

Podcasts accompanying

EQUITY & TRUSTS

by

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**Podcast Materials
2007/08**

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Important

These podcasts do not constitute an entire course in Equity & Trusts Law. Rather, these podcasts are merely introductions to various aspects of the subject intended to bring the textbook to life.

Each podcast is about 5-10 minutes long and therefore cannot possibly constitute all of the necessary teaching in any of these subjects. Listening to these podcasts is not a replacement for attending lectures nor for reading the textbook and the case law in full. Your course may very well take a different approach to some issues from these podcasts.

No responsibility can be accepted nor is it accepted for any reliance placed on advice given in these podcasts.

Reading

Each podcast topic has a reading list. All materials refer to:-

**Alastair Hudson, *Equity and Trusts*
(5th ed.: Routledge-Cavendish, 2007).**

The reading lists also refer to:

*Alastair Hudson, *Understanding Equity and Trusts*
(2nd ed, Cavendish, 2004)

and

to the newest practitioner text in England and Wales
*Geraint W Thomas and Alastair Hudson, *The Law of Trusts*
(1st ed., Oxford University Press, 2004, 1,907pp).

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0. What is equity?

General reading: **Hudson Chapters 1 and 2, especially pp.1-8, 36-62.**

(A) The nature of equity

Reading: **Hudson, section 1.1**

1) Philosophical ideas of equity

The following ideas come from Aristotle's *Ethics*, and could be understood as considering the difference between common law and equity:

"For equity, though superior to justice, is still just ... justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice."

"The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. ... So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances."

2) Early case law on the role of equity

Earl of Oxford's Case (1615) 1 Ch Rep 1, per Lord Ellesmere:

"the office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs and oppressions ... and to soften and mollify the extremity of the law"

Lord Dudley v Lady Dudley (1705) Prec Ch 241, 244, per Lord Cowper:

"Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless: and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."

3) The fusion of common law and equity

Judicature Act 1873

4) The structure of English private law

Reading: **Hudson, section 1.2**

- Common law and equity were always distinct: the courts of common law were in Westminster Hall at one time, the courts of equity were in Lincoln's Inn Hall.
- For a good illustration of the difficulties caused by this distinction see Charles Dickens's *Bleak House*.
- Judicature Act 1873 merged the two streams of courts, however the *intellectual* distinction between common law and equity remains very important.

Common law

Examples of claims:

Breach of contract
Negligence
Fraud

Examples of remedies available:

Damages
Common law tracing
Money had and received

Equity

Breach of trust
Tracing property
Claiming property on insolvency

Compensation
Equitable tracing
Specific performance
Injunction
Rescission
Rectification
Imposition of constructive trust
Imposition of resulting trust
Subrogation
Account

1. What is a trust?

The structure of the trust relationship.

Reading: **Hudson, sections 2.1 and 2.2**

“The essence of a trust is the imposition of an equitable obligation on a person who is the legal owner of property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has a beneficial interest recognised by equity in the property. The trustee is said to “hold the property on trust” for the beneficiary. There are four significant elements to the trust: that it is equitable, that it provides the beneficiary with rights in property, that it also imposes obligations on the trustee, and that those obligations are fiduciary in nature.”

- Thomas and Hudson, *The Law of Trusts*

Classification of trusts.

Reading: **Hudson, section 2.2**

The four types of trust

1. Express trusts
2. Resulting trusts
3. Constructive trusts
4. (Implied trusts)

Westdeutsche Landesbank v. Islington [1996] 1 AC 669, per Lord Browne-Wilkinson:-

“(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).”

(D) The means by which the different forms of trusts come into existence.

