Podcast One – Revision and Assessment

Hello my name is Judith Riches. I am a non-practising barrister and I teach Equity and Trusts at the University of Brighton. I wrote the Optimize Equity & Trusts which is essentially a book to help you with revision and assessment and this podcast is concerned with both those subjects, i.e. revision and assessment.

Beginning with revision. You are more likely to remember information, if you revise in an active way, for example as you read, you make revision notes or cards. You may find it helpful to record the parts of equity and trusts which you find it difficult to remember so that you can listen to these over and over again. Another idea is to join a study group so that you can revise and discuss topics with others. A very useful way to revise is to practice answering questions in past papers. This is because examiners often have their own style of questions.

Now let us imagine that you are in the examination room. Try to give equal time to each answer. It is much easier to gain the first 50% of marks than the second 50% of marks on an answer – so it is important to make sure that you have enough time to attempt all the questions you are required to answer.

A common mistake is to start writing too quickly without reading the question properly. It is a good idea to draft a rough plan. This not only makes for a well structured answer but if you do find that you run out of the time, the examiner when marking may look at your rough plan and give you marks for the points it was clear that you were going to make.

Now let us look at writing law essays. Do not spent too much time on an introduction – a short introduction will do. As you write the essay, refer back

to the question where appropriate to show the examiner that you are keeping the question in mind throughout and that your answer is tailored to that question.

Do not use the word ‘you’ when answering an essay (or problem question). For example, do not say ‘you will be in breach’. Also try to avoid the use of the word ‘I’ . Thus instead of saying ‘I think’, you could write instead ‘It is likely’ or it is submitted or similar phrases. Where possible, particularly if it is coursework, it is impressive if you can refer to appropriate articles but remember to reference your sources in coursework. The Conveyancer is a useful journal for articles on equity and trusts.

Regarding problem questions, look at the end of the question to find out whom you are advising. For example, if the question ends ‘Advise the trustees’, then make sure that your answer is written from that perspective, and that you are advising the trustees rather than say the beneficiaries.

Although it is not possible to lay down too rigid a formula for answering problem questions which are usually made up of a number of sub-problems, the usual approach is first to identify the issue, then to explain the law that is the rule relating to that issue citing any relevant authority, and then to apply the law to the facts of the problem, coming to a conclusion. This would be repeated with respect to all the sub-problems within the problem question.

Podcast Two – The three certainties

This podcast relates to the three certainties which were covered in Chapter Two.

You will remember that the three certainties required when forming an Express Private Trust are: Certainty of words also known as certainty of intention; certainty of subject matter and certainty of objects (the objects meaning the beneficiaries).

These three certainties were identified by Lord Langdale in *Knight v Knight*.

Let us now consider the main reasons for these three certainties so that you could answer a question which asked for those reasons.

Beginning with certainty of intention. Suppose Sam's will states '£70,000 to Brenda trusting that she will apply it to look after father'. In this context, the word trusting is a precatory word and raises the question – did Sam intend to create a trust?

The question of certainty of intention will be important from Brenda's point of view because she will need to know whether the £70,000 is an absolute gift to her or whether she holds it on trust. Of course, it would also be important from the father's point of view, is he a beneficiary under a trust. Thirdly, if the transferor intended a trust, then it is important that his intention is carried out.

If there is a trust, then the trustee has a legal obligation to fulfil her duty. This obligation can be enforced by the beneficiary and the court would police the obligation and make sure that the trust was carried out as the testator intended.

Turning now to the reason for certainty of subject matter, remember that this certainty is divided into two. Firstly, the property to be held on trust must be certain. If the testator required the bulk of his estate to be held on trust, neither the trustee nor the court would know precisely how much of the testator's estate was to be held on trust and the trust would fail. Even if the trust property is certain, it may be unclear how much is to go to each beneficiary, i.e. their beneficial interest may be uncertain as was the case in

Boyce v Boyce. Again the trust would fail because the trustee would be unable to carry out his obligations. The property would result back to the testator's estate.

Finally, let us look at the reason for certainty of objects. It is obvious that in the case of an express private trust, the trust property must be held for someone so the objects must be certain. Furthermore, if it is a fixed trust, a list of the objects would be required. A fixed trust is where the beneficiaries' beneficial interest is fixed, e.g. £1 million to be held on trust for my employees in equal shares. The trustees would have to have a list of all the employees in order to fulfil their obligation to hold the money equally.

