CHAPTER TWO

REQUIREMENTS OF A TRUST

Before going into the area of the requirements or creation of a trust under Malaysian law, there is the initial question of the definition of a trust.

Lewin's[1] definition is as follows:

> "The word 'trust' refers to the duty or aggregate accumulation of obligations that rest upon a person described as trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called cestius que trust, or beneficiaries, if there be any; if not, for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest."

It is submitted that the above-mentioned definition is long and cumbersome and a better one is that of Sir Arthur Underhill which was cited approvingly in Green v Russell[2]:

> "An equitable obligation imposing upon a person (who is called a trustee) the duty of dealing with property over which he has control (which is called the beneficiaries or cestuis que trust), of whom he may himself be one, and any of whom may enforce the obligation."[3]

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1. Lewin's Trusts (16th edn.) p. 1
2. [1959] 2 Q.B. 226 at p. 241
3. Underhill's Law of Trusts and Trustees (12th Edn. 1970) p. 3.

Nonetheless, Underhill's definition has been critised as not including charitable trusts and the "trust of imperfect obligation." Therefore, a third and mayhaps the best definition of a trust is that of Underhill's with the following words included:

> "...or for a charitable purpose, which may be enforced at the instance of the Attorney-General, or for some other purpose permitted by law, though unenforceable."

The Requirements:

For simplification and comparison, the essential elements of a trust under English law shall be dealt with together with those under Malaysian law.

A preliminary requirement is that the settlor or testator must have the capacity to create a trust. Generally, if a person has a power of disposition over a particular type of property, he can create a trust of that property. It goes to follow, therefore, that any person over the age of eighteen [Family Law Reform Act, 1969, section 1 (1)][4] may create an express trust of any property which is capable of disposition, unless he is suffering from mental incapacity or of unsound mind.

Both in England and Malaysia, an infant, i.e. a person below the age of eighteen, cannot hold a legal title to land[5], although he can own an equitable interest in it. An infant cannot therefore create a settlement of a legal estate in land, for this has never vested in him, but he can create a trust of property which he does hold, including an equitable interest. The trust is voidable during his minority and until a reasonable time after his attaining majority.[6]

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4. This is the same in Malaysia by virtue of section 2 of the Age of Majority Act, 1971.

5. Section 1 of the Family Law Reform Act, 1969, and section 43 of the National Land Code, 1965, respectively.

6. Edwards v Carter [1893] A.C. 360.

With regard to the capacity of beneficiaries, generally, anyone who can hold an interest in the property can be a beneficiary under a trust. This would therefore cover virtually everyone including an infant, although, with respect to land, an infant can have but an equitable interest.

The Formalities

a) Intention:

A basic requirement is that the settlor or testater must have a clear intention to create a trust. It is not necessary that the settlor or testator should state in exact terms " I hereby create a trust." Any words that clearly express the intention to create a trust is sufficient. This intention must, however, be clearly shown. It was not the case in Jones v Lock[7]: A father, after being chided for not bringing back any gift for his son, put a check into the hands of his son, saying, "Look you here, I give this to Baby; it is for himself." Then he took back the check and pit it away. He subsequently reiterated his intention of giving the amount of the check to his son. He died shortly afterwards, and the check was found among his effects. Cranworth, L.C., held that there was neither a gift not a valid trust created. While there was an intention to give (which was not however effectuated) there was no intention to create a trust.

The Malaysian position on the question of intention is essentially the same. In Parmeshiri Devi & Anor v Pure Life Society,[8] the plaintiff with the intention of perpetuating the memory of her late father, had executed a lease of the Kishan Dial School and premises at Kandang Kerbau Road, Kuala Lumpur, in favour of defendant society free of yearly rent in consideration of the society maintaining and managing the school and premises, and on the express conditions that the society shall continue to operate, manage and run the school in the

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7. (1865) 1 Ch. App. 25

8. (1971) 1 M.L.J. 142

name and style of the Kishen Dial School. The lease was terminable by notice while the expenses incurred in running the School was to be borne by the society. However, whatever property or profit that was gained belonged to the society.

The society raised some money and decided to build a new school on the premises to be named the Satyananda School. The plaintiff sued, inter alia, for breach of trust. Therefore, a question posed before the court was whether or not there had been a trust created in the first place.

