
Examiner's report 2009

2660002 Law of trusts – Zone A

Introduction

As in past years, candidates' answers were marred by a reliance on prepared essays. This is dangerous for two reasons. First, the prepared answer will very likely not be an answer to the question asked. And in this respect, candidates should note that Examiners are not fooled by 'top and tailed' answers, where a paragraph at the start and another at the end are added to the prepared answer to make it seem relevant to the exam. They have been around far too long to fall for that trick. Second, the prepared answers are usually prepared by people who themselves are poor lawyers. As a consequence, even if the answer is relevant to the question, they are very often riddled with errors. By using them, candidates are not only failing to address the specific question asked, but are providing answers which are often legally suspect.

A further worrying feature was that candidates are obviously not using the subject guide provided by the University of London, preferring instead the rote answers mentioned above and the lecture notes provided by private colleges. It cannot be stressed enough that the subject guide should take precedence over all other material, for these are almost always written by the people who set and mark the exams. If candidates want to get inside their Examiners' minds, to know how they think and what the current areas of controversy in their subject are, then they should use the subject guide and *Recent developments* update provided and the books they recommended. Candidates use other materials at their own risk.

General remarks

One of the biggest problems revealed by the papers was a general lack of good exam technique. The study of law at degree level is not just about learning hundreds and hundreds of rules. It also about applying those rules. And to do that, candidates need to know the status of the rule, whether it formed part of the *ratio* of a decision or was only *obiter*; and the source of the rule, whether it is a rule of the House of Lords, Court of Appeal, High Court and so on. In addition, candidates need a critical eye, an ability to point out the difficulties in the rules laid down by the courts, even when they form part of the *ratio* of a decision, and even where it is a rule laid down by the members of House of Lords (who are certainly not infallible). This is the very stuff of a law degree. And not just that: it is also the stuff of a good legal practitioner.

Specific comments on questions

Question 1

'The three certainties have lost nearly all their former significance. Courts are now willing to find a trust based on the slightest evidence of intention to benefit others, in relation to an unidentified selection of assets, and for a vaguely defined group of people.'

Discuss.

This question invited candidates to discuss the substantive requirements of a valid declaration of trust (i.e. that there be *inter alia* sufficient intention, identification of subject matter and identification of objects) and asked how strictly those requirements are insisted on today. A good answer would have made reference, *inter alia*, to cases such as *Paul v Constance* and *Choithram v Pagarani* on issues of intent (and there are many others in this field), to *Hunter v Moss* on issues of subject matter, and *re Baden (No 2)* and the like on objects. These issues are discussed in the subject guide at 5.1, 5.2 and 5.3 and associated activities.

The question was popular, but many candidates were content to simply trot out the basic principles of law, making no attempt to engage with the question asked. Such candidates were rewarded accordingly.

Question 2

Ten years ago, Gilbert inherited 10,000 shares in Scallop Resources Co from his father's estate. The shares were then worth £50 each. He felt sorry for his mother, Bonnie, who had received title to the family home and some savings, but little else from his father's estate. Gilbert therefore transferred the shares to Ellen to hold on trust for Bonnie for life, remainder to himself. The trust instrument made no provision for any investment power on the part of the trustee.

The capital value of the shares increased dramatically, but the dividends were never very good. Bonnie complained to Ellen that the income from the trust was too low and asked her to sell all or some of the shares and invest the proceeds in assets producing higher income for her. However, Gilbert wrote to Ellen telling her not to sell, and she followed his instructions.

Advise Bonnie. How would your answer differ if a clause in the trust instrument provided that, 'No trustee shall be liable for any loss or damage to the fund or any part thereof or the income thereof unless such loss or damage be caused by the trustee's own fraud'?

This question concerned the duty of a trustee to be even-handed between beneficiaries in respect of investment decisions. The conflict here was between investments which produced a good income (to the advantage of the life tenant, Bonnie) and those which enhanced the value of the capital (and thereby accrued to the benefit of the remainderman, Gilbert). There was also the question of how far liability for such a breach of duty, assuming there to be one, on the part of Ellen could be excluded by the exclusion clause in the trust deed. The issue is discussed at 4.4 in the subject guide, with associated activities at 4.5–4.7.

The question had few takers. Of those who did tackle it, many omitted all discussion of the exclusion clause.

