The Law Society of Ireland

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627.

Question 1

QUESTION ONE

20 points

QUESTION ONE

User Identifier: 00001010

Brian, a solicitor, recently suffered a fatal heart attack. Some time prior to his death, he added to monies in his own current account by lodging funds from two other accounts. One of those accounts contained monies from a trust of which he was a trustee, and the other contained the monies belonging to George, a client. Having mixed the said monies, he made numerous payments out of, and some lesser payments into, that current account. He also made certain payments from that account to the beneficiaries under the trust in accordance with the terms thereof.

At the time of Brian's death, there were insufficient funds to meet his personal debts and to meet George's claim and the claim of the beneficiaries under the trust.

Advise George how the monies should be distributed.

Tracing. Re Hallet's etate, Foskett v McKeown, Re Diplock, Clayton's case, Barlow International v Vaughan, Re Oatway 1903, Shephard v Thompson, Re Tilley's Will Trusts confirmed re oatway. Hudson.

Introduction

The issues which arise in the question presented relate to law on equitable tracing. In Ireland, largely taking the framework of the English jurisdiction, there are three scenarios in which equitable tracing is allows:

1. When the fiduciary mixes his money with that of the beneficiary; Re Hallet's

2. When two trust funds are mixed; Re Diplock and

3. When money is mixed with an innocent volunteer's - Clayton's/Barlow.

In advising George of how the monies should be distributed, it is necessary to take him through the case law in this area. I will do this by taking examining each scenario as well as exploring the law on backward tracing in Ireland.

1. When the fiduciary mixes his money with that of the beneficiary;

In the case of ***Re Hallet's Estate,*** the Solicitor who was managing the trust fund mixed the fund monies with his own via his personal bank account. The court here held that in such circumstances, any money that has been subsequently deposited, will be viewed as being the fiduciaries own money, rather than the money of the beneficiaries. Therefore, the beneficiaries are entitled to trace into the bank account and they are also allowed to trace into the proceeds of any profit that is made by way of the deposit that occurred from the mixed fund. For example, if a trustee mixed his funds with that of the trust fund which he had control over, and he subsequently deposits money that is used to acquire a significant or successful investment, the court will hold that though the money is the trustees, any investment acquired will be the beneficiaries. The effect of this, what has been deemed the "honest fiduciary approach" is to effectively utilise the tenets of equity to stop any fraudulent or misfeasance on the part of the trustee. The House of Lords here noted that equity intervenes before any misfeasance occurs by stoping the trustee from biting the proverbial fruit. **Hudson** notes that the effect of this principle, known as the rule in Re Hallet's Estate, is a strong one which is centred on preventative action, and as such, the trustee will always be viewed as acted honestly rather than dishonestly and the effect is an ironic one where equity stops, by claiming the fiduciaries' innocence and honesty, from him being anything other than that. As per the Lords, the "honest fiduciary approach" takes a mundane approach to human nature, stating that it would realistically be the case that should the rule not be in place, trustees would become attracted to the money leading them down a misfeasance path. Re Hallet's Estate is therefore strictly protects the beneficiaries interest and equitable tracing enables the courts to fulfil this protection.

By contradistinction, ***Re Oatway [1903],*** applied the "beneficial interest approach" here which was supported in the later case of ***Re Tilly's Will Trusts.***

Scenario 2: When a fiduciary mixes money with an innocent volunteer

The issue of what occurs when a fiduciary mixes a beneficiaries money with that of what a court calls "an innocent volunteer". The position, as espoused by ***Re Diplock,*** is that the innocent parties remains liable to equitable tracing and that the money will be considered that of both parties, thus securing the beneficial interest of the beneficiaries to which the payment was made in breach of their trust. Here, the case concerned Diplock who died and bequeathed £250,000 "for charitable institutions" in his Will. The administrators of his Estate proceeded to gift over £200,000 to over 139 charitable institutions. The House of Lords however, in other proceedings, had deemed the charitable gifts invalid, and as such, an issue arose as to the property that had been acquired by various institutions who had every right to believe the property was gifted to them in uncontentious and a valid manner.

The seminal case of ***Foskett v McKeown [2001]*** noted re-emphasised the point in Re Diplock. Here, the deceased had committed suicide following investigations of fraud on his part during his time at his company. It was found that the deceased, in his fiduciary position, had paid the remaining two instalments of his life insurance premium from the trust fund of which he was a trustee. The Court heard that he had paid the first three payments out of his own money. In coming to their decisions having considered the position in Re Diplock and the general law of equitable tracing, the Court stated that the beneficiaries of the trust fund who were

suing the Estate of the deceased for their share of the life insurance premiums, where allowed to trace into the percentage of the insurance premium which had been paid for from the trust fund. This amounted to 40% of the £1 million, confirming the position of Re Diplock that the trustees and the volunteer effectively both own the money. This was applied further in the case of ***Shephard v Thompson*** in a strict manner.

As emphasised by Hudson, the reasoning behind the rule in Diplock and Foskett is to secure and protect the beneficiaries position at all costs, regardless if the innocent volunteer had not acted fraudulently or dishonestly. Here, the Court noted that honesty has little impression on their judgements in equitable tracing and that the ultimate goal is the protection of beneficiaries' rights when a breach of trust has occurred.

