Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

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15. Mixed Topic Questions

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Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on a mixture of topic areas including the three certainties, constitution and formalities for the creation of a trust, charitable trusts and trusts of imperfect obligation.

Keywords: equity, trusts, constitution, breach of covenant, imperfect gifts, certainty of objects, certainty of intention, certainty, donatio mortis causa, mutual wills

Are You Ready?

As the name of the chapter suggests, this covers a variety of areas as follows:

- The three certainties
- Constitution and formalities for the creation of a trust
- Charitable trusts
- Trust of imperfect obligation
- Mutual wills

Introduction

Your examination paper may contain one question which mixes a number of different topics. This may be upsetting at first sight. You may have carefully revised several topics which are covered in the question only to discover that it includes one topic which you thought safe to leave out. Assuming that each section in the question bears equal marks (and that is a reasonable assumption unless there is any contrary indication), then it is probably unsafe to tackle it in these circumstances. Most (if not all) questions in the paper will be discrete and you will find the question on charities or administration of trusts or whatever your favourite topic may be, without any difficulty. Once you have identified it then you are away.

However, the possibility of a mixed topic question is another reason why you should read the questions carefully before starting to write. A question might include two sections on charities, then a section on a private purpose trust with a question mark over its validity, and a concluding section on a gift to an unincorporated association. One question spotted in a university exam paper contained four problems: a secret trust; certainty of objects; certainty of intention; and wound up with the doctrine of election—not a pretty sight. If you glance at the question, think 'charities', and plough into it, only to discover 20 valuable minutes later that you have to deal with a subject about which you know nothing, you have wasted a great deal of effort and lost, probably, a class or worse.

p. 221 ↵ Needless to say, if you know each of the topics then you do not have a problem. In fact, if your luck holds and you are thoroughly familiar with the case law for each point, this question may be a dream ticket.

Four questions have been selected to illustrate these points. Question 1 mixes charitable trusts, discretionary trusts, and covenants to settle. Question 2 mixes constitution of trusts, *donationes mortis causa*, and certainty of words and objects. Question 3 mixes the three certainties, secret trusts, and trusts of imperfect obligation. Question 4 covers mutual wills and estoppel.

Question 1

Four years ago Alpha transferred £100,000 to Beta 'upon trust to provide, at his discretion, grants for law students in the United Kingdom, absolute preference to be given to my relatives'.

One year ago, Alpha covenanted with Beta to transfer to Beta, upon the same trusts, any property he (Alpha) might subsequently acquire under the will of Gamma. One month later Gamma died, and in his will he bequeathed 10,000 shares in Delta Ltd to Alpha.

Alpha died last month, without having taken steps to transfer the shares in Delta Ltd to Beta. In his will Alpha gave all his property to his niece, Omega.

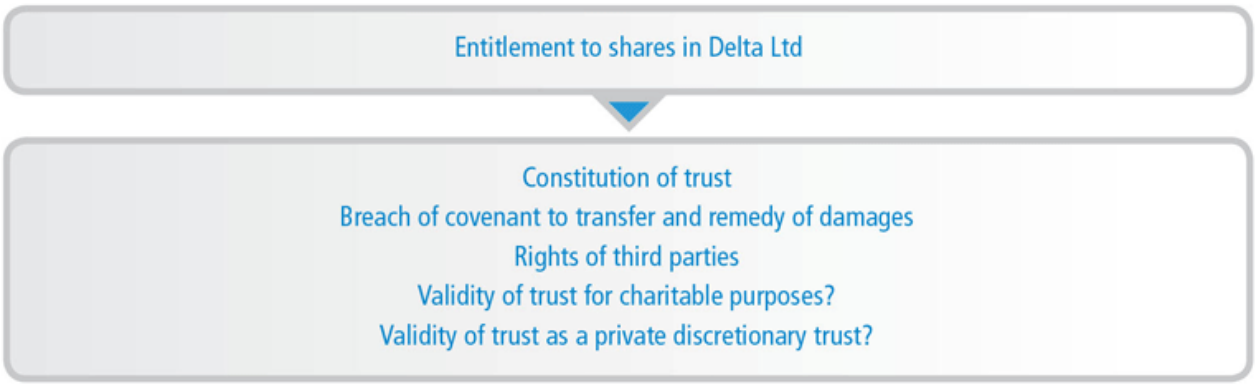
Discuss.

Caution!

■ Do not be taken by surprise by a pick 'n' mix question. Suspend disbelief: just because part (a) is on secret trusts does not mean the other sections must also be on the same theme. Read the questions carefully. Note that the instruction is: 'discuss'. So, that is a clue that it is not confined to one single topic.

■ The separate parts of the question are not intrinsically difficult, but the higher marks will be obtained by a student who can show how the different areas interact.

Diagram Answer Plan



p. 222

Suggested Answer

It will first be considered who is entitled to the shares in Delta Ltd.[1] As sole beneficiary of Alpha's will, Omega is entitled to the shares if they formed part of his estate at his death. They will not comprise part of such estate if they are the subject-matter of a fully constituted charitable trust. Alpha, however, never transferred the legal title to the shares to the trustee, Beta, as he had covenanted to do. Furthermore, there is no evidence that he did everything necessary to be done by him in order to perfect the transfer in equity: see ***Milroy v Lord (1862) 4 De GF & J 264*** and ***Re Rose [1952] Ch 499, CA***. The trust therefore remains incompletely constituted in respect of the shares. There is no evidence that valuable consideration has been supplied for the creation of the trust. As regards the shares, therefore, the trust is an incompletely constituted voluntary settlement. Equity will not compel Alpha's estate to transfer the shares to Beta, since equity will not assist a volunteer: ***Re Plumptre [1910] 1 Ch 609***.[2]

[1] You could start by considering the validity of the trust or the transfer of the shares into the trust.

[2] This establishes the starting position.

The decision in ***Pennington v Waine [2002] 1 WLR 2075***, is unlikely to assist in this case. In ***Pennington v Waine***, a share transfer form had been executed but not delivered to the beneficiary. The beneficiary needed to hold shares in the company in order to be appointed as one of its directors, and, despite non-delivery of the share transfer form, he was still appointed. It was held that it was sufficient that the shares had been transferred by an instrument in writing in accordance with **s. 1(1) of the Stock Transfer Act 1963** and that it would be unconscionable for the transfer not to be effected.

