EQUITY & TRUSTS Q&As

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You may have encountered different methods or formulas to help when advising a client in a mock scenario. One of example is the *IRAC* method or another is *Celo*. These are well documented and you can read about these. I never used them, because I had a method in my head that worked. It was not until I started teaching that I spoke about it. I call my method the "**Fact Law Sandwich**". Let me explain. If you are asked to advise a party as to their legal rights this is how you present it:

FACTS
GENERAL PRINCIPLE
LAW
APPLY TO FACTS

In **Fact:** simply state what you have been told, this why you can never be accused of not considering the facts. In **General principle:** you simply state what the general rule of the relevant issue is. You express it as if you are speaking to a child who has no knowledge of law. In **Law**: you state "using the authority of…..and you go on to state which statute or case helps prove your point. Lastly in **Apply to Facts**: you apply the reasoning of the case to your factual scenario. Your advice will sound and look structured and professional. The reason it is called the "Fact Law Sandwich", is because the advice contains two outer layers of facts that sandwich the principle and law in the middle.

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Chapter 1 - Introduction to Equity

Essay Question

What is Equity?

Introduction

Discussing what is equity, is just as wide as considering what is law. This is a vast environment of rules through which doctrines and principles are all rooted. The paper begins by attempting to define equity. It argues that the "key-stone of the whole arch" is that equity is fairness and good conscience. Therefore in order to answer this question this paper will first critically discuss equity as a parallel system to law. It does this to explain to the reader how equity was developed and how today equity has redeveloped from how it started many hundreds of years ago. This paper will then argue the doctrine of unconscionability is what the courts see when considering equity. It will critically highlight some examples of the courts use of unconscionability? This paper will then question whether the concept of unconscionability, (that we have argued supersedes equity) can be encompassed into one unifying concept? This paper will then go on to provide a conclusion of its findings, followed by a annotated bibliography.

What is equity?

The philosophical idea of Equity can be traced back to Aristotelian ethics, wherein Aristotle questioned how fixed laws would be able to resolve unknown situations. The theory behind equity is that in order to find justice one must seek to do fairly unto one another and when the law is in conflict with acting equitable then equity should be the first priority. Aristole argued "*When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission-to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice-not better than absolute justice but better than the error that arises from the*

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absoluteness of the statement".[1] Aristotelian equity has been defined more precisely throughout history to come to represent what the equity courts of Britain which deal primarily in recompense for unjust enrichment. "*It is well-known that the source of one version of 'equity' is the concept of επιεκεια found in Aristotle's Nichomachean Ethics, where the idea is explained in terms of the difficulty of making general definite rules cover the indefinite range of possible factual situations. 'Equity' is then like the lead ruler allegedly invented in ancient Lesbos, which adapts the fixed measurements (the terms of the law) to the irregular stone (the particular situation).*"[2] The increasing use of currency in the late 1300s forced contracts and courts to adjust the way that equity was decided in order to transform immesurable values into monetary awards.[3]

Even in disagreements between judicial theorists of the 1600s the focus was still on equity. While Thomas Hobbes believed that judges should have a mostly free hand for finding equity when it is at odds with the law (or no law exists) Jeremy Bentham argued that equity could be found through an amending process for the law. Here we see the split between those who believe there is natural law and utilitarian theorists and shows in the way they believe judges should act.[4] The jurisdiction of equity has expanded over time to include new classes of individuals to protect but ultimately still asks whether the weaker party has full knowledge of the agreement they are entering into.[5] What we can conclude from this is what Snell argues, that the overarching thread through equity is *"Equity suffers no wrong without a remedy."*[6]

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[1] Aristotle, *Nicomachean Ethics* (W.D. Ross tr. 1st edn, Alex Catalogue 2000) 58

[2] Mike Macnair, 'Equity and Conscience' (2007) 27(4) Oxford Journal of Legal Studies 659, 660-661

[3] Giovanni Ceccarelli 'Risky Business: Theological and Canonical Thought on Insurance from the Thirteenth to the Seventeenth Century' (2001) 31(3) Journal of Medieval and Early Modern Studies 607 617

[4] James E. Crimmins 'Bentham and Hobbes: An Issue of Influence' (2002) 63(4) Journal of the History of Ideas 677 , 689

[5] Pawlowski, Mark, Unconscionability as a Unifying Concept in Equity; (2001-2003) 16 Denning L.J. 79 , 80

[6] E.H.T. Snell & J.R. Griffith, *The Principles of Equity: Intended for the Use of Students and the Profession* (2nd edition Stevens & Haynes 1872)

