

DEPARTMENT OF LAWS
EQUITY AND TRUST (LAW 2222)
SECOND SEMESTER 2021/2022 EXAMINATION
PAST QUESTIONS & ANSWERS

QUESTION 1:

Alie by Will, made the following bequests:

- a. Le 500,000 to my daughter, KARIMA, and I trust that she will provide for the children out of this.

Answer:

In the case of **Knitting v Knitting (1840)**, Lord Langsdale held that for a valid and enforceable Will, the three certainties need to be established, if one of the certainties had failed, then the trust will be void. The three certainties are the certainty of intention, the certainty of subject-matter and the certainty of object.

In regards to Karima, the issue of concern is the certainty of intention on the validity of Alie's Will. The first certainty to be discussed is the certainty of intention. In **Re Adams and Kensington Vestry [1884]**, where a testator left his property by will 'unto and to the absolute use of my wife . . . in full confidence that she will do what is right as to the disposal thereof between my children'. The court held that no trust had been created for the children, so the wife was entitled to the property absolutely. In **Comiskey v Bowring-Hanbury [1905]** the court concluded that on construction of the facts of the case, a trust was intended by the testator. In applying this to the fact, there is no certainty of intention to create a valid trust for the benefit of the children but Karima is to have absolute interest in the property.

However, in the event that the certainty of intention is satisfied, the certainty of subject-matter needs to be established. In **Hunter v Moss [1994]**, the court held that the subject-matter of the trust was sufficiently identifiable to create a valid trust. Similarly, in **Choithrain International v Pagarani (2001)**, the Privy Council held that declaring a trust of uncertainty property, but mentioning a specific item as included, creates a valid trust of the item. This was supported in **Shah v Shah (2010)**, the court held that the bulk

of the company's property was sufficient to declare a trust. To satisfy this requirement, looking at the facts of this question, the Le 500,000 would be the subject matter as it clearly stated in the Will, hence, this requirement is satisfied.

The next certainty is the certainty of object and the Complete List Test will be applied here which was established in **IRC v Broadway Cottages Trust**. The Complete List Test states that if a complete list can be made of all objects in the trust, then the test is satisfied. Applying this to the facts of this question, it is possible to make a list of all Alie's children. Hence, this requirement is satisfied. Karima will be advised that in the event that the certainty of intention requirement is satisfied, she would get Le 500,000 from Alie's Will, to be used for the benefit of the children.

- b. Le 250, 000 to my son, NYANDA, on trust to use the income for such period as /the law allows for the provision of summer outings for the employees and their relatives and/or dependants of my old company, Nuts and Bolts Ltd.

Answer:

NYANDA will be advised on the issue on certainty of intention. In **Comiskey v Bowring- Hanbury [1905]**, the court concluded that you need to look at the way in which the property was left. In **Re Adams and Kensington Vestry [1884]**, the testator expressed in his will "in full confidence that she would do what was right as to the disposal thereof between my children". The court decided that on construction of the words used in the will, no trust was intended. Similarly, in **Re Snowden (1997)** where an aunt said to her brother: 'leaving it to split up the remainder as he thought best'. The court held that vague language was not sufficient to establish a trust in and of itself. On the facts of the case, there is no certainty of intention in Alie's will as the wording on the will was vague. Hence, this requirement is satisfied.

The next requirement to be established is the certainty of subject-matter. In **Re Goldcorp**, the rules established not simply around it being logistically possible to identify the property, but rather that the property itself has actually been segregated (appropriated) for the purpose of subjecting it to the trust arrangement. This was applied

in **Hunter v Moss (1994)**, the court held that there was a valid trust over the identified shares of the company's property. This was also supported in **Choithrain International v Pagarani (2001)**. Applying it to the fact, the Le 250,000 is the subject-matter as it is stated in Alie's Will.

In identifying the certainty of object in Alie's will, the Complete List Test will be drawn to identify the class of persons to benefit from the will. Thus, the employees and their relatives and/or dependants will be the object in Alie's will.

NYANDA will be advised that if the intention in Alie's Will was certain, then there would have been a valid and enforceable trust for the benefit of the beneficiaries. But the gift given to her on trust was for her own absolute use.