Even in a discretionary trust, where the trustees select from a class of beneficiaries, difficulties may arise regarding certainty. No list of beneficiaries is required, you will remember that the trustees apply what is called the is or is not test, i.e. they must be able to say with certainty whether a given applicant is or is not a member of the class of beneficiaries. This would not be possible for them to do if the class of beneficiaries is uncertain, e.g. a trust for friends. What constitutes a friend. Or the trust might be administratively unworkable because the class was too wide – the trustees could not sensibly survey that class, such as – all the inhabitants of Sussex. In both these cases the trust would fail for uncertainty of objects.

Podcast Three – Completely and Incompletely constituted trusts

This podcast relates to Chapter Four and deals with answering a problem question involving completely and incompletely constituted trusts.

Let us suppose that the settlor intended to create a trust for his children. He had capacity to create a trust, the three certainties were satisfied, and the statutory formalities if any under s53 Law of Property Act 1925 were fulfilled, but he suddenly died and the question arises as to whether the trust was completely constituted.

When answering such a problem question, you would first need to decide whether the settlor had vested legal title to the trust property in the trustee. Remember that the way in which he would do this would depend on the type of property involved.

If he had vested legal title in the trustee, then the trust is completely constituted and could be enforced as such by the beneficiaries. However, if the trust property had not been vested in the trustee, then the trust would be incompletely constituted and the beneficiaries could not enforce it as a trust.

At this point, you would need to continue to consider if there is any solution available to the beneficiaries, e.g. in contract law. Thus if the settlor had promised the beneficiaries to create a trust and the beneficiaries had given consideration for that promise, then they could seek specific performance of the settlor's promise in contract law. Marriage settlements – where the trust is made in consideration of marriage – are rare nowadays, but in such a case the beneficiaries could enforce the settlor's promise if they were within the concept of marriage consideration.

It is more probable that the settlor covenanted to create the trust, i.e. promised in a deed. The Common Law recognises such covenants as specialty contracts requiring no consideration. If the covenant was made between the settlor and the beneficiaries, there is a contract between the settlor and the beneficiaries, and the beneficiaries could sue at Common Law for damages for breach of this covenant.

It is more likely that the covenant was made between the settlor and his trustees in which he promised to create a trust for the benefit of his children. In this case, the children as third parties could use the Contracts (Rights of Third Parties) Act 1999 but again would only be entitled to damages as equity does not recognise the special qualities of such a deed and therefore an equitable remedy would not be available.

Fourthly, when you read the question, notice whether the trustee was also the executor of the settlor's will. As the executor of the settlor's will, legal title to the settlor's estate would temporarily vest in the executor so that he could administer the will and distribute the property. We have seen that the settlor died before he had vested legal title in the trustee, but fortunately, the trustee now acquires legal title in a different capacity as executor. Provided that it can be shown that the settlor had a continuing intention to create the trust, it may be possible for the beneficiaries to rely on the Rule in Strong v Bird to perfect the incompletely constituted trust by arguing that the trustee has now acquired legal title to the trust property in the capacity of executor.

There is a fifth solution which you could mention in passing, namely the trust of a promise, although this has lost its importance since the enactment of the Contracts (Rights of Third Parties) Act 1999.

Podcast Four – the theoretical basis for enforcing secret trusts

This podcast relates to Chapter five on secret trusts and considers a controversial issue, namely what is the theoretical basis for enforcing secret trusts.

First we will consider this issue with relation to a fully secret trust. There is no evidence on a fully secret trust on the face of a will. The testator leaves property to a legatee in his will but that legatee has agreed with the testator to hold it on trust for a secret beneficiary. We are concerned with the question why is such a secret trust upheld when it appears to conflict with the Wills Act 1837 as the property is not passing to the person named in the will.

The traditional basis for upholding a fully secret trust is the fraud theory. If the legatee has agreed with the testator that he will hold the property on trust for another, and that legatee then used the Wills Act to keep the property for himself this would amount to using the Wills Act as an instrument of fraud. The fraud is not simply the fact that the legatee would be keeping the property for himself, because even if he gave the property to someone else, say the testator's wife, there would still be fraud, since he is not carrying out the testator's wishes. The fraud theory regards fully secret trusts as testamentary trusts.