Question 3

'There is no reason to treat knowing receipt any differently from dishonest assistance. A stranger should not be liable unless he or she wrongly interferes with the trust, and mere notice of a breach of trust is not a wrong.'

Discuss.

A good answer to this question would have explained that what the quote is concerned with is the ongoing debate as to the nature of the personal equitable claim in 'knowing receipt'. It would point out that some judges and commentators have argued that it is a species of liability in unjust enrichment, with the consequence that the requirement of 'knowledge' or 'dishonesty' present in many cases is mistaken. The question challenges that notion, arguing instead that it is a species of wrongdoing and that the requirement of a high degree of fault is consequently justified. However, even if the argument that it was not unjust enrichment could be sustained, it does not thereby follow that the liability is to be attributed to wrongdoing, nor, even if it could, that it should be fault-based to a high degree, for the law of torts ranges across a broad spectrum from strict liability upwards. Candidates were therefore expected to discuss the appropriate level of fault, if any. These issues are discussed at 16.4–16.6 of the subject guide, including requisite activities.

Many answers to this question avoided the fundamental issue raised by the question, reciting only the present law. Worse still, a number of answers gave an account of the law relating to dishonest assistance and nothing else. Although obviously relevant in terms of comparison, the main focus of answers should have been on issues of unauthorised receipt.

Question 4

'When a donor attempts but fails to complete a gift, there is no reason for a trust to arise unless it would be unconscionable for the donor to refuse to complete the gift.'

Discuss.

This question raised issues concerning equity's reaction to imperfect gifts; more specifically, whether it will raise a trust in favour of a disappointed donee. The topic of imperfect gifts is treated at 6.2 and associated activities in the subject guide. The reference to 'unconscionability' is made to take account of the reasoning, if one can call it that, of the Court of Appeal in *Pennington v Wayne*. In that regard, a good answer would ask why it was thought to be unconscionable for the donor in that case to resile from her gift, but not the donor in the leading case of *Milroy v Lord*.

This question was popular, though answers tended to comprise just a list of cases in which courts will assist volunteers to perfect imperfect gifts, and even some which involved nothing of the sort. The question was specifically limited to the cases where trusts arise to perfect imperfect gifts, but this point was not picked up by the majority of candidates. The question was certainly not concerned (or at least not directly) with covenants to settle.

Question 5

Are secret trusts express trusts or constructive trusts? Does it matter how we classify them?

The question of the correct classification of secret trusts and, more particularly, whether they are express or constructive, is one which is debated in all the texts and commentaries. The topic of secret trusts is treated in Chapter 8 of the subject guide and associated activities. A good answer would have explained that the issue turns on how the courts see section 9 of the Wills Act 1837 and whether it is a rule of substance or procedure. If the latter, then *Rochefoucauld v Boustead* indicates that the trust is express, though even then there are those who argue that *Rochefoucauld* itself involves a constructive trust. Whereas if it was the former, then the trust would clearly be constructive, as the trust created by the testator would fail for informality and the trust arising in its stead could only be one created by the court. The question would then arise why a constructive trust should arise, a topic of debate excluded if the trust is seen as express. One practical area in which the difference matters is in relation to alleged declarations of secret trusts of land which are unsupported by section 53(1)(b) evidence.

This question was generally poorly done. Many candidates were content to simply list the rules relating to secret trusts, without attempting to explain why they cause a problem for the courts. Without such explanation, the question of whether secret trusts are express or constructive cannot be dealt with.

Question 6

Ferris desperately wanted his children to attend a highly rated state school which only admitted pupils living in its catchment area. Ferris's good friend, Cameron, lived in that area and Cameron's daughter, Sarah, had already finished school. To make it appear that Ferris and his family lived in the area, Cameron instructed the Chief Land Registrar to transfer title to his house to Ferris, which he did. Cameron continued to live in the house, but Ferris was able to use his proprietorship of the title to get his children into the school. When Sarah had a son of her own, Cameron decided to give his house to Sarah so that her son could attend the school when the time came. Cameron told Sarah of his arrangement with Ferris, gave her the keys to the house, and told her that the house was hers. He then telephoned Ferris to tell him what he had done. Cameron then moved to Australia and Sarah moved into the house. Five years later, she attempted to enrol her son in the school, but her application was refused as she was not the registered proprietor of title to the house. She thereupon asked Ferris to transfer title to her, but he has refused, since he still has two children who attend the school.