The test of unconscionability is difficult to apply because of uncertainty—and that is a criticism of the decision. But it is arguable that ***Pennington v Waine*** is distinguishable from the current problem since no steps at all have been taken to transfer the shares and there ↵ appears to be no detrimental conduct undertaken on the basis of the promise which might render it unconscionable not to allow equity to assist the volunteer. In that case, the person entitled to the shares would be Omega. [3]

p. 223

[3] It is difficult to be dogmatic on this point because of the use of the vague tests of unconscionability in ***Pennington v Waine***.

Nevertheless, even though the shares are not themselves bound by the trust, it is still necessary to consider whether Beta can sue Alpha's estate for damages for breach of covenant. [4] It has been argued that a covenantee of a voluntary covenant should be able to sue for damages for its breach and hold such damages in trust for the volunteers: see Elliott (1960) 76 LQR 100. The courts, nevertheless, are opposed to such a claim. In ***Re Pryce [1917] 1 Ch 234***, the court would not direct the covenantees to sue, and in ***Re Kay's Settlement [1939] Ch 329*** it positively directed them not to sue. There is no objection to such a claim if the covenantee is suing in respect of her own loss as beneficiary, as in ***Cannon v Hartley [1949] Ch 213***; but this is not the situation in the problem. By contrast, in ***Fletcher v Fletcher (1844) 4 Hare 67***, the court held that there was already a perfect trust of a chose in action: viz., the benefit of the covenant itself. This suggests that if Alpha intended the benefit of the covenant to comprise trust property, Beta will be obliged to sue Alpha's estate for damages for breach of covenant and to hold the substantial damages which he will recover upon the trusts declared. There is, however, no evidence that this was Alpha's intention.

[4] This is the next point.

An alternative explanation was proffered in ***Re Cook's Settlement Trusts [1965] Ch 902*** by Buckley J. He considered that, whilst it might be possible to create a valid trust of the benefit of a covenant concerning property in existence and owned by the settlor at the date of the covenant, it is not possible to create a trust of the benefit of a covenant which relates to after-acquired property. If this view is followed, there can be no trust of the covenant in the problem.

Since the covenant was entered into only one year ago, it is enforceable by a third party whom the covenant purports to benefit, unless it appears that the parties intended otherwise (**Contracts (Rights of Third Parties) Act 1999**). If the specified purpose is charitable, this raises the question whether such a covenant is enforceable by the Attorney General. This seems unlikely, since he is not a person who is intended to benefit from the covenant. It also seems unlikely that the persons who might benefit under a charitable trust would have a personal right of action under the 1999 Act, since such persons do not have a beneficial interest under a charitable trust. The conclusion must be that the 1999 Act does not operate in relation to voluntary covenants to transfer property in favour of charity. [5]

[5] No case law here so difficult to be decisive.

Even if a trust of a chose in action has been created, Beta will not hold it upon the trusts declared unless these are valid trusts. [6] The **Charities Act 2011, s. 3(1)** lists 13 descriptions of purposes which
p. 224 ↵ will be charitable if they satisfy the 'public benefit' test which is set out in **s. 4**. The thirteenth category (**para. (m)**) includes all purposes previously recognised as charitable. It also preserves the ability of the courts to develop charity law by enabling new purposes to develop by analogy with, or within the spirit of, any of the purposes listed in **paras (a) to (l)**. The limiting factor that the purpose be beneficial to the community is now apparently subsumed within the broader 'public benefit' test contained in **s. 4**. However, if a purpose has already been held to be for the public benefit then that requirement will already have been satisfied. New purposes under **para. (m)** will have to be shown to be for the public benefit.

[6] Now deal with the validity of the trust—is it charitable? If not, is it a valid private trust?

Applying **s. 3(1)**, clearly the primary purpose here (providing grants for law students in the United Kingdom) would be charitable under **para. (b) of s. 3(1)**. It would also be charitable under **para. (m)** as education has always been a charitable purpose and was Lord Macnaghten's second category of

charitable purposes in ***Pemsel's Case [1891] AC 531***. Under the previous law, the requirement for public benefit excluded from charitable status a trust for a group of beneficiaries defined by a personal nexus (***Oppenheim v Tobacco Securities Trust [1951] AC 297***; ***Re Compton [1945] Ch 123***), and this appears to be imported into the current law by **s. 4 of the Charities Act 2011**. Under the previous law, there was a qualification in that, provided that the primary class of beneficiaries was a sufficient section of the public, the courts allowed preferences for a class of beneficiaries which was not (***Re Koettgen [1954] Ch 252*** where a 75 per cent preference was allowed). ***Re Koettgen*** was much criticised (see ***IRC v Educational Grants Association Ltd [1967] Ch 993***) and it remains to be seen whether the preference cases will survive the new public-benefit test. Although a preference of 75 per cent of the fund was accepted as a charity in ***Re Koettgen***, a priority class on whom the whole of the fund can be spent is not: ***Caffoor v ITC [1961] AC 584***. The words 'absolute preference' in the disposition may suggest a priority, in which case it will fail.

If it is not charitable, can the trust be valid as a private discretionary trust? [7] It would probably satisfy the test for certainty of objects, since it would appear to be possible to say of any given person whether or not they are a law student in the United Kingdom: ***McPhail v Doulton [1971] AC 424, HL***. It would probably also not fail for administrative unworkability, since the description of objects probably does form something like a class: ***McPhail v Doulton***. Nevertheless, unless (which is unlikely) it can be construed as a trust for immediate distribution of capital, it would be void for perpetuity. Assuming this to be so, the benefit of any chose in action would be held by Beta on a resulting trust for the benefit of Alpha's estate. In practice, this means that the covenant is simply unenforceable.

[7] And now the last point.

p. 225 ↵ If the purported trust is void, the money which Alpha transferred to Beta is also held on a resulting trust for Alpha's estate. Omega is therefore entitled to it. [8]

[8] Don't forget to deal with this point—if it is not valid, where does it go?

Looking For Extra Marks?

