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

Rosalind Malcolm

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3. The Three Certainties and Formalities

Rosalind Malcolm, Barrister, Professor of Law, University of Surrey

https://doi.org/10.1093/he/9780198853213.003.0003

Published in print: 06 August 2020

Published online: September 2020

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 the three certainties and formalities.

Keywords: certainty of intention, subject matter, certainty of objects, formalities, trusts, legal title, beneficiaries, trustees, trust law

Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Certainty of intention
- Certainty of subject-matter
- Certainty of objects
- The formalities required for the creation of a trust

Key Debates

Debate: should a trust be created to prevent money paid to a company for a particular purpose being available for distribution generally to its creditors?

The cases on this point have been criticised in academic articles (see, for example, Goodhart and Jones, 'The Infiltration of Equitable Doctrine into English Commercial Law' (1980) 43 MLR 489 and P. J. Millett, 'The Quistclose Trust: Who Can Enforce It?' (1985) 101 LQR 266). They are, however, defensible on the practical grounds that if potential customers or lenders who are helping a company to survive are not allowed to protect their property, they will not be prepared to deal with the company at all. In ***Re Kayford Ltd [1975] 1 WLR 279***, where Megarry J found that a trust had been created, he made the point in his judgment that, although it was quite proper for the mail order company to have done what it did with money received from members of the public, he was not so sure that the same considerations should apply to commercial creditors. The distinction has not been drawn in subsequent cases, however, where the courts have found trusts in favour of commercial creditors also (see ***Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd [1985] Ch 207*** and ***Re Lewis's of Leicester [1995] 1 BCLC 428***).

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Question 1

Lucien, who died recently, left a will appointing Bill and Ben his executors and trustees. The will contained the following dispositions:

a 'My freehold house to my wife Harriet absolutely in full confidence that she will hold it for either my daughter Tessa or my son James as she sees fit.'

b 'The income from my blue-chip shares to my trustees Bill and Ben from which they must ensure that my old Uncle Tom has a reasonable standard of living.'

c 'Three of my five Van Gogh paintings to my trustees to hold one of them in trust for my sister Pearl, whichever she may choose, and the other two in trust for my sister Jewel.'

Pearl died before the testator.

Advise Bill and Ben as to the validity of these dispositions.

Would your answer in (c) differ if Pearl had survived the testator but died before choosing?

Caution!

■ This question is an example of how two parts of a question, (a) and (b), may both include different examples of uncertainty as to words or intention. You should therefore state the general law on this subject fairly fully in your answer to (a), but merely refer to it briefly and apply it in your answer to (b).

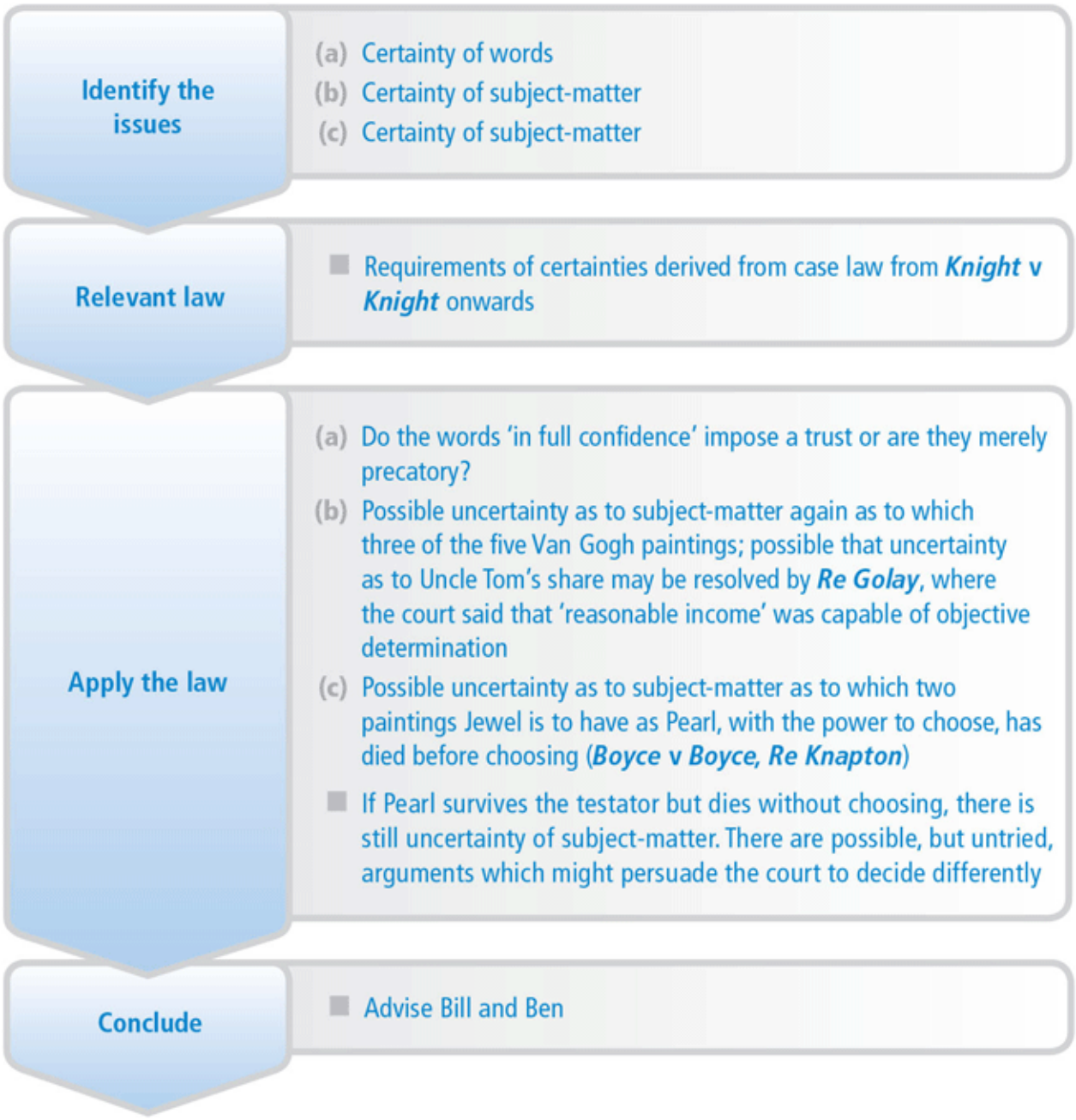
■ Both parts (b) and (c) include uncertainty as to subject-matter, and again any general statement of law on this should be made under (b) and avoid repetition of this under (c).

■ It may be appropriate to mention some cases briefly in (a) and discuss them further in (b) and (c), but make sure that they are relevant ones, e.g. ***Mussoorie Bank v Raynor (1882) 7 App Cas 321***. However, as well as looking for an understanding of the requirement of certainty of intention, the examiner will be looking for a proper application of the law to the problem set and not a general discussion of cases which are dissimilar.