Scenario 3: Mixing two trust funds

The final scenario in which a court will enable a beneficiary to invoke the law of equitable tracing is when a fiduciary mixes the funds of two trust funds together, causing confusion thereafter as to who owns which funds. The Court in Clayton's case developed the rule "first in first out" which as noted by **Mee** and **Delany**, caused a plethora of issues both theoretically and practically. It was also subject to the rule in Re Hallet's. Clayton's rule created confusion and was often challenging to impose. As such, the case of Barlow International v Vaughan overruled Clayton's case, by preferring a "proportional approach". It was noted that Clayton's case had developed in societal circumstances where money was fixed and tangible. In today's world, as highlighted by **Biehler**, it is difficult to ascertain what comprises an "asset" due to the influx nature of finances and also due to the easy manner in which money can be withdrawn, transferred, ect in the digitised world of banking. Clayton's is therefore now considered an exception rather than the rule, as we have moved on from the now draconian definition of finances and assets.

Backward Tracing

A further issue which arises here is that of backward tracing. In the recent case of the Federation of ***Brazil v Durant International and Ors [2015],*** the country Brazil took an action against the defendants who had in their complex money laundering scheme effectively obscured and removed the ability for equitable tracing. In doing so, the court considered the concept of backward tracing to uncover the funds and to establish where they had been transferred to. Historically, backwards tracing has not been allowed, as courts have considered overdrawn or insufficient bank accounts to be *"a liability rather than an asset"* as was held in ***Shamo v Relmo.*** However, in today's increasingly complex world of online banking, the concept of backward tracing courts and scholars have argued should be utilised to enable equitable tracing. It has been noted by **Biehler** for example, how an overdrawn account means very little in today's banking world. Ultimately however, **Biehler** asserts, the law in Ireland remains occluded in terms of whether or not backwards tracing is/will be permitted.

Application

Applying the judgements of Re Hallet, Re Diplock, and Foskett, I would advise George the following:

1. His money has been mixed with that of a trustee into his Solicitor, Brian's, bank account.

2. The Court will do everything in its power to protect the rights of the beneficiaries where a trustee has acted in breach of trust.

3. It is unknown whether the payments removed from the account yielded any successful investments. If this is the case, then those profits will be held on a constructive trust for the beneficiaries of the trust.

4. The money that was removed from the account will be viewed, as per Re Hallet's, to have been the fiduciaries own money as per the "honest fiduciary approach".

5. As per Re Diplock, George will be viewed by the court as being an "innocent volunteer" however his behaviour/honesty will have little impact or influence on their judgement.

6. The money will therefore be distributed in accordance with Re Diplock, Re Hallet's and Barlows case on a proportional basis, taking the "proportionate approach" of the court in Barlow.

Conclusion

To conclude, I would advise George, having considered the law in relation to equitable tracing in Ireland, that the funds of the beneficiary will be those protected by the Courts and that the beneficiary will be granted permission to trace into the mixed funds where it will be held that they held the funds jointly and a "proportionate approach" will be taken when considering who gains what. Equity will not allow the debts of Brian to supersede the monies owed to the beneficiary and to him and that he is protected in that regard.

Question 2

QUESTION TWO

20 points

QUESTION TWO

The Mixed Vegetables Club ['the club'] is an unincorporated association that owns ten acres of garden allotments. The club has an account with 1,000 Euro in it that comes from money raised by the club to buy a new greenhouse. The money was raised from donations made by some members of the club and from donations by visitors to the allotments. The club has now decided not to build the greenhouse. Instead, the current members of the club have voted to disband and sell the land the club owns to a developer.

Advise the members of the Mixed Vegetables Club how the proceeds of the sale of the land and the 1,000 Euro in the club's account should be distributed.

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Question 3

QUESTON THREE

20 points

QUESTON THREE

Write a note on any **two** of the following three topics. Refer, where appropriate, to relevant case law:

(a) The Rule in Hastings Bass;

(b) The circumstances in which a trustee may be removed from his or her position;

(c) The Rule in Strong v Bird.

HB, FvF, spoiled the party, world of its own,

SvB; Re Inn, Re Frederick, Re Wilson, Pinnel's case,

ANSWER

A) The Rule in Hastings Bass

The rule in Hastings Bass is espoused from the 1975 case "Hastings-Bass" granted a trustee in a fiduciary position discretion to act and consider all considerations which she viewed as relevant when protecting and investing in the trust fund. As noted by, "the duty of a trustee is an onerous one, and all too often a thankless one". As such, the courts have adopted a myriad of duties and powers which are vested in trustees when carrying out their duties for the trust. Historically, one of those was the discretionary power to invest how one deemed fit.

The rule also allowed for the voiding of such actions to which the trustee did not envisage, and often this involved unwanted tax consequences for the trust, as demonstrated and elaborated in the case of ***Sieff v Fox***, where the Court noted that the trustee had not considered all the relevant considerations to be taken into account when acting in his power as a trustee. The rule became known as the "discretionary rule" and it was being used, as per **Lord Nuremburg**, "as a get out of jail free card" which allowed trustees to set aside any acts which she envisioned the outcome to be different than that which occurred.

