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Question example

- Can [TP] challenge the trust in favour of [beneficiary]?
 - Validity – if a trust is validly created, it is binding and irrevocable (*Mallott*).
- Can D challenge/contest T's investment decisions?
- What are [object]'s rights, if any, to the money in [settlor]'s bank accounts?
 - [Settlor] attempted to declare a trust by transfer over the \$50K in her bank accounts in favour of [the class]. We will determine whether the trust is valid, and if so, what rights [object] might have under it
- Advise the [TP] of whether or not they can successfully seek distribution of the trust property

21, 25, 7 and 7 mark

All references to *Trustee Act* unless otherwise noted.

Three Certainties

The Clauses are valid if three certainties exist (*Knight*). Once created, it cannot be revoked by [settlor] (*Mallot*). If the trust fails because one of the three certainties is not present but trust property has been transferred to [trustee], then [trustee] will hold it on resulting trust for [settlor].

Certainty of intention

[Settlor] must have intended to create an express trust by their [words, conduct or terms] and not some other kind of legal apparatus.

Non contentious

- (1) The act of [settlor] 'immediately and irrevocably' transfers property to [trustee], applying the objective approach (*Byrnes*), manifested sufficient intention to create a trust.
- (2) [Settlor] is establishing a trust by declaration. Applying the objective approach (*Byrnes*), the facts manifested sufficient intention to create a trust.
- (3) The appointment of trustee / use of a deed will indicate an overall intent to create a trust (*Byrnes*). Each of the clauses are certain unless otherwise stated

Immediate intention to create trust

Given that on the 5th October 2009 I will remarry, ... I now hold

(+) In contrast to *Harpur*, the instrument does not explicitly state the settlor held the property on trust from a future date. Instead, [settlor] states that 'I now hold', implying a present intention to create a trust. As noted in *Harpur* by Neave JA, when a deed's words are ambiguous, extrinsic evidence can be admitted.

No unequivocal manifestation (*Paul v Constance*) - oral statement

[Beneficiary] asserts that the oral statement constitutes the creation of a trust. To establish a trust, [settlor] must have objectively manifested an intention to create one. The absence of explicit and unambiguous trust language is not fatal, especially considering that an unsophisticated layperson like [settlor] is not expected to use such formal language (*Paul v Constance*; *Byrnes*). In this case, a reasonable person would understand that [settlor] intended to benefit [beneficiary].

Furthermore, [settlor]'s subsequent act of confirming this intention through an email to [beneficiary] reinforces the objective manifestation of the intention to create a trust (*Paul v Constance*; *Byrnes*).

Moral obligation

To my sister I leave \$25,000 trusting that she will use it to educate her daughters at private school

The facts do not imply that [beneficiary]'s enjoyment of the [trust property] is contingent upon a legal condition. The word [trusting] could be seen as expressing a wish, or expectation rather than establishing an equitable condition as in *Cobcroft and Gill*. This suggests that the [trust property] is a gift. Additionally, [settlor] refrained

from using imperative language in this clause, unlike the use of 'on trust' elsewhere in the deed (*Re Williams*), indicating an objective intention not to create a trust (*Byrnes*) Thus, at most, there may be a moral obligation for [beneficiary] to honour [settlor]'s wishes, but such an obligation is not legally enforceable.

Charge

Red flag: payment of money, subject to, Bequests and devises to parents for the maintenance and support of children
OTF, it appears that it is mere a gift subject to a charge.

Consequence: [Donee] will have ownership over the property, including beneficial title, but [B] will have a security interest in the form of a charge. This enables [B] to seek an order to sell the property in satisfaction of the debt. If the value of the debt is greater than the value of the property, [donee] is still obligated to meet the outstanding amount.

Equitable condition

Condition's language is too vague

Similar to the situation in *Gill*, where the language 'keep the homestead as a home and provide board and residence for his sisters' was considered too general and vague due to the lack of clarity on what actions the son needed to take, arguably [phrase] is similarly ambiguous. Consequently, it is improbable that this constitutes a legal condition and more likely represents an equitable condition.