■ Sometimes there is a trap in these apparently straightforward questions. If the question seems to fit very obviously into a particular precedent (as in part (a) of this question), look out for a later precedent which may distinguish it.

■ Frequently, parts of the question may appear to be based directly on one case. Avoid the temptation to start your answer with a reference to the case. Establish the general principle, apply it to the particular problem, and then support it with a reference to the particular case.

Diagram Answer Plan



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Suggested Answer

(a) Freehold House

In ***Knight v Knight (1840) 3 Beav 148***, Lord Langdale MR said that three certainties were required to establish a valid trust, namely, certainty of words (or intention), subject-matter, and objects.[1] The essence of a trust is that it imposes a binding obligation on the trustees, and the question to consider here is whether the words used are sufficiently obligatory to impose a trust. Until the **Executors Act 1830**, courts were very ready to find a trust, as property to which a trust was not attached would remain in the hands of the executors. The **Executors Act 1830** changed this, however, and from then on the courts were less willing to find a trust where the words used could be construed as merely precatory. ***Lambe v Eames (1871) 6 Ch App 597*** ↵ is generally regarded as the turning-point, where the court refused to construe merely precatory words as creating a trust. In ***Re Steele's Will Trusts [1948] Ch 603*** it was said that the exception to this would be where a testator had used identical wording to that previously held to create a trust. This case has been criticised, however, for replacing a search for the testator's intention with a mechanical application of legal rules; furthermore it ignores the fact that the meaning of words can change over time.

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[1] You could separate this as an introduction to all that follows. But it is a single sentence and works just as well as part of the answer to part (a).

There are two conflicting cases where words used were similar to those found here. In ***Re Adams & Kensington Vestry (1884) 27 ChD 394*** a gift 'to the absolute use of my wife … in full confidence that she will do what is right as to the disposal thereof between my children' was held not to impose any trust upon the wife but was construed by the court to be an absolute gift to her. In ***Comiskey v Bowring-Hanbury [1905] AC 84***, however, the House of Lords (Lord Lindley dissenting[2]) considered a bequest to the testator's wife of 'the whole of my real and personal estate absolutely in full confidence that she will make use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default to my nieces equally'. This was held to create a trust for the widow for life, remainder to the nieces as she might by will appoint, but otherwise equally between them, as the testator had shown a clear intention to benefit his nieces in any event.

[2] See 'Looking for Extra Marks?' later. You could take this dissenting opinion further for extra marks. But if you do that—be judicious and don't devote too much space to a lengthy discussion for fear of going off-point.

In ***Re Hamilton [1895] 2 Ch 370*** it was said by Lindley LJ that each disposition must be construed on its own merits. So, in ***Suggitt v Suggitt [2011] EWHC 903 (Ch)***, the court considered it quite clear that a trust was not intended where the words used were: 'And I express the wish (without imposing a trust)'. The disposition in this problem appears to be nearer to ***Re Adams & Kensington Vestry*** than to ***Comiskey v Bowring-Hanbury*** on the ground that there is no gift over in default. Nevertheless it may be possible to distinguish the disposition in (a) from ***Re Adams & Kensington Vestry*** on the specificity of the ultimate beneficiaries—in which case it could be construed as imposing a trust.

If there is a trust, it is a discretionary trust for either Tessa or James, and there is therefore no uncertainty of objects. If the words are held not to impose a trust, then the disposition operates as an absolute gift to Harriet.[3]

[3] Students often forget to add this part focusing just on the discussion of certainty of intention.

(b) Income From Blue-Chip Shares[4]

[4] Never come across this expression? That means you have not come across ***Re Kolb*** which might make answering this question difficult.

For a trust to be valid, the subject-matter must also be certain. This includes both the property and the beneficial interests which the beneficiaries are to take. If either of these is uncertain, the trust will fail. In this case, it is possible that both are uncertain.

p. 28 ↵ In ***Re Kolb's Will Trusts [1962] Ch 531*** it was said that a reference to stocks and shares 'in the blue-chip category' was insufficiently certain because the term 'blue-chip', whilst used to indicate a very good share, has no precise meaning. If so, the trust will fail for uncertainty of subject-matter, which means that all Lucien's shares (and the income therefrom) not otherwise validly and specifically bequeathed, will form part of Lucien's residuary estate. If, however, the reference to blue-chip shares is held sufficiently certain it becomes necessary to consider other parts of this disposition.

The wording 'they must ensure' might well be sufficiently obligatory to impose a trust on the income in the hands of the trustees, as it indicates that the trustees were not intended to enjoy the whole of the income beneficially. It would appear, however, that they are not to use the whole of the income for Uncle Tom. Sufficient income for a reasonable standard of living might appear to be uncertain, but in ***Re Golay's Will Trusts [1965] 1 WLR 969*** it was held that 'a reasonable income' was capable of being quantified objectively in relation to a person's lifestyle. Presumably, therefore, a sufficient income relating to Uncle Tom's lifestyle could be ascertained.

If the gift fails for lack of certainty of subject-matter then it will fall back into the estate and be disposed of in accordance with the provisions of the will regarding residue (or, failing that, fall to be determined according to the rules of intestacy).

(c) Van Gogh Paintings

The problem in this part of the question is again to determine the subject-matter of the trust. There is an initial uncertainty as to the subject-matter of the trust as a whole, that is, as to which three of the five Van Gogh paintings are to be held on trust for Pearl to choose from. This is similar to ***Palmer v Simmonds (1854) 2 Drew 221***, where a gift of 'the bulk of my estate' failed for uncertainty. Additionally, the interests of Pearl and Jewel are uncertain until Pearl has made her choice; death means that no choice can now be made. In ***Boyce v Boyce (1849) 16 Sim 476***, a testator left three houses in his will, 'one to Maria, which she may choose; the others to Charlotte'. Maria predeceased the testator, and the trust for Charlotte, which was dependent upon Maria's choice, was held to fail for certainty of subject-matter. Pearl having predeceased the testator, it is impossible to determine which paintings should be held in trust for Jewel. All three paintings will therefore fall into residue. In the absence of a residuary gift, they will pass, as on intestacy, to Lucien's next-of-kin.

If Pearl survives the testator but died before choosing?

