

Equity and trust law assignment,

Law



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Question 1

Daniel Smithson and the beneficiaries to the trust may be able to sue Agnes and Brian for breaching their fiduciary duties and thus causing a loss to the beneficiaries; *Nocton v Lord Ashburn*[1] and *Target Holdings v Redferns*.[2] This is because under s1 of the Trustee Act (TA) 2000 a duty of care is placed upon trustees to ensure that they exercise reasonable care and skill when managing the trust. Reasonable care and skill do appear to have been exercised when Agnes and Brian used the trust shares in the company to vote the directors out of the office and vote themselves onto the board of directors. This is because their efforts on behalf of the company were successful and the company's shares are now worth ? 8 instead of ? 60,000. Accordingly, it seems as though their decision to do this can be justified on the basis that they were acting in the best interests of the company; *Kirby v Wilkins*.[3] Furthermore, although trustees are entitled to "reasonable remuneration" for their services under ss28-29 TA it is questionable whether ? 50,000 is a reasonable amount to be paid. In relation to the ? 60,000 that was paid to Doris, a lack of care and skill has been exercised since Agnes and Brian have managed the trust inappropriately. In addition, it cannot be said that they have taken the same precautions as an ordinarily prudent man would have taken; *Speight v Gaunt*[4] and they have clearly treated Doris more favorably than the other beneficiaries. This has caused a loss to the other three beneficiaries and both Agnes and Brian did not have the power to authorize such a transaction until Doris reached the age of 25 since not all of the beneficiaries are of adult age and so the trust cannot be terminated early; *Saunders v Vautier*.[5]

Agnes and Brian have also breached their duties under the trust in respect of the sale of the trust's shares in Gormley Iron & Steel Plc since there has been a deliberate misapplication of the trust property; *Armitage v Nurse*.^[6] In addition, it cannot be said that Agnes and Brian took all of the necessary precautions that an ordinarily prudent man would have taken when exercising the trust fund. Furthermore, the investment that was made in Fleetwood Princess is a breach of their duties under s3(1) TA since it is unlikely that they would have made the same investment had they been absolutely entitled to the trust assets. Thus, it was a risky investment to make and does not satisfy the "standard investment criteria" under section 4 (3). In effect, it seems as though the two have acted "recklessly careless" in making the investment; *Re Vickery*.^[7] Brian has also breached his fiduciary duties in relation to the investment into Drug Star Plc since it was made clear in *Cowan v Scargill*^[8] that a trustee must make sure that any investments made are wholly beneficial to the beneficiaries and not themselves. Agnes will also be liable for this breach because "it is the duty of a trustee personally to run the trust and part of that duty is to observe what the other trustees are doing and intervene if they are doing something wrong"^[9] as in *Bahin v Hughes*.^[10] If Agnes and Brian can show that they honestly believed the investments to be good then they may escape liability; *Re Smith*.^[11]

Overall, it is unlikely that Agnes and Brian will be able to satisfy the defense that they honestly believed the investments to be good, and as such, it is likely that they will both be found to be in breach of their fiduciary duties.

Question 2

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In advising Brian and the trustees as to the validity of the express trust that has been created by Agnes, it must be determined whether the three certainties that are required for a valid trust to be created are present. In *Knight v Knight*[12] it was held that trust will only be deemed certain if it can be shown that there is “certainty of intention to create a trust; the certainty of the identity of the subject matter comprising the trust fund; and certainty of the beneficiaries (or objects) of the trustor power in question.” In effect, if any of these three certainties cannot be established then the trust will not be valid as it will be an incomplete trust. In acting with sufficient certainty Agnes must have had the intention to create a valid trust, the trust property must have been easily identified, and the beneficiaries must be sufficiently recognizable.[13] Once it has been shown that the three certainties are present, it must then be considered whether the three trusts that have been created have been properly constituted and that the formalities have all been complied with. Subsequent to these provisions being complied with, the trustees will then be able to distribute the trust property in accordance with the terms of the will. Thus, as shown in *DKLR Holdings Co (No 2) P/L v Commissioner of Stamp Duties*,[14] the trustee has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit since equitable obligations require him to use them for the benefit of other persons.” In effect, the trustees will be required to deal with the trust assets in accordance with their equitable duties.

It does appear as though there has been a certainty of intention in relation to all three of the clauses under the trust since Agnes has executed a will that has possibly been drafted by a solicitor. Thus, if Agnes did not have the

intention to create a trust she would not have gone through the trouble of making a will. Essentially, Agnes's conduct in making the will demonstrates a clear intention to create a trust. In relation to the certainty of subject matter, it is clear that clause 3 is certain because of the fact that it relates to a specific piece of property (? 500, 000), whilst clauses 1 and 2 are uncertain as they do not. This is because; the distribution of the shares in clauses 1 and 2 cannot be identified. In *Re London Wine Co (Shippers) Ltd*[15] it was held that; " to create a trust it must be possible to ascertain with sufficient certainty not only what the interest of the beneficiary is to be but to what property it is to attach." Therefore, because Agnes failed to identify the number of shares that were to be used on Charles and Doris, it cannot be said that the subject matter is certain. This was also recognized in *MacJordan Construction Ltd v Brookmart Erostin Ltd*[16] when it was made clear that trust property needed to be segregated and clearly defined for it to be valid. Accordingly, it is unclear what part of the shares shall be given to Charles and Doris because there is a great deal of uncertainty as to what is meant by the " lion's share of the income" and how much of the " better performing shares" is to be held on trust for Doris. As such, it is likely that the trust will fail.