Equity a parallel system of law

In English law there did at one time exist two parallel systems in the courts, namely the common law courts and the equitable or chancery courts. Whenever a dispute arose it would be allocated to the suitable court dependent on the dispute it concerned. This dual system developed over many hundred years. The general consensus was that the common law courts were not seen to be doing justice. There was a time in legal history where the courts became rigid, very artificial, and the court would follow strict precedents and did not consider the real justice of the given case. It was thought at one time equity was part of a larger framework of jurisprudence centred on who or what had power over an individual's body.[7] Practice emerged of claimants appealing to the Lord Chancellor who acted on behalf of the Crown. The custom that emerged was that the Lord Chancellor could overrule and dispel the decisions of the courts. These two systems of the common law and equity courts were fused over 150 years ago, in 1862. But still you find in English law the legacy of this traditional division – the legacy is that some rules of law are derived from the law dispensed in the common law courts, while other parts of the law derive from the law originally dispensed in the Chancery courts. This is the technical distinction between common law and equity. Today the common law and equity are both dispensed by all courts, and all courts will apply the rules wherever they have been derived. In fact these days the distinction has become blurred and the origin of these laws has ceased to be of any great importance. The significance of this is controversial because we see through writing a debate around whether this distinction should be preserved.[8]

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[7] Virpi Mäkinen & Heikki Pihlajamäki 'The Individualization of Crime in Medieval Canon Law' (2004) 65(4) Journal of the History of Ideas 525 528

[8] James Oldham, A Profusion of Chancery Reform, [2004] Law and History Review and also depicted in Charles Dickens's *Bleak House*, Penguin Books, 1971

The Role of Conscience and Unconscionability

The foundation of Equity can be reduced to 11 maxims. The goal in all cases is to make sure that no one is wronged without a remedy. Due to the historical construction of equity and it's nature within common law there is no one way to resolve questions of equity, just guidelines for resolving individual conflicts. Snell argues *"Each maxim often contains by implication what belongs to another. The cause of this incapability of logical division lies in the history of equity—that it arose not as one harmonious whole, the creation of one mind or one and the same period, but gradually developed in the course of five centuries, out of an idea vague and indefinite at first, to a comprehensive and admirable science."*[9] One argument that can be raised is that equity is based on maxims which are lose and flexible concepts. The maxims are discretionary and judges may wish to apply them or not. Thus the shortcoming is that they do not provide certainty in the law, something more is needed. Lord Nottingham, Lord Keeper and Lord Chancellor from 1673 to 1682 are considered the father of modern equity law, developing a more specific interpretation of conscience for purposes of identifying intent as well as the different between public conscience and private conscience.[10] Peter Millett in Article 'Equity - The Road Ahead' when describing the relationship of common law and equity remarked: *"The common law provides redress for breach of contract, and in order to do justice it may imply terms into existing contracts and even imply the existence of a contract; but Equity's approach is different. It is called into play, not by breach of contract express or implied, but by unconscionable conduct, and the duties which it enforces are those which it considers to be inherent in the relationship of the parties."*[11] He is identifying *unconscionable conduct* as the trigger that will open the equitable determination. The central focus of equity law is distinct from common law in that the consent of the

[9] E.H.T. Snell & J.R. Griffith, *The Principles of Equity: Intended for the Use of Students and the Profession* (2nd edition Stevens & Haynes 1872) 12

[10] Dennis R. Klinck 'Lord Nottingham and the Conscience of Equity' (2006) 67(1) Journal of the History of Ideas 123 , 124-125

[11] Peter Millett (Lord Millett) in his article 'Equity - The Road Ahead' [1995] 9 Trust Law International 35 at 37

weaker party is not the focus of equity law which instead focuses on the powerful party's intention. Peter Millet asserts *"The equitable doctrine differs significantly from the common law remedy for economic duress, with which it may be usefully be compared. The common law remedy looks at the means by which the consent of the weaker party was obtained; equity looks to the conduct of the stronger party to see if the transaction is one which he can maintain good conscience."*[12] What is certain is the unconscionability concept is at the root of equity judgments and is the provision by which equity supersedes standard judicial decision-making.[13]

