In order to create a valid inter vivos trust of property which he owns absolutely, the trust must be perfectly constituted and fulfil specific statutory requirements.

Discuss

In order for there to be a valid express private trust, certain requirements have to be satisfied, namely those relating to the three certainties, formalities and the constitution of the trust.

In relation to the three certainties, first, the court must be satisfied that the settlor/testator has used words which reveal a clear intention to create a trust in keeping with the equitable maxim that 'equity looks to intent rather than form.' This was demonstrated in *Paul v Constance*. The court held that 'non-lawyerlike words could be used, the word 'trust' did not have to be used. The words 'this money is as much mine as yours' was held to be sufficient to satisfy the intention to create a trust. Similarly in *Rowe v Prance*, the court held that the use of the word 'our' was sufficient to indicate that a share was held by the claimant in the yacht.

Problems may arise with use of precatory words, ie those expressing a 'hope' or desire' that the donee will hold a gift for another. These have sometimes been held sufficient to create a trust; however, the attitude of the courts over time has changed. In *Lamb v Eames* the testator gave the estate to his widow 'to be at her disposal in any way she thinks best for the benefit of herself and her family. It was held that this did not create a trust and she took absolutely. *Re Adams and The Kensington Vestry* followed *Lambe v Eames*. The court held that a trust could not be imposed by the use of precatory words. The testator had imposed a moral obligation upon his wife which not legally enforceable. It can be seen however, in *Comiskey v Bowring-Hanbury* where the House of Lords held that in looking for certainty or words or intention, that the document as whole should be examined and the trust was held to be valid.

It can be stated therefore in relation to certainty of intention that in modern times, the use of precatory words is not sufficient to validate a trust and such words would seem to indicate merely what the settlor/testator would like to happen or their motive for the gift. The exception to this situation may however be where the testator has used a precedent which would have created a trust under old cases, and may be construed as an intention to create a trust (*Re Steele's Will Trusts*)

Secondly, there must be certainty in relation to subject matter, the trust property must be certain. In *Palmer v Simmonds* it was held that a declaration concerning 'the bulk of my estate' was ineffective to create a trust, there was a clear intention to create a trust but it was not clear what property was affected by it. Purported trusts may also fail for uncertainty of segregated money (*Re Goldcorp Exchange Ltd*). This case can be contrasted with the case of *Hunter v Moss* where the trust of a specified number of shares was upheld even though the particular shares were not identified. The facts of these two contrasting cases leave us to deduce that in the case of intangible property, certainty of subject matter does not require segregation, however with regard to goods which are not

segregated and the property does not pass to the purchaser, no trust will be created. The ultimate outcome of such uncertainty of trust property is that no trust will exist and that the property will remain with the settlor in a resulting trust or if death has occurred, the property will form part of the residuary estate.

Once the subject matter is established, it is necessary to identify who takes the beneficial interest in the property. The size of the beneficial interest to be taken must be certain, if it is not, the outcome will be the same as with trust property unless it is a discretionary trust, where the trustees may allocate beneficial interest as they see fit, or, the court may apply the maxim 'equality is equity' and divide the trust property between the beneficiaries as it thinks fit. Where a gift is given to one beneficiary and the remainder to another and the remainder fails for lack of certainty, the one beneficiary may take the entire gift, which can be demonstrated in the case of *Sprange v Barnard*.

Thirdly, the objects ie the beneficiaries of a trust must be certain. If they are not but the other two certainties are present, there will be a resulting trust for the settlor of his estate. The trust may fail if it is conceptually uncertain where there is doubt over the definition of the class who will benefit eg to my friends, or evidentially uncertain, where a particular claimant can not prove that he comes within a certain class or is outside a certain class.

Previously it was important to distinguish whether the gift fell within the ambit of a fixed trust, discretionary trust or a mere power because the court devised certain tests depending on which category the trust fell into and once satisfied there would be certainty of objects.

In the case of a fixed trust, a complete list of beneficiaries should be stated in the trust document in order that the trust be administered (*IRC v Broadway Cottages*).

The test for a power is that it will be valid if it can be said that a person is or is not a member of the class (*Re Gulbenkian's Settlements*). If it is impossible to state whether a person is or is not a member of a class then the power fails for uncertainty.

The power will not be uncertain if the trustees are able to add beneficiaries, but may be invalid if it is capricious as in the case of *Re Manisty's Settlement* where Templeman J said that "a power to benefit 'residents of Greater London' is capricious because the terms of the power negative any sensible intention on the part of the settlor."

In the case of a discretionary trust, the trustees may select amongst a class of beneficiaries. The decision in *McPhail v Doulton* and *Re Baden (No 2)* following the decision in *Re Gulbenkian's Settlements* now requires that the test for a discretionary trust is the same as that of powers ie that 'a power is valid if it can be said with certainty whether any given individual is or is not a member of the class and does not fail simply because it is impossible to ascertain every member of the class.' It must be pointed out that even if there is certainty of class, it may still fail for administrative unworkability as per *R v District Auditor No 3 Audit District of West Yorkshire Metropolitan County*

Council ex p West Yorkshire MCC, where the gift was unworkable and not capricious due to the trust fund being intended to benefit 2.5 million inhabitants of West Yorkshire.