It was held that there was no trust created as there had been no effectual declaration of trust, i.e., no intention to create a trust. In the words of Abdul Hamid J. the document executed by the donor and the society "lacked...the essential features of a trust... (and)...should only amount to an agreement or contract under which the parties have agreed to bind themselves."[9] Consequently, there could not be any breach of trust by the society. Furthermore, the cost of running the school and expenses were borne by the society; trustees do not incur such liabilities in the course of their normal duties. (On this ground, the intention to create a trust was negatived.) The court concluded that the plaintiff would fare better by suing in contract.

A Malaysian case in which the said intention was found is the recent case of Wan Naimah v Wan Mohamad Nawawai.[10] In 1956, one Wan Abdullah bought a piece of land but the land was transfered to the brother-in-law. Subsequently the whole land was transfered to the appellant, the daughter of Wan Abdullah. At the time of purchase however, Wan Abdullah had told one Wan Yaacob that half-share of the said land was for his son, Wan Mohamad. In 1061, before leaving on a pilgrimage to Mecca, Wan Abdullah made Wan Naimah sign a document renouncing a half-share of the land in favour of Wan Mohamad. Wan Abdullah then passed away in 1968.

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9. Ibid. p. 145

10. / 1874 / 1 M.L.J. 41

The main issue was whether Wan Mohamad was entitled to a half-share of the land. This would depend on the question whether there had been a trust created. The High Court held that the appellant, Wan Maimah, held the half-share in the land in trust for the respondent, Wan Mohamad.

The Federal Court also held that there was a valid trust as there was the intention to create a trust. Suffian C.J., in delivering judgement of the court, approvingly cited Grant v Grant[11]:

> "The law is that a declaration of trust may be made quite informally, provided the words used are clear and unequivocal. As was stated by Romilly M.R. in Grant v Grant, words declaring a trust 'need not be in writing.... They must be clear, unequivocal and irrevocable, but it is not necessary to say 'I hold the property in trust for you', nor is it necessary to say 'I hold the same for your separate use.' Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of showing that the trust had been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created."[12]

Thus, the deceased Wan Abdullah was held to have divested himself of all beneficial interest in the property by words uttered in the presence of witnesses in 1956. The document which was executed in 1961 was held to be "in itself a statement, a confirmation by the deceased that he had created a trust."[13] Thus while it may be argued that a trust was not created in 1956, nevertheless, the document executed in 1961 clearly showed an intention to create a trust.

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11. 55 E.R. 776 at p. 777

12. [1974] 1 MLJ at pp. 41-42

13. Ibid. at p. 42.

b) Forms:

In England, section 53 (1) (b) of the Law of Property Act 1925, which replaces section 4 (in part) and section 7 of the Statute of Frauds 1677, provides that a declaration of trust respecting any land or any interest therein, must be manifested and proved by some writing signed by some person who is able to declare such trust, or by his will. It is to be noted that the declaration of trust should in effect be merely evidenced by writing; it need not necessarily be created by writing. Resulting, implied and constructive trusts are exempted from this requirement.

In Malaysia, however, neither the Statute of Frauds 1677 nor the Law of Property Act 1925 is applicable. The earlier-mentioned case of Wan Maimah v Wan Mohamad Nawawi[14] established that the Statute of Frauds 1677 does not apply to Malaysia. Thus, a trust over land can be created by words or conduct and need not be evidenced by writing.

Under the English law, by virtue of section 53 (1) (c) of the Law of Property Act, 1925, a trust over equitable interests must be in writing and signed by the parties concerned. This requirement also does not apply to Malaysia.

Trust by Testamentary Disposition:

In so far as a considerable percentage of trusts created are usually trusts created under wills, it may be pertinent to go into this matter at this juncture.

The general rule regarding trusts created by testamentary dispositions is that should the will in question be invalid, the trust would be invalid too. In order that the will be valid, there are certain forms and conditions to be fulfilled.

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14. Supra.

In England, section 9 of the Wills Act 1837 provides that a will shall be in writing, signed at the foot or end thereof, by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and the witnesses should attest in the presence of the testator. A will executed without these formalities is void, and this applies both to an equitable interest as well as to a legal estate disposed of by the will.

The local position on this point, as provided by section 5 (2) of the Wills Ordinance, 1959, is, in all material points, the same as the Wills Act, 1837.