Scholars became critical of the Rule in Hastings-Bass due to its flexibility to set aside decisions made by trustees who had not acted in breach of trust but who did not view the exercise as being useful to the trust. **Hudson**, for example, noted that the rule had come to "acquire a life of its own" for decisions where trustees had erred and acquired unwanted tax consequences for the trust.

The courts began to restrict the discretionary power of trustees and in Ireland the case of ***Fuller v Fuller*** was viewed as *"spoiling the party"* (**Hudson**) for trustees and was applied in the case of ***Donaldson v Smith***. This was further demonstrated in the seminal English Court of Appeal case of ***Pitt v Holt***, wherein the Court asserted that the only manner in which the Hastings Bass rule could be invoked is when it is proven that the trustee acted in breach of trust, otherwise, the unwanted exercise could not be set aside or voided. In Ireland, the case of ***Abacus Trust v Barr*** signalled the restriction and Pitt was followed by the case of ***Coady***, which confirmed the restricted nature of the Hastings Bass rule to circumstances where it is evidenced that the trustee acted in breach of trust.

Therefore, though there has been little jurisprudence in this area since, it is clear that the Irish jurisdiction has followed in the footsteps of its British counterpart in restricting the rule in Hastings-Bass which was seen as providing a "magic eraser" (**Hudson**) to trustees who had erred or acquired unwarranted tax consequences.

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B) The Rule in Strong v Bird

The rule in Strong v Bird, **Delany** notes, is an exception to the equitable maxim that equity will not perfect an imperfect gift. Here, the case involved Bird who had borrowed £1,100 from his stepmother and had been paying this sum back in quarterly payments of £100. After the second payment, his stepmother stated that he no longer had to to repay her and that his debt had been sufficed. This was done by way of oral communication. Bird looked after his stepmother and she vested the power of administration of her will to him and he was named as executor of the will.

When considering the matter, the Court turned to the question of whether or not the debt had indeed been satisfied or if it formed part of the debts of the Estate. In ruling on the matter, and going against Pinnel's rule, the court held that it is paramount that the power of executorship and administration was vested in the donee.

The Court held against the traditional rule in ***Pinnel's case [1602]*** which noted that oral communication that the debt is finalised is insufficient consideration for that debt and thus the debt must always remain until it has been adequately satisfied. The Court in Strong v Bird held that the stepmother had intended to make the £900 an immediate gift to Bird by denouncing the debt.

Further, it is vital that the donee did not intend to make the perfect gift but rather to create an immediate gift to the donee.

Re Stewart here the rule was controversially applied in respect of real property, and this has led to much judicial debate in terms of what forms the subject matter of a Strong v Bird gift and in ***Re James,*** the court again controversially applied the Strong v Bird rule in circumstances where the donee was not the administrator and executor of the will.

- Re Wilson
- Re Freedland
- Re Inns
- Re Gonin

Cont intent 5

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Question 4

QUESTION FOUR

20 points

QUESTION FOUR

Annie died recently. According to her Will, the residue of her estate is to be held in trust for so long as the law allows:

(a) to promote ice skating among the public in the Republic of Ireland;

(b) to construct and maintain a monument to the memory of the great Irish skater Noeline Wall who died some years ago;

(c) to improve the facilities of the Dublin Ice Skating Club (DISC).

Geraldine has been appointed as the executor of Annie's estate. She has done an "Introduction to Law" course and is aware of charitable and non-charitable purpose trusts and wonders if these bequests fall under any of those headings. DISC is a sports club which owns and operates two ice skating rinks, changing rooms, a dining lounge, a bar, and other facilities for use by its members. Annual membership dues are €2,500 per adult and €1,500 per child. Advise Geraldine.

Charitable trusts for sports.

Question 5

QUESTION FIVE

20 points

QUESTION FIVE

User Identifier: 00001010

"[T]o prevent the jurisdiction of the Courts being stultified, equity has invented the *quia timet* injunction, that is an action for an injunction to prevent an apprehended legal wrong, though none has occurred at present."

Per Lord Upjohn in *Redland Bricks v Morris* [1970] AC 652 at 664.

Discuss the considerations to which a court dealing with an application for a *quia timet* injunction will have regard.

Quia Timet Injunction essay

Szabo v ESAT - Geoghegan J;AG v Manchester Corporation;Pembroke and Rathmine Joint Hospital BoardRyanair v Aer Rianta.Campus Oil principles PMPA v PMPS LtdIrish Newspapers v Irish Press

11.30-12.10 !!because he fears

Introduction

A Quia Timet Injunction is one that is used by the Court in circumstances where it is feared that the defendant will commit a legal wrong or other form of dangerous action. In any application for a Quia Timet Injunction, the could will have regard to several important considerations. A Quia Timet Injunction is similar to other interlocutory injunctions and the meaning "quia timet" directly translates from the Latin, "because he fears". Thus, an application for an injunction of this type is grounded on the applicant's fear of the defendant's threatened action. This essay will discuss the various considerations to which a court dealing with an application for a quia timet injunction will have regard to such as locus standi, substantial risk/fear of the defendant's threatened action, and to a lesser standard, the application of the Campus Oil principles.