Reading: **Hudson, section 2.2**

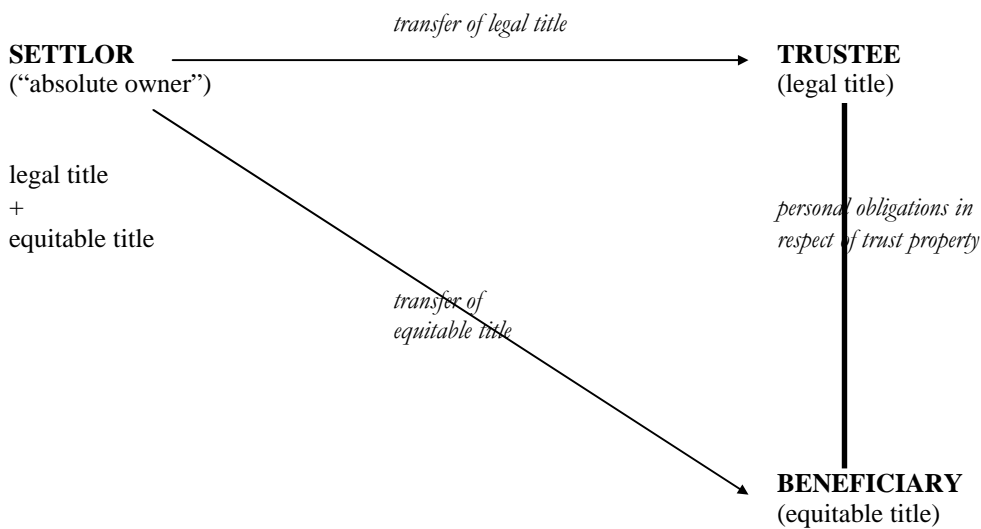
“A trust comes into existence either by virtue of having been established expressly by a person (the settlor) who was the absolute owner of property before the creation of the trust (an express trust); or by virtue of some action of the settlor which the court interprets to have been sufficient to create a trust but which the settlor himself did not know was a trust (an implied trust); or by operation of law either to resolve some dispute as to ownership of property where the creation of an express trust has failed (an automatic resulting trust) or to recognise the proprietary rights of one who has contributed to the purchase price of property (a purchase price resulting trust); or by operation of law to prevent the legal owner of property from seeking unconscionably to deny the rights of those who have equitable interests in that property (a constructive trust).”

- Thomas and Hudson, *The Law of Trusts*

(E) The rudiments of express trusts.

Reading: **Hudson, section 2.3**

An express trust can be understood as follows, comprising the “magic triangle” of settlor, trustee and beneficiary. The core of the “trust” is the inter-action of personal rights and claims between these persons in relation to the trust property. It is therefore vital to distinguish between “*in personam*” and “*in rem*” rights.



Significant features of the trust

- Once a trust is created, the settlor ceases to have any property rights in the trust or any control over the trust *in her capacity as settlor*.
- The instant that the trust is declared (or deemed to have been created in the case of a constructive or resulting trust) the legal title in the trust property is owned by the trustee(s) and the equitable interest is owned by the beneficiary(-ies).
- The trustee(s) hold the legal title in the trust property.
- The trustee(s) owe equitable obligations to the beneficiaries to obey the terms of the trust. The trustee(s) obligations are *fiduciary* in nature (thus requiring the utmost good faith and prohibiting any conflict of interest).
- The beneficiaries own equitable proprietary rights in the trust fund.
- There can be an infinite number of beneficiaries in theory, or there may be only one beneficiary (a bare trust).
- The same human being can be settlor, one of the trustees *and also* one of the beneficiaries: importantly, she will be acting in different *capacities* in each context (as though she were three different people). However, the same person *may not* be the settlor, the sole trustee and the sole beneficiary because then no property rights would have moved at all.
- The beneficiaries may fall into various classes with different qualities of rights: e.g. there may be a beneficiary entitled to the income from the trust fund during her lifetime (a "life tenant") with the capital being divided among the other beneficiaries after her death ("remainder beneficiaries" or "remaindermen").
- Individual items of property making up the trust fund may, if the terms of the trust permit it, be sold or exchanged for other property – that other property then becomes part of the trust fund.
- Significantly, then, more than one person can have property rights in the same property at the same time: this enables settlors to create an infinite range of property holdings to suit their circumstances.
- The trustee(s) will be personally liable for any loss caused to the trust by her/their breach of trust.

