.C. 2544 at [16] where a failure to include a provision in a deed of variation of a will making a specific gift subject to inheritance tax was treated as a mistake as to effects rather than consequences in a rectification claim.

^{30a} *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [210].

^{30b} *Pitt v Holt*, above, at [167], [203] and [210], applying *Ogilvie v Littleboy* (1897) 13 T.L.R. 399 at 400, CA (affirmed (1899) 15 T.L.R. 294, HL).

³¹ *Gibbon v Mitchell* [1990] 1 W.L.R. 1304 at 1309E. See too *Meadows v Meadows* (1853) 16 Beav. 401; *Stone v Godfrey* (1854) 5 De G.M. & G. 76; *Whiteside v Whiteside* [1950] Ch 65 at 74.

^{31a} As in *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch. 476. See too *University of Canterbury v Att. -Gen.* [1995] 1 N.Z.L.R. 78, NZ HC.

^{31b} *Pitt v Holt*, above, at [206].

^{31c} The distinction between mistakes of fact and law has been abandoned in common law money claims seeking relief from mistake (see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, HL) but survives in England under the equitable jurisdiction, an aspect of *Pitt v Holt*, above, criticised in *Re S Trust* [2011] JRC 117 at [34]–[38].

³² *AMP (UK) Ltd v Barker* [2001] P.L.R. 77 at [70], per Lawrence Collins J.: “a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about commercial effects of their transactions or have second thoughts about them”.

^{32a} *Pitt v Holt*, above.

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AT THE END OF THE TEXT ADD: This was confirmed in terms in *Pitt v Holt*,^{40a} where the Court of Appeal said,^{40b} that “the impact of taxation on or as a result of a particular transaction is a consequence, rather than a part of the legal effect, of the transaction and is therefore outside the scope of the factors as to which a mistake on the part of the donor is relevant to the jurisdiction”. Since a mistake as to tax consequences is a mistake of law, it will not come within the second category of mistake referred to at the beginning of this paragraph, however basic or fundamental it is to the transaction. It has, nevertheless, been suggested in Jersey that in a case where the settlor overlooks US tax liabilities at rates up to 100% on US beneficiaries who are to receive distributions from the trust, the mistake is one of legal effect since the practical effect of the tax liabilities is to substitute the US government as beneficiary in place of those chosen by the settlor.^{40c} In the Isle of Man^{40d} and Jersey,^{40e} the distinction between effects and consequences has been discarded in favour of a test whether the mistake was so serious as to render it unjust for the volunteer donee to retain the monies if the payment would not have been made “but for” the mistake, thus allowing a tax mistake to vitiate a transaction.^{40f} In *Pitt v Holt* this test has been disavowed, on the basis that the gravity of the mistake is an additional requirement to be satisfied but is not itself sufficient,^{40g} and recent decisions made in reliance on it must now be regarded as doubtful in England.^{40h} In turn the test in *Pitt v Holt* has been rejected in Jersey and the offshore decisions before *Pitt v Holt* have been followed.⁴⁰ⁱ

^{40a} [2011] EWCA Civ 197; [2011] 3 W.L.R. 19.

^{40b} At [209], *per* Lloyd L.J.

^{40c} *Re S Trust* [2011] JRC 117 at [29].

^{40d} *Clarkson v Barclays Private Bank (Isle of Man) Ltd* [2007] W.T.L.R. 1703, Manx HC at [41]; *Re Betsam Trust* [2009] W.T.L.R. 1489, Manx HC.

^{40e} *Re A Trust* [2009] JRC 245; (2009–10) 12 I.T.E.L.R. 866 at [43]; *Re Lochmore Trust* [2010] JRC 068.

^{40f} Based upon the decision in *Ogilvie v Littleboy* (1897) 13 T.L.R. 399, CA (affd. (1899) 15 T.L.R. 294, HL), see § 4–64. These courts have proceeded to rescind transactions without considering first whether they are capable of rectification. In *DD v B* [2010] JRC 193 at [16], however, the court considered that if both remedies are available, a remedy which preserves the trust is to be preferred to one which sets aside that which the settlor intended to establish.

^{40g} At [207].

^{40h} Especially *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2008] EWHC 118 (Ch); [2009] Ch. 162. In *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [198] and [206], Lloyd L.J. doubted whether *Ogden* was correctly decided. The Supreme Court has given permission to appeal against the decision of the Court of Appeal in *Pitt v Holt* and so the exposition of its application in this work must be treated as provisional until the Supreme Court has given judgment.

⁴⁰ⁱ *Re S Trust* [2011] JRC 117.

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Indirect effects

- 4–59** AT THE END OF THE TEXT ADD: The Court of Appeal has confirmed that it is not possible or desirable to set out hard and fast rules as to when the effect of a mistake is sufficiently serious that the equitable jurisdiction to rescind may be invoked.^{42a}

Mistake by trustees as to tax consequences

- 4–60** AT THE END OF TEXT ADD: It is now clear, however, that this jurisdiction may be invoked only where the trustees have acted in breach of their fiduciary duties.^{46a}

Court's discretion to order rectification

- 4–63** NOTE 60: AT THE END ADD: But see *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch); [2010] S.T.C. 2544 at [22] where a deed of rectification of a deed of variation of a will did not preclude the remedy of rectification by the court since HMRC considered that the deed of rectification failed to have any effect on the inheritance tax incurred by reason of the deed of variation.

AT THE END OF THE TEXT ADD: The court has a discretion to rectify a trust deed to give effect to the intentions of the parties to the deed and it is not necessary for them to have agreed the precise form of words to be inserted.^{60a}

Rescission

- 4–64** NOTE 61. AT THE END ADD: See, in particular, *Pitt v Holt* [2011] EWCA Civ 197; [2011] 2 All E.R. 450, where the cases were subject to a detailed analysis, and the test for rescission reformulated.

AT THE END OF THE TEXT ADD: It has been said that, where a transfer to trustees is made under a mistake, the transfer is voidable and not void and that relief may be refused as a matter of discretion.^{73a}

^{42a} *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19.

^{46a} *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19. See § 29–238 *et seq* (online supplement).

^{60a} *Stephenson v Stephenson* [2004] EWHC 3473 (Ch); [2009] W.T.L.R. 1467. In *Whalen v Kelsey* [2009] EWHC 905; [2009] W.T.L.R. 1297, an ultimate default clause for a charity was deleted on an application for rectification, when the evidence showed that the settlors' true intention as to the beneficial interests did not require such a clause.

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Settlements executed by way of bargain

4-66 NOTE 80. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 16-025.

Rescission on the ground of fraud, duress, mistake, misrepresentation or undue influence*Undue influence*

4-68 NOTE 87. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), §§ 8-008 *et seq.*

Cancellation

4-70 NOTE 96. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 14-007.

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^{73a} *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2008] EWHC 118 (Ch); [2009] Ch. 162 at [34]. Although the decision in *Ogden* is now regarded as doubtful, we consider this statement to be correct.