Law:

Firstly, it is seminal that the applicant establishes locus standi and this issue was illustrated vividly in the case of ***Bocswana v Batwa.*** Locus standi can include demonstrating a substantive cause of action in the areas of right to earn a livelihood, nuisance, or to protect the public. Secondly, it must be demonstrated by the applicant that there is a substantial risk that the defendant will commit the offence threatened. Thirdly, though the jurisprudence is slightly more vague and occult on this factor, the Court will also consider whether or not the Campus Oil principles apply and whether there is an important question to be tried.

The primary case for a Quia Timet Injunction in Ireland is that of ***Szabo v ESAT International.*** Here, the plaintiffs comprised of several friends (parents) taking action on behalf of their minor children. The plaintiffs were attended school in Co. Sligo and the Defendants had a project in place to erect a mobile telephone station in the Garda Station adjacent to their school. Geoghegan J judged the application that came before him on the basis of the medical and other professional evidence for both parties. The plaintiffs provided medical reports which expressly stated that the radio radiation that would be emitted from the mobile telephone framework would be detrimental not only to their physical health, but also to their mental health. The children were in National School and it was submitted that they would be significantly exposed to the radiation during their daytime activities in school. The Defendants on the other hand, claimed that the plaintiffs were "picking and choosing" their facts and submitted to the Court that in the 50 years prior in Ireland, there had been no claims or actions for personal injury as a result of the same radiation anywhere across the country.

The Defendants also relied upon their own medical assessments and professional engineering and other reports in their evidence to the court. In hearing the submissions of both parties, Geoghegan J reasserted the high threshold required for the grant of a Quia Timet Injunction and stated that the test to be met is whether or not there is a "significant fear of harm" or danger. In affirming this test, Geoghegan J explained that the test in the earlier case of ***AG v Manchester Corporation*** had gone too far in that the quoted test was one of an extreme fear on the part of the applicant.

In concluding that the case did not meet the test for risk of danger, Geoghegan J then considered the Campus Oil principles and held that they were irrelevant for consideration in applications for Quia Timet injunctions. However, he did express, that if he was wrong in his judgement and they were of relevance, that it did not matter, considering he did not believe there was a serious question to be tried in substantive proceedings.

Szabo is the leading case in Ireland, and it follows on from the strict and disciplined questions in which the courts have regard to when considering applications for a Quia Timet Injunction. Similarly, in the case of ***AG v Pembroke and Rathmines Joint Hospital Board,*** the case considered a Quia Timet injunction for the erection and construction of a quarantine hospital, where the significant risk of danger was one of spreading infection, which the plaintiff's sought to avoid. However, on the facts of the case, the Courts could not find any evidence substantiating the claim that the spread of infection was serious or dangerous, and as a result, the application failed. The Court here did not consider the Campus Oil principles.

In ***Irish Newspapers v Irish Press,*** the applicants sought a Quia Timet Injunction to restrain the defendants from publishing, passing off or otherwise utilise their brand or materials claiming that the seriousness of the action lay in the passing off of their organisations which caused serious detriment to them financially. The issue was one of the Defendants naming their paper the "Evening Standard"

for example, and the plaintiffs claimed that all information was confidential and therefore the risk of same being re-published or utilised in a manner that was unjust should not be allowed. The Court here refused the injunction, stating that the substantive civil proceedings for passing off should consider the issues presented, as they did not sufficiently meet the test for a risk of danger.

Therefore, it can be seen that the courts in Ireland continue to utilise the Szabo test, and that this is a high test to be met, and one which must be substantiated and evidenced by way of professional reports, such as medical or engineering reports. The test was upheld in the case of ***Ryanair v Aer Rianta*** and it appears, from Szabo, that if there are any conflicting evidence (here the plaintiffs were accused of "picking and choosing" their medical evidence in a fashion that suited them while not considering the holistic picture of the defendants intended action) will cause a serious barrier in any application for a Quia Timet injunction, and the court will have serious regard for any conflicting issues which arise in the evidence.

In terms of the Campus Oil principles (originating from the ***American Cynamide case***) , recent cases such as ***PMPA v PMPS Ltd,*** have considered that the Campus Oil principles (recently upheld for cases of interlocutory injunctions in ***Merck and Sharp v Dohme 2019***), should be considered and that the question of whether there is a serious question to be tried is a relevant one that the court should have regard to in Quia Timet applications.

With this being said, however, the jurisprudence in this area has had little movement and as such, the position in Ireland remains occluded. It appears that Szaba and Geoghegan J's judgement is the authority for Quia Timet applications and as such, courts may continue to disregard the Campus Oil principles in future judgements, however this is yet to be seen.

Conclusion

In conclusion, this essay has considered the consideration to which a court dealing with an application for a quia timet injunction will have regard. Those are;

(a) Does the applicant have the requisite locus standi to bring an application for a Quia Timet injunction?

(b) Has the Szabo test been met? Risk of harm/danger.

(c) What role do the Campus Oil principles play?

Though in the Szabo authority, Geoghegan J held that the Campus Oil principles are irrelevant as it would be distasteful to balance the rights of the plaintiff and defendant, the courts have in subsequent decision stated that they are in fact relevant to Quia Timet Injunctions and that judges should have regard for to these principles. It is yet to be seen if this is the case in Ireland and whether or not this will become an applicable principle for the courts in QT applications.