Examples of Unconscionability

A case in which unconscionability is prominent is in the case of *Pennington & Breen v. Waine & others.*[14] In this case the courts chose not to give effect the equitable maxim equity will not perfect an imperfect gift. Contrastingly it can be said the courts in this case allowed equity to extend the doctrine that exists to do justice in a case at the cost of certainty. The facts of *Pennington* are Ada Crampton wished to bestow 400 shares on her nephew, Harold. She wanted to do this because she wanted him to sit as a director on the board, for which he needed to be a shareholder. She told Mr. Pennington, the company auditor, to execute a stock transfer form in respect of the shares, she wished to bestow. Ada told her nephew about the proposed transfer. Mr. Pennington in turn wrote to Harold and enclosed a 288A form and told Harold about the transfer 400 shares to him. Mr Pennington did nothing further and in the meantime Ada passed away. Harold argued even though legal title to the shares was not transferred to him, title in equity of the shares passed to him. Harold approached the courts for recourse and relied on the doctrine in *Re Rose*[15]. Lord Evershed MR in *Re Rose* expressed the doctrine as: *"…the settlor did everything which, according to the nature of the property*

[12] Lord Justice Millett 'Equity—The Road Ahead' (1995-1996) 6 KCLJ 1 , 5-6
[13] Pawlowski, Mark, Unconscionability as a Unifying Concept in Equity; (2001-2003) 16 Denning L.J. 79 , 81
[14] [2002] 1 WLR 2075
[15] [1952] EWCA Civ 4

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comprised in the settlement, was necessary to be done by him in order to transfer the property- the result necessarily negatives the conclusion that, pending registration, the settlor was a trustee of the legal interest for the transferee". This means if a donor has done everything within their power to vest the legal interest in the shares to the donee, then this will be sufficient effort for the gift to pass. At first instance judge Howarth found in support for the donee Harold. There was no authority that *Re Rose* applied in such circumstances. What becomes apparent is that the judges are applying equitable principles without really having an understanding of the context in which *Re Rose* was created. The judge has done the opposite of what the equitable maxim says, equity will not perfect an imperfect gift. *Pennington* then came become the Court of Appeal on the grounds that trial Judge had erred.

Clarke LJ the minority in the Court of Appeal dismissed the appeal and felt the gift was valid and effective, without the donee having knowledge of the gift. Clarke LJ felt the delivery of share certificate or transfer form was not a precursor to the operation of the doctrine laid down in *Re Rose.* This view suggests equity will perfect the imperfect gift and transfer is not a prerequisite. The line of reasoning taken by Clarke LJ can be criticized because the decision means a merely completed transfer form will amount to an equitable assignment of shares. This suggests a disposition of legal interest can become satisfied by a valid disposition of the equitable interest. This has the effect of no longer leaving distinction. This is a broad application of *Re Rose*. This analysis ignores the principle in *Milroy v. Lord*[16] which laid down three modes of making a voluntary settlement: (i) by transferring property directly to beneficiary, (ii) by transferring property to trustee to hold on trust; and (iii) by the settlor declaring himself the trustee. It is only when one of these methods is used and the gift fails that *Re Rose* can be employed. It is then you can ask the court to give effect to the gift by allowing assignment of the legal interest as a trust or constructive trust. It is argued the reason Clarke LJ erred in his approach was because he was applying a broad principle, the intricacies of which are hard to understand.

[16] [1862] EWHC J78

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The majority Arden LJJ and Schiemann LJ came to the same conclusion through different analysis. They reasoned that the principle is *"the donor will not be permitted to change his or her mind if it would be unconscionable, in the eyes of equity, vis a vis the donee to do so"*. This introduced the concept of unconscionability. This concept is used to highlight that it would be unfair and unreasonable for Ada to have changed her mind and revoke the transfer of the shares to Harold. This seems quite artificial, because this is never what Ada intended to do and the courts are using what she has not done (go back on her word) to perfect the gift. Moreover, she would not have been able to go back on her word because she had died. Professor Oakley refers to the addition of unconscionability into the reasoning as a *"wholly novel proposition"*. He goes on to say *"this decision seems to have been based on a complete misunderstanding of the decision of the Privy Council in Choithram v Pagarani"* which held where a settlor is also a co-trustee his declaration of trust if not properly constituted remains effectual. The reasoning in *Choithram* sits in line with both *Re Rose* and *Milroy v. Lord*.