- Picking up all the points is the key here to extra marks.
- For a few more, discuss the correctness of the decision in ***Pennington v Waine***.

Question 2

Discuss, with reference to decided cases, whether any of the following words create a valid trust. Indicate any problems which may have to be overcome before a trust can be imposed in these cases.

a Look, I am giving this cheque to our baby.

b The money in my deposit account is as much yours as mine.

c I hereby give to my executors and trustees £500,000 on trust to apply the said sum at their absolute discretion for the maintenance and support of red-haired women in London.

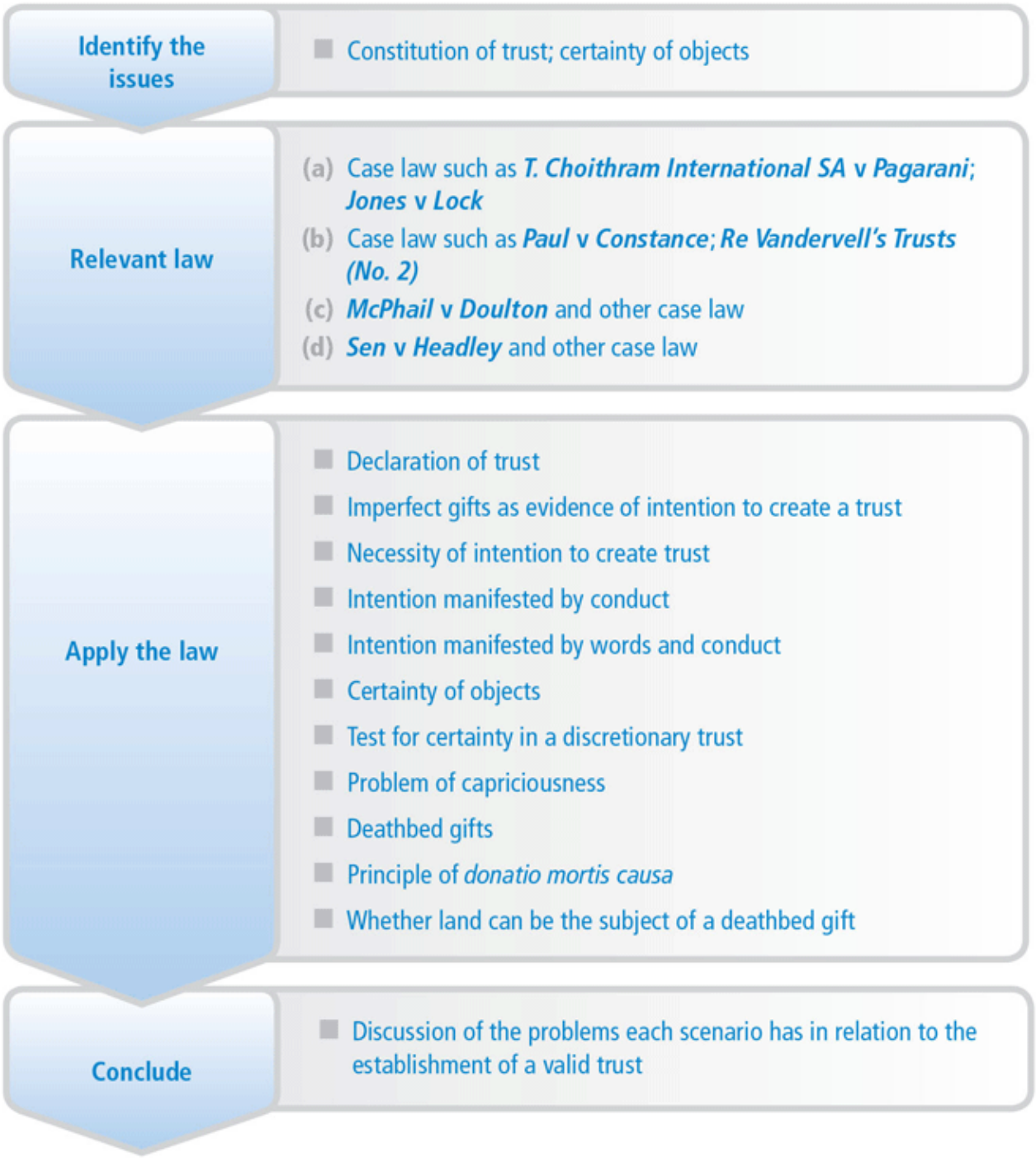
d It is my dying wish, Marjorie, that you should have my London flat. Here are the deeds and the keys, put them in your bag. My solicitor will sort out the details when I am dead.

Caution!

■ This question contains a mixed bag of problems relating to the constitution of a trust. It draws heavily on particular cases, which can make it very unattractive if you are not familiar with the exact case. In that sense, it is not a very sporting question. Many examiners try to avoid questions which rely on the student's knowledge of a particular case, preferring to test the understanding of general principles. However, if you are faced with a question of this type, and you know the relevant cases, then it can be a gift.

■ Avoid the temptation of starting your answer with an immediate reference to the case. For example, do not start with: 'This is a ***Jones v Lock*** problem …'. Instead, state the issue raised by the question, then the general rule with exceptions, and then illustrate your answer with cases. Some questions of this sort can subtly vary the facts of the case. Watch out for those!

Diagram Answer Plan



p. 226

Suggested Answer

Part (a)

In order for a trust to be created there must be a clear manifestation of an intention to create a trust. [1] Where the settlor makes a declaration of self as trustee, the trust is fully constituted. Where the settlor is to be one of co-trustees, the declaration constitutes the trust and it is not necessary for the property to be transferred into the names of ↵ all the trustees to give effect to it (***T. Choithram International SA v Pagarani [2001] 1 WLR 1, PC***).

p. 227

[1] Setting out the law.

The statement made implies a gift not a trust. [2] The gift is imperfect since a cheque is merely an order to a banker; therefore, even if the cheque is handed to a baby when the words are spoken, no property right is thereby transferred beyond the paper on which the cheque is written. In ***Jones v Lock (1865) LR 1 Ch App 25***, an attempt was made to argue that, in effect, the donor had made a declaration that he was a trustee of the cheque for the beneficiary. It was held that a failed gift will not be construed in equity as evidence of an intention to declare a trust. Likewise, in ***Pappadakis v Pappadakis [2000] WTLR 719***, it was held that an invalid assignment which did not identify the assignee who was to hold on trust could not operate as a declaration of trust.

