Revision Box Questions: Guidance for approach

Revision Box Chapter 2

1. For very fundamental issues, explain the following:
   (a) What is meant by the term ‘express trust’?

   This is a trust arrangement first and foremost, and so it exhibits what was explained in Chapter 1 in terms of arising where ownership of property separates into distinctive ‘legal’ and ‘equitable’ title to property. In this arrangement those who hold legal title are subject to a number of duties relating to the property oriented towards ensuring that the benefit or enjoyment of the property is available for another. As we have learned, this happens to property for the most part because this is what is intended to happen. And in the express trust we see a trust of property arising because it is an owner of property’s express intention that it should do so. There is generally an important role for intention in trust creation, but this is where we see in the clearest way a trust arising because this is what an owner of property has expressed that he wants to happen—doing so through his words, and sometimes through a combination of words and actions, or even through his actions alone.

   (b) What ‘roles’ or ‘actors’ can be identified in an express trust arrangement?

   Here we have three identifiable roles. The settlor is an owner of property who becomes a settlor through property owned outright by him being settled which means that benefits of the property will now be enjoyed by a beneficiary. The trustee in this arrangement is required to ensure that the beneficiary can enjoy the property as intended by the settlor.

   (c) If ownership is separated into distinct components in a trust, who holds each type of title and what happens to the original owner of the property?

   The settlor in a trust arrangement no longer has the entitlements of an owner. In the express trust scenario, the person intended to benefit from property which is now ‘trust property’ is its beneficiary who has entitlement to the property ‘in equity’. The person responsible for ensuring a beneficiary will have entitlements as they have been specified by a settlor is the trustee, who acquires legal title when ownership becomes separated. What causes ownership to separate in this way is appreciation by a trustee that although he is formally entitled to the property by virtue of holding legal title to it, that he is not intended to benefit from the property as its owner. With the trustee’s consciousness of this, ownership will separate, and a trustee become subject to a number of duties which are there to ensure he acts as trustee rather than owner, and the beneficiary receives entitlements as intended by an owner-cum-settlor. Once the trust has been created the settlor is no longer a part of the arrangement which now subsists. It is only a beneficiary under a trust who can enforce it, and not the one-time owner of property, and any action as such will be between trustee and beneficiary.

   (d) Why create a trust rather than make a gift of property from the perspective of each of the actors encountered in an express trust arrangement?
If we think about the trust arrangement alongside the relationship created by a valid and legally binding contract, we can see that the former is a way of giving third parties enforceable rights which are ordinarily prevented by the doctrine of privity. As for reasons underpinning trust creation rather than making a gift, it is very important to appreciate that a gift involves an outright transfer of ownership from one party to another. Here, trust creation is associated with owners being able to control the use being made of property which once belonged to them, and at one extreme of this not to have to worry about it in the hands of a minor or an adult who isn’t as responsible as they should be. Generally, creating trusts helps to promote a long-termist view of property, providing assurance that changes over time can be reflected in changing approaches to safeguarding property; and it provides enjoyment for another with peace of mind that this person does not have to be responsible for managing the property. For a beneficiary it provides for enjoyment of property without responsibility for it. For a trustee, this is all about responsibility, certainly in theory, and the position of trustee arose entirely as one of obligation, but as we will discover, today acting as a trustee can be a highly specialised and highly lucrative occupation.

2. In focusing on express trusts directly, explain what is meant by the following:
(a) An express trust that is ‘fixed’
(b) An express trust that is discretionary'

An express trust which is fixed is said to arise where a settlor provides instructions on how his property is to be distributed amongst those intended to benefit, by making it clear what share each of them is to have- this may or may not be equal share, but the point is it is the settlor who decides this. In a discretionary trust, trustees are left to determine who is to benefit from the trust property, from a group of potential beneficiaries which has been chosen by a settlor, and from this a trustee also determines what share an individual he has chosen will receive.

(c) A ‘power’, and how ‘powers’ are encountered in the study of trusts.

The creation of a power is the creation of the capacity to act in a particular way, giving the person who holds this the discretion or authorisation to do so. The power to give property in this discretionary way is known as a ‘power of appointment of property’ and is different from the mandatory arrangement put in place by the creation of a trust. We encounter powers in the context of trusts because powers can have the appearances of discretionary trusts, and there are similarities and differences in what is required for each of these arrangements relating to property to be valid ones.

3. In focusing on the introduction given to ‘theory’ and context’, explain:
(a) What, at this stage, you understand to be the meaning of ‘theory’ and ‘context’ in understanding trusts and the law
(b) Why it might be important at this stage to appreciate where trusts are commonly to be found.

Theory and context are both useful for understanding how trusts work and where they can be found, and they can assist in this in their respective different ways. Theory helps us to understand what is happening by ‘abstracting’ trusts from much of the reality of what they
do and where they are found. Here we think about the legal rules themselves, reflecting on them alongside other key features of law and intellectual approaches to understanding its key concepts and systems. Context is in many ways the complementary opposite, and helps us explore the limitations of looking at legal rules alone, because of the ways in which they actually operate in the real world. It is for this reason of differences between ‘law in books’ and ‘law in action’ that it is important to appreciate where we can find trusts at work. But this is also important for helping us to theorise how they work, through understanding that some aspects of the way trusts work are easier to explain than others from where they are found in reality, and so having an abstracted overview of what needs to be understood about them is very important.

4. Summarize what you currently understand is meant by the terms ‘mandatory’ and ‘default’ terms as they arise in analysis of trusts law.

This is an introduction to Langbein’s taxonomy of rules found in the law relating to express trusts. Moving from the position that all trusts are mandatory arrangements, Langbein proposes that express trust - where a trust arises from the express intentions of an owner of property that this should happen - creation is highly contractual in nature. This is that an owner of property has plenty of scope to decide what is to happen, and that in furtherance of this, the law will provide a ‘default’ position for when matters haven’t been specified by the settlor. Langbein proposes that alongside this there are rules relating to the creation of an express trust and its ongoing operation which cannot be altered or discounted by a settlor, and will apply whatever his views to the contrary might be. From this Langbein’s classification of mandatory and default rules gives us a framework for analysing the law relating to express trusts.