Unifying Concept in Equity

Other areas where unconscionability arises is areas where there is inequality. Examples include undue influence, where there is evidence there has been coercion over the weaker party.[17] Alternatively we can see the presence of unconscionability in the idea of going back on one word, in the development of the common intention constructive trust.[18] It also long been debated (along with unjust enrichment) to be a key feature in the emergence of a constructive trust.[19] There are many cases where the courts have raised the concept of conscience and the prevention of unconscionablity.[20] The next logical question then is whether

[17] Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44
[18] *Pettitt v Pettitt* [1970] AC 777; *Gissing v Gissing* [1970] UKHL 3; *Lloyds Bank plc v Rosset* [1990] UKHL 14
[19] Jensen, D. 'Reining in the Constructive Trust' Vol 32 (87) (2010) Sydney Law Review 87-112 and Dewar, John L., The Development of the Remedial Constructive Trust, (1982-1984) 6 Est. & Tr. Q. 312
[20] *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133; *Boustany v Pigott* (1995) 69 P&CR 298; *Credit Lyonnais Bank*

unconscionability is a consistent and unified concept. There has been a discussion over whether doctrines such as undue influence and unconscionable bargain-making can be combined into one common doctrine. Ultimately, the only major difference is whether the intention of the more powerful party was to take advantage of their relationship.[21] Halliwell argues that unconscionability is a hinge on which many equitable doctrines are triggered. She feels that unconscionability as a tool for the courts would be better utilized if it is understood as a principle on which equity operates. In turn she believes that unifying unconscionability will prove worthless and what is better is to understand how the doctrine can be better used as a basis for equitable activity.[22] It is believed by some that forming a system by which equity judgements would be made, would destroy the purpose of equity law, however if equity is formalized only as a relational system, wherein the individual situation is the most important thing to evaluate then there is no risk of inequitable action happening as a result of the ruling. Dunn endorses this notion of unconscionability as providing a move toward a broad principle and away *"rigid definitions"*. She feels this is the right tool for the modern age.[23] Dunn goes on to argues *"For equity to develop in a meaningful way, the recognition of an organising principle of unconscionability, if accepted, cannot take place as before in a vacuum. The survival of equity depends not so much upon re-conceptualising past mistakes, as it does upon a re-evaluation of the legal system as a whole."* [24] Dunn argues the danger of equity doctrine is in the interpretation, once ideas like unconscionability become defined then all the things which qualify as unconscionable must be defined as well. Then the question arises as to whether an action is unconscionable in all situations. Ultimately the flexible method which equity offers enables it to

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Nederland NV v Burch [1997] 1 All ER 144; and *Gillett v Holt* (1998) The Times June 18

[21] Pawlowski, Mark, Unconscionability as a Unifying Concept in Equity; (2001-2003) 16 Denning L.J. 79 , 83-85

[22] *Margaret Halliwell*, Equity and Good Conscience in a Contemporary Context, London: Old Bailey Press, 1997, p 18

[23] Dunn, A. 'Equity is Dead: Long Live Equity!' Vol 62 (1999) Modern Law Review 140-150, p 142

[24] Dunn, A. 'Equity is Dead: Long Live Equity!' Vol 62 (1999) Modern Law Review 140-150, p 150

provide justice in all situations.[25]

Conclusion

This paper has provided different views of leading academics and can conclude that the development of equity has been gradual and spanned over 150 years. Equity cannot be determined without having reference to hinges such as conscience, unconscionability, unjust enrichment. These concepts are import in doing justice in each individual case and cannot ignored when determining the question what is equity? Thus the question should be a wider one and that is can all of these concepts be unified under the heading of equity? The answer is no they cannot. All of the evidence suggests the concepts need to be left open and not formalized into a body of rules. Otherwise judges will be bound by them and this defeats the whole purpose for which equity was created and that is to do justice in each individual case.

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[25] Alison Dunn 'Equity is Dead. Long Life Equity!' (1999) 62(1) The Modern Law Review 140 , 144-145

Chapter 2 – Introduction to Trusts

Essay Question

What is a Trust and what are its principle applications?

Answer

Introduction

First this paper will discuss what the exact nature of the trusts is? Furthermore, it will discuss whether we should continue on the premise that is can be exactly defined. Second this paper will critically examine the principle applications of the trust instrument. Last this paper will discuss the validity of the legacy in question 2.

What is a trust?