The consequence if the house if forfeited

If [recipient] fails to [look after Fido], and this results in the forfeiture of [big trust property], it raises a [significant] consequence. Such an outcome appears [comparable] to the situation in *Gill*, where compelling the son to surrender the entire house for not allowing access to one room was deemed excessively harsh. Consequently, it is [not likely] that a legal condition will be imposed on [recipient] and instead an equitable condition that would allow for [third party] to achieve an equitable remedy such as specific performance or EC.

Consequence

There are no proprietary consequences for non-performance. But [B] can seek personal remedies against [donee] for non-performance (compensation or specific performance).

Legal condition

Inclusion of time frame

The inclusion of a [time frame] in the statement by [testator] signifies a mandatory requirement for [recipient] to [condition], akin to the 2-year time frame in *Re Gardiner*. This temporal element is intended to function as a legal condition. Thus, ownership will not fully crystallise until the condition precedent or subsequent is met, this will lead to forfeiture of title.

If time has not passed

However, given that the [2 years] period has not yet lapsed, a court is likely to consider it as an equitable condition, akin to *Cobcroft*, subject to a specific performance order (requiring the transfer of the [trust property] to the [third party] within the [2 years]).

Certainty of subject matter

Presently existing property

[Beneficiary] is a volunteer and thus for there to be trust, there must be presently existing property (*Norman*).

Interest under a discretionary trust

[Settlor], as an object of the discretionary trust, has a mere expectancy to receive the trust property (*Kennon*). It is not presently existing property since the trustee may never distribute the property in their favour. As future property, it cannot be the subject matter of the trust without consideration. As there is no consideration, the COSM, and consequently the trust, fails.

Money

As money is fungible and the exact amount is specified, the subject matter is clearly identified (*Hunter*).

Residue clause – ‘rest and residue of my estate’

Clause X is valid. The trust property as a whole is subject matter certain, so [beneficiary]’s entitlement is also certain, including everything left over. Thus, if clause X is invalid, trust power form part of the residue which [beneficiary] will be entitled to.

‘Part of my estate’

Analogising with *Palmer*, where ‘the bulk of my said residuary estate’ was deemed unascertainable, the use of ‘part’ is not considered sufficiently identified (*Mussoorie*). Without a specific amount intended to be held on trust is unclear, clause [X] is invalid.

Shares

- (1) Given that X% of the [shares] are fungible and all associated with the same company, assuming they are of the same class and carry identical rights, they can be considered sufficiently identifiable (*Hunter; White*).
- (2) OTF, shares are from two different classes or two different companies; therefore, the subject matter is not certain because shares possess different rights.

Certainty of object

FIT

Clause [X] is a FIT. To fulfil COO, list certainty must be satisfied – [trustee] must be able to compile a list of all the beneficiaries (*Gulbenkian*). Unless otherwise stated beneficiaries under a fixed interest trust take in equal proportions.

Special trust power:

I leave the sum of \$200,000 to my trustee on trust for such of my other relatives as my trustee shall in his absolute discretion select.

[Trustee] has been given a discretion to select amongst [the ascertainable class]. The presence of the word ‘shall’ and the absence of a default clause indicate that [trustee] has a discretion, but it is imperative that he makes a choice. Therefore, this is a trust power in favour of a special class.

The test for COO is criterion certainty and administrative unworkability (*McPhail*).

Criterion certainty – [trustee] must be able to say with certainty whether any given individual is a member of the class – ‘[the class]’ (*McPhail*).

- (1) All words in the clause are capable of objective definition and do not involve a lack a layer of subjectivity
- (2) The term [my old friends] is very vague and depends on a subjective interpretation of the word [old]. Consequently, this class is conceptually uncertain (*Gulbenkian*).
- While proving who falls within the class is difficult, mere evidential uncertainty does not invalidate the power (*McPhail*) and [trustee] can seek court instructions under Order 54 *Supreme Court Rules*.

Administrative workability – The class cannot be ‘so hopelessly wide as not to form anything like a class’ (*McPhail*).

- (1) We don’t know how many numbers of people in [the class], but it cannot be 2.5 million (*District Auditor*), and the court may be able to assist [trustee] in their inquiries. I would argue that this is not administratively unworkable, as the number of beneficiaries is not too large, and they all have a clear link to [settlor].
- (2) [Residents of Victoria] consists of 6.7 million people, which is significantly larger than the class in *District Auditor* (2.5 million people – unworkable). Moreover, the class is so broad that [trustee] has no objective criterion to make a decision to distribute between the objects.

