TRUSTS, EQUITABLE INTERESTS AND THE NEW ZEALAND STATUTE OF FRAUDS

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The Property Law Amendment Act 1980[1] contains provisions which effectively patriate sections 7-9 of the Statute of Frauds 1677, replacing the "archaically worded and often obscure provisions"[2] of the original English statute with a more modern set of provisions which again have an English derivation being "taken almost word for word"[3]from that country's Law of Property Act 1925.[4] The new provisions take effect as section 49A of the Property Law Act 1952 and, in so far as they concern the law of trusts, read as follows:

> 49A(2) A declaration of trust respecting any land or any interest in land shall be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.
>
> (3) A disposition of an equitable interest or trust subsisting at the time of the disposition shall be in writing signed by the person disposing of the same or by his agent lawfully authorised in that behalf, or by will.
>
> (4) This section does not affect the creation or operation of resulting, implied or constructive trusts.

Section 49A is stated[5] as being "in substitution for" the corresponding provisions of 1677 and represents a consolidation of those provisions, although perhaps not, as has been suggested,[6] a "true consolidation". The point is that the structure of section 49A would appear to indicate that the ambit of its application is different from that of its predecessor. In particular, the provision contained in section 49A(4) appears to have an application within the context of the section as a whole whereas under

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1 Section 2.

2 *Hatton* v *Clayton* unreported, High Court, Auckland, 11 April 1983, A797/81 at 9, per Vautier J.

3 Ibid at 17.

4 Section 53. Note that section 53 is the model for (and in some cases its contents form the entire content of) corresponding provisions in Australia. See Property Law Act 1958, s 53 (Vic); Law of Property Act 1936-1975, s 29 (SA); Conveyancing Act 1919, s 23C (NSW); Property Law Act 1974-1981, s 11 (Qld); Property Law Act 1969-1979, s 34 (WA); Conveyancing and Law of Property Act 1884, s 60 (Tas).

5 Property Law Act 1952, s 49A(6).

6 "Section 49A represents a consolidation of provisions in the Statute of Frauds. There is then a presumption against change in the law, a presumption that will be stronger in New Zealand than in England, where the legislative history of some of the relevant provisions of the Law of Property Act 1925 prevents them from being a 'true consolidation' of the 1677 Statute." Brookfield, "Property Law Amendment Act 1980: No Cause for Alarm" [1981] NZLJ 321, 322.

the terms of the statute of 1677 it served (as section 8) merely as a proviso to what is now section 49A(2)[7] and as such was relevant only to declarations of trust in respect of land.[8]

Section 49A as a whole is, of course, concerned with more than trusts and interests subsisting thereunder. Indeed a plausible argument could be mounted in support of the proposition that the section is primarily concerned with land and that the provisions relating to trusts are intended to apply only to trusts of land. Such an argument would draw support from the express terms of subsections (1)[9] and (2) and from the restricted application of subsection (4) under the original statute, although whether this last would be a factor which would weigh with a modern court must be open to doubt in the light of Vautier J's view in *Hatton* v *Clayton*[10] that reference back to the old provisions is not to be encouraged. Even subsection (3), which makes no mention of land and was likewise not connected exclusively thereto under the terms of section 9 of the original statute, was felt by one judge of the Australian High Court to apply only to equitable interests under trusts of land.[11] The adoption of a construction restricting the application of its component parts in this way would, it is suggested, provide section 49A as a whole with a coherence that it would otherwise lack and would avoid some of the difficulties that have become associated with these provisions in other jurisdictions in which they operate.[12] However, while it is possible for the New Zealand courts to strike out on their own in this matter, it seems unlikely, given that the legislature has chosen to adopt a precedent used and judicially pronounced upon in other parts of the Commonwealth, that they will do so, or indeed that they would have been expected by those responsible for the legislation to do so. Given that courts in England and Australia have treated provisions corresponding to sections 49A(3) and (4) as applicable to trusts of personalty as well as to trusts of land it seems unlikely that the New Zealand courts will not follow suit.

If sections 49A(3) and (4) are not restricted to trusts of land but extend to trusts of personalty also it may be asked why those responsible for the

7 Section 7.

8 Furthermore, section 49A(5)(b) appears to acknowledge that a change of substance has occurred in that it prevents anything in section 49A from affecting any interests validly created prior to the coming into force of the 1980 Act. Such a saving would be unnecessary if the scope and effect of the new provisions were exactly the same as those of the old.