The concept of trusts in parlance of property law has been a subject of several attempted definitions but none seem wholesome enough to encompass all the possible usages of trusts. This is largely because a trust has a range of possible applications and different variants of it exist. To seek to provide a generally workable definition of a trust will be impossible, since it will shallow, and incapable of reflecting other possible applications and types of trusts. This position was confirmed by Scott: *"Even if it were possible to frame an exact definition of a legal concept, the definition would not be of great practical value."*[26]

In truth, instead of attempting to provide a wholesome definition for trusts, as Scott suggests it is better to describe the trust. To this end he opines that:

> *"All that one can properly attempt to do is give such a description of a legal concept that others will know in a general way what one is talking about. It is possible*

[26] Culled from David Hayton and Marshall, Commentary and Cases on The Law of Trusts and Equitable Remedies, 2005, Sweet and Maxwell, 12th edition. page 4

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> *to state the principal distinguishing characteristics of the concept so that others will have a general idea of what the writers mean."*[27]

This is exactly what Mayo J in ***Re Scott*** (an Australian case) did, and won academic embrace. He described trusts as referring to "*the duty or aggregate of accumulation of obligations that rest upon a person described as trustee*." [28] He continued this description on the footing that the basis of the obligations lie in property held by one. Second that the capacity in which one holds this property by be one of confidence reposed by another, or where there is no specific oral or written instructions to hold it, or for some other necessary reason, to the extent that equitable principles ordain.

From Mayo J's encapsulated description one can glean a trust (.i.e. the holding by of property one for another) can be initiated by deliberate measures, such as where the transfer of property by A to B to hold for the benefit of C or for a particular purpose. This would be an express trust. This could be by oral instructions or written instructions. It can be inferred too from the summary of Mayo J's statement that where property is not given to another on an express understanding to keep, equity could still conjecture a trust where it thinks it necessary. Such trusts are considered imputed trusts. They could come in form of a constructive trust or resulting trust[29].

A constructive trust is one which arises from equity's consideration of circumstances surrounding a situation and deems it essential that property in issue be held on trust for an innocent person. This could be to prevent fraud as in ***Bannister v Bannister,***[30] where there is non-conformity with formality requirement ***Re Rose***[31] or to prevent unconscionability as in

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[27] Ibid
[28] [1948] SASR 193 at 168
[29] Ross Grantham & Charles Rickett; On the Subsidy of Unjust Enrichment, Law Quarterly Review, 2001, 117(Apr), 273-299

[30] [1948] 2 All E.R. 133
[31] [1949] Ch 78

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Pennington v Waine.[32] A resulting trust on the other will be one to arise as postulated by Lord Wilberforce in ***Wesdeutche v Islington LBC*** [33] where property is transferred to another voluntarily, and it is shown that it was not intended to be parted with by the transferor (type A resulting trust) or where there was an intention to benefit another but that benefit was not properly disposed. In either circumstance equity will ordain that the benefit or property result back to the original owner.

Application of the trust

Having been able to deduce the major classifications of trusts based on their modes of creation, it is apt to discuss the applications of trusts. Adopting Graham Moffat's taxonomy of trust, we can identify four purposes. They are:

1) Preservation of family wealth: In the preservation of family wealth trusts can be created to prevent the alienability of dynastic property[34]. In other words a trust might be created to prevent the possibility to disposition of family property outside the family circle. This can be done by the adoption of a fee-tail trust settlement whereby property is given to A, that upon his demise it shall vest in B and upon her demise to her grandchildren. This offends the circulation of capital in the economy and to counter this, the **Perpetuities and Accumulations Acts**[35] came were enacted to prevent remote vesting.

Tax considerations might warrant the need for trusts in other situations to protect family wealth. The upsurge in of the usage of discretionary trusts whereby property is transferred to a trustee for the benefit of unknown beneficiaries was due to the fact that the Revenue office will not be able to tax the settlor for the property which he had transferred, nor will the trustee be liable to tax on property held by them on trusts, so too will the unknown beneficiaries escape tax liabilities. Asides this there are other tax

[32] Mark Pawlowski, **Constructive trusts, illegal purpose and locus poenitentiae,** Conveyancer and Property Lawyer, 2009, 2, 104-126
[33] [1994] 1 WLR 938
[34] Laurence M Friedman, **The Dynastic Trust**, 1964, Yale LJ 547
[35] Perpetuities and Accumulations Acts 1964 and 2009

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advantages inherent in discretionary trusts.[36]

There is also the use of offshore trusts, such as seen in ***Vesty v IRC***,[37] where families could transfer wealth to a tax-haven, while allowing it to generate income there and hold it on trust for some beneficiaries which in fact were them.[38]

2) Family Breakdown: Before divorce a couple could make divorce settlements in which they would agree amongst each other how property acquired during marriage will be held or shared. A good example of this was seen in ***Cannon v Hartley***.[39] Even in circumstances where there were no express agreements as to how property will be shared upon family breakdown equity can impute trusts, on the basis of a constructive or resulting trusts depending on the circumstances of the case, in favour of a family member where there has been joint acquisition of property[40]. Examples are seen in ***Gissing v Gissing***[41], ***McKenzie v McKenzie*** [42]and ***Stack v Dowden*** [43] among others.

