Steven’s And Yannis’s Claims: Equity Will Not Assist A Volunteer And Equity Will Not Perfect An Imperfect Gift

Steven was an Englishman and wealthy individual who died earlier this year. In his will, he left the following instructions to Tony and Victoria, his trustees:

- (a) 500,000 to you to hold on trust for those dependants of mine whom you think I would believe to be most deserving of the money in such amounts as you think fit;
- (b) 250,000 to you, knowing that you will use the money to benefit my sister Wendy;
- (c) All my shares in Flyaway Airways Ltd to my brother, George; and
- (d) The residue of my estate to my uncle, Lee

Since Steven’s death, Tony and Victoria have been contacted by one of Steven’s friends, Yannis. Yannis told Tony and Victoria that, shortly before his death, Steven said to Yannis that he would hold 100 of his 500 shares in Flyaway Airways Ltd on trust for him. Steven also promised Yannis that he would transfer his house at 1 Winchester Court to Yannis. Yannis has found a signed Transfer document in Steven’s house purporting to transfer the house to Yannis, but it seems that it was never sent to the Land Registry for registration.

Advise Tony and Victoria as to the correct distribution of Steven’s estate.

A trust is an obligation that binds the trustee to manage property for the benefit of beneficiaries in accordance with the terms of the trust.

One of the most common types of trust is express trust. This is created when the settlor deliberately and consciously creates a trust to come into existence now or upon death. There are two components to create an express trust, they are (i) a Valid declaration and (ii) Constitution. In order to declare a trust, the settlor must fulfill four criteria: (1) Formalities – all legal formalities must have adhered to (2) Beneficiary principle – the trust must be for the benefit of a legal person and not to carry out a purpose, (3) Rules against perpetuity – the trust must be vested in the beneficiaries for a certain amount of time (4) Three certainties – certainty of intention, the certainty of subject matter and certainty of objects (beneficiaries) Constitution – Property must be constituted by the settlor lawfully vesting the property into a trust. If the property is not legally transferred to the trustee then the settlor retains ownership and does not become trust property. The settlor must take all the appropriate legal formalities to ensure the transfer of property.

In order to ascertain if Steven’s will is validated each element of each component must be examined.

For an express trust to be constituted equity requires that the three certainties and formalities be completed. The three certainties are said to be ‘a description of a set of conditions which, when fulfilled, exemplify a trust’. The three certainties are certainty of intention, the certainty of subject matter, and certainty of the object. The origins of three certainties first appeared in

Wright v Atkins [1] (1823) Turn & R 143 where the Lord Chancellor, Lord Eldon said; first…the words must be imperative…secondly…the subject matter must be certain…and thirdly…the object must be certain as the subject." (at p 157). However, it was conceptualized by Lord Langdale in Knight v Knight [2] 1840 [1:] [2:]

The rationale behind the three certainties are first, the trustees need to know what is required of them in terms of carrying out the trust, and second if the courts are called upon to intervene in a trust dispute they must be able to act with clarity and sensible understanding of what the settlors have attempted.

Having looked at each part of the will the following concerns arose:

- (a) Certainty of intention and object
- (b) Certainty of intention
- (c) Based on the findings of Yannis
- (d) Certainty of subject matter and findings of Yannis

Yannis – constitution

(a) Certainty of intention –

Although in most instances the word 'trust' is not essential it is advantageous because it makes it a lot easier to determine that a trust is created. Megarry J in Re Kayford [3] stated that [3:]

"a trust can be created without the use of the word "trust" or "confidence" or the like. It is more a question of whether in substance a sufficient intention to create a trust has been manifested."

The settlor has to show a clear intention to create a trust as the court will construe the words used to find the settlor's intention and even though the word 'trust' suggests a trust it is not conclusive. If the words demonstrate a different intention then no trust will be created, intention has to be clear and certain because anything else will not constitute a trust. As equity looks at the intent rather than form. The words utilized in the instructions are clear that Steven is calling upon his trustees to use their discretion when selecting his dependants.