Question 6

QUESTION SIX

20 points

QUESTION SIX

User Identifier: 00001010

Mary died last month. She died testate. She was a widow and is survived by four children. Helen is the youngest of these four children. Helen qualified as a doctor and practised that profession for a number of years. Although she was doing very well, and had indeed been offered a prestigious promotion, Helen abandoned her job in order to help her mother, then recently widowed, develop the family businesses as property developers and construction engineers. Helen also lived at home with her mother and cared for her during bouts of illness on her mother's part. Approximately two years ago, Helen decided that she wished to buy a house for herself but when her mother, Mary, heard this, she became upset. Mary asked her to stay with her at home and asked "why would you want to get yourself a house? Then you would have two houses as you know that this house and all I have is yours when I die." After that conversation with her mother, Helen decided not to buy herself a house but instead began an extensive redecoration of the family home on the basis that she would inherit it after her mother's death. No costs were incurred when redecorating due to the contacts she and her mother had in various construction and interior decorating businesses.

Helen has now learnt, however, that Mary's Will leaves her estate, which includes the family home and the property development and construction engineering businesses, to her four children in equal shares. She seeks your advice. (*Students need not advise in relation to any possible reliefs under the Succession Act, 1965.*)

Rough work; Proprietary estoppel; Baxendale v Bennett, Re Industrial Securities Ltd; Jennings v Rice; Thorner v Major; Carter v Ross; Yeoman's Cobbe v Row; Downings v Lissmore; McGuiness2; McCarron2; Re Basham; Gillet v Holt. Ramsden v Dyson. Qayyam v Hameed "disciplined and principled fashion".

"conscious silence"

"requisite intention"

Worthington, Cooke and Mee; Cooke; Hudson; Smith - enhances Succession Law.

Introduction

In order to advise in relation to her interest in the family home and the property development and construction engineering business, I will inform her and talk her through the development of the law of proprietary estoppel, commonly known as "*equitable estoppel*" (as per Gillet v Holt and henceforth here "estoppel"). I will also advise her in relation to the development of the concept of "unconscionability" and how this may strengthen her equitable claim over the property and business.

Law:

Estoppel occurs, as noted by **Worthington**, when an individual with proprietary rights makes assurances to another as to their expected interest in the property and that individual relies upon those assurances to their detriment. Smith (2014) notes how the equitable doctrine of estoppel operates in a manner that enhances, rather than restricts, the Law of Succession in Ireland. Cases have referred to the "odious" nature (***Baxendale v Bennett***) of the doctrine due to the fact that the extent of the remedy required to resolve the equitable issues at play is unknown until the conclusion of the matter.

The traditional three-limb test for estoppel was espoused by the Court in the case of ***CF v JDF [2005],*** Supreme Court, and ***Ramsden v Dryson*** as being:

1. The testator made assurances/representations to the claimant during their lifetime;

2. The claimant relied upon the assurances;

3. To their detriment.

There must be a causal nexus between the reliance and the assurance and furthermore, the standard which is applied by courts when considering whether or not the reliance was appropriate is that "of a reasonable man".

In the case of ***Thorner v Major,*** the claimant was a farmer who worked on the deceased farm for all of his life, for no pay. The claimant worked long house and was always there to assist the deceased, often at a cost to his personal and familial life. The deceased it was claimed had made assurances to the claimant that he would inherit the farm when he died however, when he died, this did not occur. The administrators of the deceased Estate claimed that the assurances were not substantial enough so to cause the claimant to rely on them to his detriment. Here however, the Court heard evidence that the deceased had made "implied representations" to the claimant. The Court considered the circumstances in which the two parties lived, that being they were farmers, and it was submitted on behalf of the claimant that it was practically unheard and unconventional for farmers to discuss their livelihoods/financials etc. Therefore, it was submitted, that the assurances were implied and that the important question before the court was whether or not the deceased had knowledge about the existence of the implied representation that the claimant would inherit the farm. The Court agreed with the claimant and stated that it would be next to impossible for the deceased not to have any knowledge of the existence of the representation, considering substantial and significant detriment arose in

circumstances where the equitable interest was not bequeathed to the claimant upon the deceased death, i.e he had been working for little to no money, long hours, heavy labour on the farm. The Court granted the estoppel on the basis that all of the traditional limbs were met, and it offered a liberal approach to how the courts will consider the test for "assurances".

With this being said, I would note to Helen that subsequent decisions have stated that "conscious silence" must be met with "requisite intention".

A similar situation arose in the case of Jennings v Rice. Here, the claimant was the deceased widow's gardner for a significant period of time. When he was first employed by her, he was paid 30 pence an hour. Gradually however, the payments ceased, and the claimant worked free of charge. The deceased, the Court heard, made various representations to the claimant throughout his life, that he would inherit her house, "when I am gone, this will all be yours". Leading up to her death, the claimant's wife moved into the house and assisted with the caring and welfare of the deceased. She then died intestate. The claimant brought an action under estoppel, and the Court noted that the relationship between the deceased and the claimant was one which gave rise to estoppel in circumstances where the representations were infrequently made, but which they were substantial enough, given the circumstances of their relationship, which would cause the claimant to rely on them to his detriment. The detriment here was his lack of renumeration/his free services and labour, and that of his wife's also. The Court granted the estoppel and endowed the equitable interest to the claimant.

