
Examiner's report 2009

2660002 Law of trusts – Zone B

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, students 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, students 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 students 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 forms part of the *ratio* of a decision or was only *obiter*; and the source of the rule, i.e. 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 one 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

"It is unhelpful to categorise resulting trusts according to whether they are 'presumed' or 'automatic'."

Discuss.

This question was concerned with the classification of resulting trusts adopted by Megarry V-C in *re Vandervell (No 2)*. A good answer would explain what these terms mean and whether they, in fact, describe what is going on in such trusts. Some, for example Lord Browne-Wilkinson in *Westdeutsche*, have attacked the division as incorrect, and attention should have been paid to the question of whether these criticisms are justified. A first class candidate might point out that, even if Lord Brown-Wilkinson's critique was flawed, the classificatory terms used by Megarry V-C suffer from the fact that they are not opposed. The whole topic of resulting trusts is addressed in Chapter 12 of the subject guide.

This 'question' was popular with candidates. The reason for the inverted commas is that the vast majority of those who answered it ignored the question altogether and simply rehearsed their often limited knowledge of resulting trusts. And even those who attempted something better by discussing the competing theoretical bases of resulting trusts, often failed to link their answers to the question asked.

Question 2

'We must continue to do our best with the accepted formulation of the liability in knowing receipt, seeking to simplify and improve it where we may. While in general it may be possible to sympathize with a tendency to subsume a further part of our law of restitution under the principles of unjust enrichment, I beg leave to doubt whether strict liability coupled with a change of position defence would be preferable to fault-based liability in many commercial transactions...'
(*per Nourse LJ in BCCI v Akindele (2000)*)

Discuss.

This question was concerned with the perennial problem of the rationale of the liability generally known as 'knowing receipt'. A number of commentators have argued that what is involved here is a claim in unjust enrichment, with the consequence that liability should be strict. Such an argument was put to the Court of Appeal in *Akindele* but rejected, for the reason given in the quote. One question which candidates were expected to discuss is whether those reasons stand up, especially in light of the fact that a defence of *bona fide* purchaser will almost always apply to commercial dealings. The whole issue is discussed at length in section 16.6 and associated activities in the subject guide.

This was not a popular question, and those that did it produced poor answers. There seems little appreciation of the theoretical arguments current in this subject, despite their articulation in the subject guide, though not, of course, in the sub-degree level texts to which many candidates unnecessarily cling.

Question 3

"... a trust for selection will not fail simply because the whole range of objects cannot be ascertained. The test ... is satisfied if, as regards at least a substantial number of objects, it can be said with certainty that they fall within the trust; even though, as regards a substantial number of other persons, if they ever for some fanciful reason fell to be considered, the answer would have to be, not 'they are outside the trust', but 'it is not proven whether they are in or out'."
(*per Megaw LJ in re Baden's Trusts (No 2)* (1973))

Discuss.

This question was concerned with the correct test for certainty of objects in a discretionary trust, a topic discussed in section 5.3 and associated activities in the subject guide. The specific point needing discussion was whether Megaw LJ's formulation of the test in *re Baden (No 2)* is consistent with Lord Wilberforce's speech in *McPhail v Doulton*, or, on the other hand, whether Sachs LJ's approach in *Baden* is the better one. Moreover, is it ever enough, as Megaw LJ suggests, for courts to abdicate responsibility in such matters to the good sense of the trustees?

Although popular, few candidates bothered to engage with the question, a symptom perhaps of the fact that few had read the case. What the Examiners were dished up with instead was a standard account of the test for certainty of objects (and intention and subject-matter!), with little hint that any problems existed in this area.

Question 4

Doug, who had 500 shares in Del King Co, a private company, decided to give them to Laura. He executed a share transfer form, gave the form to Vic and instructed him to give it to Laura when he next saw her. Doug then wrote to Laura, telling her that Vic would be giving her the share transfer form and that she should sign and submit it to the company to complete the transfer. Vic saw Laura the next day, but forgot to give her the form. Laura received Doug's letter the following day and phoned Vic, who said he would be back next week with the form.

Laura decided to share her good fortune with her best friend, Noreen. She phoned her to tell her about the gift and said, 'I want you to have 100 of the shares. Consider them yours already. I do.'

Laura died three days later, before Vic could deliver the share transfer form. Doug has now changed his mind and does not want to go through with the gift, and Vic has returned the form to him. Noreen wants her 100 shares. Laura's son, Zack, is entitled to her estate.

Explain who is entitled to the shares.

This question was concerned with imperfect gifts, treated in Chapter 6 of the subject guide. The first issue was whether Doug's act of filling in the share transfer form and giving it to Vic brought the transaction within the so-called 'Rule in *re Rose*' and, if so, whether that case was rightly decided. If it did not fall within that rule, or if the rule could not be defended, then the question was whether any other exception to *Milroy v Lord* could apply (the most probable here being *Pennington v Waine*, a decision equally open to criticism). A second issue, assuming Laura was the beneficiary of a trust of the shares, was whether her oral statement could be construed as a self-declaration of trust or an attempted assignment of her interest under a

trust. If so, a subsidiary issue arose as to the applicability of section 53(1)(c) LPA 1925.

Candidates struggled with this question. Some saw Doug's attempted gift of the shares to Laura as involving issues relating to section 53(1)(c), even though he was not attempting to dispose of a subsisting equitable interest. The explanation for this would seem to be that many of the cases on section 53(1)(c) involve shares, and so candidates, adopting a Pavlovian approach to exam questions, assumed that section 53(1)(c) is relevant whenever shares are involved. If only they read the statute itself, they would know how wrong this is. A number of candidates also mistakenly saw the issue of Laura's phone call to Noreen as involving a covenant to settle. Such candidates obviously have a very strange idea of what is a deed, or, for that matter, a phone!