Certainty of object – Beneficiaries for trust must be ascertained or ascertainable, Endacott [4] [1960] Ch 232 CA. The test to determine the certainty of objects in a discretionary trust was decided by the House of Lords in McPhil v Doulton [5] where it was stated that an individual must be identified with certainty to be a member or not of the class. [4:] [5:]

In a discretionary trust unlike a fixed trust IRC v Broadway Cottages Trust [6] 1955 Ch 20 CA; the list of objects need only be conceptual. The tests for the certainty of objects for both fixed and discretionary trusts was established in Re Gulbenkian's Statement Trust [7] 1970 AC 508 and later adopted by the House of Lords in McPhil v Doulton [8]. [6:] [7:] [8:]

Can it be said with certainty whether any individual is or is not a dependant of Steven's? In Re Baden's Deed Trusts (No. 2) [9] {1973] CH 9 CA the terms 'relatives' and 'dependants' were subjected to the test. It was considered that the terms were conceptually certain and therefore

sufficient. [9:]

In Re Baden, Stamp LJ stated that “the trust was valid because the court could always determine who was a dependant …..”

Sachs LJ held that the test required only clarity in the concept.

“The court is never defeated by evidential uncertainty… Once the class of persons to be benefited is conceptually certain it then becomes a question of fact to be determined on the evidence whether any postulant has on inquiry been proved to be within it: if it is not so proved, then he is not in it.”

Having established that Steven’s dependants can be with identified with certainty and his words are clear as he has imposed an obligation upon his trustees, it is therefore established that this part of the will is a discretionary trust, giving the trustees Tory and Victoria full powers to use their discretion as to which dependants will receive what.

(b) Certainty of intention –

The first part of the statement defines a fixed trust as Steven has identified his intentions – to you (his trustees), the subject matter – 250,000 and the object – the trustees of the trust. However what comes into question is whether it is with certainty that he wants his sister Wendy to benefits based on the use of his words “knowing that you will,” which could be seen as precatory words and therefore not create a trust. To create trust, there is a distinction between imperative words which show intention and precatory words which merely express hope of wish of a moral obligation. Phrases like ‘…in full confidence that she will do what is right as to the disposal…” used in Re Adams [10] and the Kensington Vestry [11], it was held that there was no trust based on the construction of the will as a whole and particular words. However, in Cromiskey v Browing-Hanbury [12] because of the context of the will which indicated the settlor’s intention, the use of the same words imposed a trust. It can therefore be established that looking at this part of the will in context and by the construction of the words, it was Steven’s intention the 250,000 was left for Tony and Victoria to use for the benefit his sister Wendy, which meets the criteria of a fixed express trust. [10:] [11:] [12:]

(c) For a trust to be valid, the subject matter must be certain.

The subject matter may be defined as property, land, shares, bank deposits etc. There are two parts to certainty as to the property itself and certainty as to how much of the property each beneficiary will get.

Steven has indicated that all his shares in Flyaway Airways Ltd be left to George which is straight forward fixed express trust. However, with Yannis’s claim, both parts must be looked at simultaneously to determine if Yannis will benefit from Flyaway Airways Ltd shares and if so, what will be left for George.

Historically property and non-property had to be segregated, However, in recent times the courts have held that there is no longer a need for tangible and intangible assets to be segregated.

Where a trust of the unidentified section of tangible property will fail, a trust of an unidentified section of intangible property such as shares will be valid. In Re London Wine Co (Shippers) Ltd [13]. a trust could not be established as the buyers of the wine could not identify which particular bottles were theirs as they were not segregated or identified in any way and therefore could not claim priority over other creditors by saying which bottles were held in trust for them. In Re Gold Corp Exchange Ltd [14] a group of buyers were able to claim their rights as their gold had been segregated. [13:] [14:]

In Hunter v Moss [15] Dillon LJ made no reference to the distinction between tangible and intangible property but stated that all the shares were identical. Hunter v Moss the oral declaration of 5% of trust of the issued shares of a particular private company was held to be sufficiently certain even though the shares had not been segregated. It was held that the intangible property was of the same class and therefore there was no need to identify which particular shares were held on trust. [15:]

Neuberger J in Holland v Newbury [16] criticised Hunter v Moss at length however felt he was bound to uphold. [16:]

Academic reaction to Hunter has been mixed. Jill Martin in an article in the Conveyancer and Property Lawyer [17] call it “fair, sensible and workable it is a welcome example of the court’s policy of preventing a clearly intended trust from failing for uncertainty” Alison Jones, in a different article for the same journal said that “Logically the decision in Hunter v Moss appears a sensible one, but noted that it did create difficult questions.” Alastair Hudson [18] suggested that the decision in Hunter v Moss was wrong and should not be relied upon because it contradicted existing property law and drew a distinction between tangible and intangible property which he felt was “spurious.” David Hayton wrote in the Law Quarterly Review [19] that “the unreserved judgment of Dillon LJ…may well come to be stigmatised.” [17:] [18:] [19:]