- c. Le 100,000 to my son, MICHAEL, confidence that she will pay a reasonable sum each year to my Aunt Martha for her maintenance.

Answer:

In regards to Michael, the issue in question concern the certainty of intention on the validity of Alie's Will. The first requirement to be addressed on the validity of the Will is the certainty of intention. In **Mussoorie Bank v Raynor (1882)** where a deceased husband gave property to his widow using these words in the gift: "Feeling confident that she will act justly to our children in dividing the same when no longer required by her". The Privy Council held that there was no trust created in favour of the children. This was also considered in **Re Australian Elizabethan Theatre Trust (1991)**, the court held that the words expressing preference were insufficient to demonstrate an intention to create a trust. Also in **Will of Warren (1907)**, where a testator's will made a gift to a particular woman followed by these words; "believing that she will do justice to my relatives". It was held that there was no trust created. In **Re Adams and Kensington Vestry [1884]**, where a testator left his property by will 'unto and to the absolute use of my wife . . . 'in full confidence that she will do what is right as to the disposal thereof between my children'. The court held that no trust had been created for the children, so the wife was entitled to the property absolutely. In applying this to the facts, there is no intention to

create a valid trust in Alie's will. The gift is merely a moral obligation to benefit the aunt, Martha.

The next requirement to be discussed is the certainty of subject-matter. In **Hunter v Moss [1994]**, the court held that the subject-matter of the trust was sufficiently identifiable to create a valid trust. Similar approach was taken in **White v Shortfall (2006)**, where the court considered a single trust over all the intangible assets with power given to trustees to split off specific parcels based on equitable entitlement. Applying to the facts of the case, the Le 100,000 is the subject-matter of Alie's will to be held on trust by Michael.

The next condition is the certainty of object. In **Morrice v The Bishop of Durham (1815)**, it was stated that there must be certainty with regards to the identity of the person (s) to benefit under the trust in order for the courts to police trustee's performance. This was applied in **IRC v Broadway Cottages (1955)**, and further states that the objects of a trust have to be certain in order for the courts to control and manage trusts as a last resort where there is a dispute with trustees. In identifying the object of Alie's will, the "is or is not test" will be drawn. Thus, Aunty Martha would be the object to benefit from the will.

MICHAEL will be advised that in the event that the certainty of intention requirement is satisfied, he would get Le 100,000 from Alie's Will, to be used for the benefit of his aunt, Martha.

- d. My collection of old railway timetables to my other sons NYAMBEH and IVAN and they are to allow my old railway enthusiast friends to have any timetables which they wish. In case of doubt as to who is an old railway enthusiast friend, my wife GIFTY can be asked. She knows who they are.

Answer:

In regards to Nyambeh and Ivan, the issue in question concern the certainty of intention, certainty of subject-matter and the certainty of object.

The first certainty to be discussed is the certainty of intention. In **Re Alston (1955)** where the deceased woman in her will said "it is my express wish" that her trustees should grant leases on easy terms of two valuable properties to a favoured male friend. As a matter of construction, the words 'express wish' could not be construed to have intended to create a valid trust. In **Re Adams and Kensington Vestry [1884]**, The court held that no trust had been created for the children, so the wife was entitled to the property absolutely. This was supported in **Will of Warren (1907)**, where a testator's will made a gift to a particular woman followed by these words; "believing that she will do justice to my relatives". It was held that there was no trust created. Applying it to the fact, the collection of old railway timetables were for the absolute use of the sons, Nyambeh and Ivan, but it has not confer any legal obligation on them. Therefore, there is no certainty of intention in this regards.

The next requirement to be satisfied is the certainty of subject-matter. In **Re London Wine Co Ltd. (1986)** where unsecured creditors of a bankrupt wine trading company, London Wine Co (Shippers) Ltd. argued that they should be able to claim the bottles of wine they had paid for. The bottles that the customers had brought had not yet been individually identified. It was held that even if the company had said the wine was to come from current stocks, the trust would in any event have been uncertain. Similarly, in **Sprange v Barnard**, where a property to husband 'for his sole use' subject to the all that is remaining in stock, that he has not necessarily use for, to be divided equally between named beneficiaries. There was no trust created. Applying to the fact, there is no certainty of subject-matter in Alie's will. The construction of the will with the following words "My collection of old railway timetables" could be construed differently. Hence, this requirement is satisfied.

