

Essay question

Explain why an appeal against the decision of the Court of Appeal in *Pennington v Waine* would be likely to succeed on grounds of precedent, principle and policy.

Guidance

It is important to adhere to the precise question asked, so in addition to a brief introductory paragraph and a brief concluding paragraph it is important to arrange the main body of the answer under the three headings referred to in the question. The following are some of the key points that might have been made under the respective headings.

Precedent

The decision of the Court of Appeal in *Pennington v Waine* failed to follow the binding precedent laid down by the Court of Appeal in *Milroy v Lord* as developed by the Court of Appeal in *Re Rose*.

The decision of the Court of Appeal in *Pennington v Waine* inappropriately followed the merely persuasive authority of the Privy Council in *T Choithram v Pagarani*. *T Choithram v Pagarani* is merely persuasive authority and, more significantly, it is clearly distinguishable from *Pennington v Waine* on its facts. For one thing, *T Choithram v Pagarani* involved a clear intention to establish a trust, whereas *Pennington v Waine* involved an intention to create a gift.

Principle

The key principle in this part is ‘unconscionability’.

Broadly understood, unconscionability refers to abuse of legal rights, powers or position but its particular meaning can only be grasped by examining its operation in the contexts in which it is employed. The Court of Appeal in *Pennington v Waine* erroneously adopted an expansive version of this principle without explaining its particular meaning in the context of making gifts. The Court of Appeal failed to acknowledge that it has never been considered unconscionable for a donor merely to change his mind. Donors have a *locus poenitentiae* – a right to ‘repent’ of their donation (*Re Diggles*). Apart from the fact that she had died, which should be irrelevant to her intentions and her conscience, the donor had

not reached 'the point of no return' in making the transfer. Had she lived it would have been open to her to revoke the instructions to her agent and withdraw the gift.

If Arden LJ had been correct in her conclusion that the donor had reached the point of no return it could only be because the donor's conscience had been affected by acts of detrimental reliance suffered by the intended donee in the expectation that he would receive the intended gift. On the facts of *Pennington v Waine* he appears to have suffered no sufficient acts of detriment, and, even if he had so suffered, the doctrine of proprietary estoppel, and not a vague notion of 'unconscionability', would have been the proper basis for perfecting the gift (compare *Dillwyn v Llewellyn*)

(It could also be argued in this part that the Court of Appeal departed from orthodox application of the principles enshrined in the maxims 'equity will not perfect an imperfect gift', 'equity will not assist a volunteer', 'equity will not spell out a trust from a failed gift' and 'equity abhors a vacuum in beneficial ownership'. However, it must be acknowledged that equity has always perfected gifts and assisted volunteers by means of estoppel so answers should not be uncritically supportive of the equitable maxims).

Policy

The Court of Appeal attached too little significance to the need for certainty in dealings with property, certainty in commercial dealings such as share transfer and certainty in the identification of the estates of deceased persons. Policy reasons behind transfer formalities, such as the prevention of fraud, ought also to have been afforded greater weight. Broader policies associated with the restriction of judicially-assisted proprietary transfer – including such matters as the right of private persons to determine the destination of their own property and the freedom to change their minds about making dispositions – should have been respected. It is arguable that the uncertainty inherent in the Court of Appeal's interpretation of 'unconscionability' will produce more litigation and overwhelm the courts (the so-called 'floodgates' argument) but it should be borne in mind that although uncertainty breeds litigation it might also deter it.