Revision Box Questions: Guidance for approach

Revision Box Chapter 4

1. Using the chapter materials and further discussion on the Online Resource Centre, explain what is meant by ‘transfer formality’ and ensure that you:
   - understand why any transaction involving a transfer of title from one person to another will require transfer formality;
   - are able to provide examples of why and how transfer formality required will depend on the nature of the property;
   - understand how, in the context of trust creation, transfer formality can be linked to the ‘less visible’ nature of equitable interests in property;
   - understand when transfer formality will arise in express trust creation and when it will not; and
   - understand how requiring transfer formality in trust creation can be seen to protect the interests of each of the ‘trust actors’ identifiable in an express trust arrangement.

This requires us to return to the nature and fundamental importance of ownership in English law and then to the similarities as well as differences entailed in making gifts of property and creating express trusts. Both involve an owner of property permanently and irrevocably giving up the property and his entitlement to exclusive use of it and dominion over it. An owner of property is the only person whom law recognises as holding these entitlements to property, and ownership of property at law is the most important property right in English law, which regards legal title as good against the world. In recognition of the enormous implications of losing ownership, where there is any kind of permanent transfer of legal title law requires this to meet prescribed ‘legal form’ to ensure: the only is seeking to do this with his property, and is not seeking to do something different such as loan his property; that because it is only an owner who is authorised to pass good title to property, that there are no ‘secret dealings’ involving property; and to protect a recipient who can be confident he is receiving good title. This is obviously important for a purchaser who provides value, but even the recipient of a gift does not want to be receiving stolen property! What is required to satisfy formality depends on the nature of the property, with greater formality required by way of writing and registration for real property on account of its uniqueness and high value, and intangible personal property on account of its non-physical existence. In the case of the creation of an express trust, transfer formality requirements must be met as if the transaction were one for value or an outright transfer of title made gratuitously (a gift) to a new owner, but because what isn’t being transferred to a new legal title holder is outright ownership, this can raise difficulties for purchasers when trust property is being sold- it is in this setting that the traditional doctrine of notice and the current regimes for registration of proprietary interests have become particularly important.

2. Explain what is meant by ‘declaration formality’ and, using cases and statutory materials as appropriate, where this is encountered in express trust creation.
When an express trust is created, an owner-cum-settlor when showing his certainty of intention is said to be declaring that property once owned outright is now subject to duty and obligations. This is how we know a trust is intended. There are no prescriptions about making a declaration of trust in writing for the creation of most trusts: written records of declarations of trust exist widely for providing an evidence trail, reflecting the use of trusts in taxation. For property which is land, s 53 (1)(b) of the Law of Property Act 1925 requires that declarations of trust must be manifested in signed writing, with the statutory provisions and Gardner v Rowe helping us to understand that the declaration itself doesn’t have to be made in signed writing, but such written evidence that it has been made must subsist.

3. Using cases and statutory materials as reference points, ensure that you understand the way in which the courts have approached ‘dispositions’ in the context of formality, and what this reveals about how and why express trusts are created.

This requires understanding of s 53(1)(c) of the LPA 1925 requiring ‘disposition of an equitable interest…’ to be ‘in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will’. This core idea brings into very sharp relief the importance of the tax angle for understanding why a large number of express trusts are created. Key case law here is Grey v IRC (1960), the Vandervell litigation and Oughtred v IRC (1959). Grey concerned whether ‘disposition’ should be interpreted narrowly or broadly for the purposes of the legislation; with Vandervell showing how complex the very idea of a disposition can be where property confers more than simply ‘value’, and where there are ‘purchase options’ involved, with Oughtred v IRC – in concerning disposition in the light of specifically enforceable oral contracts for transferring subsisting equitable interests- being what the Textbook materials term almost entirely a pure taxation case, rather than one that illustrates any particular policy rationale for formality requirements.