

### Chapter 3: Capacity and Formality Requirements

#### Summative Assessment Exercise - Outline Answer

- (a) Bill has declared himself to be trustee of freehold land for the benefit of his son. The declaration of the trust of land may be made orally, but it will not be enforceable in court unless it is 'manifested and proved' in writing signed by Bill (or by his will (s. 53(1)(b), Law of Property Act 1925).
- (b) In contrast with (a) what we have here is not the creation of a new trust, but an *inter vivos* (life-time) dealing with an existing trust. The only relevant statutory formality requirement is s. 53(1)(c), Law of Property Act 1925 which provides that: 'a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing'. This writing must be signed by Tony, or by an agent authorised by him in writing. In contrast with (a), where the declaration was valid, but unenforceable until manifested in writing, the disposition here is not valid at all unless *made in writing*. The reason for this formality requirement is to prevent hidden oral transactions with equitable interests under trusts.

Lord Radcliffe in *Grey v Inland Revenue Commissioners* [1960] AC 1 did suggest that 'there is warrant for saying that a direction to his trustee by the equitable owner of trust property prescribing new trusts of that property was a declaration of trust', but even if that were the case, his Lordship observed that the direction might nevertheless be a disposition falling within s. 53(1)(c) (and thus in need of written form) if 'the effect of it was to determine completely or *pro tanto* the subsisting equitable interest of the maker of the direction'.

- (c) Secret trusts are a means by which a testator is able to by-pass the formality requirements laid down in the Wills Act. As Dankwerts J put it in *Re Young*, 'the whole theory of the formation of a secret trust is that the Wills Act has nothing to do with the matter'. The secret trust in the instant case is said to be a fully secret trust. This is where X formally leaves property by his will to Y in circumstances where Y is informally made aware by X during X's lifetime (and Y expressly or impliedly accepts)

that Y is to hold the property as trustee for the benefit of Z. On the face of the will Y will appear to be the beneficial owner of the property.

Although fully secret trusts have certain testamentary characteristics they are valid, despite lack of testamentary formalities, because the trustee accepts the trust during the settlor's lifetime. They are essentially *inter vivos* express trusts and therefore operate independently of the Wills Act 1837. Generally, the declaration of an express trust does not need to comply with any formality. However, even if the property comprised land, the secret trustee could not rely upon the lack of formality to defeat the trust. The jurisdiction to enforce a secret trust is aimed at preventing equitable fraud on the part of the alleged trustee. His conscience would bind him to carry out the trust, he would, despite the settlor's *expressed* intention to create a trust, become a *constructive* trustee. The creation and operation of constructive trusts need not comply with any formality (s. 53(2), Law of Property Act 1925).

- (d) This is a case of a bare trust, where the beneficiary has given a direction to his trustee to transfer the legal estate to some other person, the intention being that the equitable interest should pass simultaneously. This type of transaction was one of the many matters considered by the House of Lords in *Vandervell v IRC* [1967] 1 All ER 1.

In 1958, Mr Vandervell, the immensely wealthy controlling director and shareholder of VP Ltd, decided to give 100,000 of his shares in the company to the Royal College of Surgeons (RCS) to found a chair in pharmacology. The shares were currently held by his bank under a bare trust for him. Accordingly, V directed the bank to transfer 100,000 shares to the RCS. It was intended that the RCS should keep the shares for a limited period only, and should relinquish them after receiving £150,000 income on the shares by way of dividends.

As to whether the direction to the bank had been void for lack of written formality, the House of Lords held that s. 53(1)(c) only applied to cases where the equitable interest in property had been disposed of independently of the legal interest in that property. The object of s. 53(1)(c) was to prevent hidden oral transactions in equitable interests which might defraud other parties (such as the Inland Revenue).

In cases, such as the present, where the equitable owner had directed his bare trustee to deal with the legal and equitable estates simultaneously, s. 53(1)(c) had no application.