Hybrid trust power:

[Trustee] has been given a discretion to appoint [trust property] to property to anyone in the world except [person / specified class]. However, the clause will be deemed invalid – because ‘the rest of the world’ excluding [person / specified class] is a hopelessly wide class of people and therefore administratively unworkable (*Hay’s*).

General trust power

Clause [X] purportedly creates a general trust power since [trustee] can appoint the trust property to anyone in the world. However, the clause will be deemed invalid – because it is a hopelessly wide class of people and therefore administratively unworkable (*Hay’s*).

Special mere power

It is a mere power in favour of a special class – [trustee / donee of power] has the discretion to distribute the trust property among [specified class] without any obligation to do so.

The class must criterion certain – see above

Capriciousness test is also relevant (*Templeman J in Manisty*) – Here, the power is capricious because there is no discernible link between [settlor] and the excluded class (*Manisty*). Nevertheless, there is no precedent for setting aside a bare power on grounds of capriciousness.

Hybrid mere power

It is a mere power in favour of a hybrid class – [trustee / donee of power] has the discretion to distribute the trust property anyone in the world except [the class] without any obligation to do so.

The excluded class must criterion certain – see above

Capriciousness test is also relevant (Templeman J in *Manisty*) – Here, the power is capricious because there is no discernible link between [settlor] and the excluded class (*Manisty*). * But court in *Hay's* held that hybrid bare power is not capricious.

General mere power

It is a mere power in favour of a hybrid class – [trustee / donee of power] has the discretion to distribute the trust property anyone in the world without any obligation to do so. But note that the court will read down the mere power from a general to a hybrid to exclude [trustee] because of their fiduciary duties.

The power is criterion certain because ‘anyone in the world’ is semantically certain (*Hay's*). Evidential certainty is not a problem, as proving class membership is straightforward with everyone included.

Taker in default

\$10,000 shall be held for my children. In default of appointment, the money is to go to my granddaughter

This is a FIT subject to a special mere power.

Life estate + remainder

The trust creates a life estate in favour of [B1] who is entitled to all of the use and income of the trust property for her life. Upon [B1]’s death, [trustee] must appoint the trust property amongst the class of objects. Certain?

Standing to sue and object’s right

Object under a discretionary trust

Objects have a right to due administration and a right to consideration for distribution (*Kennon*).

[Object] has a chose in action to compel [trustee] to consider and exercise their power to appoint. But [Object] has no right to require [trustee] to exercise the power in their favour. Regarding the exercise of the power, [object] can demand [trustee] to exercise the power on good faith, with real and genuine consideration, and in accordance with the purpose of the power (*Karger*).

[Object] can require [trustee] to make careful enquiries, examine the field of objects, and distribute according to differing circumstances and financial situations (*McPhail, Owies*).

At the time the discretion is exercised in their favour, [object] became a beneficiary under the trust.

Object under mere power

[Object], as an object under a mere power, does not have standing to complaint about the trust.

The court, under its inherent jurisdiction, has the authority to supervise the trust. [Object] can apply to the court, and the court may intervene if there is an improper exercise of the power (*Karger*) or to make [trustee] to consider exercising the power (*Hay's*). The court cannot compel [trustee] to exercise the power (*Tempest*); it can only require trustee to consider periodically whether to exercise the power, consider the range of objects and consider the appropriateness of individual appointments.

Beneficiary under FIT

[Beneficiary], as a beneficiary under a FIT, has an equitable proprietary interest in trust property and has standing to bring an action for breach of trust.

Beneficiary under the default clause

[Beneficiaries] under the default trust have the beneficial interest, which is subject to being divested by an exercise of the power. They have the right to complain of an improper exercise of power.

Non-exercise mere power

If the bare power is not exercised, [X] as an object under it will not have rights unless the discretion is exercised. In such a case, the property will go to the person designated under the default clause.

If there is no default clause, and if the power is inter vivos, the property reverts on resulting trust to the [S]; if it is testamentary, it falls into the residue clause, or if there is none, it results in a partial intestacy.

Constitution

Testamentary trust: The property is transferred by a valid will. There are no questions of constitution

Trust by declaration: Constitution is not required for a trust by declaration (*Paul v Constance*).