If Pearl had survived the testator but died before making a choice, although prima facie there is still an uncertainty of subject-matter, it is possible that this would enable the circumstances to be distinguished from ***Boyce v Boyce***. The ***Boyce v Boyce*** situation has an element of ademption about

p. 29 ↵ it as the testator is presumed to know that Pearl has predeceased him and is therefore unable to make a choice. However, if the testator has no reason to suppose that Pearl will not choose and dies in the belief that he has set up a valid trust, it might be possible for equity to intervene, although it is not clear how. The maxim 'Equity is equality' would not reflect the testator's intentions. In ***Re Knapton [1941] 2 All ER 573***, the gift was saved by the complete absence of a mechanism to make a selection. It involved a number of houses which were to be distributed among identified relatives and friends. It was held that the beneficiaries could choose the house they wanted in the order in which they appeared in the will as the judge concluded that the intention was that they were to have one each. This sensible conclusion might well be applied to a situation where Pearl survives the testator but then dies without making a selection. It could be argued in reliance on ***Re Knapton***, that the intention had been that Pearl would have one painting and Jewel the other two.

One tenuous argument might be that Lucien intended to make Pearl a trustee of the power of selection, i.e. that it is a trust power to select. This would mean that the maxim 'Equity will not allow a trust to fail for want of a trustee' could be applied, and someone else (or even the court) could make the choice. On the wording of the disposition, however, there seems little to favour such a construction.[5]

[5] No overall conclusion as each part is self-contained. To repeat would be a waste of words.

Looking For Extra Marks?

■ Generally, these problem questions are gifts to the reasonably well-prepared examinee. No such person should get less than a 2(ii) on such a question. Conversely, it is quite difficult to get a first. You would really need to impress the examiner with a detailed knowledge of the cases, perhaps even referring to distinguishing judgments (as in question 1(a) with the reference to ***Comiskey v Bowring-Hanbury [1905] AC 84***).

Question 2

Clockwise Ltd is a mail order company selling a particularly popular line of talking alarm clocks. It received numerous orders with accompanying cheques but, because of difficulties with the suppliers of certain components, was unable to dispatch the orders. On the advice of the company's accountants, the cheques were paid into a separate bank account which the bank was instructed to call the 'Customers' Trust Deposit Account'. Owing to an error by the bank clerk, the account was called instead 'Clockwise No. 2 Account'.

Clockwise Ltd also wished to purchase some new machinery, and one of its business associates, Ticktock plc, agreed to lend the company the sum of £10,000 solely for this purpose. This money was paid into ↵ another separate account called 'Clockwise No. 3 Account'. Clockwise Ltd signed an agreement for the purchase of the machine and paid a deposit of £3,000 from this account, leaving in it £7,000.

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Unfortunately, the problems with Clockwise's suppliers became more acute and Clockwise Ltd has now gone into liquidation. The bank (which is owed money by the company) and the liquidator are claiming the monies in the No. 2 and No. 3 accounts.

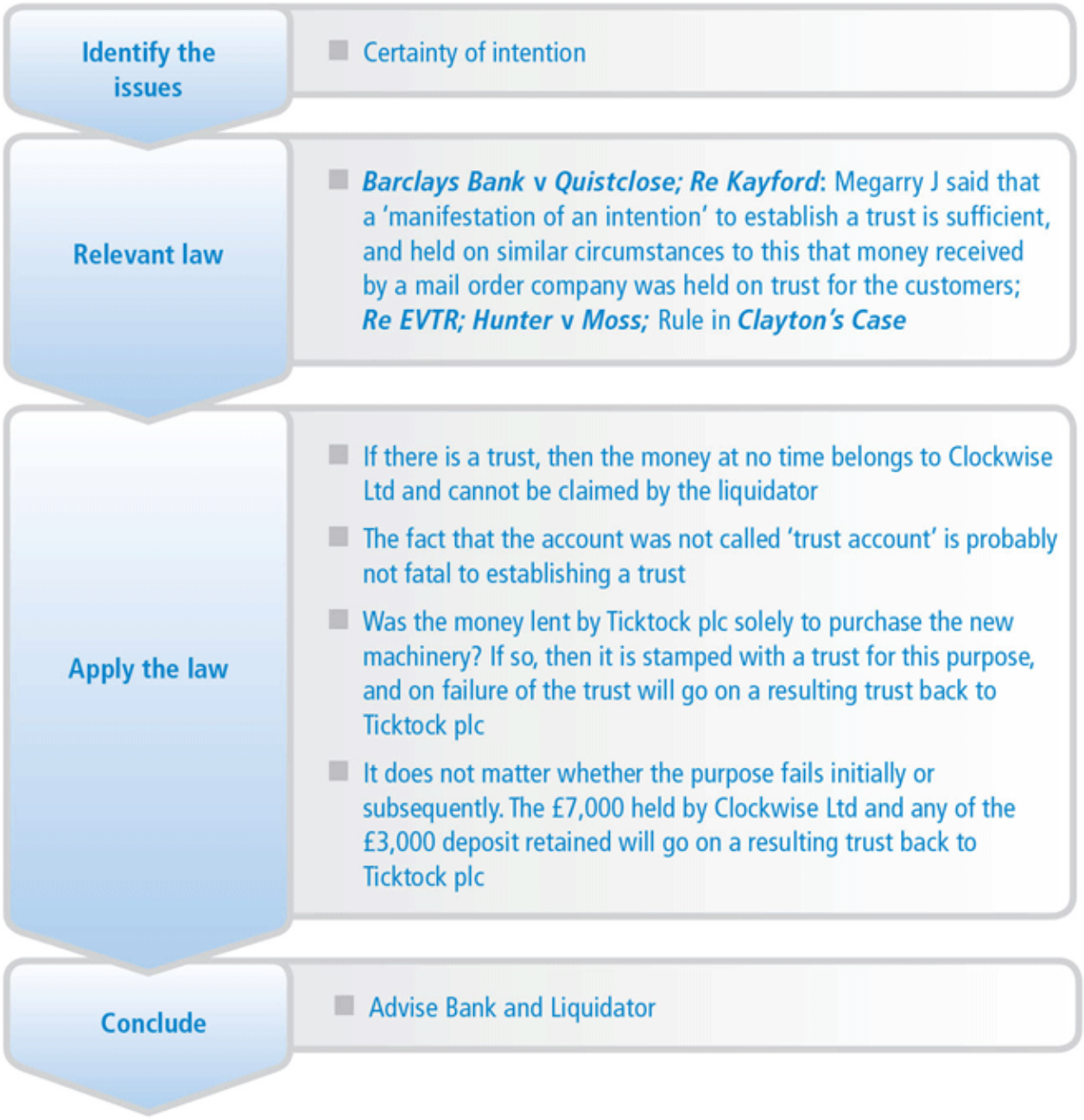
a Advise the bank and the liquidator.

b Would your answer differ if the monies paid by the customers, and lent by Ticktock plc had, by an error of Clockwise Ltd, been paid instead into Clockwise Ltd's general trading account?

Caution!

■ This is quite a complex question—especially with the addition of the rider at the end (a sting in the tail). It is a good example of a question which assumes you have the whole course at your fingertips linking certainties and tracing.

