

*Waddell (No 2)*⁵. In *Midland Bank v Wyatt*⁶, a husband set up a sham trust to favour his family so that he could prevent the bank seizing the matrimonial home. It was held that although the legal document was signed, there was no real intention to create a trust. It is evident here that certainty of intention is essential, to address these types of situations.

As Trustees are under mandatory duties to follow the terms of the trust, if a trust exists there needs to be sufficient words of imperative command as stated by Eldon LJ in *Wright v Atkyns*⁷. A moral obligation is not enough as illustrated in the case *Sweeney v Coghill*⁸. Precatory words such as 'have confidence', 'feeling confident', 'request', and 'specially desire', are merely words of hope and desire, and are no longer sufficient to impose a legal obligation to use the property for the benefit of a third party. Cotton LJ stated in *Re Adams and the Kensington Vestry*⁹ that some of the older authorities held that some particular words appearing in a Will were sufficient to create a trust. However, in the later cases, especially *Lambe v Eames*¹⁰ and *Re Hutchinson and Tennat*¹¹, the courts showed a desire to consider the document as a whole, the testator's intention and the meaning of the words he used.

The problem faced by the courts is that there are no fixed or technical words that need to be followed; it is left to the court's discretion to look at the facts of the case to decide whether there is intention to create a trust. In *Cominsky v Bowring-Hanbury*¹² despite the use of the words 'in full confidence' it was held not to be indicative of a trust coming into existence. Although, it appears here that case law has affected the efficacy of certainty of intention, it is required, so that if we see words of command as in *Adams*, a trust will be found, but if only a hope that someone will do something, it will not be a trust.

However, the degree of the intention required differs whether this is a family trust or commercial trust. For family trusts, as seen in *Paul v Constance*¹³ the standard was set artificially low and the phrase 'this money is as much mine as yours' was constituted to have certainty of intent. This is because as Scarman LJ¹⁴ stated:

'We are dealing with simple people, unaware of the subtleties of equity...one should consider the various things that were said and done by the plaintiff and the deceased during their time together against their own background and in their own circumstances.'

For commercial trusts this is set high, as they are used as a powerful form of asset protection. For a company to protect their assets they can do this through a trust, a retention of title clause or by use of a company charge

⁵ [1977] 3 All ER 129.

⁶ [1995] 1 FLR 696.

⁷ (1823) Turn. & R. 143, 157 as per Lord Eldon.

⁸ [1998] EWCA Civ 1436.

⁹ (1884) 27 Ch D 394.

¹⁰ (1870-71) LR 6 Ch App 597.

¹¹ (1878) 8 Ch D 540.

¹² [1905] AC 84, HL.

¹³ [1979] 1 WLR 527.

¹⁴ *Ibid* at 530.