Inter vivos trust by transfer only

The transfer to [trustee] must be fully constituted – i.e. complete in law/equity.

[Trustee] is a volunteer and thus for there to be an assignment, there must be presently existing property (*Norman v FCT*).

Land

To legally transfer [land], s 40 TLA requires (i) the registration of a signed instrument of transfer by both [settlor] and [trustee], along with (ii) the duplicate certificate of title. The transfer of legal title occurs when (iii) the registrar updates the land register. However, [trust land] has not legally transferred to [trustee] because the necessary registration has not taken place.

Debts and Chose in action

Red flag: bank account, debt, right under the contract

The bank account is a chose in action and therefore presently existing legal property. At law, the transfer must comply with s 134 PLA. The assignment must be

- (1) Absolute – yes
- (2) [settlor]’s whole interest – yes, [settlor] is declaring a trust over his entire account.
- (3) In writing and signed by [settlor]; – yes
- (4) An express, written notice must be given to the bank (can be given by either the assignor or assignee: Griffiths CJ in *Anning*) – No

Thus, the transfer fails at law OR

OTF, [settlor] has completed all the steps mentioned above, the legal requirements for the assignment have been met.

Shares

Per s 1071B *Corporations Act*, for shares to be assigned at law, [settlor] must provide [trustee] with the share certificate and the transfer must be registered on the company books – which has not been completed. Thus, the legal ownership of the shares has not yet vested in [trustee].

Nevertheless, since the only outstanding step is the registration of the shares, [trustee] can fulfill this requirement, the shares can be considered effectively assigned in equity (see *Rose*).

Chattels

Chattel can be legally passed to [settlor] either by: (i) deed OR (ii) delivery with intent to transfer the legal ownership

‘Complete everything necessary’ argument

Equity will uphold the gift if [trustee] has done all they alone must do to effect legal transfer and the transfer beyond the recall of [settlor] (*Corin*).

- *Failed to deliver any requisite documents* – Windeyer J in *Norman* suggests that [settlor] must have delivered any necessary document to [trustee] for the transfer to be effective (after delivery to [trustee], [settlor] cannot change their mind), has not been widely accepted by the courts. Therefore, the fact that [settlor] did not deliver the document to [trustee] does not matter.
- *Agency (acted for both)* – OTF, [agent] acted for both [settlor] and [trustee] - was the transfer beyond the recall of [settlor]? Determining the point at which [agent] ceases to represent [settlor] and starts acting for [trustee] is crucial (*Marchesi*). The shift occurs when [agent] has [settlor]’s authority to treat [subject matter] as [trustee]’s, and [settlor] has given [agent] the necessary documents.
- *Failed to pay stamp duty* – [Settlor] has not arranged for the payment of stamp duty (which presumably they would be liable to pay) (*Marchesi*). This suggests the transfer is not beyond recall (*Corin*), and consequently, the trust is not constituted.
- *Equitable interest under a trust* – Even if the title deed was arranged, as the single beneficiary under the trust, [settlor] could have required the trust property to be transferred back at any time, following the rule of *Saunders v Vautier*.

Consequence

If the assignment is complete at equity, [settlor] holds the property on CT for [trustee], upon legal title being attained the CT ends and [trustee] holds legal title on trust per Clause X.

Assignment of equitable property (interest under a trust)

The interest under FIT is equitable in nature and so in equity only. [Settlor] must manifest a clear intention to make an immediate and irrevocable transfer (Windeyer J in *Norman*). The best way to do this is by deed (Windeyer J in *Norman*). But deed is not essential, some writing is sufficient. Additionally, the instruction seems to be more than a revocable mandate (Dixon J in *Howard-Smith*) – clear and is a document prepared by solicitor. Therefore, the trust is validly constituted.

Then See s 53(1)(c) PLA.

Part chose in action

[Settlor] purported to transfer 50% of the debt (cf entire debt) so s 134 PLA does not apply. Accordingly, the debt may nonetheless be assigned in equity if there is a clear expression of intention to make an immediate and irrevocable transfer (Windeyer J in *Norman*).

Formalities

Testamentary trust

S 53 PLA formalities do not apply to testamentary trusts (s 55 PLA). Instead, testamentary trusts must be in writing, signed by the testator in the presence of two witnesses (s 7 *Wills Act*).