(I) Fundamental principles of trusts: the obligations of trustees and the rights of beneficiaries

Reading: **Hudson, section 2.4**

***Westdeutsche Landesbank v. Islington* [1996] 2 All E.R. 961, 988. [1996] AC 669

**Saunders v Vautier* (1841) – the rights of the beneficiary

Lord Browne-Wilkinson in *Westdeutsche Landesbank v. Islington* [1996] 2 All E.R. 961, 988 sought to set out the framework upon which the trust operates:-

“THE RELEVANT PRINCIPLES OF TRUST LAW:

(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

‘(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience ...

‘(iii) In order to establish a trust there must be identifiable trust property ...

‘(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.’

2. Certainty of intention

The need for the three certainties

Reading: **Hudson, sections 3.1 and 3.2**

Wright v. Atkyns (1823) Turn. & R. 143, 157, per Lord Eldon: "...first...the words must be imperative...; secondly...the subject must be certain...; and thirdly...the object must be as certain as the subject"

Knight v Knight (1840) 3 Beav 148

(A) Certainty of Intention.

Reading: **Hudson, section 2.6, and especially 3.3**

(1) Intention to create a trust inferred from the circumstances

***Paul v Constance* [1977] 1 W.L.R. 527

**Re Kayford* [1975] 1 WLR 279

Don King Productions v. Warren [1998] 2 All E.R. 608

Re Farepak [2006]

(2) Trusts as opposed to merely moral obligations

Re Adams and the Kensington Vestry (1884) 27 Ch. D. 394 ("unto and to the absolute use of my dear wife ... in full confidence that she will do what is right as to the disposal thereof between my children" = a merely moral obligation).

Cf. *Comiskey v. Bowring-Hanbury* [1905] A.C. 84 (HL) ("in full confidence that... she will devise it to one or more of my nieces as she may think fit..." = a trust).

Re Hamilton [1895] 2 Ch 370 ("take the will you have to construe and see what it means, and if you come to the conclusion that no trust was intended you say so", per Lindley LJ)

(3) Lack of intention where a joke or an imperfect gift

Jones v Lock (1865) 1 Ch App 25 ("... look you here, I give this to the baby ...")

Richards v Delbridge (1874) LR 18 Eq 11 (failure to effect transfer of lease)

(4) Sham trusts and trusts intended to defraud creditors

Snook v London and West Riding Investments Ltd [1967] 2 QB 786, esp 802

**Midland Bank plc v. Wyatt* [1995] 1 F.L.R. 696, [1997] 1 BCLC 256 (sham trusts).

3. Certainty of subject matter

(B) Certainty of Subject Matter.

Reading: **Hudson, section 3.4**

Question: What is the necessity of ascertaining subject matter and extent of beneficial interests; and what is the effect of lack of certainty of subject-matter?

(1) The traditional principle – the trust fund must be separately identifiable

**Re London Wine Co. (Shippers) Ltd.* (1986) Palmer's Co. Cas. 121 (*wine bottles to be held on trust not separated from other bottles*).

***Re Goldcorp* [1995] 1 A.C. 74 (*necessity of segregating trust property - bullion "ex bulk"*)
Westdeutsche Landesbank v Islington [1996] AC 669

(2) A different principle for intangible or for fungible property?

***Hunter v. Moss* [1994] 1 W.L.R. 452 (*identification of shares - the nature of intangible property*).

**Re Harvard Securities* [1997] 2 BCLC 369

But see **MacJordan Construction Ltd v Brookmount Erostin Ltd* [1992] BCLC 350

(3) What is the nature of the property which can make up a trust fund?