Three Certainties:

Lord Langdale's jufgement in Knight v Knight[15] is frequently refered to as setting out the proposition that in order for a trust to be valid, the "three certainties" must be present - certainty of words, certainty of subject and certainty of object. There was, however, nothing novel in this statement. Lord Eldon, for instance, in the case of Wright v Atkyns[16] said that for a trust to be valid, "first, that the words must be imperative...; secondly, that the subject must be certain ...; and thirdly, that the object must be as certain as the subject."

a) Certainty of Words:

Since "equity looks to the intent rather than the form", there is no necessity for any technical expressions to constitute a trust. It is a question of construction, in every case, of the words used to ascertain whether they, together with any admissable extrinsic evidence, established an intention to set up a trust. Hence, the words used must be imperative, though the word 'trust' itself need not be used.

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15. (1840) 3 Beav. 148

16. (1823) Turn & R. 143, 157.

The question has often arisen under wills whether a trust is created where the testator uses such terms as 'confidence, wish, belief, desire, hope or recommend,' i.e. the use of precatory words.

In England, in the earlier cases, the courts were very willing to hold that such precatory words set up what is commonly called a 'precatory trust', the reason being that prior to 1830, on the death of a person leaving a will and the will did not deal with certain portions of his property, the executor could take the residue for himself. In 1830, however, the Executor Act, 1830, was passed whereby such residue was to be held in trust for the next-of-kin.

After 1830, therefore, there was no longer a necessity to create trusts out of precatory words; the intention to create a trust had to be clearly shown. Thus, in the case of Re Adams and the Kensington Vestry[17], it was held that no trust was constituted where a testator gave all his property to his wife "in full confidence that she will do what is right as to the disposal thereof..."

In Re Dinggle[18], it was held that no trust was created where the relevent words were, "it is my desire that she allows X an annuity of £25/- during her life." And in Re Johnson[19] where, after leaving half of his estate to his mother, the testator provided, "I request that my mother will on her death leave the property or what remains of it...to my sisters," it was held that there was no trust created.

A plausible exception to the rule that precatory words are insufficient to constitute a trust came out in the case of Comiskey v Bowring-Hanbury[20]. The testator gave all his property to his wife "absolutely in full confidence that she will make use of it as I would have made myself and at her death, she will devise it to such one or

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17. (1884) 27 Ch. D. 394.
18. (1888) 39 Ch. D. 253.
19. [1939] 2 All. E.R. 456.
20. [1905] A.C. 84

more of my nieces as she may think fit." The House of Lords held that, on a true construction of the whole will, the words, "absolutely in full confidence..." created a trust as they showed an imperative direction.

The Malaysian position on the question of precatory words is not so clear. In the first instance, there are no known cases on the point. Secondly, there is section 2 of the Specific Relief Act 1950 to contend with. Illustration (a) of section 2 reads:

> "Z bequeaths land to A 'not doubting that he will pay thereout an annuity of $1000/- to B for his life.' A accepts the bequeath. A is a trustee, within the meaning of this Act, for B to the extent of the annuity."

The intention of the legislators is not clear, and the words used seem to be of a precatory nature; yet the words are sufficient to create a trust. This would, therefore, appear to conflict with the English law.

b) Certainty of Subject:

This requirement has an aura of ambiguity, for the phrase 'certainty of subject' may mean (i) that the property subject to he trust must be certain; or (ii) that the beneficial interests of the cestuis que trust be certain.

With regard to the former i.e. the property subject to the tfust must be certain, where the trust property cannot be clearly identified, the purported trust is altogether void, as was the case in Palmer v Simmonds[21], where the subject of the alleged trust was "the bulk of my said residuary estate."

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21. (1854) 2 Drew 221.

As regards the latter meaning i.e. that the beneficial interests of the cestui que trust must be certain these beneficial interests will fail for uncertainty if they are not certain. This was established in Boyce v Boyce[22], where the testator devised two houses to trustees on trust to convey one to Maria "whichever she may think proper to choose or select" and the other to Charlotte. Maria predeceased even the testator. Charlotte then claimed one of the houses. It was held that, since the beneficial interest to be taken by Charlotte was not ascertained, the trust failed.