[X] Legal interest + personal property (Declaration of trust over bank account)

OTF, [settlor] has full legal and equitable title of [personal property] – a declaration of trust over a legal interest in personal property, no s 53 formalities need to be complied with. The trust can be created orally, provided there is sufficient COI (see *Paul v Constance*). As per my analysis above, this is/ is not met.

[para (a)] the creation or disposition of a legal or equitable interest in land

An interest in land includes legal or equitable interests (*Adamson*).

OTF, [transferor] attempted to transfer their legal / interest in land to [transferee]. Para (b) not required because this is not a declaration of trust. Para (c) is not required because [transferor] has legal title to the land therefore legal and equitable title not yet split - so no subsisting equitable interest.

[Transferor] is disposing of their legal interest in the land and creating a legal interest in [transferee]. Since para (a) is a validity requirement, the actual transaction must be in writing and signed by [transferor / agent] - satisfied.

Thus, the creation or disposition is valid.

[para (a) + (b)] Interest in land created by declaration of trust (declaration / transfer)

[Settlor]'s declaration of trust over land raises both s 53(1)(a) and s 53(1)(b). Per *DSS v James*, s 53(1)(a) will read down to excluding declarations of trust in respect of land, so as to not render para (b) otiose. Thus, s 53(1)(b) will apply.

[para (b)] declaration of trust over land (by transfer or declaration)

(1) In writing – The written declaration by [settlor] that [trustee] is to hold [trust land] in favour of [beneficiary] is sufficient to constitute a declaration of trust. The declaration of trust over land raises both s 53(1)(a) and s 53(1)(b). Per *DSS v James*, s 53(1)(a) will read down to excluding declarations of trust in respect of land, so as to not render para (b) otiose. Thus, s 53(1)(b) will apply – the declaration must be manifested and proved by some writing signed by [settlor].

(2) made orally – The oral declaration by [settlor] that [trustee] is to hold [trust land] in favour of [beneficiary] is sufficient to constitute a declaration of trust. Since (b) is an enforceability requirement, it is simply unenforceable until subsequently manifested and proved.

(3) informal writing – For the purpose of (b), a combination of documents capable of being read together is sufficient (*Adamson*) provided (1) settlor signed at least one of them, (2) they show an intention to create a trust, identify the objects of the trust, identify property subject to the trust, and state terms of trust (*DSS* endorsed in *Re McGown*).

[para (c)] Equitable interest + personal property (Transfer the interest as beneficiary under a FIT)

Red flag: Disposition of equitable interest in personalty such as a loan \$500k (*Maradonna*); or beneficiaries interest under a trust / partnership interest / option to purchase

(1) [Settlor] attempted to transfer their subsisting equitable interest as beneficiary in remainder to [trustee] to hold on trust for [beneficiary].

Has [settlor] disposed of their interest?

OTF, [settlor] gave [trustee] an irrevocable direction in the deed to hold the interest for [beneficiary] (*Howard-Smith*). Thus, [settlor] has disposed of their interest (so s 53(1)(c) applies). **OR**

[Settlor] has only given authority to [trustee] to act in a certain way. It is not a disposition (so s 53(1)(c) does not apply). Similar to *Howard Smith*, where the beneficiary requested the trustee, when probate is complete, to transfer his equitable interest as a residual beneficiary to other parties, [settlor] requested that [trustee], upon the occurrence of [future event], to transfer their equitable interest to [beneficiary]. This constitutes a revocable mandate because until [trustee] acts upon this request, [settlor] could change their mind and revoke that mandate (*Howard-Smith*).

In writing signed by [settlor] or their agent?

As sub-s(c) is a validity requirement, if not in writing, disposition is invalid. A policy argument can be made for not requiring writing for a declaration of trust of an equitable interest, aiming to maintain consistency with the treatment of declarations of trust for personalty.

(2) [Settlor] declared they hold their subsisting beneficial interest as beneficiary in remainder on trust for [beneficiary /B2].

Since this is a declaration of sub-trust, this raises the issue of whether a declaration of sub-trust amounts to a disposition of a subsisting equitable interest, and therefore must comply with s 53(1)(c) PLA.

Has [settlor] disposed of their interest?