9 See generally *Hatton* v *Clayton* supra n 2; Brookfield supra n 6.

10 Supra n 2 at 18 adopting the headnote in *Farrell* v *Alexander* [1976] 2 All ER 721 (HL) to the effect that the court should, even in the case of a true consolidation, "interpret the Act in accordance with the usual canons of statutory construction and without recourse to the Act's antecedents."

11 *Adamson* v *Hayes* (1973) 130 CLR 276 at 293 per Menzies J, in relation to the Western Australian equivalent of section 49A(3). This view, however, was not accepted by the other judges of the High Court and is inconsistent with earlier English authority, notably *Grey* v *Inland Revenue Commissioners* [1960] AC 1 (HL); *Oughtred* v *Inland Revenue Commissioners* [1960] AC 206 (HL); and *Vandervell* v *Inland Revenue Commissioners* [1967] 2 AC 291 (HL).

12 See further Battersby, "Some Thoughts on the Statute of Frauds in Relation to Trusts" [1975] Ottawa LR 497; Battersby, "Formalities for the Disposition of Equitable Interests Under a Trust" [1979] Conv 17; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (2nd ed 1984), Ch 7.

1980 reforms felt it necessary to confine section 49A(2) to declarations of trust of land or of interests therein; alternatively, it may be asked why, if it is not felt necessary to require that certain formalities be observed in respect of declarations of trusts whose subject matter is personalty, such requirements are necessary where the subject matter is land? In the case of a measure which effects changes of substance[13] and not merely of form it can hardly be sufficient to justify the retention of this double standard merely on the basis of ensuring continuity.

It may be objected that such double standards have not caused difficulties in the past and that there is nothing in the form of words used in section 49A(2) that is likely to change that state of affairs. Certainly in the sixty years that this form of words has been in use there appears to have been no Commonwealth decision that has turned on the difference in the formalities required. Nevertheless that difference could be of consequence where a declaration of trust is made in respect of an interest subsisting under a trust for sale of land. The point is that the presumed application of the doctrine of conversion in such cases has been brought into question in a line of English cases where certain types of interests so subsisting[14] have been held to be interests in land rather than in personalty.[15] As such a question as to whether section 49A(2) would apply to a declaration of trust respecting such an interest cannot be said to be free from doubt. Furthermore, such a declaration of trust raises an additional question, namely whether it amounts to a "disposition"[16] within section 49A(3) and as such needs to comply with different formal requirements from those demanded by section 49A(2).

It may be asked why, if the exercise embarked upon by the 1980 Act was felt to be necessary or desirable, and if it was to take a form that would

13 See supra n 8 and accompanying text.

14 In particular those subsisting under the "statutory trusts for sale" which arise where a co-ownership situation exists under English law. There is no corresponding New Zealand legislation.

15 See especially *Williams and Glyn's Bank Ltd* v *Boland* [1979] Ch 312 (CA), affirmed [1981] AC 487 (HL), approving *Elias* v *Mitchell* [1972] Ch 652 and *Cooper* v *Critchley* [1955] Ch 431, and disapproving *Irani Finance Ltd* v *Singh* [1971] Ch 59.

16 What amounts to a "disposition" for the purposes of section 49A(3) has not yet been the subject of judicial consideration in New Zealand. Indeed the only relevant judicial authority seems to be English and this is not entirely satisfactory. The leading case is the decision of the House of Lords in *Grey* v *Inland Revenue Commissioners* [1960] AC 1 where the difference in wording between the current provision and the wording of section 9 of the statute of 1677 ("grants and assignments") is referred to. In this case Viscount Simonds (with the other Law Lords in agreement) held that "disposition" should be given its ordinary meaning and that this ordinary meaning was wider than the meaning of "grants and assignments". If the approach of Vautier J in *Hatton* v *Clayton* (see supra n 10 and accompanying text) is to be adopted in this area of the law in New Zealand it would seem that such a conclusion would find favour with the New Zealand courts. On this basis "disposition" would appear to include the following transactions –

(a) A simple assignment by a beneficiary (B), whether for consideration or not, to an assignee (A).

(b) A direction by B that the trustees hold his beneficial interest on trust for A; *Grey* v *Inland Revenue Commissioners,* supra.

