Revision Box Questions: Guidance for approach

Revision Box Chapter 9

1. Ensure that you can explain what is meant by a ‘secret trust’ and what its origins are.

A secret trust has its basis in a Will being a public document, and a testator wishing to make provision in his Will for someone(s) he does not wish to name. This can be done by a **fully secret trust** meaning a gift is left in your Will to someone who is actually intended to hold it for someone entirely different whom your Will does not name at all as a beneficiary, or a **half-secret trust**, so called because the testator says that they are leaving behind a gift in their Will for someone who knows what the purpose is without actually specifying in the Will what the purpose is.

2. Explain what the law relating to secret trusts can reveal about:
   a) the significance of formality in the creation of trusts; and
   b) the significance of implied trusts for addressing injustices arising from property and its ownership.

The law relating to secret trusts is important for understanding formality because on the one hand it reinforces the manifest purpose of formality for providing certainty and clarity in transactions involving property, because in this instance Wills which do not satisfy statutory formality will not be valid. However, secret trusts also reveal for us how Wills formalities can effectively be avoided. Here, equity will allow the clear provisions of the Wills Act 1837 (as amended) to be avoided on the basis that justice requires this, and so this provides a further setting for looking at how implied trusts are capable of interfering quite radically with apparent entitlements to property— even as they are set out in the public documentation of the Will.

3. Explain what is meant by ‘fraud enforcement’.

Although there are some important differences between secret and half secret trusts, analytically they are often treated as being very similar. Here, it is conventionally regarded that equity will utilise implied trusts on the basis of fraud theory or in the pursuit of fraud enforcement: this is that it would be fraudulent for someone who is named to take the property beneficially if what he actually agreed to was to confer the benefit to someone different who is not named, and so the person named will be required to apply the property in favour of the person not named. Here we can see that an injustice would arise if the only reason property had been left to someone named is that this reflected an unwritten understanding that someone else was to benefit.

4. Explain what the decision in McCormick v Grogan (1869) LR 4 HL 82 reveals about resulting trusts in the context of secret trusts

This case, *is authority for the justification for enforcement of secret trusts, with the House of Lords holding that that the courts will in principle enforce secret trusts*. On the facts of the case the secret trust alleged was not enforced, but it is clear from the judgment that had the facts been different such an arrangement would have been enforceable by the
excluded beneficiary. Given what we learned about resulting trusts arising where the settlor’s wishes cannot be carried out, you will need to explain the importance of presumed intention for a resulting trust to arise, and look at arguments clustering around the position of residue legatees, pre and post Executors Act 1830 positions, and policy arguments in favour of enforcing secret trusts.