In one view, in declaring the trust, [settlor] drops out of the picture completely, constituting a disposition (*Grey*), and thus, the writing requirement must be met. [Settlor]'s oral statement does not comply with s 53(1)(c) so the disposition is invalid.

However, this may be seen as a declaration of a sub-trust (*Howard-Smith*) — [Settlor] retains their equitable interest but imposes obligations on themselves to hold for the benefit of [B2]. Since writing is not required for a declaration of sub-trust over personal property, the oral statement would be sufficient to create a trust. Nevertheless, [B2] needs property rights to enforce the sub-trust, but if that is what B2 holds, it is unclear what [settlor] holds — so there may be a disposition, but the law is not settled.

In writing signed by [settlor] or their agent?

As sub-s(c) is a validity requirement, if the disposition itself not in writing, the disposition is invalid.

(3) [Assignor] purported to transfer [assignee] her equitable interest. S 53(1)(c) PLA formalities must be met. A direct assignment will constitute a disposition (Dixon J in *Howard-Smith*). The disposition has been done in writing, thus s 53(1)(c) has been complied with.

[para (a) + (c)] Equitable interest + land (equitable mortgage)

Red flag: Equitable mortgage / equitable lease

There is an overlap between ss 53(1)(a) (*Adamson*) and (c) (*Maradonna*) because the nature of [settlor]'s interest is an equitable interest in land. Whilst, the law is unsettled, there is no impact as both sub-sections require writing signed by [settlor] or their agent, and both validity provisions.

Here, as disposition [has/has not] complied with (a) and (c), the disposition will be [valid / void].

[para (b) + (c)] Declaration of sub-trust over land

Red flag: *I now declare that I hold my equitable interest in land in this trust on trust for B2*

Para (b) applies because there is a declaration of trust over land.

However, the application for para (c) is unclear – There are two conflicting interpretations as to the consequence of declaring a sub-trust.

Replacement model — The model suggests that in declaring the sub-trust, [settlor/B1] drops out of the picture completely, constituting a disposition (*Grey*). Thus, both paras (b) and (c) requirements must be met.

Sub-trust model – [B1] retains their equitable interest with the addition of new obligations as sub-trustee. Hence, there is no disposition of [B1]'s interest as required by s 53(1)(c). Thus, only para (b) must be met.

Mini conclusion for validity

Validly formed trust

As trust has been validly created, it is binding and irrevocable (*Mallott*).

Failure of ET by declaration

Because the trust by declaration has not been validly created, [settlor] will continue to hold the property on their own account.

Failure of ET by transfer

Because the trust property has been transferred to [trustee], then [trustee] will hold it on resulting trust for [settlor].

Failure of ET by testamentary disposition

The [property] will revert to the residue of the estate.

Charitable trust

Clause X purportedly creates a trust for purpose, it must be charitable to be valid (*Morice*) – ie it falls under one of the *Pemsel* heads and is for ‘public benefit’.

(a) Relief of poverty

An intention to provide relief from poverty can be inferred from the Clause (*Downing*). Prima facie, the term ‘ameliorate’ suggests a general intent to benefit those whose ‘lot needs improvement’ (*Downing*). Poverty means a relative deprivation compared to the broader community (don’t need destitution) (*Downing*). Here, ‘poor people’ are in necessitous circumstances as they usually struggle to obtain all necessities for a ‘modest standard of living’ (*Ballarat*). Given that the clause has the potential to alleviate this relative deprivation, it falls it under head (a) (*Pamset*).

As this is for poverty, the trust is conclusively deemed to be for a public benefit, by reducing the burden on the public purse (*Dingle*).

Hence, this will be a valid charitable trust.

(b) Advancement of education

Clause X may be considered a trust for ‘advancement of education’ if it can bring educational value (*Pinion*). Here, [settlor] ...

(c) advancement of religion

The clause may fall under a trust for the advancement of religion. Courts take a broad view of the meaning of religion and are reluctant to make qualitative judgments about the legitimacy of religion (*New Faith*). Following Mason ACJ and Brennan J’s interpretation, religion requires a belief in supernatural, and an acceptance of canons of conduct to give effect to those beliefs (*New Faith*). [Followers] believe in supernatural things like ‘divine spirit’ and ‘the life of the soul’. Required conduct includes giving away personal possessions and spending time in meditation.