**Don King Productions v. Warren* [1998] 2 All E.R. 608

Re Celtic Extraction [1999] 4 All ER 684

Swift v Dairywise Farms [2000] 1 All ER 320

(4) A different approach in commercial law

Sale of Goods Act 1979, s 20A – *tenants in common of the combined fund*

Sale of Goods (Amendment) Act 1995

Re Wait [1927] 1 Ch 606 – *old approach applied trusts law not commercial law*

Re Staplyton [1994] 1 WLR 1181: *SGA applied instead of trusts law*

(5) A note on the nature of property in trusts law

Reading: **Hudson, section 31.1**

Re Goldcorp [1995] 1 A.C. 74 – *the identity of the property is paramount*

Attorney-General for Hong Kong v. Reid [1994] 1 AC 324, [1993] 3 WLR 1143 – *the morality of the situation is paramount*

See Grantham, 'Doctrinal bases for the recognition of proprietary rights' (1996) OJLS 561.

4. Certainty of objects

(C) Certainty of Objects.

Reading: *Hudson*, section 3.5

Question: how certain must the words used by the settlor be in creating a trust, and in what way will the court measure sufficient certainty?

Introduction

Morice v. Bishop of Durham (1804) 9 Ves. Jr. 399 (affd. (1805) 10 Ves. Jr. 522): *there must be some person in whose favour the court can decree performance.*

Re Hay's Settlement Trusts [1982] 1 W.L.R. 202: for the most useful summary of these principles and of the various forms of power.

1) Distinguishing between types of power and of trust

- Fixed trusts and bare trusts obligations
- Discretionary trusts, (once known as “powers in the nature of a trust”)
- Fiduciary powers: powers of appointment and powers of advancement
- Personal, non-fiduciary powers

2) Certainty rules for personal powers.

Re Hay's Settlement Trusts [1982] 1 W.L.R. 202

3) Certainty rules for mere (fiduciary) powers.

Re Gulbenkian's Settlement [1970] A.C. 508: *the “any given postulant test”; aka the “is or is not test”.*

4) Certainty rules for discretionary trusts.

***McPhail v. Doulton* [1971] A.C. 424

5) Certainty rules for fixed trusts (e. g. fixed shares within a class).

**I.R.C. v. Broadway Cottages Trust* [1955] Ch. 20.

6) Mechanisms for eluding the “any given postulant test” (1): conceptual and evidential certainty.

***Re Baden's Deed Trusts (No 2)* [1973] Ch. 9.

***Re Barlow* [1979] 1 WLR 278

5. Beneficiary principle

Question: when will a trust be void for want of a beneficiary, and what manner of beneficiary will be necessary?

General reading: **Hudson, Chapter 4**

The nature of the beneficiary's rights in the trust fund

Reading: **Hudson, section 4.1**

The principle in *Saunders v Vautier*

***Saunders v Vautier* (1841) 4 Beav 115

The beneficiary principle.

Reading: **Hudson, section 4.2**

1) The general principle

**Morice v. Bishop of Durham* (1804) 9 Ves. 399; (1805) 10 Ves 522.

"There can be no trust, over the exercise of which this court will not assume control ..If there be a clear trust, but for uncertain objects, the property... is undisposed of... Every...[non-charitable] trust must have a definite object. There must be somebody in whose favour the court can decree performance" (per Lord Grant M.R.).

Bowman v Secular Society Ltd [1917] AC 406

2) The strict, traditional principle

***Leahy v. Att.-Gen. for New South Wales* [1959] A.C. 457 (trust for 'such order of nuns' as trustees shall select) – this case is considered in detail below.

***Re Grant's WT* [1979] 3 All ER 359 (gift "for the benefit of the HQ of the Chertsey CLP" = void purpose trust; see below).

(C) Alternative interpretations of the beneficiary principle

Reading: **Hudson, section 4.2**

1) Interpreting what is ostensibly a purpose trust as being a trust for the benefit of persons

***Re Denley's Trust Deed* [1969] 1 Ch. 373 (trust "directly or indirectly for the benefit of individuals" = people trust and therefore valid.)

