Isle of Man Trust Basics: The Three Certainties

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By **Paul Harvey**, 25th June 2024

Trusts provide a legal arrangement for the separation of legal and equitable title to defined assets. However, in order for a Trust to be valid it must be properly constituted.

Among other constitutional requirements, the three certainties must be present at inception. The doctrine of the three certainties is a fundamental principle in Trust Law and ensures that the Trust exists under law, can be executed and is enforceable. Simply put, a Trust cannot exist without the three certainties.

In this short article, we take a look at the doctrine of the three certainties, why they are important and what can happen when the Trust is not properly constituted:

1. Certainty of Intention
2. Certainty of Subject Matter
3. Certainty of Objects
4. The Issues with Uncertainty
5. How Dixcart can Help

1. Certainty of Intention

Certainty of intention requires clear evidence that the settlor intended to create a Trust i.e. to impose or assume the duty which is characteristic of a Trust e.g. the duty to hold property for or apply it for the benefit of a Beneficiary.

The Courts take an objective approach to determining certainty of intention. The Settlor must manifest an unequivocal intention to impose enforceable duties on the Trustees through their conduct and words (spoken or written).

In the context of an Express Trust the Court will determine intention by identifying the meaning of words used in the provisions of the Trust Instrument (e.g. a Trust Deed or Will). The Instrument will also set out the nature of the relationships and transaction, including any substantive rights and duties created by it. The segregation of Trust Property also indicates intention e.g. creation of bank accounts for specific purpose or earmarking assets for certain Beneficiaries. In this sense, intention is determined in accordance with the maxim 'substance over form', meaning that if it possesses the characteristics of a Trust, it is a Trust, despite any labels etc. attributed to the arrangement.

Certainty of intention is the foundation of the whole Trust arrangement, and even where there is a dispute over some issue pertaining to the subject matter or objects it is common for Court to examine whether there was the prerequisite intention to create a Trust at all. After all, a Trust imposes a duty; it is improbable that an individual intended to impose a duty if it is so vague that the Trustees tasked with fulfilling it cannot ascertain what is required of them.

Without a clear intention, a purported Trust may fail and be considered a mere gift or a non-binding moral obligation. For instance, where the assets are gifted into Trust, but the Settlor retains control over the Trust Property it may fail for still be considered to form part of the Settlor's Estate and therefore be distributed in accordance with their Will or intestacy rules.

In the case of an Express Trust, the existence of an instrument such as a Trust Deed is evidence of the intention to create a Trust. Where a Professional Trustee is engaged, the drafting should provide the Settlor with certainty.

2. Certainty of Subject Matter

The certainty of subject matter comprises of two distinct elements:

a. **Trust Property:** It must be possible to identify the Trust Property.

a. **Beneficial Entitlement:** It must be possible to ascertain the Beneficiary's interest in that Trust Property.

Trusts are characterised by two principal features, a duty and a right to property.

The duty to hold the Trust Property for Beneficiaries or apply it for their benefit is meaningless where the Trust Property to which the duty relates cannot be identified. Likewise, the Beneficiaries cannot assert their equitable interest in the Trust Property where it cannot be identified.

Generally such issues flow from the description of the Trust Property, particularly where they form part of a larger mass. For instance, where a Settlor declares a Trust over 5 out of 10 of their diamonds, if the specific diamonds are not identified or earmarked, the Trustees will be unable to identify which of the 10 diamonds they hold on Trust and the Beneficiaries cannot identify which they hold rights to. In this example, the diamonds may hold different values (e.g. cut, clarity, weight etc.), they are not identical. This Trust may fail for lack of certainty of subject matter.

If the Trust Property or the Beneficiaries' interests are uncertain, the Trust may fail. Uncertainty in subject matter can result in the purported Trust property reverting to the Settlor's Estate and therefore would be distributed in accordance with their Will or intestacy rules.

In the instance of an Express Trust, generally the Trust Property is transferred to the Trustees when the Trust is formally constituted, and all interests delineated within a well drafted Trust Deed. This ensures that the Trustees know what assets they are managing and to whom they owe fiduciary duties.

3. Certainty of Objects

Certainty of objects ensures that the Beneficiaries of a Trust are clearly identified, or the Trust must provide a clear mechanism for their identification. Usually, the objects of a Trust will be persons, although in the instance of an Isle of Man Purpose Trust the objects are the permitted purposes of the Trust. The objects of a Trust need to be certain so that the Trust can be regulated and enforced by the Courts where required.

The legal test for certainty of objects differs depending on the nature of the Trust in question. For instance, a greater degree of certainty is required for identifying the objects of a Fixed Trust when compared to a Discretionary Trust, as the objects are certain.

The less stringent test for determining objects that is applied to Discretionary Trusts only requires conceptual certainty, requiring the classes of objects to be clearly defined, but does not have to be a certain list – in such circumstances a claimant would likely have to prove that they are within a defined class of Beneficiary. This different standard flows from the fact that the Trustees' fiduciary power allows them to determine which objects benefit under the Trust. The objects under a Discretionary Trust have no equitable interest until the Trustee's discretion is exercised in their favour. The same standard is applied where a power of appointment is given under the arrangement, as the Trustees' exercise of that power is discretionary.

Certainty of objects ensures that Trustees can execute their duties effectively and that the Trust can be enforced by or on behalf of the Beneficiaries. Without clearly identified Beneficiaries it may also present operational difficulties e.g. improper payments may be more likely because the Trustee does not realise that they are making a payment to the wrong person or because the true objects are not able to prove that they have standing to enforce the Trust and prevent the wrongful payment. Ultimately, without clearly defined objects the Trust could be deemed void for uncertainty.

4. The Issues with Uncertainty

When any of the three certainties is not present, the Trust may be deemed void, potentially causing a number of issues, which can include:

- **Failure of the Trust**: Simply, the Trust may not come into existence, meaning that no legal Trust relationship is created. Therefore, the property is not transferred to the Trust and the Trustees do not hold legal title or gain the authority or responsibility to manage it.

- **Reversion of Property**: If the Trust is not properly constituted, the property that was intended to be transferred to the Trust may revert to the Settlor's Estate e.g. it may pass according to the Settlor's will or the laws of intestacy.

- **Legal and Tax Consequences**: There may be legal and tax implications for both the Settlor and the intended Beneficiaries e.g. unintended tax liabilities or the need for Probate.

- **Beneficiaries' Rights**: The intended Beneficiaries may not have any enforceable rights to the property or benefits under the Trust, as the Trust itself does not legally exist.

The appointment of a Professional Trustee provides assurance that the three certainties are present when the Trust is constituted and that all other formalities are met.

5. How Dixcart can Help

Dixcart has extensive experience with all offshore entities and can assist with the setup and ongoing administration of your private client planning and corporate structuring. This includes all forms of Trusts and any underlying Special Purpose Vehicles or corporate entities.

Over the past 50 years, we have developed strong working relationships with some of the world's leading advisers. If you have not yet engaged a professional adviser, we can facilitate an introduction as appropriate.

PLEASE NOTE: This information is provided as guidance as of June 2024 and should not be considered advice. Where you are considering the establishment of any entity you should always seek professional advice before acting.

Get in Touch

If you would like to discuss Professional Trustee services, or how Dixcart Isle of Man can assist with your Estate or Succession Planning, please feel free to get in touch with Paul Harvey at Dixcart: advice.iom@dixcart.com

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