The second theory is the dehors theory, that the fully secret trust operates outside (dehors) the will and therefore is not governed by the Wills Act 1837. A case which illustrates this theory is *Re Young.* You may remember that s15 of the Wills Act prevents a witness to the will from taking as a beneficiary under the will. In *Re Young,* the secret beneficiary under the trust witnessed the will and the question arose whether he could take as a secret beneficiary. It was held that the secret trust operated outside the will, it was not governed

by the provisions of the Wills Act and therefore the secret beneficiary could witness the will and the secret trust was valid.

A controversial point regarding the dehors theory, is whether the fully secret trust is an inter vivos trust or a testamentary trust. When does the fully secret trust come into being. The legatee agrees with the testator that he will hold the property on trust but the trust cannot exist at that point because the property does not vest in the legatee, i.e. the secret trustee, until after the testator's death. It is not completely constituted until after the testator's death. (This is one reason why the decision in *Re Gardner* is considered wrong – because it is based on the secret trust coming into existence when it was communicated and accepted by the trustee – before it was completely constituted. Another reason is that at that point, the trust would relate to future property which you may recall cannot form the basis of a valid trust).

Are fully secret trusts in fact testamentary trusts as they bear the characteristics of a testamentary disposition, coming into effect on the testator's death and being revocable during his lifetime, and therefore strictly should comply with the Wills Act 1837.

Now looking at half secret trusts. These are different in that there is evidence of the trust on the face of the will but the secret beneficiary is not revealed. For example, the will might read: £100,000 to John to be held on trust for the purposes which I have communicated to him. As the trust is evident on the will, there is no question of the trustee taking beneficially but if he did not carry out the testator's wishes, it could be argued that he is acting unconscionably and that it would be a fraud insofar as he is not carrying out the testator's wishes. The dehors theory can also be argued in respect of half secret trusts.

But there is a third theory. This relates to the fact that half secret trusts have to be communicated to the secret trustee before or at the time that the will is made. It is argued that half secret trusts are accordingly based upon the

probate doctrine of incorporation of a document by reference. Under this doctrine, if a will mentions a document, e.g. it refers to a list of the testatrix's jewellery, then this document forms part of the will and must be admitted to probate. A key requirement is that the document must exist at the date of the execution of the will. It is argued that this is the basis justifying the enforcement of half secret trusts. They too are mentioned in the will and the terms of the secret trust must have been communicated to the trustee before or at the time of the execution of the will. However, there are too many differences between half secret trusts and the doctrine of incorporation by reference for this theory to be justified. To take just two examples, in the probate doctrine, there must be a document, whilst with a half secret trust, the terms may have been communicated orally to the trustee. Secondly with the probate doctrine, the incorporated document becomes public but with a half secret trust, the terms of that trust remain secret.

Podcast Five – The presumptions of a resulting trust and advancement and evidence of illegality

This podcast relates to Chapter 6 on Resulting Trusts and considers the topics of the presumption of a resulting trust, the presumption of advancement and evidence of illegality.

Where the transferor of personal property makes a voluntary transfer to a transferee, in other words there is no consideration from the transferee, there is a rebuttable presumption that the transferee holds the property on resulting trust for the transferor. The presumption will not apply regarding a voluntary transfer of land as s60(3) of the Law of Property Act 1925 has abolished the presumption in that context.

Where a purchaser purchases property in the name of another there is again a rebuttable presumption that the recipient holds the property on resulting trust for the purchaser and this applies to both personal property and land.

It is for the recipient to rebut the presumption by evidence that a gift to him was intended.

Now let us consider the situation where the transferor or purchaser transferred the property for an illegal reason – will that make any difference? You will be aware that a person is not allowed to rely upon evidence of illegal conduct – the reliance principle. The House of Lords case *Tinsley v Milligan* illustrates that the transferor or purchaser can still rely on the presumption of a resulting trust – for they have no need to rely on their illegal conduct in order to establish their title. All they have to show is that there was a voluntary transfer or purchase in the name of another for the presumption of a resulting trust to arise.