2) Transfer interpreted to be a gift

***Re Lipinski's W.T.* [1976] Ch. 235 – gift ("a clear distinction between ...a purpose ... clearly intended for the benefit of ascertained or ascertainable beneficiaries ..., and the case where no beneficiary at all is intended ... or where the beneficiaries are unascertainable")

6. Unincorporated associations

Conceptual issues with property held for unincorporated associations.

Reading: **Hudson, section 4.3**

1) The various modes of interpretation

a) Invalid purpose trusts

***Leahy v. Att.-Gen. for New South Wales* [1959] A.C. 457 (non-charitable endowment not valid as private trust).

b) Transfer to association's officers as an accretion to funds, as part of contract law

**Neville Estates Ltd. v. Madden* [1962] Ch. 832.

***Re Recher's Will Trust* [1972] Ch. 526.

c) Transfer to association's officers subject to a mandate to use in accordance with club's constitution

***Conservative and Unionist Central Office v. Burrell* [1982] 1 W.L.R. 522 (*transfer to the officers of the association subject to a mandate to use the property in accordance with the club's constitution*).

Analytical possibilities of transfers to unincorporated associations

Reading: **Hudson, section 4.3.3**

If there has been a transfer made for the benefit of an association and/or its members, then these are the analytical possibilities of that transfer. You should consider the facts of each transfer and decide which you consider to be the most appropriate analysis of the facts in front of you.

1. A transfer to the individual members of the association for their benefit – *Re Denley*
2. A transfer for present and future members of the association – *Leahy v Att Gen NSW*
3. A transfer to the trustees or other officers of the association to hold as an endowment – *Leahy; Re Grant's WT*
4. A transfer to the existing members beneficially as an accretion to the association's funds - *Re Recher*
5. A transfer to the officers with a mandate to use it for particular purposes - *Conservative Association v Burrell*, per Brightman LJ

7. Incomplete gifts and incompletely constituted trusts

The proper constitution of trusts & the problem of incompletely constituted trusts.

General reading: **Hudson, sections 5.3, 5.4 and 5.6**

Question: What if the settlor promises to settle property on trust but fails to constitute the trust properly: can the intended beneficiary claim a right in conscience to the property?

1) Imperfect gifts may not be effected by means of a trust ...

Reading: *Hudson*, sections 5.4.1 and 5.4.2

***Milroy v. Lord* (1862) 4 De G. F. & J. 264, per Turner LJ (*there is no equity to perfect an imperfect gift*):

'... in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property [to the trustee] and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes ... but in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift.'

2) ... except where transferor has done everything necessary for him to do to effect the transfer

Reading: *Hudson*, section 5.4.3

***Re Rose* [1952] Ch. 499 (*ineffective transfer of legal title to shares but equitable title held to pass because inequitable for transferor to seek to renege on the transfer*).

3) The extent of the *Rose* principle today

Reading: *Hudson*, section 5.4.3

T Choithram International SA v Pagarani [2001] 1 WLR 1

Pennington v Waine [2002] 1 WLR 2075

8. Dispositions of an equitable interest

(B) Dispositions of equitable interests.

General reading for this topic: **Hudson, section 5.7**

This topic is subtle and complex. The problem for the clients involved here was their trusts being rendered void by virtue of s.53(1)(c) LPA 1925. There are a range of cases, however, which illustrate the different methods which imaginative lawyers have used to avoid s.53(1)(c). For you as law students, it is important to understand the differences between these various approaches and to analyse factual situations so as to identify which analysis is applicable to those facts. For a trusts lawyer, using the techniques considered in these cases to achieve your client's goals is a key skill.

