

Sam and Janet marry and establish a trust with the following terms: 'To Sam and Janet for life, remainder to the children of their marriage, if there is a failure of issue, remainder to the next of kin'. Sam and Janet are parties, with the trustees, Tabitha and Tatiana, to the trust deed. Janet covenants that she will transfer any after-acquired property to the trust. Sam does not covenant, because he comes from a poor family and does not expect to inherit anything.

When her mother dies, Janet inherits a house, Paisleyacre, and shares in Everlast plc. Janet does not transfer Paisleyacre to the trust, but instead puts it into the joint names of herself and her husband Sam. She promises to transfer the shares to the trustees, but merely fills in the transfer section on the share certificate and hands the certificate to the trustees.

Janet and Sam do not have any children of their own, but adopt a child, Pablo. There is only one next of kin, Janet's brother Sebastian. Sam and Janet both die. The trustees wonder whether they should enforce Janet's covenant and try to obtain Paisleyacre and the shares in Everlast plc for the trust. The beneficiaries, Pablo and Sebastian are keen that they should do so. Advise the trustees, Tabitha and Tatiana.

Suggested Answer

This is a problem on incompletely constituted trusts. It looks quite like a marriage settlement: *Re Densham*. This means that those within the marriage consideration can enforce Janet's promise: *Pullan v Coe*. This would include Sam and it does not matter that he has not covenanted as this is equitable consideration not common law consideration.

An adopted child would not be included under the traditional definition, unless his equitable interest was 'intertwined' with that of others: *AG v Jacobs Smith*. It may be that, with changes in family law, adopted children would now be regarded as within the marriage consideration.

If Pablo is not within the marriage consideration, he is, like Sebastian, a volunteer and according to a line of traditional authority, they cannot enforce Janet's promise: *Re Plumptre*, *Re Pryce*, *Re Kay* and *Re Cook*. A better answer would attempt to explain the subtle differences in reasoning of these cases. In *Plumptre* common law enforcement was not possible because of lapse of time and in *Re Cook* it was thought undesirable to enforce promises relating to property that the covenantor only hoped to inherit in the future. In *Re Pryce* the court would not compel the trustees to sue, but in *Re Kay* the court went further and ordered the trustees not to sue.

An even better answer would go into the counter arguments, that these cases are wrong. *Re Cavendish-Browne* allowed the enforcement of a promise relating to property that the covenantor already had. *Fletcher v Fletcher* is said to have invented the idea of a trust of the promise. The Contracts (Rights of Third Parties) Act 1999 might remedy the situation in future.

If Janet has successfully transferred the property to the trustees, then there is no need for any enforcement of her promise. With the house she has not kept her promise, but put it further out of the reach of the trustees by transferring half of it to her husband, who made no promise anyway. The shares have not been properly transferred and the facts are very similar to *Milroy v Lord*. Possibly this might be reconsidered in the light of *Re Rose and Pennington v Waine*. She has done everything in her power, by completing the forms and it is the fault of the trustees, not her, that the transfer has not been completed.