Summative assessment exercise - outline answer

Mrs White should be advised that her husband's testamentary gift to the sportsclub will only be valid if it can be construed to be either (1) a gift to the members of the association as joint tenants; (2) a gift to the existing members subject to their respective contractual rights and liabilities towards one another as members of the association; (3) a trust for the benefit of the present members of the association; *or* (4) a trust (limited to the perpetuity period) for the benefit of the present and future members of the association. Because the gift was testamentary, it is *not possible* to construe the gift to be (5) a donation to the officers of the sportsclub subject to a mandate or agency (*Conservative and Unionist Central Office* v *Burrell* [1982] 1 WLR 522).

In other words, Mrs White should be advised that the legacy, whether given on trust or for the members beneficially, will fall into residue (for her benefit) if she can show that it infringes the rule against inalienability of capital.

What is more, if she can show that the legacy was made on trust to achieve purposes of a purely private, non-charitable and impersonal nature, the gift will also fail for lack of a beneficiary *(Re Shaw* [1957] 1 WLR 729). However, the fact that the employees of Whitestone Ltd are intended to benefit from the cricket ground, suggests that the legacy will not be construed in this way.

Let us take each of the possible constructions in turn.

(1) Absolute gift to the members as joint tenants

If a gift is made to a club only very rarely will a sensible construction allow it to be divided among the present members in individual shares. Whether this construction will be admitted will depend in large part upon the subject matter of the gift. Thus, where a gift of land is made for the purposes of establishing a cricket ground it is most unlikely that the

donor intended the individual members to divide the land up physically and for each member to take allotments in it.

(2) Absolute gifts to members subject to the contractual rules of the club

This construction was accepted (*obiter*) by Cross J in *Neville Estates Ltd* v *Madden* [1962] Ch 832 and followed by Brightman J in *Re Recher's WT* [1972] 3 All ER 401. In the latter case, a testatrix left a share of her residuary estate to 'The London and Provincial Anti-Vivisection Society'. Brightman J held that the society's existing funds already formed the subject matter of a contract in accordance with which the members had bound themselves *inter se*, and that the testatrix's legacy should be construed as a gift to the *present* members of the society beneficially, as an accretion to the society's general funds. In short, this legacy was a gift to existing persons, not a trust for purposes. As such it did not breach the rule against inalienability of capital because if all the members agreed, they could decide to wind up the society and divide the net assets amongst themselves beneficially.

The construction approved in *Re Recher's* was applied to the facts of *Re Grant's WT* [1979] 3 All ER 359, but failed to save the gift in that case. Vinelott J held that the gift could not take effect as a gift to the current members of the association (the local Labour party) subject to their contractual rights and duties *inter se* because the members were not free, under the rules of their association, to dispose of the property in any way they thought fit. On the contrary, the rules made it plain that the decisions of the members of the local party were subject to the control of the national Labour Party.

Applying this to the instant case, where we are told that 'the decisions of the committee are subject to veto by the board of directors' and that on its dissolution the club's assets 'shall belong to Whitestone Ltd', it seems to be fairly clear that the *Re Recher's* construction will fail to apply in this case as it did in *Re Grant's.*

(3) Gifts on trust for the present members of the association or club

If a disposition can be construed to be a trust of this sort it will clearly comply with the rule against inalienability of capital, but only where the beneficiaries will certainly be able to appropriate the capital to their use and benefit within the perpetuity period (*Re Turkington* [1937] 4 All ER 501). However, there seems no reason to suppose that the gift in the instant case was intended to benefit present members only. The very nature of a cricket ground suggests that future members of the club are intended to benefit just as much as present members.

(4) Gifts on trust for the present and future members of the association or club

It is not necessary that the words 'on trust' be used in order for the disposition to be construed as a trust. As Viscount Simonds stated in the Privy Council in *Re Leahy* [1959] AC 457 at 484:

> if a gift is made to individuals, whether under their own names or in the name of their society, and the conclusion is reached that they are not intended to take beneficially, then they take as trustees. If so, it must be ascertained who are the beneficiaries. If at the death of the testator the class of beneficiaries is fixed and ascertained or ascertainable within the limit of the rule against perpetuities, all is well. If it is not so fixed and not so ascertainable the trust must fail.

Perhaps the best reported examples of dispositions which were construed as gifts on trust for the present and future members of the association or club are those in *Re Leahy* itself (a gift on trust for certain religious orders) and *Re Denley's Trust Deed* [1969] 1 Ch 373 (a gift on trust for the employees of a company).

The trust in *Denley* succeeded because the trust had been expressly limited to take effect within 21 years. The trust in *Leahy* had not been limited in this way and would have failed

had it not been saved by a particular New South Wales statute which validated the trust as charitable.

Applying these cases, it appears that the gift in the instant case could be construed as a trust of the *Denley* type. However, the fact that the land is leased to the trustees of the Club for a period of 21 years only, should not mislead us into thinking that the legacy is valid on the basis that it is bound to take place within the perpetuity period or not at all. In fact, a lease can be renewed or otherwise extended well beyond the perpetuity period.

Conclusion

It appears that not one of the currently accepted modes of construing valid gifts to unincorporated, non-profit, non-charitable associations falls on all fours with the legacy in the instant case. It is therefore by no means certain that the legacy will be applied to the specified ends, or be otherwise applied, within the perpetuity period. Consequently, the legacy to the sportsclub breaches the rule against inalienability of capital, fails and falls into the residue of Mr White's estate. As a result, Mrs White, the residuary beneficiary of that estate, should be delighted with your advice!