There is an opposite presumption to the presumption of a resulting trust. This is the presumption of advancement, where it is presumed the transfer or purchase was a gift. However, it only applies to certain relationships, that is where a husband transfers property to a wife (not the other way round); and where a father or a person in loco parentis transfers property to a child. In these relationships, a gift is presumed and it is for the transferor or purchaser to rebut that presumption and prove that he intended to retain a beneficial interest in the property. Therefore if the transferor had transferred the property for an illegal reason, he would not be able to rebut the presumption of advancement because he would have to rely on illegal evidence in order to establish his title. This was the case in the Privy Council case *Chettiar v Chettiar.*

However, if the illegal transaction has not been carried out or the transferor repented before it was carried out, then the transferor may plead his illegal intention in order to rebut the presumption of advancement as was the case in *Tribe v Tribe.*

In its report The Illegality Defence in 2010 the Law Commission proposed reform of this area of law by giving the court a statutory discretion to disregard the illegality taking into account various factors such as the value of the equitable interest at stake, and the conduct of all the relevant parties. However, the Government has stated that it will not be implementing the Law Commission's proposals at least for the time being. One recommendation has however been adopted and that is the abolition of the presumption of advancement by s199 of the Equality Act 2010. However, this section has not yet come into force and when it does so, it will not be retrospective in effect.

Podcast Six – Gifts to Unincorporated Associations

In this podcast, we will look at gifts or donations which are made to a non-charitable unincorporated association as this is a popular area for examination questions.

You will remember that an unincorporated association such as a club or society is not a legal person – it is simply an association of individuals. So when a donation or gift is made to the association, the question arises to whom is this gift actually made. The question is particularly important when a legacy is given to an unincorporated association as the validity of this gift may be challenged by the person or persons who stand to gain if the gift fails. This is likely to be the residuary beneficiary under the testator's will because if the gift fails, it will result back to the testator's estate and pass to the residuary beneficiary.

Let us therefore consider how such gifts have been construed by the court. Let us imagine that a legacy of £100,000 has been left to the Hamfeld Camera Club.

Firstly, if this is construed as a gift to the club for its purposes, then it will fail because a trust or gift for non-charitable purposes is void – the basic reason is that there is no beneficiary to enforce it.

However, if the controversial decision in *Re Denley* is followed and the purpose of the association is inward looking, then the gift may be held to be for the direct or indirect benefit of its members.

Secondly the legacy may be interpreted as an outright gift to the members of the club. This has the drawback that it is unlikely to have been the testator's intention that each member should personally regard the money as their own.

Furthermore, it would not be a practical interpretation if there was a gift of land, or if there were a large number of members – an example of this would be *Re Leahy.*

Thirdly the legacy may be regarded as held on trust for present members of the club. Again this would probably be contrary to the testator's intention because the members, if sui juris could all agree to terminate the trust and take their share. Also such an interpretation does not take account of future members.

Thus the fourth interpretation might be that the legacy was held on trust for present and future members of the club. However, the gift must vest within the perpetuity period, now 125 years and therefore the trust would terminate automatically at the end of that period.

A fifth interpretation is that the gift or donation is given say to the treasurer of the club with authority from the donor to use it for the benefit of the club. The problem with this interpretation is that it cannot be used for legacies as any authority given ceases on the donor's death.

The favoured solution at present is the contractual solution, i.e. that the property is given to an officer of the association or on trust for the members but subject to their contractual rights and is regarded as an accretion to the funds of the club. The relevant case is *Re Recher.*

Podcast Seven – Charities

In this podcast, we will run through the three requirements for a valid charity as this is a popular examination area.

The first requirement is that the institution or trust must be for a charitable purpose. There are thirteen purposes set out in section 3 of the Charities Act 2011. Some of these purposes overlap so a charity may in fact satisfy more than one of them. If you think this is the case, then say so. Try to learn as many examples and cases illustrating the charitable purposes as possible. You will have noticed that the last head under s3 is broadly worded so that new charitable purposes can be developed.

It is important to remember that an organisation or trust will not be charitable if its purposes are political but a distinction is made between the organisation's main purpose being political and the situation where any political activity by the organisation is merely incidental.