There is no uncertainty, however, where there is is a discretion given to the trustees to determine the exact quantum of the beneficial interest,[23] or where the words used by the testator are a sufficient indication of his intention to provide an effective determinant of what he intends. Thus in Re Golay's Will Trusts[24], where the testator by will directed his executors to let T. "enjoy one of my flats during her life time and to receive a reasonable income from my other properties," it was held that there was a valid trust. The testator merely left to the discretion of the trustees as to what is 'reasonable' income.

c) Certainty of Object:

It is a fundamental rule that the object of a trust must be certain, or at least, capable of being rendered certain. This requirement was restrictively interpreted in I.R.C. v Broadway Cottages Trust[25], which laid down that "a trust is void unless it is possible to make, at the time when the trust comes into operation, a list of all the beneficiaries.", and if the class was unascertainable at any time, the trust would fail for uncertainty.

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22. (1849) 16 Sim. 476.

23. discretionary trusts.

24. [1965] 2 All. E.R. 660

A very relevent Malaysian case on the question of certainty is that Re Chionh Ke Hu decd.[27] In this case, the testator directed his executors to convert all his property into money and after payment of his debts, to divide the balance into two hundred equal shares, out of which he made specific bequests of 170 shares. He further provided in clause 5 of his will:

> "I direct my executors to distribute the remaining thirty shares out of the said 200 shares among such persons professing or practising the Buddhist religion and in such proportions as my executors shall in their absolute discretion think fit."

The main issue that arose for determination before Winslow J. was whether clause 5 above created a valid and binding trust, charitable or otherwise. Hence it was argued that the clause created a valid charitable trust; in the alternative, that there was a valid purpose trust; in the further alternative that there was no uncertainty with reference to the objects and there was a valid private trust.

To the question whether the clause created a valid charitable trust, Winslow J. held that it did not create a charitable trust for the advancement of religion as the element of public benefit was lacking. As to whether the gift might be a valid non-charitable purpose trust, he held that it could not, after citing the English decisions in Re Astor Settlement Trusts[28] and Re Endocott[29] to the effect that a trust can only be for charity or persons; that the scope of the "anomalous" cases should not be further extended.

Finally, as to the more relevent question of whether the said clause can be a valid private trust, Winslow J. was of the view that all the objects of the power could not be ascertained and there was therefore an uncertainty with reference to the objects. Consequently,

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27. (1964) 30 MLJ 270.
28. [1952] Ch. 534.
29. [1960] Ch. 232.

the clause did not create a valid private trust and there was therefore an intestacy in respect of the thirty shares.

It may be noted that Winslow J. placed great emphasis on the need for certainty. However, this is just about the only instance when a judge of the Malaysian court has echoed the view of English judges that a trust,not being for charitable purposes, must have ascertained or ascertainable beneficiaries who could enforce it.

In the above case, one also notes that Winslow J. seriously attempted to uphold the bequest. But his attempts were defeated by his earlier finding that the direction in clause 5 contained words which were "imperative if not mandatory calling for conversation, division and distribution"; that these words amounted to something more than a discretion to distribute . He evidently regretted this finding, for he felt that if it were otherwise, he would have reached a different conclusion as the test for certainty would be lower.

Before concluding, it may be pertinent also to go into the care of Re Lee Mooy Chye[30]; The testator after making some bequests directed in his will as follows:- 'The remaining fifteen shares and the money in cash under my name shall be reserved as the ancestral property of my family. The money in cash must be remitted back to the fatherland (China) in order to form ancestral property. If and when my property is disposed of (sold), the value thereof must be remitted back to the fatherland in order to form ancestral property.'

The plaintiffs sought a declaration that, upon a true construction of the clause, the trust was (a) invalid as infringing the rule against perpetuity (b) void for uncertainty or (c) failed by reason that the trust declared therein is impracticable of performance.

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30. [1966] 1 MLJ

As regards (a) it was held that inasmuch as the trust was to be carried out in a foreign country namely China, the objection that the trust was invalid according to the law in Singapore as infringing the rule against perpetuity was immaterial, and it must therefore fail.

With regard to the second question the Court was of the view that the trust was not void for uncertainty as the objects of the trust and the persons to be benefited by the trust were expressly designated.

Nevertheless, the trust failed on the ground that it was impracticable of performance; it was not practicable to send money to China because of exchange control restrictions.

Conclusion:

On the whole, apart from the English statutory provisions, the requirements of a trust under Malaysian law is very much the same as those of the English law. The trend is our courts appear to be to follow English principles as far as possible. This is evident particularly from the decision in Wan Naimah's case. This trend is in conformity with section 3 of the Civil Law Act 1956.