The next requirement to be satisfied is the certainty of object. In **Re Barlow Will Trusts (1979)**, where an old lady left some pictures in her will with a proviso that the paintings

shall be held by her executors for sale for her "family and friends". The trust was held to be invalid as there was no severality of friends. This was followed in **Re Benjamin (1902)**, and the court held that 'friends' is conceptually uncertain. The House of Lords in **Re Gulbenkia's Settlements (1970)** decided that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class. In this case, Lord Upjohn also held that 'friends dealing with trust is not conceptually certainty. This was affirmed in **Re Baden's Deed Trusts (1971)**. In this requirement, there is no certainty of object. The terms 'enthusiast friends' could have a variety of meaning.

QUESTION 3: WHAT WERE THE LEGAL AND EQUITABLE IMPACTS OF THE JUDICATURE ACT 1873 AND 1875?

The Judicature Act 1873-75 was an Act of the Parliament of the United Kingdom in 1873. It recognized the English court system to establish the High Court and the Court of Appeal, by merging the common law courts and equity courts. Essentially, the Act was a first modern attempt to reduce the clutter and the consequent inefficiency of courts that had specific powers of jurisdiction throughout England and Wales.

The coming of the 1873-1875 Judicature Act established in England one single Supreme Court of Judicature and by section 3 of this said Act consolidated and unified the old Court of Chancery with the Court of common law. For instance, the Court of Common Pleas, the Court of Queen's Bench and the Court of Exchequer. It also split that Supreme Court into the High Court and the Court of Appeal. What's more interesting, is that S.25 (11) of the Act provided some certainty in that it clarified which court would prevail in situations of incompatibility, again reaffirming the view of the King in 1615 that if the Common Law and equity conflict then equity shall prevail.

By the enactment of the Judicature Acts 1873 and 1875, it created the question of 'fusion fallacy'. For example, in her book *Equity* (2006) **Worthington, S** argues that there should be an end to the two different systems of Common Law and Equity whereas **Browne, D** in his book *Ashburner's Principles of Equity* (1933) as 'comparing the law

and equity to separate streams, while acknowledging they run side by side “do not mingle their waters”. However, there is a clear difference in opinion in that Diplock, L in the case of **United Scientific Holdings v Burnley Borough Council [1978]** considered the law of equity and the common law as fused.

It can be said that the effect of the adoption of the Judicature Act 1873/75 not only fused the jurisdiction of the courts but also fused the rules to which each court, prior to the Act enforced separately so that now they are regarded as one.

The implementation of the Judicature Act 1873-1875 can be seen in the case of **Walsh v Lonsdale (1882)** in which the defendant, Lonsdale, agreed to grant the claimant, Walsh, the lease of a mill for seven years, the rent to be paid quarterly in arrears with a year’s rent payable in advance if demanded. The parties did not execute a deed for grant of the tenancy, but the claimant moved in and paid rent quarterly in arrears. The defendant then demanded a year’s rent in advance. The claimant refused to pay. The claimant argued that under common law rules a lease had to be created by deed to be legal. This had not been done; therefore the lease was not legal. The Court of Appeal found in favour the defendant landlord. The Judicature Act 1873-1875 had fused the two separate legal systems of common law and equity into one system. In any conflict, the rules of equity should prevail. Relying on the equitable maxim "Equity looks on as done that which ought to be done", the parties were treated as having a lease enforceable in equity from the date of the agreement to grant the lease. Such a lease was held under the same terms and the court could order specific performance of it.

In **Tinsley v Milligan (1994)**, notwithstanding the illegality issue, the court held the defendant had a “right in law to assert her equitable ownership” based on a resulting trust; This decision was viewed as merging the “unclean hands” maxim into the common law rule.

While both the Common Law and equity have case law which sets precedents, equity has also developed maxims which must be satisfied ultimately ensuring fairness. In the case of **Boardman v Phillips [1967]** Upjohn, J recognised that ‘the rules of equity have to be

applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the specific circumstances of each case'. Walker, L in the recent case of **Futter and another, v HMRC; Pitt and another v HMRC [2013]** defined a maxim of equity as 'not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles'.