Turning to the constitution of trusts, in order for a trust to be enforceable, it must be properly constituted. This can be done in two ways; either by an effective transfer to the trustees or by a declaration of trust where the property is already vested in the trustee.

The settlor must transfer the property to the trustee in the correct manner. In order to transfer freehold property a conveyance is necessary, registered land must be transferred. Leases require a deed of assignment. Shares can be transferred by executing a transfer form and registering a new owner on the company's register. Chattels require physical delivery.

In *Richards v Delbridge*, the gift failed as there was no proper deed of assignment to pass the legal estate or a declaration of trust. Similarly in the case of *Re Fry*, the donor who resided abroad needed the consent of the Treasury, this was not obtained and hence the gift failed. It is important that the correct procedure is followed; otherwise the transfer will be ineffective. However, where the donor has done everything in his power to transfer the gift but the effectiveness of the transfer rests with the donee or a third party, then the gift will not fail (*Re Rose*).

There may be an effective assignment of equitable interest without the need to transfer the legal estate to trustees, but this assignment must be in writing in compliance with section 53(1)(c) of the Law of Property Act 1925.

A settlor may also declare himself trustee of property for a beneficiary. He may do this orally or in the case of land, this must be in writing to comply with section 53(1)(b) of the LPA 1925. As previously mentioned in certainty of intention, the settlor can use any form of words or intention inferred from conduct (*Paul v Constance*).

An ineffective gift will not be construed as a declaration of trust. In *Milroy v Lord* the court held that they would not perfect an imperfect gift and that as the settlor had shown intention to give the property away but not carried out the necessary formalities, the court would not construe this as a declaration. A similar decision is demonstrated in *Jones v Lock*.

The enforceability of a trust is dependent upon whether it is properly constituted, if it is, the beneficiaries may enforce it whether they have given consideration or not. In the case of an incompletely constituted trust, this can only be enforced by beneficiaries who have given consideration, as equity looks on as done what ought to have been done. The imperfect transfer would be treated as a contract to transfer. However, in the case where beneficiaries have not provided consideration, the trust will be unenforceable as equity will not assist a volunteer. Valuable consideration means money or marriage. Only certain people are deemed within marriage consideration ie husband, wife and children. In *Pullan v Koe* it was held that children were within the marriage consideration and could enforce the covenant of the wife. This case can be contrasted with *Re Plumptre's*

Marriage Settlement where the next of kin who were volunteers could not enforce the covenant.

Problems may occur with future property. A voluntary covenant of assignment, without consideration, to transfer any property received in the future is a nullity. In *Re Ellenborough* there was an assignment of property which might be received in the future. When this property was received, the sister refused to transfer the property to trustees and the court held that they would not compel her to do so as the beneficiary had not given any consideration. Declarations of trust relating to future property will also be void unless consideration is given.

Difficulties have also arisen with covenants. Remedies for breach of contract with consideration at common law can be obtained in an action for damages *Cannon v Hartley*. However, in equity, specific performance will only be granted where there is consideration. Volunteers have no right of specific performance of the covenant and trustees should not be compelled to sue for breach of covenant (*Re Pryce*) and have indeed been directed not to sue (*Re Kay*), because this would mean that beneficiaries would be obtaining indirectly what they would have obtained directly. The settlor can, however, make a covenant with a trustee so that the trustee shall immediately hold the benefit of the covenant for the beneficiary. This would form a completely constituted trust and would be enforceable by a beneficiary without consideration as in *Fletcher v Fletcher*.

It can be seen that there are exceptions to the rule that equity will not assist a volunteer. A donatio mortis causa (DMC) is a gift made inter vivos in contemplation of death. There is an express or implied condition that the gift will not become absolute until the donor dies, ie it is perfected at death. Lord Russell in *Cain v Moon* laid down three essentials for a valid DMC these being, the gift must be in contemplation of death, the subject matter of the gift must have been delivered to the donee and the gift must have been made under such circumstances as to show that the property is to revert to the donor if he should recover.

The other exception to the rule is where an inter vivo gift fails because of non-compliance with some legal formality and the donee subsequently receives property in another capacity then the gift will be deemed perfected. The donor must have manifested a continuing intention to make a present gift of definite property. The property must become lawfully vested in the donee, ie where he becomes the executor (the rule in *Strong v Bird* and similarly in *Re Ralli's Will Trusts*).

Finally, where a donor has made an imperfect gift and the donee relies on the gift, the courts may in some circumstances compel the donor to complete the gift by use of the equitable device, proprietary estoppel (*Pascoe v Turner*)

Bibliography

SPR Notes

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