Question 5

By his will, Ben left his freehold title to Blackacre to Gerry, 'in full confidence that he will use the property for the purposes which I have communicated to him'. After making the will, Ben telephoned Gerry and asked him to hold Blackacre on trust for Hilary. Gerry agreed. By the same will, Ben left a parcel of shares to Nigel 'on trust for such purposes as I shall communicate to him'. After making the will, Ben wrote to Nigel, asking him to hold the shares on trust for Mary. Nigel agreed.

Ben has now died. The day before his death, Mary was killed in a car crash. Gerry, who is also Ben's residuary legatee, has disclaimed the gift of Blackacre.

Discuss.

This was a question on secret trusts, the subject matter of Chapter 8 of the subject guide. Specific issues raised included: (a) whether the trust of land was fully secret or half secret; (b) the rules concerning the timing of the communication of such trust; (c) the applicability of section 53(1)(b) LPA 1925 to secret trusts; (d) the correctness of the decision of the Court of Appeal in *re Keen*; (e) the effect on the trust of the pre-decease of the secret beneficiary; and (f) whether a secret trustee is allowed to disclaim so as to benefit himself.

A number of candidates spent huge amounts of time discussing the theoretical bases for secret trusts. Although such discussion may be appropriate in essay questions, in a problem question the candidate should state them briefly (two or three lines will do) and move on to answering the question, which is essentially whether there is anything stopping those theories applying on the facts of the question. And while on the subject of theories, it is wrong to say that *dehors* (outside) the will theory fails to explain the operation of secret trusts because it maintains that the testator creates an *inter vivos* trust, and that such a trust will fail for want of subject matter. A careful reading of the relevant case-law shows that this has never been the contention of the courts, except, of course, for the aberrant decision of Romer J in *re Gardner (No 2)*. Whatever the faults of the *dehors* theory, this is not one of them.

Question 6

Discuss whether the Trustee Investment Act 2000 has made any appreciable difference to the investment duties of trustees.

This question required a discussion of the rules concerning the investment duties of trustees prior to the enactment of the Trustee Investment Act 2000 and the changes made therein. The topic is discussed in section 4.4 in the subject guide. It had very few takers.

Question 7

Lionel holds shares in Kybosh Ltd, a private company, on trust for Mark. Mark orally instructs Lionel to transfer the Kybosh shares to Peter as a gift. After Lionel does so, Peter orally contracts with Quentin to sell his interest in the shares to him. Lionel also holds shares in Sundance Ltd, another private company, on trust for Nigel for life, remainder to Oliver. Oliver orally contracts with Nigel to assign him his interest under the Sundance trust. Nigel then orally declares himself trustee of that interest for Rachel. Finally, Oliver holds a fee simple title to Purpleacre, a farm. Oliver procures the registration of Lionel as proprietor of his fee simple title to Purpleacre, having previously orally instructed him to hold it on trust for Ursula.

Discuss.

This question raised issues as to the applicability of section 53(1) LPA 1925 to the various acts in question. As to the oral direction by Mark to Lionel to transfer the shares to Peter, the question was whether this amounted to an attempt by Mark to dispose of his interest under the trust, falling foul of the writing requirement of section 53(1)(c). *Grey v IRC* would seem to say that it was, but *Vandervell v IRC* contradicts this. Assuming the correctness of *Vandervell*, the next question was whether the oral contract had the effect of making Peter a trustee for Quentin, for, on one view at least, this was a disposition by Peter of an equitable interest and therefore void for want of writing. Such a view is clearly wrong, but candidates needed to explain why. The next issue was the effect of section 53(1)(c) on Oliver's contract with Nigel, and the operation of the rule in *Grainge v Wilberforce* in this context, especially in light of *Nelson v Greening & Sykes*. The final issue concerned the question whether, assuming there was no section 53(1)(b) evidence, oral testimony was admissible to prove Oliver's declaration of trust. This involved consideration of, *inter alia*, *Rochefoucauld v Boustead* and *Hodgson v Marks*.

The question was avoided by most candidates. Those that did it usually failed to distinguish between sections 53(1)(b) and (c) and produced instead an amalgam of both, which satisfied neither.

Question 8

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

- (i) '£1,000,000 to teach schoolchildren how they can use the Human Rights Act 1998 to protect themselves against the oppressive actions of the state';
- (ii) '£100,000 to encourage spiritual belief amongst the poor';
- (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 question was concerned with purpose trusts. A good answer would point out that such trusts are generally void unless charitable, the subject matter of Chapter 10 of the subject guide and related activities. As to (i), the issue was whether the trust failed to qualify because of its political nature. An astute answer would have picked up the fact that there was here no attempt to change the law, merely to harness the existing law. As to (ii), although it concerned the poor, there being no attempt to relieve poverty, the trust could not be valid on this ground. The question then was whether the encouragement of spiritual belief is sufficient. As to (iii), the question was 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 came within some other head of charity. As to (iv), the concern was both with the question of whether the gift was charitable and what would happen if the Society ceases to exist, either before David's death or after.

This was a popular question, though one not particularly well done. The main problem was a 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 when candidates looked at whether the purposes in question qualified as charitable. Moreover, the possible application of *cy pres* in the last part of the question was ignored by most candidates.