Statutory material

*LPAs. 53 (1) (c): "*A disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent...*"

1) Declarations of trust may sometimes amount to dispositions of an equitable interest and so be caught by s. 53 (1) (c)

Reading: **Hudson, section 5.7.1 and esp. 5.7.2**

***Grey v. I.R.C.* [1960] A.C. 1 (*direction to trustee by beneficiary constituting disposition of equitable interest*).

2) Direction to transfer legal estate (carrying with it the equitable interest) is not a disposition under s. 53 (1) (c)

Reading: **Hudson, sections 5.7.3 and 5.7.4**

***Vandervell v. I.R.C.* [1967] 2 A.C. 291.

3) Structures falling outside s 53(1)(c)

a) Sub-trusts not a disposition of the equitable interest if some rights retained

Reading: **Hudson, section 5.7.6**

Re Lashmar (1891) 1 Ch 258

Grainge v Wilberforce (1889) 5 TLR 436

b) Declaration of a new trust, rather than disposition of equitable interest

Reading: **Hudson, section 5.7.7**

**Cohen Moore v. IRC* [1933] All E.R. 950

c) Contract transfers equitable interest automatically

Reading: **Hudson, section 5.7.8**

Oughtred v. I.R.C. [1960] A.C. 206.

Chinn v. Collins [1981] A.C. 533

d) Transfers in (c) understood to take effect by constructive trust

Reading: **Hudson, section 5.7.9**

Neville v. Wilson [1996] 3 All E.R. 171.

Cf. **Jerome v Kelly* [2004] 2 All ER 835, [2004] UKHL 25 (*Hudson*, para 12.6.2)

e) Were *Grey* and *Vandervell* correctly decided?

Reading: **Hudson, section 5.7.5**

Green, (1984) 47 MLR 388.

9. Covenants to settle after-acquired property

Covenants and promises to create a settlement.

Question: What if the settlor promises to put property into trust but does not actually transfer or allocate the property to it?

Reading: *Hudson*, section 5.6

1) Can the intended beneficiaries enforce the settlor's promise?

a) A settlement cannot be unmade once it has been made

Reading: *Hudson*, section 5.6.1

**Paul v. Paul* (1882) 20 Ch. D. 742

b) Mere promise unenforceable if beneficiary gave no consideration:

Reading: *Hudson*, section 5.4.2

'equity will not assist a volunteer' / 'equity will not perfect an imperfect gift'.

***Re Brooks ST* [1939] 1 Ch 993

***Re Ralli's WT* [1964] 1 Ch 288

c) But enforceable by someone who has given consideration for the promise at common law or is within marriage consideration...

Reading: *Hudson*, section 5.6.1

**Pullan v. Koe* [1913] 1 Ch. 9 (widow and children within marriage consideration).

d) ... or by someone who is a party to the settlor's binding covenant to create the trust.

Reading: *Hudson*, section 5.6.1

**Cannon v. Hartley* [1949] Ch. 213 (volunteer able to enforce as party to covenant under seal).

2) Trustee not permitted to enforce the promise?

Reading: *Hudson*, section 5.6.2 "Trustee not permitted to enforce the promise"

a) Should common law rights to enforce a binding promise/agreement be exercised against the spirit of the maxim 'equity will not assist a volunteer'?

Re Pryce [1917] 1 Ch. 234 (court won't direct trustees to enforce covenant for volunteer).

Re Kay's S.T. [1939] Ch. 329 (trustees must not enforce).

**Re Cook's S.T.* [1965] Ch. 902 (trustees cannot be required to enforce).

b) The law of contract

Contract (Rights of Third Parties) Act 1999

3) A trust of the promise itself – a means of validating this promise through trusts law

Reading: *Hudson*, section 5.6.2 "A trust of the promise itself"

(a) the settlor's binding promise as 'property' held on trust by the intended trustee(s): a 'trust of the benefit of the covenant'.

***Fletcher v. Fletcher* (1844) 4 Hare 67.

(b) modern cases on whether contracts can themselves form the subject matter of a trust, even if those contracts are unassignable

**Don King Productions v. Warren* [1998] 2 All E.R. 608; affirmed [1999] 2 All E.R. 218

Re Celtic Extraction Ltd (in liq), *Re Bluestone Chemicals Ltd (in liq)* [1999] 4 All ER 684

Swift v. Dairywise Farms [2000] 1 All E.R. 320 (milk quotas are property, even if non-transferable)

10. Charities

General reading for this topic: *Hudson*, chapter 25

The Definition of “charity”.