Diagram Answer Plan



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Suggested Answer

Part (a)

One of the three certainties essential to establish a valid trust is the certainty of words or intention. Words are not themselves necessary: the person in whom the property is vested may manifest a clear intention to create a trust by actions. In ***Paul v Constance [1977] 1 WLR 527***, a man said on several occasions that funds in a deposit account in his name belonged both to himself and his mistress. **Section 53 of the Law of Property Act 1925** does not require any formality for the creation of a trust of personalty, and these oral statements were held to be sufficient to create a trust for his mistress of half of the money in the account.

In ***Re Kayford Ltd [1975] 1 WLR 279***, a mail order company, which was experiencing financial difficulties, paid cheques received from customers into a separate dormant account which only at a later date was called 'Customers' Trust Deposit Account'. Megarry J held that this appellation was a sufficient manifestation of intention to create a trust of the monies therein for the customers. Being a trust of personalty, no written formalities were required by the **Law of Property Act 1925, s. 53**, for its creation. The monies having been kept separately meant that there was certainty of subject-matter; the objects of the trust (the customers) were also certain.

Although in the question the account into which the monies have been paid does not bear the name 'Trust Account', the fact of segregation of the money received from the customers may be sufficient evidence of certainty of intention to create a trust.[1] As the money has been kept separately there is also certainty of subject-matter; the beneficiaries are the customers. The money would not therefore be available to the bank or the liquidator.

[1] Good example of referencing the exam question.

Similarly, where property is handed over for a particular purpose only, this may be sufficient to impress it with a trust for that purpose. In ***Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567***, Quistclose lent some £200,000 to Rolls Razor Ltd (which was in financial difficulties) for the sole purpose of paying a dividend on its ordinary shares. The money was paid into a separate bank account. Rolls Razor went into liquidation before the dividend was paid. It was held that the money was not available to the bank with whom the account was opened, nor for distribution by the liquidator to the general creditors of the company. It had from the start been impressed with a trust for a particular purpose (the payment of a dividend) and had therefore never belonged to Rolls Razor beneficially. When the trust failed because the liquidation prevented the payment of the dividend, the money was held on a resulting trust for Quistclose.

Applying these principles to the question, it would seem that the money paid by Clockwise Ltd into a separate account for the purpose of purchasing machinery would similarly be impressed with a trust for that purpose, and again would not be available to the bank or the liquidator.[2] ↵ In ***Re Kayford Ltd [1975] 1 WLR 279***,[3] where Megarry J found that a trust had been created, he made the point in his judgment that, although it was quite proper for the mail order company to have done what it did with money received from members of the public, he was not so sure that the same considerations should apply to commercial creditors. The distinction has not been drawn in subsequent cases, however, where the courts have found trusts in favour of commercial creditors also (see ***Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd [1985] Ch 207*** and ***Re Lewis's of Leicester [1995] 1 BCLC 428***).

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[2] This sentence provides an interim conclusion keeping the discussion anchored and structured.

[3] This remaining part of the paragraph is good for 'extra marks'. See the 'Key Debates' section earlier in this chapter.

Does the fact that part of this money has already been appropriated for the purpose affect the trust as to the remainder?[4] In ***Re EVTR Ltd [1987] BCLC 646***, money lent for the purchase of a machine was paid to the borrower company's solicitors. When the borrower company went into liquidation, it had already paid part of the money to the suppliers under a contract of purchase. The Court of Appeal found no reason to distinguish between the resulting trust, which would have arisen if the purpose for which the money was paid had failed initially, and the failure of the purpose only subsequently. Money returned by the suppliers was held to go on a resulting trust for the lender. In the question it is likely that the £7,000 still held by Clockwise Ltd, and any money repayable to them from the £3,000 deposit paid, will go on a resulting trust for Ticktock plc.

[4] It might be easy to miss this point.

Part (b)

What if the monies in either case are paid into Clockwise Ltd's general trading account by error?

In such circumstances, although the necessary intention to create a trust might be there, there would be no certainty or segregation of the subject-matter and it would almost certainly be impossible to find a trust. In the case of the customers' cheques, presumably if a trust were intended, it would affect only funds paid into the designated account. Payment into a different account would therefore

prevent the trust being constituted. In the case of Ticktock's money, although the money would be impressed with a trust from the start, there would be the practical problem that money paid into the general trading account might not be traceable. The case of ***Hunter v Moss [1994] 1 WLR 452***[5] suggests that segregation of the subject-matter of a trust is not essential if the subject-matter is all identical and the Court of Appeal in ***Lehman Brothers (Europe) (in Administration) v CRC Credit Fund Ltd [2010] EWCA Civ 917*** stated that certainty is achieved provided that the source of the assets is identified. It might be argued on behalf of the customers of Clockwise Ltd that Clockwise Ltd has done everything in its power to constitute a trust so that the principle in ***Re Rose [1952] Ch 499*** (as approved in ***Zeital v Kaye [2010] EWCA Civ 159***) should apply. If it is possible to establish a trust in favour of the customers and Ticktock plc then they may be able to trace the trust monies into Clockwise Ltd's general trading account. They will only have a claim, however, to the ↵ extent that their monies are still in the account and not deemed to have been paid out under the rule in ***Clayton's Case (Devaynes v Noble (1816) 1 Mer 572)***.[6] If the account has been overdrawn at any time since the monies were paid in, then their claim will be defeated.

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[5] You will see that I deal with this case in the answer to question 3 at part (d).

[6] For a more detailed explanation of the rules relating to tracing, see Chapter 13.

Looking For Extra Marks?

■ The section dealing with the debate on the use of ***Quistclose*** is an example of 'extra marks'. You could also consider adding in some of the academic literature on this point although beware of losing sight of the problem question.

■ Likewise the reference to the rules of tracing and ***Clayton's Case***.

Question 3

Consider whether a trust has been created in the following circumstances:

a Eliza orally declared herself a trustee of her house, Dunroamin, for her son Percy. She subsequently wrote a letter to Percy informing him that she had done so.

b Oliver, on visiting his only niece, Alison, aged ten, handed her an emerald ring which had belonged to his grandmother. As he handed it over, Oliver told Alison that she was to have the ring. When Oliver left, he took the ring with him, and when he died shortly afterwards, it was found among his effects.

c Simon, who died recently, made a will leaving, *inter alia*, 'the residue of my estate to my dear wife Sarah trusting that she will dispose of whatever she does not want between such of my relatives and friends as she shall select'.

d One Friday, Paul bought ten tickets in the National Lottery. He immediately declared himself a trustee of nine of them for his son Steve, and of the remaining one for his girlfriend Gladys, but without indicating which of the ten was to be held for Gladys. The following day, when the draw was made, one of Paul's tickets won the top prize of £40 million.