[2] Applying the law to the facts.

Although there is present an intention to benefit the donee, there is no intention present to hold the property as trustee. This was confirmed in ***Richards v Delbridge (1874) LR 18 Eq 11***, where words written on a lease which indicated an intention to give the lease to the grandson of the leaseholder were held ineffective at common law to effect the transfer. Since they were words indicating a gift, they were ineffective in equity to operate as a declaration of trust.

The gift will be perfected only when, and if, after presentation of the cheque, the funds are transferred to the credit of the payee's account. [3]

[3] Now the conclusion.

Part (b)

This statement again raises the issue of certainty of intention to create a trust. [4] In this situation the holder of the deposit account has not made an attempt to transfer the account into joint names. It may be arguable, according to the circumstances of the case, that the account holder has manifested an intention to hold the account on trust by conduct. The words are not sufficient in themselves but, coupled with the conduct of the parties, they may be. For example, in ***Paul v Constance [1977] 1 WLR 527***, where money was put into an account in the sole name of Mr Constance, his assurances to Mrs Paul that the money in the account was owned jointly were held sufficient to indicate an intention by him to hold the account on trust for them jointly. In ***Re Vandervell's Trusts (No. 2) [1974] Ch 269***, where money from a settlement was used to purchase shares in exercise of an option, it was held that the conduct of the trustees in using this money and paying dividends into the settlement constituted sufficient evidence of an intention to create a trust even though no specific words had been used. Compare ***T. Choithram International SA v Pagarani [2001] 1 WLR 1***, where words which indicated an outright ↵ gift were construed in the context of the case as words of a gift to be held on the trusts of a settlement already constituted by the donor.

p. 228

[4] This starts by going straight into the application combined with the identification of the key issue (you can refer back to the previous answer).

The decision in ***Paul v Constance*** was applied in ***Rowe v Prance [1999] 2 FLR 787***, where a boat, which was held in the sole legal ownership of the defendant, was considered to be held on trust for the claimant and defendant in equal shares. The defendant had always referred to the boat as 'our boat' and had assured the claimant (his partner in an extramarital affair) that her interest in the boat was her security.

There must, however, be a clear intention evinced, whether by words and/or conduct, to create a trust. In ***Re B (Child: Property Transfer) [1999] 2 FLR 418***, where a house, further to a consent order, was transferred to the mother 'for the benefit of the child', no trust was created for the child. The relationship between mother and child had broken down.

Therefore, although it is difficult to state that the words are sufficient on their own to create a trust, coupled with other conduct there may be sufficient certainty of the requisite intention. [5]

[5] And the conclusion.

Part (c)

In this gift there is a clear intention to create a trust. [6] However, the issue is whether a gift to red-haired women in London is sufficiently certain to be carried out by the trustees. The trust appears to be discretionary. The test for certainty of objects in a discretionary trust was outlined in ***McPhail v Doulton [1971] AC 424, HL***, [7] where it was held that the test was the same as that established for powers in ***Re Gulbenkian's Settlements [1970] AC 508, HL.*** The test is, 'Can it be said with certainty that any given individual is or is not a member of the class?' The question is concerned with whether the concept is clear, rather than with any evidential difficulties. So, in ***Re Baden's Deed Trusts (No. 2) [1972] Ch 607***, the question was whether the words 'relatives' and 'dependants' were conceptually certain.

[6] Point this out then jump to the key issue.

[7] The law.

The problem of definition arises, therefore, in respect of red-haired women. Can it be said whether any given person is or is not a member of the class? The problem is not, in this case, in proving evidentially whether a person is or is not within the class. Instead, the difficulty lies in defining the term 'red-haired'. Whereas all people may agree whether certain individuals are red-haired, there may be some borderline cases where the trustees could not decide. The concept of what constitutes red hair may, therefore, be so unclear that it is impossible to carry out the trust.

Another problem might arise in relation to the width of the class. If a discretionary trust is so wide that it is administratively unworkable, this may invalidate it. In ***McPhail v Doulton***, Lord Wilberforce
p. 229 ↵ suggested that a discretionary trust for the residents of Greater London might be so wide that it was unworkable. This was followed in ***R v District Auditor, ex parte West Yorkshire Metropolitan County Council (1986) 26 RVR 24 (QBD)***, where a discretionary trust was purportedly created for the inhabitants of the county of West Yorkshire. The description of objects was considered to be so large that the trust was invalidated for administrative unworkability. This would be different if the gift was construed as a mere power (see ***Re Manisty's Settlement [1974] Ch 17***).

The difficulties inherent in validating this gift to red-haired women indicate a capriciousness in the mind of the donor. While there is no general principle that a donor may not act capriciously (***Bird v Luckie (1850) 8 Hare 301***), where the gift involves the exercise by a trustee of a fiduciary obligation, the position is different. The difficulties, in the first instance, of defining red hair, and, secondly, in the potential width of the class, indicate an element of caprice which may cause a court to invalidate a gift on that ground alone (see ***Re Hay's Settlement Trusts [1982] 1 WLR 202***).

Part (d)

It appears from the wording that this is a deathbed gift. [8] In order to effect a transfer of land at common law, there should be a deed (**Law of Property Act 1925, s. 52**). There would appear to be no deed transferring legal ownership in this case. Neither does there appear to be any consideration given. Marjorie is, therefore, a volunteer. The normal principle is that equity will not assist a volunteer in enforcing an imperfect gift. [9]

[8] Identify issue.

[9] Set out the maxim.

However, there are some exceptions to this and one in particular, the principle of *donatio mortis causa*, may assist Marjorie. [10] There are three conditions which must be satisfied before this exception will be allowed. The gift must be conditional on death, it must be made in contemplation of death, and the donor must give the donee control over the gift (see ***Cain v Moon [1896] 2 QB 283***).

[10] And then the exception and go on to develop this as the key point.