In contrast to this approach however, the Court's will not simply grant an estoppel on the basis of the relationship alone if that relationship proves insufficient. This was demonstrated in the case of ***Lissmore v Downings,*** where the claimant and deceased had only known each other for a short period of time and thus, the court held, this relationship and the circumstances surrounding same could not realistically have given rise to assurances which were relied upon and therefore the claim for estoppel failed.

In terms of detriment, Delany has noted that financial detriment will not be the only form of detriment that a court will uphold, and this has been verified in the case law by the cases of ***McGuinness v McGuinness, McCarron v McCarron, and Re Basham.***

In recent times however, the concept of "unconscionability" has gained traction in Courts of Equity when considering estoppel cases. Claimants have increasingly been attempting to ground estoppel claims on the issue of "unfairness" or "unjustness" alone, while departing from the traditional three-limb test.

Scholars appear to be transfixed as well as contradictory in their approach to the concept of unconscionability. For example, both **Mee** and **Cooke** have supported the concept as being a new, stand alone test for estoppel, yet in other places they have emphasised the importance of the traditional test. It is arguably the case, and one which I would inform Helen, that the concept of unconscionability underpins the traditional test for estoppel in Ireland, rather than providing a new judicial test. In this respect, as highlighted by Hudson and by the cases of ***Baxendale v Bennett and Re Securities Ltd,*** Courts will have regard to the behaviour, nature, and circumstances of an estoppel case and whether or not it would be unjust or unfair not to invest an equitable interest or provide compensation to the claimant. Unconscionability provides the overarching theme which connects estoppel cases together, but it is far from being a test in its own right.

The case of ***Yeoman's Cobbe v Row***, stated that Courts should not grant estoppel on the basis of unconscionability alone and that this must be supported by the traditional test. **Delany** notes that this case should be seen as one confined to the facts of the case, i.e. joint commercial ventures only. In the recent case of ***Qayyam v Hameed***, the Courts held that though no two estoppel cases are the same and there remains no "single formula" for the establishment of estoppel, the principles of assurance, reliance and detriment must be applied in a "disciplined and principles fashion".

Application:

In applying the case law to the present case, I would raise the following questions:

1. Did Mary make assurances/representations to Helen that she would inherit the house and business? Yes. After Helen had expressed her interest in buying a house, Mary asked her to stay with her at home and asked "why would you want to get yourself a house? Then you would have two houses as you know that this house and all I have is yours when I die." On the basis that the assurance was not one of "conscious silence" or "inferred" but rather one of "reasonably direct assurance", this part of the test would be satisfied.

2. Did Helen rely on the assurance to her detriment? Yes, following this conversation with Mary, Helen "decided not to buy herself a house but instead began an extensive redecoration of the family home on the basis that she would inherit it after her mother's death. No costs were incurred when redecorating due to the contacts she and her mother had in various construction and interior decorating businesses".

3. Was it reasonable for Helen to rely on the assurance of her mother? Yes, given the nature of the relationship between the two parties, and considering the circumstances of the cases ***Thorner and Jennings,*** I would advise Helen that the Court would deem the reliance to be a reasonable one.

4. Was their detriment suffered? The detriment suffered is perhaps the most contentious issue for Helen. This is because there was no financial suffering, however as per the cases of ***McGuinness, McCarron and Re Basham,*** labour or services will suffice to meet this test. Helen did not provide any service or labour in the reconstruction of the house, the main event which occurred upon her

reliance on the assurance of her mother. A significant reliance however is the fact that she no longer (theoretically) has a place to live due to the fact that she relied on her mother's assurance not to buy another house as she promised the family home would be hers upon her death.

5. Would it be unconscionable for a court of equity to refuse the estoppel claim? In terms of issues of unfairness and unjustness, the court will have regard to the circumstances, relationships and facts surrounding the estoppel claim. Here, the court will hear that Helen had a respected profession as a doctor before she gave this up to care for her mother. She "abandoned" this job to help her mother, however it is unknown if her mother specifically requested her to do this, or if she did it off her own bat, after receiving a *"prestigious promotion"*. I would need further clarification from Helen if her mother asked her to give up her job, as this would undoubtedly enhance her claim on the basis of unconscionability and detriment suffered.

It should be noted that Helen's livelihood was vested in the business and the courts will have regard to this fact.

Conclusion:

I would ultimately advise Helen that she should take a claim for proprietary "equitable" estoppel to gain either a) and equitable interest over the family home or b) compensation for the loss suffered. The onus is ultimately on Helen to determine the appropriate remedy should a Court find in her favour. It is unclear whether or not a Court would accept Helen's claim as there are peripheral issues that need to be ascertained. However, I would advise Helen that she meets the traditional criteria for estoppel; assurance, reliance, detriment, and that there are elements of unconscionability should she not receive the assured proprietary interest in the family home and the business, and that she should therefore take an action for proprietary estoppel.

Question 7

QUESTION SEVEN

20 points

QUESTION SEVEN User Identifier: 00001010

"The mere promise of a gift creates no legal obligation. A Donatio Mortus Causa is an exception to that basic rule in that it allows the donor to promise the donee that he or she will receive a gift when the donor dies. That promise is binding and the gift is completed when the donor dies, even though the donor never transferred ownership of the property to the donee."