Agnes should have been more specific as to what she meant by the " lion's share of the income" and " the better performing shares" as this would have segregated the number of shares that were to be used. Hence, as noted in *Morice v Bishop of Durham*[17]; " there can be no trust, over the exercise of which this court will not assume control and if there be a clear trust, but for the uncertainty of objects, the property is undisposed of and every trust

must have a definite object.” The certainty of subject matter can only be established once it is shown that there is “certainty of the property that is subject to the obligation that it is held on trust and certainty of the amount or share of the trust property that each beneficiary is to receive.”[18] In *Green v Ontario*[19] it was shown that for the subject matter to be deemed sufficiently certain there must have been a reference to a specific piece of property. This has not been achieved in the instant situation and so the subject matter cannot be deemed certain in clauses 1 and 2. Despite this, the objects in clauses 1 and 2 do appear certain because of the fact that both Charles and Doris have been identified. However, the same cannot be said for clause 3. This is because? 500, 000 is left to Agne’s trustees to pay the income to her close relatives as they see fit. A discretionary trust has been created here since Agne’s trustees have been given the absolute discretion to make awards to Doris’ and Agne’s close relatives; *Revenue and Customs Commissioners v Trustees of the Peter Clay Discretionary Trust*.[20] Consequently, it could be said that clause 3 will also fail on the grounds that its object is uncertain.[21]

Nevertheless, if it can be shown that the trust is to benefit individuals who come within a certain class, then so long as the person who the trust is to benefit comes within that particular class then the trust will be valid as in *McPhail v Doulton*.[22] However, it may be difficult to determine what is meant by “close relatives” since the trustees may not be aware of how close the relatives needed to be, which can produce a lot of problems.

Nevertheless, in *Re Baden’s Deed Trusts (No 2)*[23] it was stated that if the class of beneficiaries, specified by the settlor, are conceptually certain then

the trust will be enforceable. Therefore, since it can be said that the class of beneficiaries that have been stipulated by Agnes are conceptually certain, then it is likely that clause 3 will be valid; *Re Erskine 1948 Trust*; *Gregg and Another v Pigott and Others*.^[24] Nevertheless, the will can still fail on the grounds that it has not been validly executed. Yet, if it can be shown that all the trust was “ in writing, signed by the testator or by someone in his presence and by his direction and be attested by two witnesses” the will would have been validly executed under s9 of the Wills Act 1837. In addition, as noted by Pearce and Stevens; “ the legal title in some forms of property such as shares or land can only be transferred by registration of the transferee as the new legal owner.”^[25] It is questionable whether this has been done as there has been no effective transfer of the shares. Again, it seems as though clauses 1 and 2 will fail on the basis that they are uncertain and that they have not been validly executed since “ equity will not perfect an imperfect gift”. If it could be shown that Agnes did everything in her power to transfer the shares to Charles and Doris then the outcome would be different; *Re Rose*^[26] since “ equity would treat a transfer as complete if the transferor had done everything in his power to transfer the property to the transferee.”^[27] There was no evidence to suggest that Agnes had done everything in her power and so clauses 1 and 2 will remain invalid.

Overall, it is evident that there was the certainty of intention to create the trusts by Agnes because of the fact that she had executed a will to do so. However, clauses 1 and 2 will still fail for lacking certainty of subject matter and for failing to be properly transferred. Although clause 3 appears to lack certainty of objects, the fact that the beneficiaries come from a certain class

will render this clause valid. The trustees will only be capable of distributing the trust property in accordance with the terms of the will if it can be shown that the will was validly executed. If this has been established then the Agne's trustees will be able to distribute the? 500, 000 to Doris and Agne's close relatives as they see fit. The trust property from clauses 1 and 2 will enter into Agne's estate so that they can be distributed in accordance with the Intestacy Rules.

Reference

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9. Bahin v Hughes [1886] LR 31 Chd 390
10. Cowan v Scargill [1985] Ch 270

11. Green v Ontario [1973] 2 OR 396
12. DKLR Holdings Co (No 2) P/L v Commissioner of Stamp Duties
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14. Knight v Knight (1840) 3 Beav 148
15. McPhail v Doulton [1970] 2 All ER 228
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17. Morice v Bishop of Durham (1804) 9 Ves Jr 399
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[2012] 3 All ER 532
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24. Re Vickery [1931] 1 Ch 572
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27. Speight v Gaunt (1883) 9 App Cas 1
28. Target Holdings v Redferns [1996] 3 WLR 352