previous one. The new will stated that the £5,000 bequethed to his trustees was to be increased to £10,000 and that the trustees knew the testator's wishes as regards the use of him. The fact that the amount had been increased was not, however , communicated to the trustees. It was held that the first £5,000 was held o the terms of the ST as had previously been communicated, but the additional £5,000 was held on resulting trust for those entitled to the testator's residuary estate, because this additonal amount had not been communicated to the trustees.

- It was , however recognised that if the amount of the subsequent bequest had been lower than the amount that had been communicated to the trustees, there would have been a valid trust, because the greater included the lesser.
- It was also accepted that if the later bequest had been only slightly more than the sum communicated, then this would have been caught by the HST by virtue of the de *minimis principle, namely that small differences in amounts are not significant.*
- *HST - £ COMES BACK TO THE ESTATE*
- *MITCHELL: IF IT WAS A FST SUGGESTIONS : ONLY £10,000 CAUGHT BY THE TRUST, THE £ 5,000 EXTRA =ABSOLUTE GIFT TO THE TRUSTEES*
- *HUDSON : RESULT BACK TO THE ESTATE*

4. Trustees as beneficiaries

- ✓ **Re Rees [1950] Ch 204**
  - The testator declared a HST . When the will was executed, he told the trustees that any surplus after making certain payments could be retained by them beneficially. *It was held that the surplus could not belong to the trustees, but rather was held on resulting trust* for those entitled to the testator's residuary estate. This was because the testator's oral communication to the trustees about the surplus conflicted with the terms of the will, which stated that the trustees were to receive the property as trustees rather than beneficially.
- ✓ **Re Tyler [1967] 1 WLR 1269, 1278**
  - Pennycuick J said that he did not find the reasoning in Re Rees to be easy. On the face of it, the reasoning is unconvincing : if the testator says that the property is held on trust for certain people, why cannot some of those people be the trustees who could benefit from the surplus? But although this was not acknowledged in *Re Rees* it is surely because the trustees were asserting that they were entitled to the surplus that there was a real danger of fraud on their part, since they were seeking to obtain a personal benefit that was not identified on the face of the will.
  - Where the trustees are intended to benefit from the testator's estate, but this is not expressed in the will, the high standards of behaviour expected from the trustees should be such that they should not receive the property beneficially. If this is the correct analysis, it means that even if the trustees in Re Rees were intended to benefit under the HST itself rather than to obtain any surplus, they would not have been able to do so.

5. Theoretical basis for recognizing half-secret trusts

Why is it possible to allow evidence of the terms to be admitted so that the trustee holds the property on the secret trust for the beneficiaries chosen by the testator?

- ➢ **Incorporation by reference** - enables informal documents to be

Re Armitage [1972] Ch. 438
Re Maddock [1902] 2 Ch. 220 - beneficiary dies before testator - gift is void
Irven v Sullivan ??

Tutorial 7: Secret Trusts

Reading:
Textbooks
Virgo (2012): Chapter 5 (pp. 124-140)
Davies & Virgo (2013) Chapter 4 (pp 125-145) Pearce, Stevens & Barr (2010): chapter 8 Moffatt: pp. 146-160

Journal Articles
Critchley (1999) 115 LQR 631
Wilde, 'Secret and semi-secret trusts: justifying the distinction' (1995) 59 Conv 366 Meager, 'Secret Trusts – do they have a future?' (2003) Conv 203
Challinor, 'Debunking the Myth of Secret Trusts?' *(*2005) Conv 492

Questions

1. Reginald made a will in 2008 leaving Greenacre to Simon absolutely, and £10,000 to Tom "for him to carry out my wishes". In 2009, Reginald told Tom to use his money for the benefit of Reginald's daughter and aged aunt equally. In 2011, Reginald told Simon that he wanted him to allow his wife, Una, to live in Greenacre for the rest of her life. Simon agreed. Reginald then made a codicil, increasing the legacy to Tom to £15,000. Shortly afterwards his aged aunt died. Reginald died in 2013. His executor found a letter addressed to Tom, asking him to use the money for the benefit of his son only.

Advise Simon and Tom

- **Land**

Una : life interest in the house ; Trust of a life interest for his wife, thereafter Simon
FST - Communicated during his lifetime yes, accepted yes
Simon bound? s53(1)(b) Trusts of Land : manifested and proved in writing, hasn't been -INVALID!
Ottoway v Norman - to deny the interest would be unconscionable, constructive trust on a FSTee ; formality requirement not apply - ST = constructive trust

- **£10,000**

HST
Re Keen - prior communication rule, prior or time of, or else void! breaks rule here
LETS SAY IT IS VALID :Extra £5,000 comes back to the estate ### FST
Sufficient communication; letter after he died -not enough

FST attempt: no problem with delay in communication , 10,000 to 15,000 ?
Letter:
If aunt dies, before bequest takes place and will hasn't changed = 5,000 kept by the FSTee