3) Finance and Commerce: For the promotion of financial and security purposes, trusts are very valuable. For instance where money is given to a company for a particular purpose a trust known as '*Quistclose Trus*ts' is considered to have been created in favour of the lender, so that the lender can supervise the borrower's usage of the funds and if possible retrieve it where it considers it is improperly been used. This was confirmed in ***Twinsectra v Yardley***.[44] There has been some recent debate into how creditors have been using the Quistclose Trusts has a method of making themselves secured creditors in the event the borrower

[36] Chris Whitehouse and Emma Chamberlain, **Trust Taxation**, Private Client Business, 2009, 3, 230-237
[37] [1980] A.C. 1148
[38] Mark McLaughlin, **Offshore Tax Planning,** 2009, Busy Practitioner. B.T.R. 2009, 3, 276-305
[39] [1949] Ch 213
[40] Graham Moffat, Trusts Law, 5th edition, 2009, pg 607.
[41] [1971] AC 886
[42] [1970] 3 All ER 1034
[43] [2007] UKHL 17
[44] [2002] 2 All ER 377

goes into liquidation.[45]

Trusts might be created within commercial circles also where *Romalpa clauses* are inserted into contractual terms .i.e. clauses which still confer the seller with proprietary rights over goods sold (retention of title). Therefore until the buyer has met the conditions of the seller, he cannot treat the goods bought has his property. He therefore holds a trust over the goods in favour of the seller.[46]

4) Voluntary activities: Trust could be created to promote certain acceptable public purposes under the head of charitable trusts. Trusts which are intended to education, religion, alleviate poverty and to promote public welfare.[47] Trusts could also be used to promote non-charitable aims such as the maintenance of public buildings, the provision of domestic animals, etc among other non-charitable ends.[48]

Beyond Moffat's Taxonomy trust could be employed to ends such as the joint acquistion of property, for caretaker purposes such as the care of one's disabled relatives and the funding of one's relatives children at university.[49]

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[45] Wayne Beglan, Alice Belcher, Jumping the Queue J.B.L 1997 Jan – *'attractive to those who provide loans where they would otherwise become simple unsecured creditors'*
[46] ***Indian Oil v. Greenstone Shipping*** [1987] 3 WLR 869
[47] David Hayton and Marshall, op. Cit, page 429
[48] Ibid, page 201
[49] Graham Moffat, Op Cit, page 33-37.

Chapter 3 - The Three Certainties

Essay Question 1

Discuss how the courts have approached the various tests for certainty of objects for express trusts.

Answer

This paper will first introduce the concept of certainty. The paper will then discuss the test of certainty for objects. It will critically look at the test that has been developed for fixed trust, a discretionary trust (or trust power), and a mere power. This paper will examine the development that has been made in respect of the test for objects in discretionary trusts. In particular it will examine the cases of *Mcphail v Doulton*[50] and *Re Baden* (No 2). [51]

Certainty is a condition of validity for a trust. When a trust is created if it is to be valid it must satisfy the certainty tests. There are said to be three certainties which a trust has to meet, certainty of intention, subject matter and objects. [52] The standard authority is *Knight v. Knight*[53] in which Lord Langdale MR stated:

> *"First, if the words are so used, that upon the whole, they ought to be construed as imperative; Secondly, if the subject of the recommendation or wish be certain; and, Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain."*

Objects are a generic term, but here the term certainty of objects is used to describe or define the beneficiaries, more precisely who the objects are, what they are to receive and

[50] [1971] AC 424
[51] [1973] Ch 9
[52] Speirs, A., *Escape from the Tangled Web*, [2002] 3 Web JCLI at http://webjcli.ncl.ac.uk/2002/issue3/speirs3.html
[53] (1840) 3 Beav 148

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when they will receive it. The concern is the beneficiaries have to be certain and identifiable.[54] Lord Willberforce has indicated the object of a trust does not have to be absolutely certain, just "*sufficient"* certain with "*practical certainty"*, moreover, the "*administrative assistance"* suggests where certain types of cases will go to court on a constructive summons and the court will provide constructive meaning of a trust instrument.[55]

