

Hypothetical facts

Leon Easel, a renowned artist, died in 2012. His will contains the following provisions:

(a) To my favourite artist, Basil van Brush, I devise my country studio and gardens on the Isle of Mull absolutely in full confidence that he will make such use of them as I should have made myself and that at his death he will leave them to the Royal Academy and in default of any disposition by him thereof by his will or testament I hereby direct that all my estate and property acquired by him under this my will shall at his death be given to the Royal Academy absolutely.

(b) To my executors, my personal estate (excluding my art collection) to hold upon trust for such artists as they shall select having regard to their knowledge of my personal taste in art.

(c) To my executors, the greater part of my art collection to be held by them on trust for my favourite model, Imogen, subject to any pictures which my friends may choose.

Consider the validity of each provision, and the consequences, where relevant, of invalidity.

Guidance

This question is designed to test students' ability to apply the 'three certainties' requirement for an express trust to three dispositions in a will. Each of the three dispositions happens to take one of the three certainties as its focus, students should therefore be warned that real life (as well as real examination) examples may not separate the three certainties so neatly. They should always bear in mind that uncertain subject matter or uncertain object may indicate an uncertain intention.

(a) The primary issue here is whether or not this disposition evinces certainty of intention to create a trust. Certainty of intention is also referred to as certainty of 'words'. The question to be determined is whether the words used in making the disposition are

imperative, so as to fix the donee with trust obligations in relation to the realty. There is no magic formula for determining in every case whether or not a trust has been created.

Each disposition must be construed as a whole in order to glean the testator's true intentions. The general rule is that precedent should not be conclusive of the question of construction (*Re Hamilton* (1895) 2 Ch 370). However, if the disposition is made in terms which reproduce exactly the peculiar wording of the disposition in a previous reported case, the court may infer that the person making the disposition intended to achieve the same result as that achieved in the previous reported case (*Re Steele's Will Trusts* [1948] Ch 603). That appears to have been the testator's intention here.

His disposition repeats almost verbatim the form of the disposition in the House of Lords case of *Comiskey v Bowring-Hanbury* [1905] AC 84. The testator left to his wife 'the whole of my real and personal estate and property absolutely in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces'.

In that case it was held that, upon a true construction of the words of the will, the disposition took effect as a trust, under which the wife had a life interest, the superadded direction that the nieces should acquire an interest *in any event* showed that the wife was not intended to acquire an absolute interest in the estate.

It would appear, therefore, that the testator has constituted Theodore a trustee for himself for life and for the Royal Academy in remainder.

(b) This disposition is certainly intended to be in the nature of a trust. The use of the word 'trust' is nearly always conclusive, and the word 'shall' emphasises that there is an imperative obligation to distribute the testator's personal estate.

The object of any trust must be certain before a court will acknowledge that a valid trust has been created. The main reason for the requirement of certainty of object is to ensure that the trustees can identify the persons in whose favour they are required to distribute the fund. Where the trustees have a discretion as to which beneficiaries within a class will

take a benefit, it is not necessary to be able to list every member in the class. It *is* necessary, however, for the trustees to be able to say of any individual claimant whether they do or do not fall within the class of possible beneficiaries. This ‘individual ascertainability’ test was laid down in relation to discretionary trusts by a bare majority of the House of Lords in the case of *McPhail v Doulton*. Lord Wilberforce, who delivered the leading speech, held that the trustees of a discretionary trust must survey the class of potential beneficiaries in order to form some idea of the number of persons within it. In order to carry out this survey, and in order to exercise a fair discretion in the distribution of the fund amongst the class of potential beneficiaries, the class must be capable of reasonably precise definition. Lord Wilberforce referred to this as the requirement of ‘linguistic or semantic’ certainty, now more usually referred to as the requirement of conceptual certainty (see, in particular, the judgments of the Court of Appeal in *Re Baden’s Deed Trusts (No. 2)*).

The discretionary trust in the instant case will only be valid if the trustees (and ultimately the court) could say for certain of any claimant whether they are or are not an ‘artist’. The difficulty with the term ‘artist’ is that an artist is merely a person who produces ‘art’, and it is difficult to find any two people who can agree upon what ‘art’ is. Art and artist are conceptually uncertain words. Nevertheless, in accordance with the maxim *certum est quod certum reddi potest*, the courts will treat as certain that which can be made certain. So, is there any way in which the term ‘artist’ can be rendered certain?

One possibility is to define the concept along lines approved by the testator (the testator in the instant case actually urges this approach upon his trustees). It may be that the testator had written books or letters in which he attempted to define the term. If a usable definition can be found the court may see fit to direct the trustees to take the testator’s own definition of the term ‘artist’ as a way of remedying the uncertainty of the concept. However, although the court approved an approach similar to this in *Re Tepper’s Will* [1987] 1 All ER 970 in relation to an *individual* gift subject to a condition subsequent (the gift was made on condition that the donee remained ‘within the Jewish faith and shall not marry outside the Jewish faith’, the judge admitting evidence of the testator’s own practice in order to render certain the meaning of the term ‘Jewish’), it is doubtful that it would be applied to a gift, such as the present, which is held on trust to be *divided* amongst a class.

On balance, it is very doubtful that the court would remedy the uncertainty inherent in the description 'artist' and the discretionary trust will therefore fail for uncertainty of object. The consequence of the invalidity of the trust is that the trustees will hold the fund on trust for the residuary beneficiaries under the testator's will.

(c) This trust will fail for uncertainty of subject matter. The trustee cannot possibly know what is meant by the 'greater part' of the art collection. It could mean the greater part by value, or the greater part in terms of the number of pieces, or even the greater part in terms of physical bulk. In *Palmer v Simmonds* (1854) 2 Drew 221 a trust of 'the bulk of my estate' failed for uncertainty of subject matter. The usual consequence of invalidity due to unascertainable subject matter is that the trust fails absolutely and the person in possession of the property takes it absolutely (this is what happened in *Palmer v Simmonds* itself). However, where the persons in possession of the property are executors (i.e. already trustees by status) the property will be held by them on resulting trust for the residuary beneficiaries under the testator's will.

Finally, there is the issue of the individual gifts of paintings to the testator's friends. These gifts are absolute gifts subject only to a condition precedent, namely that each claimant must prove that he or she is the testator's 'friend'. It is the nature of such gifts that the donee takes the whole of the subject matter (i.e. the painting or paintings), this can be contrasted with a discretionary trust where the beneficiaries *share* the fund. Because there is no need to share a fund between a class of persons the test of certainty of object is less stringent in relation to a gift subject to a condition precedent. Such a gift will be valid in relation to any person who can prove that they are a friend, even though persons may exist of whom it cannot be said whether or not they are a friend (*Re Barlow's Will Trusts* [1979] 1 All ER 296). In the instant case, however, the individual gifts subject to a condition precedent were intended to operate as a charge upon the larger trust of the 'greater part' of the art collection. As the larger trust has failed it is most doubtful that the court would enforce the charge (the individual gifts) against the art collection in the hands of the executors or the residuary beneficiaries.