Here, the question indicates that the gift is made in contemplation of death and it is not difficult to raise the presumption that it is, therefore, conditional on death (***King v Chiltern Dog Rescue and Redwings Horse Sanctuary [2015] EWCA Civ 581***; ***Wilkes v Allington [1931] 2 Ch 104***). The donor states that the formalities will be dealt with after death. The subject-matter of the gift is land. Until recently, it was thought that it was not possible for land to be the subject of a *donatio mortis causa* (***Duffield v Elwes (1827) 1 Bli (NS) 497***). However, the Court of Appeal decision in ***Sen v Headley [1991] Ch 425*** dispelled these doubts. In that case, someone who already had the keys of a house was given a bunch of keys including one to a steel box in the house containing the title deeds. It was held that the donor had parted ↵ with dominion over the house and the title deeds in circumstances otherwise satisfying the conditions for a *donatio mortis causa* and the gift was completed. This has subsequently been followed in the High Court decision in ***Vallee v Birchwood [2013] EWHC 1449 (Ch)***. It would, therefore, seem that as Marjorie has the keys, giving her physical control, and the deeds, this would be sufficient to give rise to the application of the rule that gifts made in contemplation of death are enforceable despite a lack of the appropriate formalities.

p. 230

Looking For Extra Marks?

■ You could develop a number of areas here. For instance, you could discuss the certainty of objects question in discretionary trusts and set out the different approaches of their Lordships in ***McPhail v Doulton***.

Question 3

Sam, who died recently, appointed Tick and Tack as the executors and trustees of his will and made the following dispositions:

a £50,000 to my sister Doris absolutely, feeling sure that she will give her son a reasonable amount.

b £30,000 to Tick and Tack for purposes of which I will inform them.

c My freehold property 'Dunroamin' to Tick and Tack upon trust to sell and to hold the net proceeds of sale for such worthy causes as they shall think fit.

Sam left his residuary realty to his son Percy and his residuary personalty to his daughter Mavis.

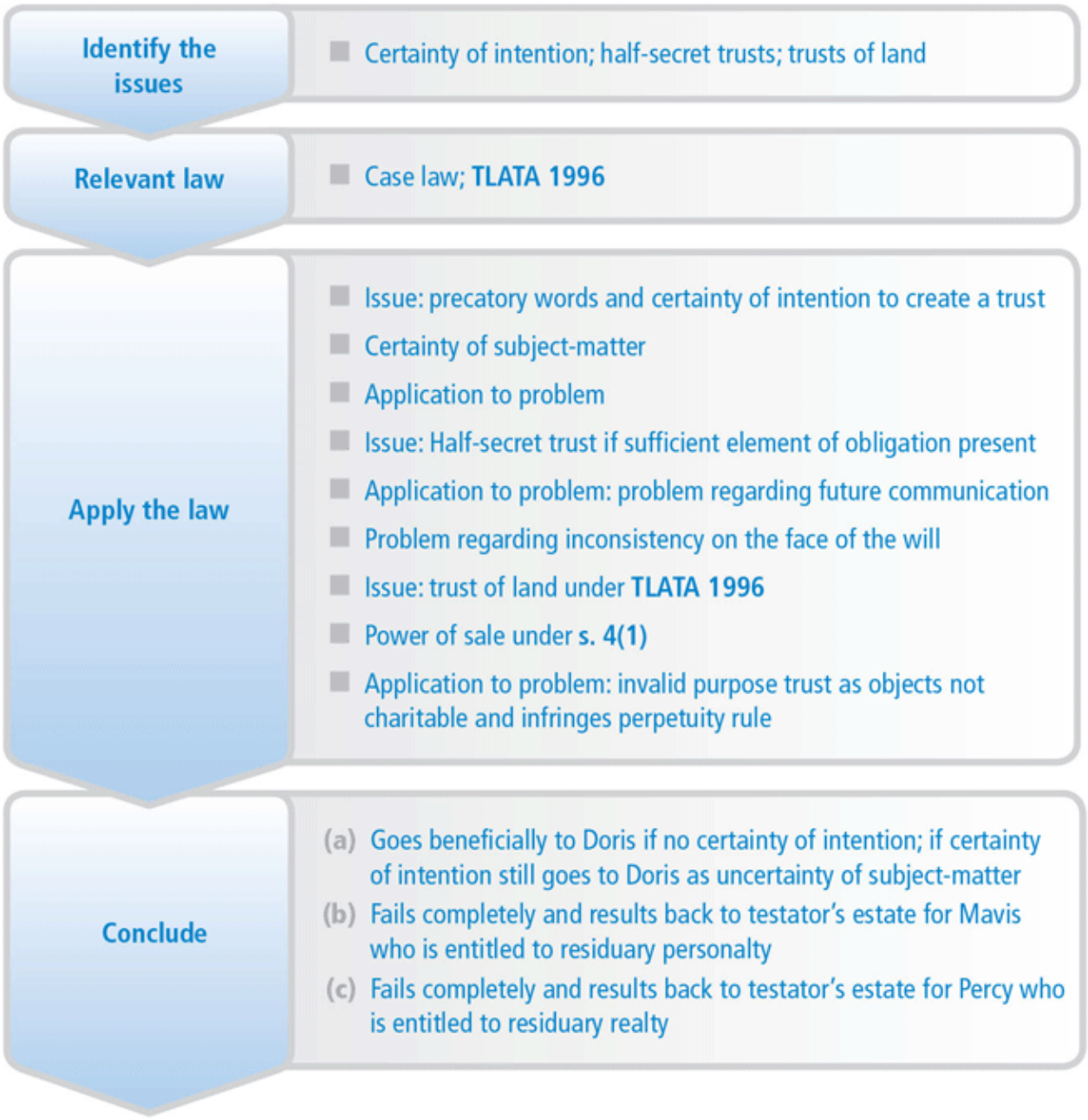
Advise Tick and Tack as to the validity of these dispositions, and as to who should benefit if any of them fail.

Caution!

■ This is a question which requires a fairly detailed knowledge of different parts of an equity and trusts syllabus. You may be lucky and find that you remember the relevant law and cases, but unless you feel fairly confident of doing well on two of the three parts, you might be wise to leave it alone. It is a question on which you might scrape a pass if you know some law, but would find it difficult to score well.

■ Examiners like to be able to see clearly which part of a question they are marking. It will help the examiner, therefore, if you number each part of your answer and leave a space between the different parts.