The certainty test varies according to the nature of the trust, for a fixed trust there is need for a greater degree of certainty, because the trustees are mechanically implementing the trust. Contrast to a discretionary trust, the trustees are exercising discretion anyway, thus it is not so important if the beneficiaries are not so well defined. Contrasted to powers, there is even less need for a sufficient practical certainty needed than with discretionary trusts.[56]

The concern for the court is that the object of the trust must be certain arid identifiable. This is not an easy task, for example consider the bequest *"my house Whiteacre and £50,000 on trust for my brother Tom"*. This bequest would cause no problems if I had only one brother Tom. However, if I had two brothers named Tom then complications will arise in ascertaining who the trust was intended. Thus the law of trusts creates special rules to determine objects which vary according to the type of the trust arrangement. The rules differ according to whether there is a fixed trust; a discretionary trust (or trust power); or a mere power.[57] Once the test of that particular category is fulfilled the court will hold there to be certainty of objects. Failing this test will mean the power or trust fails.

Fixed are such that the trustees have no discretion in the

[54] Klinck, D. R. McPhail v. Doulton and Certainty of Objects: A'Semantic'Criticism"(1988). Ottawa L. Rev., 20, 377.
[55] [1971] A.C. 424, at 450
[56] Hayton, D. J., Marshall, O. R., & Nathan, J. A. (1986). Cases and Commentary on the Law of Trusts. Stevens.
[57] Penner, J. (2014). The law of trusts. Oxford University Press.

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carrying out of their duties. It follows from this that the test for objects in a fixed trust is the complete list test. This means that a complete list of all the objects needs to be able to be drawn up for it to be certain. For example *"£150,000 to be divided equally between, my sons"*, this means all my sons will be identifiable through a list and then they can be said to be in that class of objects, as observed by Jenkins LJ in *IRC v Broadway Cottages*.[58] If the complete list cannot be drawn up the trust fails.[59]

A mere power or trust power is where the trustee has absolute discretion whether to nominate a beneficiary and ultimately make a gift or not. The obligation is not imperative. Thus because the powers are completely discretionary, there is no need to have a complete list. The test that is used with powers is the *is or is not test*.[60] If the trustees can make a list of objects and non-objects then the power will not fail for uncertainty. This test was laid down in the case of in *Re Gulbenkian's Settlements*.[61]This case concerned a trust where the trustees had a power to apply income from the trust fund to maintain, *"any person in whose house or in whose company or in whose care Gulbenkian may from time to time be residing"*. The House of Lords held to determine if a power was valid the *"is or is not test"* was the correct test for powers.

A discretionary trust is where the trustees are asked to use discretion when exercising their functions. This is the type of trust where the trustees can appoint one or all of the potential beneficiaries. Prior to 1971 were no appointment was made, the court had the power to carry into effect the trust and would usually make an equal division between members.[62] Therefore

[58] [1955] Ch 20
[59] Harris, J. W. (1970). Discretionary Trusts. An End and a Beginning?. The Modern Law Review, 686-691.
[60] Hopkins, J. (1971). Certain Uncertainties of Trusts and Powers. *The Cambridge Law Journal*, *29*(01), 68-102.
[61] [1970] AC 508
[62] Moffat, G. (2005). *Trusts law: text and materials*. Cambridge University Press.

the test was that a complete list needed to be drawn up of all objects and same as fixed trusts, failing this the trust would fail. The authority for this was *IRC v Broadway Cottages Trust Ltd*.[63] This case created significant problems because, during the last century there was a development of large discretionary trusts, with many hundreds of thousands of beneficiaries, mainly in connection with pension funds or trusts for employees set-up by companies.[64] They were often drawn up a discretionary trusts rather than powers of appointments and the problem with *IRC v Broadway Cottages Trust* was that it happened to invalidated lots of pension trust instruments, because it was inherently its nature, to be for large groups, whose beneficiaries could not be drawn up onto a complete list.[65]

After 1971the test for certainty of objects in respect of discretionary trusts was changed in *Mcphail v Doulton*.[66] The House of Lords considered the clause: *"the trustees shall apply the net income of the fund in making at their absolute discretion grants to or for the benefit of any of the officers and employees and ex-employees of the company or to any relatives or dependants of any such persons in such amounts...."* the court held the correct test to be applied to determine certainty of objects was the list test. The House of Lords held the difference in tests between the discretionary trust (complete list) and mere powers (is or is not) was arbitrary, illogical and embarrassing. They therefore overruled the complete list requirement and brought the test for discretionary trusts in line with powers. The House of Lords held that the appropriate test for discretionary trusts was the *Gulbenkian* test, i.e. that a trust will be valid if it could be said with certainty that "*any given individual is or is not a member of the class"*.[67]