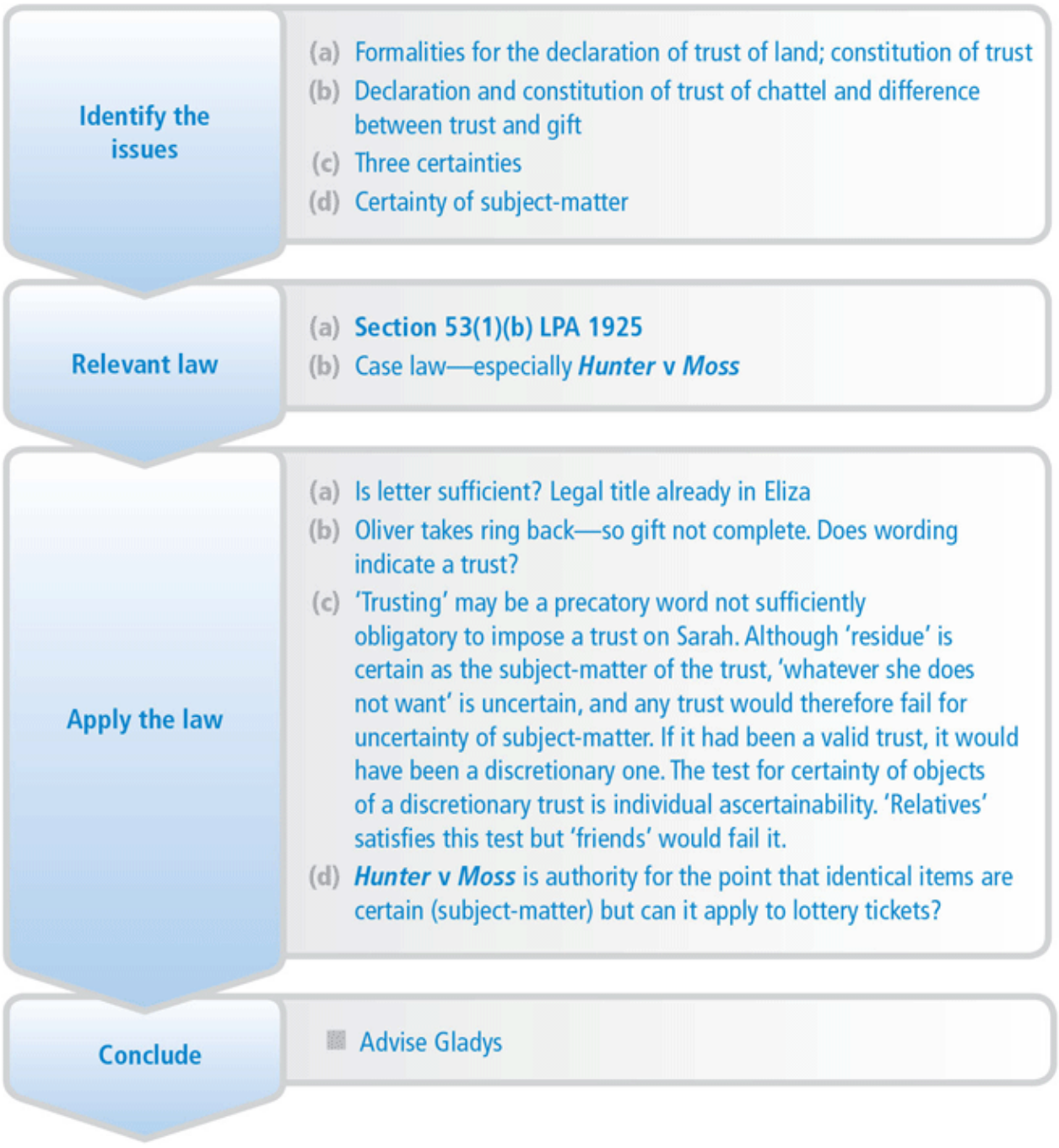
Advise Gladys.

Caution!

■ This is a certainty question mixed with other areas of trust law. In (a) all three certainties are satisfied, but you are required to consider whether the necessary formalities for the creation of a trust of land have been complied with. Part (b) raises the question of the constitution of a trust and the difference between a trust and a gift. Part (c) raises doubts about all three certainties, but also requires a knowledge of the test for certainty of objects for discretionary trusts and powers, and some of the cases on this. In part (c) you will probably consider certainty of words and subject-matter first. If you come to the conclusion that the trust would fail on either or both of these, do not of course be deterred from discussing certainty of objects also. The examiner will undoubtedly be looking for a discussion of all three certainties. Part (d) deals with certainty of subject-matter in the light of ***Hunter v Moss [1994] 1 WLR 452***.

p. 34 ■ When dealing with different parts of the question, avoid repeating yourself. The examiner will not give you marks for regurgitating the same law again. Make sure you spot the new topic in the other part and deal with this at more length. If you think both parts are on certainty of intention and nothing else, then you are probably in trouble and should choose another question.

Diagram Answer Plan



Suggested Answer

(a) Dunroamin

The three certainties for a trust are satisfied,[1] but the **Law of Property Act 1925, s. 53(1)(b)**, requires that 'a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust ↵ or by his will'. Although the oral declaration of trust by Eliza is therefore ineffective, the subsequent letter testifying to the oral declaration signed by Eliza would be sufficient for the purpose of **s. 53**. The section does not require that the trust should be created in writing, but merely that its creation should be evidenced in writing.

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[1] This brief reference is enough to explain the certainties point.

(b) Emerald Ring

If Oliver had declared himself to be a trustee of Alison's ring, this would have been effective as it is possible to create a trust of personalty by words alone. As the ring is still in his possession, he would have held it as trustee and the trust would have been fully constituted. His words would have had the effect of severing the beneficial ownership in the ring, thereby creating the duality of ownership essential to a trust. However, Turner LJ stated in ***Milroy v Lord (1862) 4 De GF & J 264*** at p. 274 that the court will not allow a purported gift which is ineffective because there is no delivery of the subject-matter to take effect as a trust. In ***Jones v Lock (1865) LR 1 Ch App 25***, a father put a cheque into the hand of his nine-month-old son saying, 'I give this to baby for himself'. When he later died and the cheque was found among his effects, it was held that there had been no effective gift; nor had any effective trust of the cheque been created. Similarly, in ***Richards v Delbridge (1874) LR 18 Eq 11*** where a grandfather endorsed a lease of property he had with the words 'This deed and all thereto belonging I give to [his grandson] from this time forth', it was ineffective to transfer the lease by way of gift as a deed was required to transfer a legal estate in land. But neither could the words of gift be construed as an intention to create a trust.