Reading: *Hudson*, sections 25.1.2, and 25.7

Relief of poverty.

Reading: *Hudson*, section 25.2

- 1) Approach of the courts to “poverty”
***Dingle v. Turner* [1972] A.C. 601 (employees).
- 2) Meaning of “relief of poverty”
**Joseph Rowntree Memorial Trust Housing Association Ltd. v. A.-G.* [1983] 1 All ER 288 (special housing for the elderly; “alleviation” = “relief”).
- 3) No necessary public benefit element if a genuine charitable intention; hence trusts for relatives
Re Scarisbrick [1951] Ch. 622 (relatives).

Advancement of education.

Reading: *Hudson*, section 25.3

- 1) Public benefit: exclusion of personal nexus
Re Compton [1945] Ch. 123 (C.A.) (relatives).
**Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297 (employees).
Cf. *Dingle v. Turner* (above) (poor employees).

Advancement of religion.

Reading: *Hudson*, section 25.4

- 1) What is “religion”?
Re Hetherington's Will Trusts [1990] Ch. 1.
- 2) Requirement of public benefit
**Neville Estates Ltd. v. Madden* [1962] Ch 832.

Disqualifying Factors: Political Purposes.

Reading: *Hudson*, section 25.5.4

National Anti-Vivisection Society v. I.R.C. [1948] A.C. 31 (promoting legislative change).

(H) Requirement of the exclusivity of the charitable purpose.

Reading: *Hudson*, section 25.1.6

**Guild v. I.R.C.* [1992] 2 A.C. 310.

11. Trusts implied by law – introduction

There are three core areas:-

- Resulting trusts
- Trusts of Homes
- Constructive trusts
- Proprietary estoppel

s.53(2) of the Law of Property Act 1925 refers to “*implied resulting or constructive trusts*” not requiring formalities for their creation. The most important recent statement of the core principles of trusts law was made by Lord Browne-Wilkinson in *Westdeutsche Landesbank v. Islington*:-

“THE RELEVANT PRINCIPLES OF TRUST LAW:

(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.” [1996] 2 All E.R. 961, 988.

12. Constructive trusts – general principles

General Reading on this topic: **Hudson, chapter 12.**

Constructive trusts are imposed by operation of law: that is to say, their imposition is not entirely at the discretion of the court, nor are they imposed as a remedy in certain situations. This is the attitude taken by all of the books and by the courts themselves. However, there are a number of objections to this categorisation and some dispute as to which interests fall within the category 'constructive trust'. Some of the categories included below are a little controversial in that sense.

The general principle: constructive trusts at large

Reading: **Hudson, sections 12.2**

The English model 'institutional constructive trust' will protect existing rights in proprietary by means of imposition of a trust. By definition, these are rights which would not be protected by common law remedies.

***Westdeutsche Landesbank v. Islington LBC [1996] A.C. 669*

13. Constructive trusts – secret profits

Fiduciary making unauthorised profits

Reading: **Hudson, sections 12.5**

(a) **The basis of liability: avoidance of conflicts of interest**

Keech v. Sandford (1726) 2 Eq Cas Abr 741, per Lord King LC:

“This may seem hard, that the trustee is the only person of all mankind who might not have [the trust property]: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease ...”

Bray v Ford [1896] AC 44, [1895-99] All ER Rep 1009, 1011, per Lord Herschell:

“It is an inflexible rule of the court of equity that a person in a fiduciary position ... is not, unless otherwise expressly provided [in the terms of the that person’s fiduciary duties], entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as had been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to law down this positive rule.”

See, e.g. Parker LJ in *Bhullar v Bhullar* [2003] 2 BCLC 241, para [17] referring to the “ethic” in these cases.