Although its an obvious conclusion to draw from Dillion LJ’s statement, Hunter is commonly cited that with intangible, identical property, it is not necessary to segregate the trust and non-trust sections. However, Dillon LJ merely distinguished Re London Wine Co [20], allowing him to decide the case on facts alone. In Re Harvard Securities [21] Neuberger J reluctantly applied Hunter and indicated that Hunter said there was no need to segregate intangible property. [20:] [21:]

In White v Shortfall [22] a case outside England & Wales the Supreme Court of New South Wales rejected Dillon’s reasoning. However, through different reasoning, Campbell J reached the same conclusion that a settlor could declare a valid trust of unascertained part of shares that was part of a larger fund. [22:]

From the information provided it appears that Tory and Victoria were not aware of Yannis’s portion therefore, the burden of proof would be on Yannis to show Steven’s intentions. The information provided did not state if Steven had changed hats from Settlor to Trustee and declared a trust for Yannis. Therefore, if Yannis is able to prove correspondence of Steven’s intentions, then according to Hunter v Moss he would be entitled to 100 of the 500 shares, if not all the shares would go to George. However, based on the information provided all shares will go to George.

(d) The clause of the will, the ‘residue of my estate’ is valid as clearly defines the subject

matter of a trust (the remainder of the trust that is not specifically disposed of) and should be distinguished from cases such as Palmer v Simmonds [23] (the bulk of my estate) and Sprange v Bernard [24] (the remaining part of which is left) where the subject matter is unclear. The residue of a persons' estate is valid and can be made as a specific bequest to a named person, which in this case is Lee. Nevertheless, there is uncertainty here based on Yannis's claims and the signed transfer of the house. [23:] [24:]

All trusts must be constituted, with that regard the settlor must successfully transfer property to the trustee or the settlor changes hats and has declared that he is holding trust for a beneficiary. Under normal circumstances, if legal title has not been reached the trustee equity will not step in. The two equity maxims that cover this area are (i) Equity will not assist a volunteer and (ii) Equity will not perfect an imperfect gift.

For a trust to be valid, the settlor needs to do everything which is necessary to transfer the trust property and make that settlement binding, Milroy v Lord [25]. In Rose[26] sometimes known as Re Rose or the 'every effort principle' the donor had done everything in his power to transfer the property however the transfer was held up by a routine operation of the law. The court held that Mr. Rose had done everything in his power to transfer to Mrs. Rose. This was not the case with Steven who signed the transfer papers however based on the information provided did nothing with them. In Re Fry [27] who executed a transfer but failed to obtain the consent of the Treasury under the Regulations. The court held that he had not done everything that was required to be done to transfer the shares. Again, the facts may not be similar as with Steven's case the outcome is the same. After Steven signed the papers there is no information that he either declared a trust and as equity will not assist a volunteer, his had not done everything that could be done and therefore no trust was constituted. Equity will not step in to assist Yannis as equity will not perfect an imperfect gift. [25:] [26:] [27:]

Based on the above it would appear that Yannis has no claim to the shares or the house. The information provided indicates a conversation between him and Steven with no record of it being declared a trust nor information provided to the trustees. Regarding the house even though the transfer was signed by Steven, Steven had done nothing else to ensure legal title could be transferred to Yannis. He had not registered it nor relied anyone to get it transferred. Therefore, the shares are as stated to go to George with the house forming part of the residue of the estate that will go to Lee.

In summary, having examined each part of Steven's will and Yannis's claims each has met the requirements necessary to create a trust fund and Tony and Victoria will be able to dispose of the property as instructed by Steven to his dependents – where the certainty of objects was in question, this was satisfied based on McPhil v Doulton and the word trust was found not to be a precatory word; Wendy – certainty of intention where the words "knowing that you will", shows an obligation on the trustees part to dispose of the funds as set out by Steven; George who will receive all the shares in Flyaway Airways if Yannis is not able to prove Steven's intention and Lee who will receive the residue of Steven's estate including the house in Winchester Court as all formalities were not completed for legal transfer to Yannis. The burden of proof will be on Yannis to receive shares from Flyaway Airways and he will not acquire the house in Winchester Court as the Steven did not all that could be done for him to acquire it legally.