Making a Will, The Law Commission of England and Wales (2017), at p226.

Discuss the criteria necessary to create a valid Donatio Mortus Causa.

10-10.45

Rough Work

"gift of an amphibious nature"

Academics; Bansal, Farran, Delany, Biehler, Leow & Roberts.

Case Law: Bentham v Potterton; Woodrow2; CainvMoon, Re Craven's Estate, King v Dubrey, Re Mullaney; Birch v Treasury Solicitor; Re Wasserberg; Sen v Headley; Wilkes v Allingham; Mills and Shields v Kelly; Agnew v Belfast Banking Society; Vallee v Birchwood, Pennington v Waine; Davey v Bailey [2021]

Introduction

As per the Court in ***Pennington v Waine***, equity "strive to perfect and imperfect gift". This equitable maxim is expressed through the doctrine of Donatio Mortis Causa ("DMC"), which is an exception to the rule that allows a donor, in circumstances where they are contemplating death, to promise the donee that he/she will receive a gift upon their death. In ***Re Beaumont,*** the Court described a DMC as a *"gift of amphibious nature"*. As per **Delany**, a valid DMC occurs when a donee, in contemplation of death, makes a gift to another, in full knowledge that it is dependent upon their death, and this is evidenced by the fact that the donee has departed with dominium/possession of the gift. It has been argued by scholars, such as **Bansal (2018)**, that the equitable doctrine of DMC is no longer of "social utility". However, the recent global pandemic, coronavirus, has reignited the doctrine and refuelled conversations surrounding its utility. As emphasised by **Professor Farran (2020),** the doctrine of DMC has shown its necessity in light of the coronavirus pandemic, enabling individuals nearing death to bequeath gifts which would otherwise be invalidated as a result of the rules of intestacy or succession.

Law: The Test for a valid DMC

The necessary criteria to create a valid DMC were elaborated as a five part test in the case of ***Re Wasserberg*** as follows;

1. The gift must be made in contemplation of death;

2. The gift must be able to form the subject matter of a DMC;

3. The gift must be made in circumstances that if the donee recovers, it will go back to them;

4. It is indefeasible until death and dependent upon death; and

5. The property was delivered to the donee prior to death occurring.

This test has been simplified in the case of ***Bentham v Potterdon*** and the current requirements necessary to create a valid DMC have been resigned to a three-factor test;

1. Must be made in contemplation of death;

2. Indefeasible until death; and

3. Property must be delivered to the donee prior to death occurring.

An important prerequisite question which must first be addressed is whether or not the circumstances or manner in which the donor died effects the validity of the DMC. This question was raised in the cases of ***Wilkes v Allingham, Mills and Shield v Kelly*** and ***Agnew v Belfast Banking Society.*** In all cases, the donee committed suicide. In Mills, the gift was contemplated in circumstances where he had terminal cancer and was en route to a doctors appointment in Dublin when he decided to end his life. The judge heard this evidence and advised that the fact that the donee died in a manner which differed from the one contemplated, did not invalidate the DMC. However, what will invalidate the DMC is if the donee assisted the donor in committing suicide.

1. Contemplation of Death

The first necessary criteria in the creation of a valid DMC is that the donor made the gift "in contemplation of death". In the case of Bentham, the donee was an elderly lady and the aunt of the claimant. Three weeks prior to the donee's death, she had shown the claimant access to her bank books and expressed the words *"if I go, I want you to have these, and be sure to give the rest a few quid"*. The donee died three weeks later from cancer. However, upon hearing the matter, the Court held that the deceased had no

knowledge of her cancer and could therefore not have contemplated her death. The evidence highlighted the need for death to be imminent and the donee must have knowledge of the fact that he/she is going to die soon. As a result, the Court held that the first limb of the test was not met for a valid DMC and therefore the claimant failed in her application to the Court.

Cain v Moon expanded and gave a greater understanding of the definition of "contemplation". Here, the Court noted that in order to satisfy the necessary criteria to form a valid DMC, it is sufficient for the gift to be made "in expectation of death" rather than simply "in contemplation of death". The difference here is arguably the imminent nature of death occurring, as scholars, such as **Biehler**, have emphasised the difference in the language of "contemplation" and "expectation" - the former having greater emphasise on the philosophical and the latter having a more practical imminent nature to it. ***Re Craven's Estate*** is useful in clarifying this issue, where the Court held that the requirement to make the gift in contemplation must go beyond a mere philosophical idea that "we all die someday" - must therefore be a tangible and realistic thought that death is imminent and going to occur soon. Here the donee expressed that he was a "doomed man" and he died shortly thereafter, validating this necessary first criteria in the creation of a valid DMC.

A spanner in the works occurred in this area in the case of ***Vallee v Birchwood.*** Here, the Court of Equity in England allowed for the validation of a DMC in circumstances where the donor died four months after the gift was bequeathed. The Court expressed a flexible and liberal approach to the definition of contemplation here, and it is one that has received much scholastic and judicial criticism, most notably from the 2015 case ***King v Duprey [2015],*** which effectively overruled Vallee and reaffirmed the traditional, strict test that a donee must have made the gift with death being imminent. It was held in this case that if the donee had a true intention to bequeath the gift to the claimant in Vallee, he should have made a new will which would have reflected those wishes. Four months was therefore considered too long to satisfy the first criteria necessary for the creation of a valid DMC.