If Oliver's words on handing over the ring to Alison indicate an intention to make a present gift, the gift is thereby perfected and his taking back the ring cannot recall such gift. In such circumstances, he would, at most, be a bailee of the ring for Alison.[2] On the other hand, Oliver's words on handing over the ring might indicate merely an intention to make a gift of it in the future. In these circumstances, Alison has merely custody or bailment of the ring, and Oliver is free to take it back (which he does).[3] If Oliver had made it clear when he left that he was taking the ring with him for safekeeping but he regarded it as belonging to Alison, this might have been sufficient intent to create

a trust of it for Alison with himself as trustee, or else merely a bailment with himself as bailee. However, there is no evidence to support such interpretation, and it is therefore probable[4] that there will be an ineffective gift and an ineffective trust.

[2] This is an 'extra mark' comment answering the question: if not owner then what is he?

[3] This is an example of a discussion around the question—'on the one hand ... this ... on the other hand ... that ...'.

[4] Good word to indicate what degree of certainty there is in your answer.

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(c) Residuary Gift

First,[5] it might be argued that the word 'trusting' in this context is a more colloquial expression than the legal words 'on trust for', implying merely reliance upon Sarah's integrity rather than imposing an obligation on her. If this is argued successfully, then the words are precatory in nature and fail to satisfy the certainty of words necessary to create a trust.

[5] Sometimes it is good, as here, to list your points numerically. But don't accidentally leave out the 'secondly' and 'thirdly'.

Secondly, 'the residue of my estate' is sufficiently capable of ascertainment to form the subject-matter of a trust (the residue being the remainder of a person's estate not specifically disposed of). Nevertheless, there is uncertainty of subject-matter here because the share which the friends and relatives are to receive ('whatever she does not want') is necessarily uncertain. In ***Sprange v Barnard (1789) 2 Bro CC 585***, a gift to the testatrix's husband with a provision that 'at his death, the remaining part of what is left, that he does not want for his own wants and use' was to be divided between the testatrix's brother and sisters, failed as a trust for uncertainty of subject-matter.

The third certainty, that of objects, also has to be considered here. If the requirements of certainty of words and subject-matter were satisfied, there might still be a problem with regard to certainty of objects. This would be a discretionary trust and the test for certainty of objects is that laid down by the House of Lords in ***McPhail v Doulton [1971] AC 424***, namely, can it be said of any given postulant that they are, or are not, within the scope of the discretion? When the Court of Appeal considered the

application of this test to the word 'relatives' in ***Re Baden's Deed Trusts (No. 2) [1973] Ch 9***, the Court of Appeal decided that the expression 'relatives' was conceptually certain enough to satisfy the test, although the judges had differing reasons for deciding this. We therefore have high judicial authority that the word 'relatives' is conceptually certain.

In ***Re Barlow's Will Trusts [1979] 1 WLR 278***, the testatrix directed that 'any friends of mine' might buy a painting from her collection at a reduced price. This was held valid, but only because the court interpreted this as a series of individual gifts to apply conditionally to anyone who was able to satisfy the trustees that he or she was a friend. The test for certainty of objects of conditional gifts is, however, more relaxed than that applicable to certainty of objects of discretionary trusts. Had the provision been construed as a discretionary trust (or fiduciary power) to select amongst the testator's friends, it would not have satisfied the test in ***McPhail v Doulton***. As part (c) involves a discretionary trust, the disposition might well fail the ***McPhail v Doulton*** test for conceptual certainty.[6]

[6] A slightly guarded conclusion which is fine given the arguments which have been made.

(d) Lottery Tickets

A declaration of trust relating to property other than land may be made orally, so that the declaration of trust made by Paul does not offend the **Law of Property Act 1925, s. 53**.[7] It would seem, however,

p. 37 ↵ that the purported declaration of trust is void for uncertainty of subject-matter, in that the interests of the intended beneficiaries, Steve and Gladys, have not been specified. In other words, Paul has not indicated which tickets he is holding for which beneficiary.

[7] An introduction to the problem.

In ***Hunter v Moss [1994] 1 WLR 452***, the Court of Appeal held that a declaration of trust of 50 shares from a holding of 950 did not fail for uncertainty of subject-matter, even though the settlor had not specified which particular shares out of his holding were to be subject to the trust. A different result had been reached in the earlier decision of ***Re London Wine Co. (Shippers) Ltd (1975) 126 NLJ 977***, where a purported allocation of some bottles of wine in a wine cellar was held insufficient to confer a property interest, since no bottles had actually been segregated and set aside for a particular customer. ***Re London Wine Co.*** was applied by the Privy Council in ***Re Goldcorp Exchange Ltd [1995] 1 AC 74***, where it was affirmed that on the purchase of unascertained goods, there was no fixed and identifiable bulk created by a deemed appropriation, and therefore no property to which any tracing claim could apply. The purchasers of unascertained goods (as in ***Goldcorp***) may now have a better

claim as against creditors in a liquidation under the **Sale of Goods (Amendment) Act 1995**, which provides that purchasers who have paid for such goods acquire property rights as tenants in common in them. This would not of course affect a declaration of trust of identifiable and ascertained goods.

The ***London Wine Co.*** case was distinguished in ***Hunter v Moss*** on the ground that the bottles of wine might not be of equal quality, whereas the shares were all of the same class and carried the same rights. This is not true of tickets in the National Lottery, since the particular number selected for each ticket is an intrinsic part of its potential value. ***Hunter v Moss*** is therefore distinguishable.[8] The suggestion in ***Hunter v Moss*** that the tracing remedy could be used to cure uncertainty of subject-matter has been criticised:[9] Luxton, 'Certainty of subject-matter: a problem shared?' (1994) 28 Law Teacher 312. In any event, it is difficult to see how the tracing rules could be used to identify which beneficiary is entitled to the winnings.

[8] If the answer is clear then be clear in your answer.

[9] This is an 'extra marks' point.

Therefore, the only way in which certainty of subject-matter could be satisfied would be if the declaration could be construed as creating not one trust for Steve of nine tickets and another for Gladys of one ticket, but rather a single trust of all ten tickets under which Steve and Gladys, as tenants in common of the whole, share the beneficial interest in the ratio of 9:1 in Steve's favour. Such an approach was approved in the Australian case of ***White v Shortall [2006] NSWSC 1379*** where beneficial co-ownership over the shares in question was the solution. This approach was also approved in ***Lehman Brothers*** ↵ ***(Europe) (in Administration) v CRC Credit Fund Ltd [2010] EWCA Civ 917***. The winnings would then be held in trust for them both in the same ratio. This does not seem, however, to be what Paul intended. The trust is therefore probably void[10] for uncertainty of subject-matter, and Paul is entitled to keep the winnings for himself.[11]

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[10] You can prevaricate in your answer when it is genuinely not free from doubt.

[11] Don't forget to say this—if the trust fails where does the subject-matter go?

Looking For Extra Marks?