Diagram Answer Plan



p. 231

Suggested Answer

Part (a)

It is unlikely that the words in the disposition to Doris are sufficiently obligatory to attach a trust to the property in the hands of Doris. [1] Such words are precatory words and, since ***Lambe v Eames (1871) 6 Ch App 597*** and the **Executors Act 1830**, the courts will not lean in favour of a trust: they simply construe the words in the context of the instrument to ascertain if a trust obligation is imposed. In

p. 232

Mussoorie Bank v Raynor (1882) 7 App Cas 321, the words 'feeling confident' were held to be precatory and failed to impose a trust, and the words 'feeling sure' used here would probably similarly fail. Doris would therefore take the gift beneficially.

[1] Precatory words and certainty of intention.

Even if the words were sufficiently certain to impose a trust, a 'reasonable amount' would be too uncertain as regards subject-matter. [2] Although the court held in ***Re Golay's Will Trusts [1965] 1 WLR 969***, that a 'reasonable income' was capable of objective determination by reference to a person's lifestyle, a reasonable amount in this case would not seem to have any objective criteria by which it could be assessed, and it would therefore fail.

[2] Certainty of subject-matter.

Part (b)

This disposition could be an attempt to create a half-secret trust if it is found to have the necessary element of obligation. [3] Although the words 'upon trust' are not used, it seems fairly clear from the face of the will that Tick and Tack are not intended to take the disposition beneficially.

[3] Half-secret trust if sufficient element of obligation present.

In the case of a half-secret trust, the half-secret trustees must accept the trust before the execution of the will. [4] This does not appear to have happened, as Sam refers to a future communication. Although communication of the identity of the beneficiary at any time before death would be sufficient for a fully-secret trust, there are dicta in ***Blackwell v Blackwell [1929] AC 318, HL***, and it was accepted in ***Re Bateman's Will Trusts [1970] 1 WLR 1463***, that this must be before the execution of the will in the case of a half-secret trust. The reason given for this is that a communication after the will would allow the

testator to change his mind and effectively make testamentary dispositions without complying with the **Wills Act 1837**. This is criticised as failing to take account of the fact that the secret trust arises from its acceptance by the trustees quite independently of the will. Further, since the courts may now order the disclosure of letters of wishes as in ***Breakspear v Ackland [2008] EWHC 220 (Ch)*** then this is a point about which care needs to be taken.

[4] Problem of communication.

Even if there has already been a communication of the purposes which Tick and Tack have accepted, it will still be invalid as there would then be an inconsistency on the face of the will, [5] which is fatal to a half-secret trust: ***Re Keen [1937] Ch 236***. The will clearly refers to a future communication and evidence of a prior communication would be inconsistent with it.

[5] Problem if inconsistency on face of will.

Part (c)

This will impose a trust of land under the **TLATA 1996**. [6] Even where the trust is expressed as a trust for sale, the power to postpone sale cannot be abrogated (**s. 4(1)**). [7] It is a matter for Tick and Tack whether ↵ they decide to sell 'Dunroamin' or keep it for the beneficiary under the trust. There would appear to be a discretionary trust as regards the proceeds of sale, but the trust is a purpose trust. There are no objects of the trust who can, if necessary, enforce it against Tick and Tack. Moreover, a trust must be sufficiently certain for a court to enforce it if necessary and 'worthy causes' would be too vague. In ***Re Atkinson's Will Trusts [1978] 1 WLR 586***, it was held that it would be impossible to confine worthy objects to charitable objects, so there is no possibility of this taking effect as a charitable trust. Although charitable trusts are purpose trusts, they are valid as they are enforceable by the Attorney General. A non-charitable purpose trust fails, however, for certainty of objects, and also if it infringes the rule against perpetual trusts. This trust will therefore fail. [8]

p. 233

[6] Establish the issue relating to trust of land under **TLATA**.

[7] Power of sale.

[8] Invalid purpose trust.

Conclusion[9]

[9] This sums it up and sets out where everything goes.

The disposition in (a) will go to Doris beneficially if there is no certainty of intention to create a trust. If there is such certainty, but the purported trust in favour of Doris's son fails for uncertainty of subject-matter, Doris similarly takes the entire legacy beneficially as it is only the trust grafted onto it which fails (***Curtis v Rippon (1820) 5 Madd 434***). The dispositions in (b) and (c) fail completely, however, and will result back to the testator's residuary estate on failure.

The pecuniary legacy in (b) is personalty and will go as residuary personalty to Mavis. The doctrine of conversion, which applied to a trust for sale under the **Law of Property Act 1925**, was abolished by **s. 3 of the TLATA 1996**, and 'Dunroamin' would go to Percy, who is entitled to the residuary realty.

Looking For Extra Marks?

- Extra marks could be gained by discussing the case law in more detail.

Question 4

Five years ago Olga, a spinster, married Clive, a widower with three children. They agreed to make wills in identical terms leaving their property to each other and then to Clive's two daughters, Amy and Bea. Wills in accordance with this agreement were executed by both of them shortly after they married. Clive had quarrelled with his son Nigel and did not want him to benefit from his estate.

p. 234

↲ About three years ago Clive became seriously and terminally ill. Amy was a nurse and Clive told her that if she would take unpaid leave to go and live with him to look after him, as Olga was not strong enough, he and Olga would ensure that his house 'Greensleeves' would be left to her. Amy took unpaid leave and nursed her father for nine months before he died. While living at the house, she paid for the modernisation of the kitchen and bathroom.

Some three months before he died, Clive and Olga executed identical codicils to their wills, both signed on the same day, varying the ultimate disposition of 'Greensleeves' so that Amy should receive it from the survivor of them and the remainder of their property should ultimately be divided between Amy and Bea.

After Clive died, Olga gave away considerable property which had belonged to Clive to charity. She also won £500,000 on the football pools. Nigel, who lived near to Olga, visited her regularly and did small jobs for her. Olga died recently and a will was found among her papers, dated a few days before she died, revoking all previous wills and testamentary dispositions and leaving all her property 'to my wonderful stepson Nigel'.