2. **"Dependent upon death"**

In ***Agnew v Belfast Banking Society,*** the court held that the gift must be indefeasible upon death, and dependent upon same. For example, if the gift was made in contemplation of death and death did not occur, then the case would be that the gift must return to the donor, rather than being transferred to the donee. The reason behind this is to uphold the exceptional and emergency nature of a DMC, being that if the donor doesn't end up dying, they should instead create a valid will as they are no longer meet the exceptional circumstances to create an imperfect gift which equity must perfect and resolve. This point was most recently noted in the case of ***Davey v Bailey [2021].*** Here, the deceased had expressed a gift to the claimant in circumstances in which he was contemplating his death. However, the court heard evidence which suggested that the deceased was not intending to make the gift as an expression of his impending death, but rather, it was an intention to create the gift by way of remaking his will. The court therefore noted that this second limb was not satisfied, as it was not "indefeasible upon death" but rather, was dependent upon the deceased intention to include the claimant in his will, which he never actually did. The court noted that just because the gift was made in contemplation, does not in itself validate a DMC. Rather, the gift must be made with the intention of a DMC, and must be dependent upon the donee's death.

3. The donee must part with dominium

The test which has perhaps caused the most controversy in the doctrine of DMC, is defining what exactly is meant by parting with possession of the gift bequeathed to the donee. Traditionally, this meant departure of possession, and as per Birch v Treasury Solicitors, departure had to be something more finite than mere symbolic transfer. The development of the case law in this area provides a useful and interesting analysis of the definition of departure. The case of ***Woodard v Woodard*** involved a father who had gifted his car to his son in circumstances where he was a) contemplating his death and b) intended for the gift to be dependent upon his death. The question before the court was whether or not the father had sufficiently parted with "dominium" of the car. He had shown the son the car keys but had retained possession of the keys, which ultimately invalidated the DMC as it was held the retention of the keys could not amount to departing with possession/dominium of the gift. The same circumstances arose in ***Re Mullaney,*** where the donor had shown the donee the box in which the donee kept the deeds and documents to the house which they had gifted to the donor in contemplation of their death. The donee however showed the donee the key, and then proceeded to place the key back in their pocket. The Court ruled that the display and retention of the key invalidated the DMC as it did not sufficiently meet the third-limb of the test. This was also a question at issue in ***Davey v Bailey.***

The most interesting case in this area was the Court of Appeal case of ***Sen v Headley***, which extended the subject matter of DMC's to real property. The case involved the deceased who had been in a partnership with the claimant for over 10 years. On his deathbed, he gifted the house to the claimant, stating *"here's the key to the safebox where the deeds are kept"*. The deceased handed the key to the claimant, and this in effect had validated the DMC as it was held the deceased had sufficiently parted with possession and dominium of the key to the safe.

Scholars, such as **Leow**, have argued that dominium is more closely aligned with "factual possession" however this complicates the doctrine of DMC as it unnecessarily places barriers which equity typically strives to ameliorate. **Roberts**, on the other hand, argues that in today's "dematerialised world" it is vital that dominium is more flexible and that a liberal approach is taken, such as was demonstrated in the Court of Appeal in Sen, where giving the keys to a safe amounted to parting with dominium.

Conclusion

In conclusion, the historical five-limb test for the creation of a valid DMC has been simplified to a three-factor test as per ***Bentham v Potterton.*** They are, that the gift must be made (a) in contemplation of death in (b) circumstances where the gift is indefeasible upon death and (c) the donee parted dominium/transferred possession the gift prior to the death. The "deathbed gift" (Delany) was in recent times viewed as being of no social utility by scholars (partially due to registered/unregistered property issues) however, as has been highlighted by the recent global crisis, the doctrine is as useful and seminal as ever and remains a key doctrine in the law of equity.

Question 8

QUESTION EIGHT

20 points

QUESTION EIGHT

Jim died recently. He had lived all of his life in the small village of Ardaghee and was survived by his wife, Mary. He had one daughter, Bridget, who predeceased him as she had died tragically in a car accident some years ago. Bridget had always loved sport and was an active member of the Ardaghee Sports Association.

Jim died testate and in his Will he bequeathed all of his property to his wife Mary, save for a specific bequest in the residuary clause in which he bequeathed the residue of his estate; "to the Bridget Murphy fund, to be administered by the board of the Ardaghee Sports Association for the promotion of sport in the two primary schools in my home village of Ardaghee."

Jim and Mary never had any interest in sport themselves but, wanting to do something in Bridget's memory, intended to arrange for the setting up of a fund to promote sport in their village. They had intended to hold fundraising events during Jim's lifetime and provide the monies raised to the Fund but unfortunately, they never actually took any steps in this regard and the Bridget Murphy Fund was never established.

Jim's brother, Peter, is the executor of Jim's estate and he has approached you asking how the residue of the estate ought to be administered. He is anxious to determine whether the residuary bequest is a charitable one and if so, how it can be administered, as the Bridget Murphy fund never existed. Advise Peter as appropriate.

charitable and cy-pres.