Advise Sarah. She does not want to bother Cameron, but will if that is necessary.

A good answer to this question would have identified it as concerned with resulting trusts, which are treated in Chapter 12 of the subject guide, and, more specifically, with their operation in the sphere of illegality. The question also raised issues as to the operation of section 53(1)(c) of the Law of Property Act 1925, which is treated in Chapter 7. The answer would have explained why illegality presents a problem in this area, and

how resort to the law of resulting trusts might possibly help Sarah. In that regard, specific attention should have been paid to the question of whether section 60(3) LPA 1925 abolished the presumption (whatever its content may be), triggering a resulting trust in cases of voluntary conveyances of land. And assuming that Cameron did have an interest under a trust, the question would arise whether he managed to transfer it to Sarah without the use of writing. In that respect, a discussion of *Grey v IRC* and *Vandervell v IRC* was required.

This question was generally poorly done, with candidates either failing to spot the illegality point or the section 53(1)(c) point, or both.

Question 7

In 1957, a group of college friends formed the Treat Animals as People club (or TAP) to raise public awareness about the ethical treatment of animals and campaign for laws better protecting animals and recognising their rights. Each member paid £5 per year in club dues and they raised money for their activities through public appeals. TAP grew in popularity, and by 1977 it was receiving substantial donations from the public and had over 300 members, each paying £25 in annual membership dues. The members then bought a title to a house for £25,000, to be used as TAP's offices. Title was registered in the joint names of Frank and Hannah. Frank was then TAP's president and Hannah its treasurer.

Jim and Selena joined TAP in 1980, and in 1988 became its president and treasurer respectively. Frank and Hannah then left the club and transferred title to Jim and Selena. Jim and Selena moved into the house together and married each other. TAP became less active in the years that followed and its membership dwindled until last year, when Jim and Selena were its only members.

Jim has recently died. Title to the house is now worth £500,000. There are 70 former members of TAP who are still alive, including 28 people who ceased to be members before the title to the house was purchased.

Advise Selena as to who is entitled to the house.

This was a question about the distribution of rights on the dissolution of an unincorporated association. The subject is treated in Chapter 13 of the subject guide and associated activities. A good answer would have explained how the rights were held immediately prior to dissolution, how the association came to be dissolved, and how the rights are held post-dissolution. There is *dicta* in the otherwise excellent decision in *re Bucks* to the effect that when only one member of the society survives, the rights held 'by the society' go to the Crown as *bona vacantia*. Candidates should have asked whether this proposition is sound, especially in light of its recent rejection by Lewison J in *Hanchett-Stamford v A-G* [2008] 4 All ER 323.

Candidates answering this question tended to write all they knew about unincorporated associations (which sometimes was very little), without much attempt to address the specific questions raised.

Question 8

Advise David, who is considering including the following dispositions in his will:

- (i) '£100,000 to fund research into the spread of HIV infection in Africa';
- (ii) '£100,000 to encourage spiritual belief amongst people in hospices for the terminally ill';
- (iii) '£100,000 to provide internet access for the unemployed';
- (iv) '£100,000 to the National Synchronised Swimming Society [an unincorporated association] to organise swimming lessons for children outside London.' It appears possible that the Society may soon cease to exist.

This was a question on charitable trusts, the subject matter of Chapter 10 of the subject guide and related activities. The first part raised issues both as to whether pure research can be charitable and whether activities outside the jurisdiction count. The second raised the question whether 'spiritual belief' can count as 'religion' and, if not, whether it falls under some other head of charity. The third asked whether the provision of internet access for the unemployed might be said to relieve poverty (see *re Niyazi's WT*) or, if not, whether it comes under some other head of charity. Finally, the fourth was concerned both with the question of whether the gift is charitable and what will happen if the Society ceases to exist, either before and after David's death.

This was a popular question, though not particularly well done. The main problem was candidates' failure to apply the relevant provisions of the Charities Act 2006. There is at present a huge controversy as to the application of the public benefit principle to charities such as those advancing religion and education, but this aspect of the Act was virtually ignored by candidates looking at whether the purposes in question qualified as charitable.