(c) A declaration by B that he holds his beneficial interest on trust for A; see *In re Lashmar* [1891] 1 Ch 258, and *Grainge* v *Wilberforce* (1889) 5 TLR 436. Although the transaction takes the form of a declaration of trust its effect is that B, a bare trustee with

bring about some change to the existing law, the opportunity was not taken to rationalise the formalities required and to introduce a degree of uniformity so that one common standard would apply to declarations of trust, whatever the nature of their subject matter, and to transactions affecting interests subsisting thereunder. While tidiness may not be a primary imperative of those framing legislation the preservation of distinctions which, it is suggested, serve no useful purpose and represent a source of actual and potential difficulty cannot be said to have much to commend it. In contrast, assuming it to be felt that formal requirements do actually serve some useful purpose, a scheme applying the same requirements to both declarations of trust and to dispositions of interests subsisting thereunder, whatever the nature of the entrusted property, would bring about a simplification of the law which would avoid these difficulties, for if the same formalities were demanded difficulties of classification would cease to have consequence.

If reform were to be undertaken standardising the formalities to be required the question then arises as to the basis on which this standardisation should take place. If a uniform set of requirements is to be imposed what effects, if any, will such an imposition produce in those areas where the requirements differ from those presently in force?

Using the formalities presently demanded by section 49A as a starting point there would appear to be three possible courses on which reform might proceed –

(1) Standardisation on the basis of the requirements specified for the disposition of subsisting equitable interests (so that writing is always essential to *constitute* a valid trust).

(2) Standardisation on the basis of the requirements specified for declarations of trusts of land or of interests therein (so that writing is always essential to *evidence* a trust).

(3) The abolition of all formal requirements (so as, in effect, to bring about a standardisation on the basis of the regime presently appropriate to declarations of trust in respect of personalty).

no active duties to perform, drops out of the picture and the head trustees (ie of the trust under which B's interest subsists) are in reality holding on trust for A.

(d) Quaere the position where B declares that he holds his beneficial interest on trust for A^1 for life with remainder to A^2. Even though, again, the form of the transaction is that of a declaration of trust if "disposition" is to be given its natural meaning this too should rank as being within section 49A(3) since its effect is to divest B of his beneficial entitlement and cause it to become vested in (ie to transfer it to) A^1 and A^2. It is suggested that on this basis the fact that the declaration creates two subordinate interests does not alter the character of the transaction; likewise, the fact that B may have active duties to perform would not appear to be decisive – effectively the head trustees will be holding on trust, not for B, but for $A^1$and A^2. However such authority as there is (albeit under the statute of 1677) points the other way: see *Onslow* v *Wallis* (1849) 1 Mac & G. 506, 41 ER 1361, approved *In re Lashmar,* supra.

(e) Likewise, quaere the position where B declares that he holds his beneficial interest on trust for himself for life with remainder to A. Here again there is the creation of two subordinate interests although in this case there would be less justification for the application of section 49A(3) since even if this could be regarded as a "disposition" it would scarcely be a disposition of an interest subsisting at the time thereof.

1 Requirements as for disposition of equitable interests

The adoption of course (1) would have the consequence that all declarations of trust, whether of personalty or of land or of interests therein, and all dispositions of equitable interests subsisting or created thereunder[17] would have to be effected in writing, if made inter vivos, or by will. The suggestion has been made[18] that the original intention underlying section 7 of the statute of 1677 was that declarations of trust respecting land or interests therein should be subject to the same requirement of writing as that imposed by section 9 and that the distinction between the two which is accepted today was the work of the courts.[19] If that is correct then, given the fact that at the time the original statute was passed land and interests therein were the principal forms of wealth and the only forms regularly put in trust, the original scheme was indeed to have such a uniform set of requirements.

The role of the courts in this regard is perhaps a little strange. While accepting after 1677[20] in respect of personalty the rule, previously of general application,[21] that a trust might be created by parol, judgments were nevertheless delivered advising that declarations of trust ought to be in writing.[22] Clearly the greater certainty that was provided by a written document was felt to be worth encouraging. So how was it that a middle course, that writing was to be required to evidence rather than to make a declaration of trust, came to be the established rule for cases within section 7? Perhaps the answer is that although the statutory requirements were intended "to avoid perjury on the one hand and fraud on the other"[23] it came to be appreciated that a rigid adherence to requirements for constitution might itself become a source of further fraud. Such an attitude would be consistent with the provisions of section 8[24] excluding implied, resulting and constructive trusts from the operation of the section 7 rules, and it is obviously the foundation of the doctrine that Equity will not permit a statute, even the Statute of Frauds, to be used as an instrument of fraud.[25] Furthermore, by placing emphasis on that part of the specification requiring the declaration to be "proved" in writing it was possible to construe "manifested" as relating to the provision of proof and so produce a rule that, because it related to evidence rather than to constitution, gave greater flexibility. Any declarations actually constituted in writing would obviously