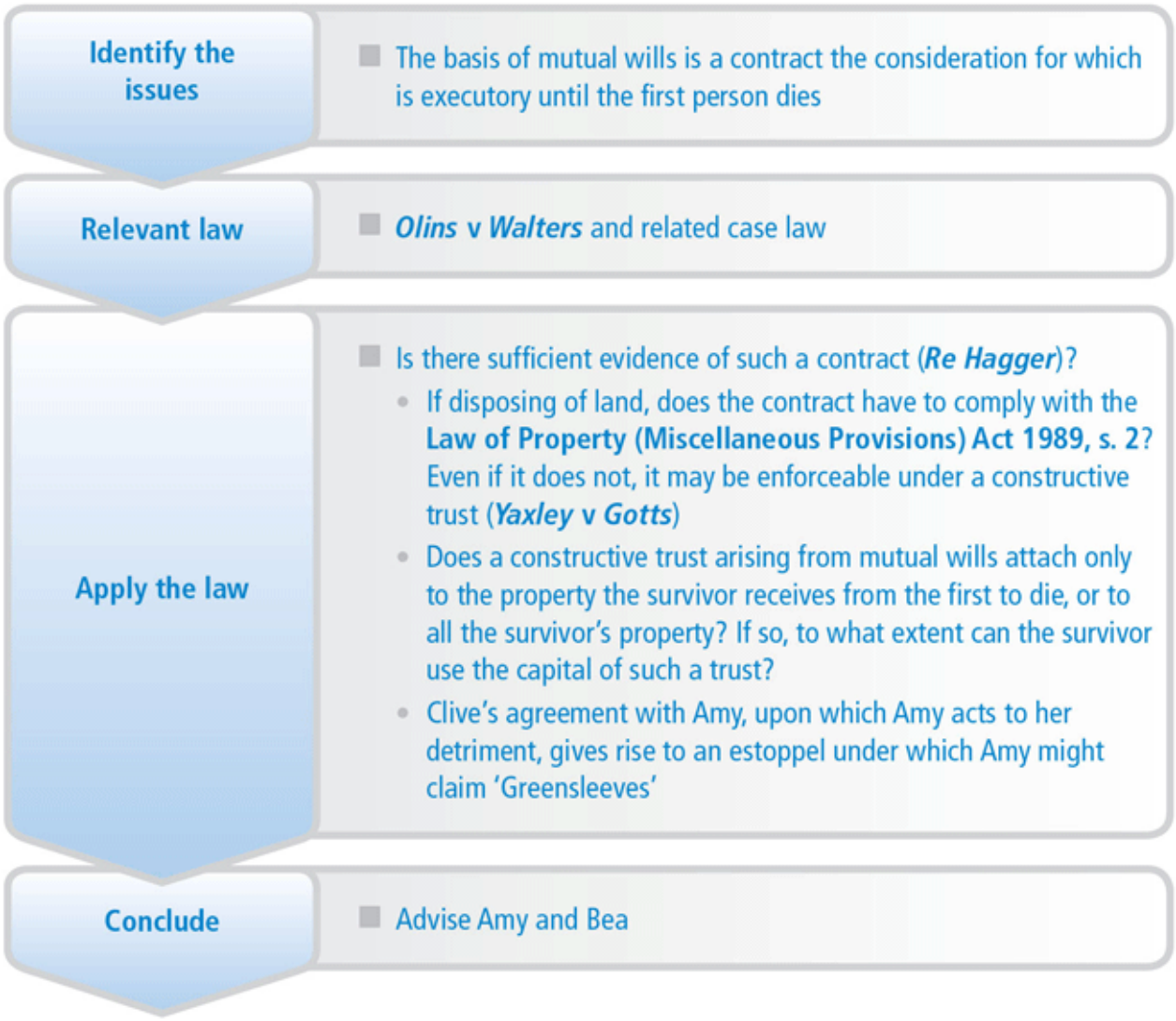
Advise Amy and Bea.

Caution!

■ This question raises some of the unresolved difficulties relating to mutual wills. You should be aware of these problems and also of the necessary requirements to establish mutual wills. Apart from this, however, the question is fairly straightforward.

■ The facts of the question disclose two possible causes of action available to one of the parties (Amy) whom you are asked to advise. If you come to the conclusion that Amy is likely to succeed on one ground, you should of course nevertheless go on to consider the other ground also. *Real* cases are often pleaded in the alternative!

Diagram Answer Plan



p. 235

Suggested Answer

The enforceability of mutual wills depends upon an agreement between the parties making them: ***Olins v Walters***.[1] The agreement is that they will both make wills in substantially the same form, leaving property in accordance with the agreement, and they agree not to revoke the wills. It will be an unenforceable agreement until such time as the first of the parties dies, as it will not be supported by consideration until then. However, when the first party dies, the consideration is the benefit which the survivor receives under their will, and the agreement then becomes binding on the conscience of the survivor, who has received a benefit.

[1] The first issue is mutual wills.

It is often difficult to find sufficient evidence of the agreement to establish that the parties did intend to make mutual wills. The fact that the wills are identical is some evidence but is not in itself sufficient (***Re Oldham [1925] Ch 75***) as there should also be an agreement not to revoke the wills. In the case of ***Re Goodchild [1996] 1 WLR 694***, the Court of Appeal held that identical wills made by a husband and wife on the same date were not mutually binding as the necessary ↵ contractual obligation not to revoke the wills was lacking. However, in ***Re Cleaver [1981] 1 WLR 939***, where two sets of wills were made by a husband and wife in identical form and a further will by the surviving wife consistent with her second identical will, this was held to be sufficient evidence of an agreement. In a High Court decision, ***Legg and Others v Burton and Others [2017] EWHC 2088 (Ch)***, it was held that an agreement for a mutual will could be based on equitable estoppel even where the wills contained contrary wording and in ***Fry v Densham-Smith [2010] EWCA Civ 1410***, the existence of an agreement was based on extrinsic evidence. Further, in ***Olins v Walters [2009] Ch 212***, where reference to an agreement to enter into mutual wills was made in a codicil, the Court of Appeal held that this was sufficient to establish clear and satisfactory evidence of a contract between the testators. The identical wills made here, together with identical codicils giving effect to identical changes, would probably be sufficient evidence to establish the necessary agreement as in ***Re Cleaver***. [2]

p. 236

[2] Sufficient evidence of contract?

