Summative assessment exercise - outline answer

The son has given no money or money's worth in consideration of his father's promise to settle the £100,000, nor can the son claim to have been within marriage consideration, for his father's promise had not been made in consideration of any marriage. Nor had the son been a party to the deed containing the covenant. Accordingly, the son cannot show any common law entitlement to have the covenant performed. The son is therefore a mere volunteer.

A volunteer (a person claiming the benefit of a voluntary promise to create a trust) cannot enforce the promise by action in court, and must therefore show that the promise has already been performed, i.e. that the trust has already been validly constituted. In other words, the volunteer must show that there has been a valid declaration by the settlor that he is to henceforth hold the property as trustee, or that there has been a valid transfer of the property to trustees to hold on trust (*Milroy* v *Lord* (1862) 2 De GF & J 264). On the present set of facts it is clear that Herbert did not intend to declare himself to be a trustee. The courts will not spell out a valid declaration of trust from a failed attempt to create a trust by transfer to trustees, therefore the son's only hope is to show that there had been a valid transfer to the trustees.

The difficulty with proving a valid transfer to the trustees is that Herbert had not done everything within his power that was necessary to be done in order to effect a transfer of the shares. To transfer the legal title in shares it is necessary not only to hand over the share certificates, but also to complete stock transfer forms and have the new owner registered at the company. It appears, therefore, that the trust has not been completely constituted. However, recent cases in the Privy Council (*T Choithram* v *Pagarani* [2001] 1 WLR 1) and Court of Appeal (*Pennington* v *Waine* [2002] 1 WLR 2075) appear, when read together, to be developing a broad and very flexible new basis for the equitable assistance of volunteers – namely that a transfer will be enforced whenever the transferor has reached such an advanced stage in the transfer that it would be unconscionable for the transferor to prevent the transfer from proceeding. This is, of course, a highly unorthodox development in this area of law which may owe a great deal to the fact that the transferors

in those cases had died before they had been able actually to transfer the subject matter. For the same reason it has the potential to save the transfer in the present case, but in the absence of any evidence that the son has relied to his detriment in expectation of the transfer it is unlikely that the 'unconscionability' approach will be successful.

The son is in difficulty. He cannot prove that he is entitled as a beneficiary under a validly constituted trust, and he cannot enforce the promise to create the trust because he has given no consideration for the promise. The son is a mere volunteer, and equity will not assist a volunteer.

Nor will he be able to rely upon the 'Roman law' doctrine of *donatio mortis causa,* for not only will the court refuse to spell out an absolute gift from a failed trust (*Jones* v *Lock* (1865) LR 1 Ch App 25), but, further the gift does not appear to have been made in contemplation of death, nor intended to revert to Herbert in the event of his recovery from illness. What is more, it has even been doubted that there can be a valid *donatio mortis causa* of shares (*Re Weston* [1902] 1 Ch 680). (Having said that, there seems to be no logical reason for disallowing a *donatio* of shares, and there is support for the view that delivery of share certificates is enough to hand over 'the essential indicia or evidence of title' in order to effect a valid *donatio* (*Staniland* v *Willott* [1852] 3 Mac & G 664).

The son, may, however, have one final argument up his sleeve: Mr Smith and Mr Overy were parties to the deed in which the covenant to settle is contained. They therefore have a common law right to enforce the covenant against Herbert's estate. If the trust has not been completely constituted (as appears to be the case) they could sue for damages for breach of covenant at a level calculated to compensate for the loss of the son's anticipated life interest in the £100,000 (see *Re Cavendish-Browne's Settlement Trusts* [1916] WN 341 — although there is a counter-argument that the trustees should only receive nominal damages because they themselves have not lost out as a result of the breach of covenant!). As trustees, they could not, of course, hold the damages for their own benefit. They would be obliged to hold them on trust for Herbert's son. It appears, then, that if the trustees choose to take proceedings against Herbert's estate in order to enforce the covenant, Herbert's son will at last receive the benefit of his life interest in the £100,000.

However, will this indirect claim, using the trustees as intermediaries, be allowed? According to *Re Pryce* [1917] 1 Ch 234 and *Re Kay's Settlement* [1939] Ch 329 it will not. In those cases the court directed the trustees not to take steps to enforce the covenant for the benefit of volunteers. As the volunteers could not enforce the covenant by direct means the court refused to allow them to acquire the benefit of it by indirect means. However, the trustees in both those cases had sought the court's directions as to the proper course to take. Does it necessarily follow that the trustees in the instant case would be acting in breach of trust were they to take it upon themselves to enforce the covenant against Herbert's estate, without ever having sought the court's directions on the issue? It would, at the very least, be difficult to argue that the trustees had breached a trust which had not yet been constituted.

If this final line of argument fails, and it is hard to imagine a court looking sympathetically upon it, it is doubtful that Herbert's son has any real prospects of success in an action to enforce the trust, for he has no common law right of action and equity will not assist him.