The main purpose will be political if it is of a party political nature or proposes or opposes a change in the law or policy of central or local government either in this country or abroad. The reason why political purposes are not permitted, and it is not an entirely convincing reason, was stated by Lord Parker in *Bowman v Secular Society Ltd* namely that a court has no means of judging whether a proposed change in the law will or will not be for the public benefit.

As stated above, a charity may pursue political activities which are incidental, such as campaigning for a change in the law if this is to promote the charity's non-political purpose. In its guidance the Charity Commission gives examples – one of them is – a refugee charity which emphasises the positive contribution

that refugees have made to society and calls for the Government to enforce existing legislation that supports the rights of refugees. This political activity would be permitted.

The second requirement is that all charities must now satisfy the public benefit requirement. There are two aspects to the public benefit requirements. The first aspect is that there must be an identifiable benefit to the public related to the organisation's aims or purposes. For example, an organisation whose purpose is the advancement of education must prove that its particular aims are of benefit to the public.

The second aspect to the public benefit requirement is that the benefit must be for the public or a sufficient section of the public. So the benefit must not be unreasonably restricted to a class within a class as in *IRC v Baddeley* in which a trust provided recreational facilities for Methodists in West Ham and Leyton. Nor must the benefit be restricted by some personal nexus – some personal connection between the beneficiaries such as blood or contract, e.g. a trust for the advancement of education of my employees children would fail. However, there is one exception to this second aspect of the public benefit requirement – the poverty exception in that a trust for the relief of poverty amongst relatives, employees or members of a club will be charitable provided those beneficiaries are not identified by name, e.g. my cousins Rachel and Daphne.

The third requirement is that a charitable trust must be exclusively charitable and cannot have charitable and non-charitable purposes.

Podcast Eight – The statutory powers of maintenance and advancement

This podcast relates to Chapter 12 and trustees' powers of maintenance and advancement both of which are read into every trust unless there is a contrary intention in the trust instrument.

You may remember that unlike his duties which a trustee has to perform, he does not have to carry out a power although he must consider its exercise if the circumstances are such that it could be exercised.

Beginning with the statutory power of maintenance – this is found in s31 of the Trustee Act 1925. Let us suppose that the beneficiary is a minor and has a vested interest in the trust, for example £500,000 is held on trust for him. It would not be appropriate to pay over all the income to someone who is a minor and so trustees have the power under s31 to pay a reasonable amount for the infant's maintenance, education or benefit and to accumulate the balance. When the minor comes of age, he will be entitled to all the income and the accumulations.

It may be that the minor has only a contingent interest, meaning that she will be entitled to the capital only on the occurrence of a future event. An example would be £500,000 to my daughter when she qualifies as a solicitor. Generally, a contingent interest carries the intermediate income (that is the available income) although there are special rules regarding a contingent pecuniary legacy which will only carry the intermediate income when the testator was the father of the beneficiary, or in loco parentis to the beneficiary and there was no other provision in the will for the beneficiary, or the will showed an intention that the gift should be used for the beneficiary's maintenance or directed that the legacy be set aside from the rest of the will. So to recap, if the contingent interest carries the intermediate income, then the trustees may apply that income for the beneficiary while she is still a minor although the

contingency remains unfulfilled. Furthermore, when the beneficiary comes of age, her interest will be accelerated in so far as she will still be entitled to the income. When she fulfils the contingency, she will be entitled to the capital and any accumulations.

Turning now to the statutory power of advancement – this is found in s32 of the Trustee Act 1925. This relates to the advancement of capital to a beneficiary before the time when he is entitled to the trust fund. For example, there may be a prior interest as where a testator sets up a trust for his widow for life, remainder to his two children. The children may apply for an advancement of capital while the widow is still alive. However, there are three conditions, firstly, they can only receive up to half of their presumptive share; secondly, they must obtain the consent of the person having the prior interest, in this case their mother. The reason is that if they receive an advance of capital, this will mean that the mother's income which derives from the capital will be reduced. The third condition is that the advance must be brought into account when they become absolutely entitled. The advancement must be for the benefit of the beneficiary and the trustees should ensure that it is used for its stated purpose – regarding which see *Re Pauling's Settlement Trusts.*

Interestingly, a beneficiary with a contingent interest, such as £100,000 to my daughter when she qualifies as a solicitor, may also seek an advancement of capital even though there is the possibility that the contingency might never be fulfilled.