■ Raise contentious issues contained in secondary references. ***Hunter v Moss*** is much criticized so reference to the literature here to show that you understand the critique would raise the mark. The article by Chung (2019) (see 'Taking Things Further') is also worth including as it criticises ***Re Goldcorp Exchange Ltd (In Receivership) (PC)*** on whether an alleged trust of gold bullion held for customers was ineffective for lack of certainty about the subject-matter of the trust. You don't have to agree with it but showing that you appreciate the critique will earn marks.

■ Note the comments boxes for extra marks points.

Question 4

Last year, as part of his estate planning, Wurzel, a wealthy farmer, wished to dispose of some of his property for the benefit of his family. His first step was to set up a family trust, of which his friends, Oats and Rye, agreed to be the trustees and to hold any property which Wurzel might transfer to them upon any trusts that Wurzel might declare.

Wurzel transferred the freehold title to six holiday cottages in Wales into the names of Oats and Rye, and sent them the deeds. Upon Wurzel's recent oral instructions, his solicitor wrote to Oats and Rye directing them to hold the cottages and the shares in trust for Wurzel's two grandchildren, Turnip and Carrot, in equal shares.

Two years ago, Wurzel transferred his holding of 5,000 shares in Racine Ltd into the name of the Cube Bank plc as security for a loan which the bank made to him. Six months ago, Wurzel repaid all sums due under the loan, and at the same time wrote to the bank instructing it to transfer the shares into the names of Oats and Rye.

Last month Wurzel orally declared himself a trustee for his son, Spinach, of his (Wurzel's) beneficial interest under the Root Trust.

Consider the validity and consequences of Wurzel's actions.

Caution!

■ The **Law of Property Act 1925, s. 53**, has been interpreted on a number of occasions in the House of Lords, namely in ***Grey v IRC [1960] AC 1***, ***Vandervell v IRC [1967] 2 AC 291***, and ***Oughtred v IRC [1960] AC 206***, and, in the Court of Appeal, in ***Re Vandervell's Trusts (No. 2) [1974] Ch 269***. In each of

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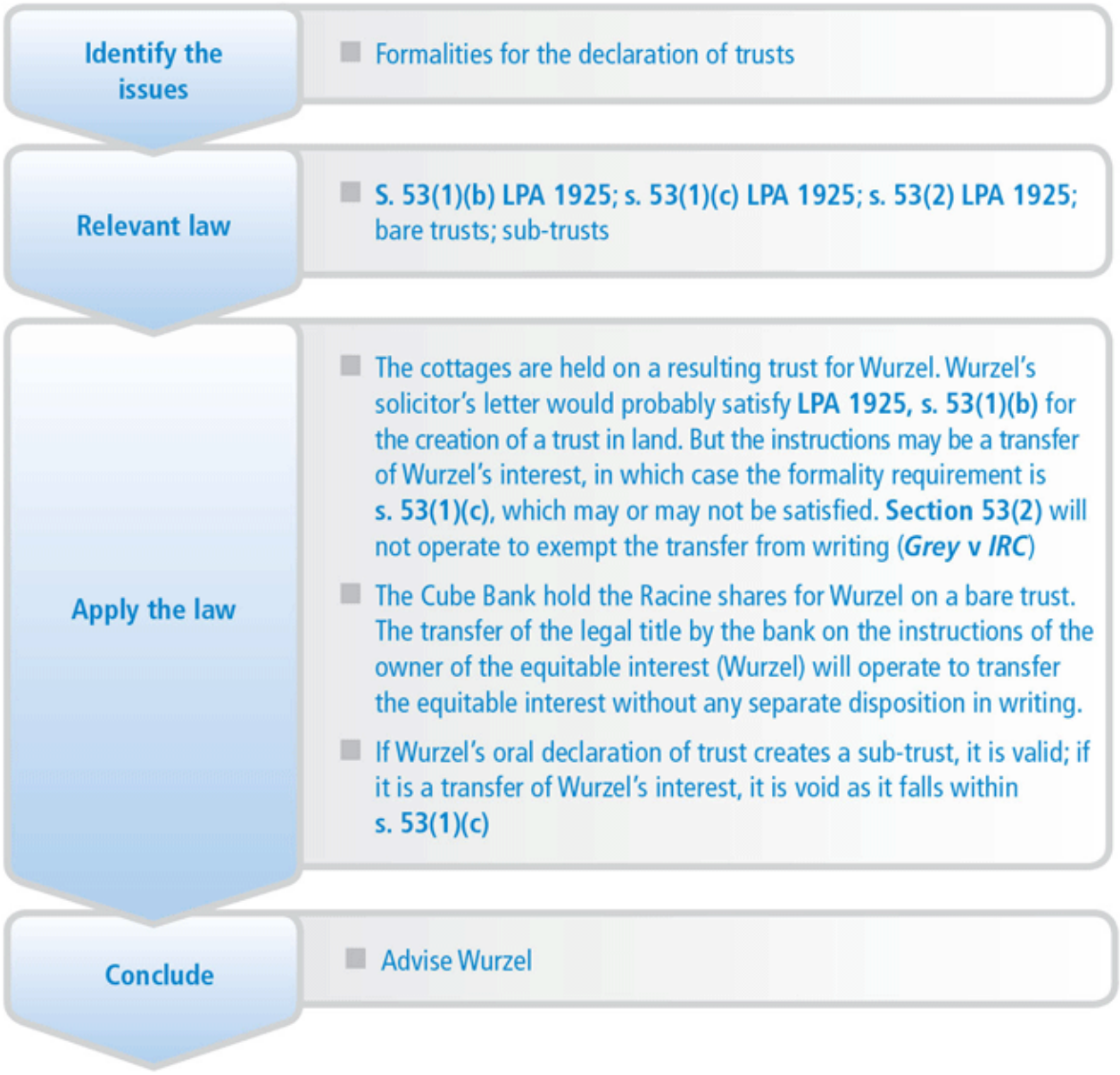
these cases it fell to be determined whether a particular transaction attracted *ad valorem* stamp duty or income tax. Stamp duty is a tax on documents only; it has in recent years been restricted in scope, but it still applies to transfers of land and to sales of shares. The consequence of failure to have a document stamped is that it cannot be produced as evidence in court. In general, you will not need to recount the facts of these cases but apply them strictly to your problem. If necessary, give a very brief account.

Diagram Answer Plan



Suggested Answer

Six Cottages

When Wurzel transferred the legal title to the six cottages to his trustees without informing them of the names of the beneficiaries, the trustees would have held the legal title to the cottages on a resulting trust for Wurzel: ***Grey v IRC [1960] AC 1***. A resulting trust arises ↵ whenever there is a gap in the beneficial ownership: as there was with the option to purchase back the shares given to the Vandervell Trustee Co. in ***Vandervell v IRC [1967] 2 AC 291***.