17 See supra n 16, paras (d) and (e).

18 See *Lewin on Trusts* (16th ed 1964) at 25.

19 See *Hannah* v *Commissioner of Stamps* (1902) 21 NZLR 409; and note especially *Mountain* v *Styak* [1922] NZLR 131 (CA), affirming [1921] NZLR 137, on the operation of the section 7 requirements in New Zealand.

20 *Lady Bellasis* v *Compton & Frankland* (1693) 2 Vern 294, 23 ER 790; *Nab* v *Nab* (1718) 10 Mod R 404, 88 ER 783.

21 *Pary* v *Juxon* (1669) 3 Rep Ch 38, 21 ER 722.

22 *Shales* v *Shales* (1701) 2 Freem 252, 22 ER 1191; *Skett* v *Whitmore* (1705) 2 Freem 280, 22 ER 1211; *Lord Altham* v *Earl of Anglesey* (1709) Gilb Rep 16, 25 ER 12.

23 *Welford* v *Beazley* (1747) 3 Atk 504, 26 ER 1090 per Lord Hardwicke LC; see also *Hatton* v *Clayton* supra n 2 at 7, per Vautier J.

24 Now Property Law Act 1952 s 49A(4).

25 *Haigh* v *Kaye* (1872) 7 Ch App 469; *Rochefoucauld* v *Boustead* [1897] 1 Ch 196; *Mountain* v *Styak* [1922] NZLR 131 (CA).

fall four-square within the terms of the section. Any declarations not so constituted could still be upheld if appropriate evidence as to what was declared was available. The price was that to stay within section 7 that evidence would have to be in writing to be appropriate.

To impose standardisation on the basis of requiring all declarations of trust to be in writing would, it is suggested, have two main advantages. First, it would make for certainty; the instincts of the seventeenth and eighteenth century judges were clearly right in this. And secondly, by establishing (or, if the view expressed above as to the original intention of section 7 is correct, by re-establishing) writing as a constitutional rather than a merely evidential requirement, it would achieve a degree of consistency as between declarations of trust made inter vivos and those made by will which is inevitably lacking under the present rules.

On the other hand it may be asked whether, whatever the advantages in terms of consistency, any practical benefits would ensue? Indeed, in so far as experience in other jurisdictions may be used as a pointer, it is at least arguable that the principal beneficiary of any rule making writing a constitutional requirement for the declaration of trusts or the transfer of interests thereunder is the Revenue in that such a rule increases the likelihood of a stamp duty charge arising.[26]

2 *Requirements as for Declarations of Trust of Land*

The adoption of course (2) would have the consequence that all declarations of trust would have to be at least evidenced in writing and would therefore impose more stringent requirements in relation to the declaration of trusts of personalty than operate at present. It must be said that whatever the justification for excluding personalty in the statute of 1677 those factors can scarcely be relevant to the conditions of New Zealand in the 1980's. If the object of the provisions enacted in 1980 is still to prevent fraud then, given the forms of wealth that are capable of existing in a modern Western society, such provisions must surely be applied to personalty trusts as well as to trusts of land.

The other consequence of adopting course (2) would be to relax the formalities required for the transfer or other disposition of equitable interests subsisting under trusts, and in so doing substitute an evidential requirement for a constitutional one. It is not immediately apparent why an evidential requirement would not serve just as well and, indeed, even allowing for the mitigating effects of any possible operation of equitable doctrines[27] on the apparently absolute rule that a disposition of such an interest be in writing, it is suggested that an evidential rule would better implement the intentions of the parties.

26 See *Grey* v *Inland Revenue Commissioners* [1960] AC 1; *Oughtred* v *Inland Revenue Commissioners* [1960] AC 206.

27 Primarily the doctrine that equity will not permit a statute to be used as an instrument of fraud (see supra n 25 for relevant cases), although a claimant may in some circumstances be able to circumvent the statutory requirements by utilising the principle of equitable proprietary estoppel; see *Pascoe* v *Turner* [1979] 2 All ER 945.