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[63] [1955] Ch 20
[64] Moffat, G. (1992). Trusts law: a song without end?. The Modern Law Review, 55(1), 123-139.
[65] Harris, J. W. (1970). Discretionary Trusts. An End and a Beginning?. *The Modern Law Review*, 686-691.
[66] [1971] AC 424
[67] Per Lord Wilberforce

There were two dissenting judges that argued discretionary trusts should be subject to a complete list test because first to execute a discretionary trust (Lord Hodson) you must know every possible beneficiary, because you have to consider each possible beneficiary, this cannot be done without a complete list. Second if the trustees fail to carry out a trust, the act must be able to act on their default, because of the traditional rulings of equity is equality, the court has to divide the trust equally and if there is no complete list test the court is unable to perform this task. Lord Willberforce who stated in a discretionary trust you do not have to consider every possible beneficiary represented the majority; it is enough if you survey the field. To survey the field you do not need to use a complete list the *is or is not test* is sufficient. Secondly, referring to Lord Hodnson second point, if there is a default the court does not need a complete list either, because it is silly to dived the trust equally in that type of case, in a discretionary trust for hundreds and thousands of people, he suggested an alternative method of distribution, such as appointing new trustees, a new scheme of distribution, to be checked by the court.

In the case of *Mcphail v Doulton* once the court had made that decision the trustee's tried to implement the trust, but there was further litigation over what was actually meant, by the is or is not test. They remitted the case back to the Chancery Division where the case became accepted as *Re Baden* (No 2).[68] Each judge had a different opinion of what was meant by the *is or is not test*. The trust was upheld although each judge provided a distinct stance as to the *is or is not test*.

Lord J Sachs emphasised that the court was concerned with conceptual certainty test and not evidential certainty. Sachs LJ was able to validate the trust only by adopting very wide definitions of both *"relatives"* and *"dependants",* enabling a clear line to be drawn between those who were within and without the class. Sachs LJ opined that relatives were defined as any persons who are linked by a *"common ancestor".* The meaning of people with a common ancestor is clear although,

[68] [1973] Ch 9

it is clear there may also be evidential problems, Sachs LJ believed evidential certainty was not an issue here. He observed that *"dependants"* had already been defined by the courts, for example in relation to the Workmen's Compensation Act 1897, but he was also able to adopt a bright line definition by taking the view *"that any one wholly or partly dependent on the means of another is a "depend-ant"."*

Lord J Stamp emphasised that the *is or is not test* was not only about conceptual certainty, a class can be conceptually certain, but it can still fail the *is or is not test* because of evidential uncertainty. The trustees are to make a comprehensive survey of the range of objects, but Sachs LJ did not believe the trust would necessarily fail if at the end of the survey, it was unfeasible to draw up a list of each beneficiary. Stamp LJ opined that relatives defined as any persons who are linked by a common ancestor, was evidentially uncertain. Stamp LJ would have taken the view that the trust failed, had it not been for the fact that he felt compelled to follow an early House of Lords authority, which held a discretionary trust for *"relations"* was valid, *"relations"* being defined in a narrow way for distribution purposes as *"next of kin"*.

It would seem Sachs LJ would uphold a trust that cannot be carried out, it is very well saying all you need is conceptual certainty, but if you do not have any evidential certainty the trust will not be viable. Stamp LJ recognises the realities; you should not validate a trust, which cannot be carried out. One objection is that the way Stamp LJ interpreted the is or is not test, seems to resurrect the complete list test for discretionary trusts which was rejected by the House of Lords as the incorrect test. Stamps view that you have to be able to establish evidential certainty and who is in the class and who is not, this makes it unnecessarily strict on the class, which more or less amounts to resurrecting the complete list test.

Lord Megaw took a different route. He required a substantial number of people being able to be shown with certainty that they fall within the class. This is a rather unclear type of test because clearly it is not enough to be able to show that *one* person is certainly within the class, as this test was rejected in

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Gulbenkian. Presumably, the test requires evidential, as well as conceptual certainty. For example relatives defined as any persons who are linked by a common ancestor, Megaw LJ took the middle line and believed within that class if you could always show a substantial number of people, then they are relatives.

Endnote

You may buy the whole book from our website. That was a great example. With no concern for profit, Private Law Tutor Publishing's goal is to provide legal education materials accessible and thorough for students of all levels. Private Law Tutor is the brainchild of a group of barristers who are also law tutors who have come together to help students throughout the globe with their studies.

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