The evolution of the Act gave persons equitable interests as well as legal interests, especially with regards to property and trusts. Legal interests are a right whereas equitable interests are dependent on the distinct set of discretionary rules known as maxims. The Maxim 'Equity acts in personam' is around this idea that in the formative years of Equity it was intended to deal with the issues of personal interests rather than proprietary rights. Its intention is to determine whether something done is 'conscionable' which is a clear difference in approach from that of the Common Law.

It's worthy to note that the equitable remedies available to the court are somewhat different to that of the Common Law. In equity there are remedies such as rescission, injunction, specific performance (enforcing someone to do something), rectification (document can be amended to reflect the true/real intentions of the parties) and are all available at the discretion of the court in addition to those available at Common Law level.

With the establishment of the Judicature Act in 1873-75, brought about the development of trust as it is equity's most important contribution to law.

QUESTION 5: WRITE SHORT NOTES ON THE FOLLOWING:

According to the definition provided in Underhill and D. Hayton, Law of Trusts and Trustees; 'a trust is an equitable obligation, binding a person (called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries) who has the beneficial interest by equity in the property and may enforce the obligation. Section 1 of the Recognition of Trusts Act 1987 declares that the term 'trust refers to the legal relationship created inter vivos or on

death by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.’

a. Express trusts

Express trusts are created in accordance with the express intention of the settler. The settler expressly declares that certain property be held in trust either for himself or for certain person or persons. Where Saquee declared himself a trustee of an estate for John or conveys it to Francis on trust for Mohamed. It is called an express trust. The declaration of such a trust involves three main requirements:

- Satisfying the three certainties as outlined by Lord Langdale in **Knitting v Knitting (1840)**, i.e, certainty of intention, certainty of subject-matter and certainty of object
- Satisfying the formalities, i.e, a declaration must be made in respect of the trust
- Transferring the subject-matter of the trust to the trustee. i.e, for a trust to be enforceable, the trust property must be duly vested in the trustee.

b. Secret trusts

A secret trust is the type of trust created between the testator and the trustee to benefit an individual without identifying that person. The terms of the trust are not apparent on the face of the will. There are two methods which can be used to set up a secret trust. Firstly, fully secret trust can be categorized as an outright gift in the will to the intended trustee. contrastingly, a half secret trust appears as a gift in the will to the intended trustees stated to be on trust or using terminology indicative of a trust rather than a mere moral obligation. In either case, the details on the trust do not appear in the will but the trustee is separately informed by the testator during their lifetime.

c. Resulting trusts

These are generally based on the presumed intention of the settlor/transferor. It may arise in the situation where a settler or a testator carries on an intentional act other than the

creation of a relationship of trustee and beneficiary from which the court inferred a relationship of trustee and beneficiary.

d. Constructive trust

A 'constructive trust' is one created by the courts in the interests of justice and conscience. Thus, whenever a trustee abuses the confidence of the settlor by realising an unauthorised profit derived from trust property, that profit is held on constructive trust for the beneficiaries. This was illustrated in **Keech v Sandford (1926)**, in which a child inherited a property on trust. The trustee sought to renew the lease on its expiry, and in his own name with the intention that he benefits from the trust fund personally. An application was made on behalf of the child to the court for the benefit of the lease to be held on trust for him. It was held that a trustee must not benefit from trust property and must be on trust for the beneficiary. Similarly, in **Re Biss (1903)**, a potential beneficiary had a lease of the trust property renewed in their favour. The court held that this was not a fiduciary relationship.

QUESTION 6: USING RELEVANT CASE LAWS, EXPLAIN THE DOCTRINE OF EQUITABLE ESTOPPEL

Estoppel is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.' The doctrine is designed to protect a reliant party from detriment which may flow where another party denies truth of an assumption or expectation which they have encouraged the reliant party to believe.

The principle of equitable estoppel was considered in the case **Central London Property Trust Ltd v. High Trees House Ltd [1947]** Denning J held that the plaintiff was entitled to recover £625. With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an equitable

estoppel, because, as was said in **Jorden v. Money (1854)**, a representation as to the future must be embodied as a contract or be nothing.