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Wurzel's declaration of the trusts of the cottages is subject to the **Law of Property Act 1925, s. 53**.

Section 53(1)(b) applies if Wurzel's equitable interest under the resulting trust ranks as an interest in land. It requires a declaration of a trust of land or any interest in land to be manifested and proved by some writing signed by some person who is able to declare such trust or by his will. The expression 'some person who is able to declare such trust' must be intended to include some person other than the settlor.

The question is whether the letter that Wurzel's solicitor sent to Oats and Rye could satisfy para. (b). There is no authority on this point;[1] but the express inclusion of signature by an agent in paras (a) and (c) of **s. 53(1)** might suggest that signature by agent does not satisfy para. (b): *expressio unius exclusio alterius*.[2] It would appear, however, that the transferee can sign: ***Gardner v Rowe (1828) 5 Russ 258***. It would also appear that, unlike paras (a) and (c), para. (b) is merely an evidential requirement, i.e. non-compliance does not invalidate the declaration but merely means that, without signed writing, it cannot be proved: ***Gardner v Rowe***. On this basis, Oats and Rye hold the cottages on a valid trust for the grandchildren, and are therefore, as trustees, obliged to provide the signed writing of the trusts in accordance with para. (b).

[1] You need to be sure before you can make this point—if you are wrong and have missed a case this is a major mark loser.

[2] The use of Latin is not fashionable (it will come back) but this expression is used by judges. Translation: 'using the expression in one place implies that it is omitted by design from the other'.

It is more likely, however, that the interest of which Wurzel is disposing is not an interest in land but a beneficial interest under a resulting trust. It was held by the House of Lords in ***Grey v IRC***, that an instruction by a beneficiary to the trustee to hold his interest in trust for a third party is in substance a

disposition, and must therefore comply with **s. 53(1)(c)**. Paragraph (c) states that a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing and signed by the disponor or by his agent there-unto lawfully authorised in writing. As the solicitor is Wurzel's agent, provided his letter to Oats and Rye complies with para. (c), there is a valid disposition of the beneficial interest.

If the solicitor's letter does not comply with para. (c) (if, for example, it is not signed), there is probably no valid disposition. It is not exempted from para. (c) by **s. 53(2)**, i.e. it does not involve the 'operation of a resulting … trust': see ***Grey v IRC***, which itself concerned a direction to trustees to hold for a third party an interest under a resulting trust. Lord Denning MR's statement in ***Re Vandervell's Trusts (No. 2) [1974] Ch 269*** that a resulting trust dies without the need for any writing at all is difficult to reconcile with ***Grey v IRC***, but is perhaps distinguishable on the special facts: the option to purchase

p. 41 ↵ (which was the subject-matter of the resulting trust) ceased to exist when exercised, and a new beneficial interest arose in respect of the shares which were thereby purchased.

Racine Shares

Wurzel's repayment of sums due under the loan from the Cube Bank plc means that the bank's legal mortgage of the shares comes to an end, and the bank holds the legal title to the shares on a bare trust for Wurzel. In ***Vandervell v IRC***, Vandervell's bank held the legal title to shares on a resulting trust for him and, upon his instructions, transferred them to the Royal College of Surgeons. The House of Lords held that Vandervell's beneficial interest passed to the College contemporaneously with the legal title without the need for compliance with para. (c).

The decision in that case means that a direction by a beneficiary under a bare trust to the trustee to transfer the trust property beneficially to a third party is not a disposition within para. (c) because the direction does not itself dispose of the beneficiary's interest. Furthermore, the trustees' transfer pursuant to such direction, although effective to vest a full title (both legal and equitable) in the third party, is not a disposition for the purposes of para. (c) either. The explanation seems to be that, when the legal and equitable titles pass together, the equitable interest is not separately disposed of, but is subsumed in the passing of the legal title. There is, therefore, no disposition of a 'subsisting equitable interest'.

For these reasons, if the Cube Bank plc has transferred the shares in Racine Ltd to Oats and Rye, the gift is perfect both at law and in equity, and Wurzel cannot recall it. If, however, the bank has not yet effected the transfer, Wurzel can revoke his instructions to the bank and prevent the gift from being completed.

Oral Declaration of Self as Trustee

If the effect of Wurzel's declaration of trust in favour of Spinach would be that Wurzel would drop out of the picture (***Grey v IRC***) and the trustees of the Root Trust would hold the trust property in trust for Spinach instead (***Grainge v Wilberforce (1889) 5 TLR 436***), the declaration would rank as a purported disposition of a subsisting equitable interest. As such, because it is made only orally, it would be void for non-compliance with para. (c).

If, however, the declaration gives rise to a sub-trust,[3] there is no disposition for the purposes of para. (c) because Wurzel retains his equitable interest under the Root Trust and a new beneficial interest is created in favour of Spinach.

[3] Deal with both options—don't assume one is wrong and therefore should not be discussed.

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It appears that the declaration will be treated as a purported disposition if no additional duties are imposed on the trustees; but otherwise, ↵ it will give rise to a sub-trust. Wurzel's declaration does not impose any express duties. If, however, Spinach is a minor, a sub-trust will be created because otherwise the trustees would be subject to additional duties, e.g. those imposed by the **Trustee Act 1925, s. 31**. If construed as a sub-trust, therefore, the declaration will be valid.

Looking For Extra Marks?

■ Incorporate dissenting judgments, obiter remarks, or judgments going a different way in a lower court. In ***Oughtred v IRC***, it was argued that no *ad valorem* stamp duty was payable on a transfer of shares (in that case an exchange) on the ground that the equitable interest had already passed under the prior contract for sale by virtue of a constructive trust, for which no writing was required because of **s. 53(2)**. The majority of the House of Lords held that, in any event, *ad valorem* duty was payable on the share transfer because it ranked as a transfer on sale. This was sufficient to dispose of the case, so that the views expressed on **s. 53** were obiter.

Taking Things Further

■ Chung, B. 'Challenging the orthodoxy: a critique of *Re Goldcorp* and the English law approach to the certainty of subject matter' (2019) 25(5) Trusts & Trustees 481–492.

This article contains a critique of **Re Goldcorp Exchange Ltd (In Receivership)**.

■ Emery, C., 'The most hallowed principle—certainty of beneficiaries of trusts and powers of appointment' (1982) 98 LQR 551.

This article breaks down the certainty of object requirement into four different constituent parts.

For differing critiques of ***Hunter v Moss*** *(certainty of subject-matter), see these two articles:*

■ Hayton, D., 'Uncertainty of subject matter of trusts' (1994) 110 LQR 335, and

■ Martin, J., 'Certainty of subject matter: a defence of *Hunter* v *Moss*' [1996] Conv 223.

There is also this article on the same topic:

■ Goode, R., 'Are intangible assets fungible?' [2003] LNCLQ 379.

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