The particular mischief aimed at by section 9 of the original statute (and presumably therefore also by section 49A(3)) has been stated[28] as being that of "hidden oral transactions in equitable interests in fraud of those truly entitled[29] and making it difficult, if not impossible, for the trustees to ascertain who are their beneficiaries." Such a purpose can be seen to be complementary to that of section 7[30] in relation to declarations of trust. If the latter was intended to protect a recipient or other holder of an estate in land from dubious and perjured claims (the idea being, presumably, that perjury is easier to commit than forgery) as to the prior burdening of that estate with a trust, so section 9 was intended to ensure that any alleged assignee of an interest under a trust would, like an alleged beneficiary under a declaration of trust, have to produce some documentation in support of his claim. However, it is unclear why, in principle or in practice, if it has been felt to be adequate for an original beneficiary under a declaration of trust to be able to establish his claim on this basis of written evidence, the same facility should not be afforded to assignees of such interests. While a written assignment is obviously a good and convenient means of proving that a transfer was in fact made, if other evidence (even if confined to written evidence) is available, it seems unreasonable that this should not be acceptable.[31]

3 *Abolition of all formal requirements*

If evidential rather than constitutional requirements are accepted as appropriate to govern the declaration of trusts and the transfer of interests thereunder does logic not suggest that all relevant evidence should be admissible whatever its form? Certainly one of the ironies of the present position is that the Statute of Frauds "is concerned to suppress not evidence but fraud"[32] but nevertheless seeks to suppress fraud by the imposition of formal requirements which have the effect of excluding evidence if it is not in the prescribed form. The primary consequence of adopting course (3) would be to remove all such restrictions on the form of evidence admissible to establish a claim; a secondary consequence would be that it would make section 49A(4) redundant. Indeed, it can be argued that if all forms of evidence are admissible to establish the existence of implied, resulting and constructive trusts to further the ends of justice, and if all such forms are admissible to establish the existence of express trusts of personalty, why should restrictions be imposed in respect of express trusts of land?

28 *Vandervell* v *Inland Revenue Commissioners* [1967] 2 AC 291 at 311 per Lord Upjohn.

29 It is not entirely clear precisely who is meant by "those truly entitled". An obvious category would be assignees whose claims would be prejudiced by a denial of an assignment's having been made; conversely an original beneficiary might be subject to false claims of an assignment supported by perjured oral evidence. Also chargees of a beneficial interest would be in similar danger.

30 Now Property Law Act 1952 s 49A(2).

31 The reason why a relaxation of section 9 did not occur on the lines of the practice developed for section 7 was that the language of the former was not so amenable to the construction possible in respect of section 7.

32 *Elias* v *George Sahely & Co (Barbados) Ltd* [1982] 3 All ER 801 at 807 per Lord Scarman. The quotation was in respect of the Statute of Frauds 1762 (Barbados).

The question is ultimately one of balance: are the opportunities for and the likelihood of fraud and perjury that would result from an abolition of the formal requirements demanded by the original and the modern Statute of Frauds provisions sufficient to outweigh the greater facility afforded for ascertaining and giving effect to the true intentions of the parties? Or, to put the question another way, do the statutory requirements achieve the objectives for which they were imposed? The very existence of provisions such as section 49A(4) and the operation of the equitable doctrines of proprietary estoppel and that the requirements of the Statute must not themselves be used as instruments of fraud would indicate that what success is achieved is also productive of further opportunities for fraud.

The suggestion is that there would be relatively little to lose by an abolition of the Statute of Frauds requirements as they apply to trusts and the interests subsisting thereunder. Such a course would not only effect a worthwhile simplification of this area of the law (which of course would also follow from the adoption of either course (1) or course (2)) but would achieve this in a way which would not adversely affect the validity of any of the types of transactions that may be undertaken under the present rules (unlike the position that would follow from an adoption of either course (1) or course (2)). If one result is that more cases ultimately turn on the court's assessment of the veracity of one witness or claimant as against another would this be any worse than at present when such a claimant can shelter behind formalities devised to cope with particular problems afflicting another place in another time? The Property Law Amendment Act 1980 may be seen primarily as an exercise in putting old wine into new bottles, but one which nevertheless appears to have worked a small, if subtle, change to the substance of the wine itself. Five years on it may be asked, if the exercise was worth undertaking at all, why was the opportunity not taken to effect a more root-and-branch reform: if changes of substance were to be made, why were they not more far-reaching; more specifically, was it necessary to preserve the substance at all?