The High Trees case set equity on the path of supplementing the doctrine of consideration by extending the common law notion of estoppel, 'equitable estoppel' has been more prominent in the books than its common law original. This was also expressed in the case of **Hughes v Metropolitan Railway Co. Ltd (1877)** where landlord gave tenant six months to repair property, or else risk forfeiture within six months, negotiations for sale of lease was opened between landlord and tenant. Negotiation failed after six months, tenant failed to repair. Landlord sought to enforce forfeiture. It was held that the opening of negotiations amount to promise by landlord that as long as they continued, he would not enforce the notice. It was in reliance upon this promise that the tenant had remained quiescent. Tenant was entitled in equity to be relieved from forfeiture. This was affirmed by Lord Cairns and stated that it would be inequitable for promisor to go back on his promise and insist on his strict legal right in law.

In **William Teo's House and Estate Agencies v Chang Eng Swee (1965)**, the plaintiff claimed the sum of \$3,592 from the defendant arising from transactions relating to the letting of premises. The defendant alleged that there was a general settlement of all outstanding claims between him and the plaintiff under which he had agreed to pay and had paid the sum of \$2,000. The plaintiff agreed that he had received the sum of \$2,000 but denied that it was an overall settlement and he claimed for the remaining settlement. The court in coming to conclusion has referred to the High Trees case and the defendant was not estoppel from setting up the defence.

It is well settled that the doctrine of equitable estoppel may only be used as a defence and not as a course of action, that is, it may be used as 'a shield and not a sword'. This principle was established in the case of **Combe v Combe (1951)** where, after a divorce, a husband promised to pay the ex-wife £100 per annum maintenance, but failed to make any payments. Whilst she pressed him for payment, she did not in fact make any application for maintenance to the divorce court. Nearly seven years after being awarded

the decree absolute, the ex-wife brought an action for £675 representing arrears for six years nine months' maintenance. She alleged that her husband had made an unequivocal promise, intending that she would act on it and that she had in fact acted on that promise, and that the husband should therefore be estopped from going back on that promise. The Court of Appeal held that the use of estoppel as a cause of action was an illegitimate extension of the principle.

There has been a resurgence of equity, beginning with the seminal decision on promissory estoppel in *Walton Stores* where until then promissory estoppel had acted as a defense to a claim and not as a weapon to create a new cause of action. The landmark decision in the case of **Waltons Stores Ltd v Maher (1988)** where Waltons had assured Maher that a contract was imminent. So, Maher acted on that promise to his substantial detriment. The court held that even though there was no contract, Waltons' actions were unconscionable. Therefore, Maher was successful in claiming for damages using promissory estoppel. Equity remains a rule of conscience, coming to relief when unconscionability would otherwise prevail – it "mitigates the rigours of strict law". The doctrine of unconscionability was invoked by judges in granting estoppel and it began with the landmark case of **Boustead Trading Sdn Bhd v ArabMalaysian Merchant Bank (1995)**. Unconscionability is understood as a doctrine used by the court to correct man's conscience against conduct and bargains that are unconscionable. In other words, the court has the power to correct a conduct when it is not in accordance with what is just or reasonable. In this case, the court held that by protesting some seven months later was characterized as being unconscionable and inequitable. The appellant was subsequently barred from challenging the validity of the endorsement.

The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. This means that the doctrine of equitable estoppel concerns to achieve justice in which it works according to the facts and circumstances of a case.

The doctrine of equitable estoppel comes with limitation. The first one is, there must be a pre-existing legal relationship in which there has been a clear and unambiguous promise which the promisee has relied on and would be inequitable and unjust to allow the

promisor to go back on the previous legal relation as stated in High Trees. Secondly, this doctrine can be used to extinguish and suspend strict legal rights and can only be used as a shield not a sword as in **Combe v Combe**.

Note: the answers contained in this document do not include questions 2 and 4, but references be made in the first semester notes for your perusal.

Q2: In *Aquaculture Corp v New Zealand Green Mussel Co* (1990) at 301, Cooke P, in the context of a confidential information case before the NZ Court of Appeal, said: "For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that, in the circumstances of the dealings between the parties, the law imposes a duty of confidence. For its breach, a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute." Discuss.**Consider the fusion of the common law and equity.**

Q4: "Equity is not past the age of child bearing" Discuss.