A further problem with regard to the disposition of 'Greensleeves' to Amy under mutual wills is whether any such agreement is caught by the **Law of Property (Miscellaneous Provisions) Act 1989, s. 2**. [3] In ***Healey v Brown [2002] EWHC Ch 1405***, the judge decided that it was, and as there was no contract in writing signed by both parties (as here), the agreement was void. He held, however, that the agreement for mutual wills was nevertheless enforceable as it was a contract for a constructive trust which arose under the wills, and so, like ***Yaxley v Gotts [2000] Ch 162***, was exempted from the formality requirement of **s. 2(1)** by **s. 2(7)**. Presumably the agreement as to the mutual wills disposing of 'Greensleeves' might similarly be enforceable as the wills would give rise to a constructive trust.

[3] Problem of land.

It is probable, therefore, that Amy and Bea will be able to challenge Olga's will leaving all her property to Nigel, and require her estate to be administered according to the terms of her will and codicil made shortly before Clive died. The decision in ***Goodchild*** suggests that even if there is no legally binding

obligation not to revoke a will, the moral obligation ensuing on the death of the first testator to die binds that person's property in the hands of the second testator, who is therefore under an obligation to deal with it as agreed.

There are a number of vexed questions with regard to the property which is subject to any trust created by mutual wills and there do not seem to be any very satisfactory answers. [4]

[4] The big debate—and one of the problems with mutual wills.

Does any trust arising attach only to the property which the survivor receives from the other party to the agreement, or does it attach to all the survivor's property on death? [5] If the latter, then the £500,000 which Olga won on the football pools would also be subject to any trust arising. As the survivor entered into an agreement to leave all their own property to the same third party too, this would seem to be a tenable argument. In ***Re Dale [1994] Ch 31***, it was ↵ held that the trust attached to all the property held by the survivor at the date of the survivor's death. In ***Re Hagger [1930] 2 Ch 190***, also a first instance decision, it was considered that the trust should at least attach to all the property held by the survivor at the date of the first death. In ***Re Green [1951] Ch 148***, it was held that the trust attached only to the property received under the will of the first party to die, but this intention was clear from the terms of the will.

p. 237

[5] Where it is debatable, ask it in question form.

Does the trust arising prevent the survivor from disposing of any property they receive under the will of the first to die? [6] If so, it would effectively be only a life interest in that property which the survivor has. In the Australian case of ***Birmingham v Renfrew (1937) 57 CLR 666***, Dixon J said that the survivor could enjoy the property as if an absolute owner, subject to restrictions on his rights of alienability, but that on his death this 'floating obligation' crystallised and attached to the property. If this is correct, presumably an action could have been brought during Olga's lifetime to prevent her from disposing of any very large sums of money. This point did not arise and was not considered in ***Re Dale***.

[6] And again state the query here as a question.

Additionally, Amy may have grounds to claim the house under the equitable doctrine of estoppel. [7] This could apply to the circumstances of the question in two ways. First, it could apply to make the oral agreement between Clive and Amy enforceable notwithstanding the absence of the requisite formality for a contract for the disposition of land. Secondly, Amy's acting to her detriment in reliance upon a promise made by her father could found a claim in proprietary estoppel.

[7] Is there an estoppel?

An oral agreement for the disposition of land will be void as it does not comply with **s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989**, which requires any such agreement to be in writing and signed by both parties. Before 1989, such an agreement had to comply with the formality requirements of s. 40 of the Law of Property Act 1925, but equity would enforce a purely oral agreement if there was a sufficient act of part performance by the party seeking to enforce it, and in ***Wakeham v Mackenzie [1968] 1 WLR 1175*** a housekeeper was able to enforce an oral agreement to leave the house to her in return for work she had done. Section 40 was repealed by the 1989 Act and the Law Commission envisaged that the equitable doctrine of part performance would be replaced by estoppel. In ***Yaxley v Gotts [2000] Ch 162***, an oral agreement that a builder who converted a building into flats should have one of the flats in return for his work was held to be binding not only on the person with whom he agreed, but also on his son who knew of the agreement and adopted it. The Court of Appeal applied estoppel, although Robert Walker LJ felt that the situation could also give rise to the imposition of a constructive trust. The agreement between Amy and Clive, ↵ whereby she gave up work to go and look after him, might therefore be enforceable against Olga and her estate.

p. 238

Amy has also acted to her detriment by spending money on the house in modernising the kitchen and the bathroom. The doctrine of estoppel is much wider in its scope than the doctrine of part performance and may be used to enforce a promise upon which the promisee has acted to their detriment.

The promisor is then estopped from going back on the promise and an equity attaches to the property to which it relates, not only in the hands of the promisor himself but also in the hands of a volunteer acquiring the property from him. Thus in ***Inwards v Baker [1965] 2 QB 29, CA***, a son who was persuaded by his father to build a bungalow on a plot of land belonging to the father was able to remain there after the father died and the land passed to his mistress. In ***Pascoe v Turner [1979] 1 WLR 431***, a man who told a cohabitee with whom he lived that his house and contents all belonged to her, and was aware that she was spending her frugal savings on repairing and redecorating the house after he had left, was estopped from denying this and was obliged to convey the fee simple in the property to her.

Moreover, estoppel is not restricted by the fundamental premise of testamentary freedom (***Gillett v Holt [2000] 2 All ER 289***). The acquiescence relied upon to found a claim of proprietary estoppel should relate to the property. Amy has acted to her detriment in modernising the property and, if this was in reliance upon her father's promise, this may well be sufficient. Both Olga and Nigel are volunteers, so that Amy's claim to the house, which is necessarily equitable and not registrable under the **Land Charges Act 1972** (per Denning LJ in ***E. R. Ives Investment Ltd v High [1967] 2 QB 379***), might succeed on this ground also.

Looking For Extra Marks?

- If you get all the points in this complex question you will be heading for high marks.

Taking Things Further

- Luxton, P., '*Walters* v *Olin*: uncertainty of subject matter—an insoluble problem in mutual wills?' [2009] Conv 498–505.

This article deals with the problems created by mutual wills.

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