(b) **The leading case**

Boardman v. Phipps [1967] 2 AC 46

(c) **The defence of authorisation and the issue as to who may authorise secret profits**

Regal v Gulliver [1942] 1 All ER 378 (*directors may not authorise other directors*)

Queensland Mines v. Hudson (1978) 18 ALR 1; (1979) 42 MLR 771

Industrial Development Consultants v Cooley [1972] 2 All ER 162

The corporate opportunity doctrine

(a) **Authorisation predicated on appropriate disclosure**

Regal v Gulliver [1942] 1 All ER 378 (*directors may not authorise other directors*)

Queensland Mines v. Hudson (1978) 18 ALR 1; (1979) 42 MLR 771

(b) **Where there was no maturing business opportunity**

Island Export Finance Ltd v Umunna [1986] BCC 460

Balston v Headline Filters Ltd [1990] FSR 385

(c) **Where there is an opportunity and insufficient disclosure is made**

Industrial Development Consultants v Cooley [1972] 2 All ER 162

Crown Dilmun v Sutton [2004] 1 BCLC 468

14. Constructive trusts – bribery

Profits from bribes

Reading: **Hudson, para 12.4.1**

The leading case: constructive trust over property acquired with the bribes; plus personal liability if value of property falls

****Att-Gen for Hong Kong v. Reid** [1994] 1 All ER 1, 4-5; [1994] AC 324, 330; [1993] 3 WLR, per Lord Templeman:-

“A bribe is a gift accepted by a fiduciary as an inducement to him to betray his trust. A secret benefit, which may or may not constitute a bribe is a benefit which the fiduciary derives from trust property or obtains from knowledge which he acquires in the course of acting as a fiduciary. A fiduciary is not always accountable for a secret benefit but he is undoubtedly accountable for a secret benefit which consists of a bribe. In addition a person who provides the bribe and the fiduciary who accepts the bribe may each be guilty of a criminal offence. In the present case the first respondent was clearly guilty of a criminal offence. / Bribery is an evil practice which threatens the foundations of any civilised society. In particular bribery of policemen and prosecutors brings the administration of justice into disrepute. Where bribes are accepted by a trustees, servant, agent or other fiduciary, loss and damage are caused to the beneficiaries, master or principal whose interests have been betrayed. The amount of loss or damage resulting from the acceptance of a bribe may or may not be quantifiable. In the present case the amount of harm caused to the administration of justice in Hong Kong by the first respondent in return for bribes cannot be quantified.”

Tesco Stores v Pook [2003] EWHC 823

Daraydan Holdings Ltd v Solland International [2004] EWHC 622, [2004] 3 WLR 1106, [2005] Ch 1

nb: **Lister v. Stubbs** (1890) 45 ChD 1 [now over-ruled by *Reid*]

15. Constructive trusts – other models

1) Profits from unlawful killing

Reading: **Hudson, para 12.4.2**
In the estate of Crippen [1911] P 108

2) Profits from theft

Reading: **Hudson, para 12.4.3**
Westdeutsche Landesbank v Islington [1996] 1 AC 669
Cf. *Att-Gen for Hong Kong v Reid* [1994] 1 All ER 1
Box, Brown & Jacobs v Barclays Bank [1998] Lloyd's Rep Bank 185, 200, per Ferris J (*thief does not ordinarily acquire property rights*)
Shalson v Russo [2003] EWHC 1637, [110], per Rimer J (*ditto*)
Cf. Proceeds of Crime Act 2002, s.6 (*Assets Recovery Agency*)

3) Profits from fraud

Reading: **Hudson, para 12.4.4**

(a) Ordinarily property acquired by fraud will be held on constructive trust

Westdeutsche Landesbank v Islington [1996] 1 AC 669, 716, per Lord Browne-Wilkinson:
“when property is obtained by fraud, equity places a constructive trust on the fraudulent recipient”.
Paragon Finance v Thackerar [1999] 1 All ER 400, 408, per Millett LJ:
“Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be “liable to account as constructive trustee.”

(b) Property acquired by fraudulent misrepresentation not held on constructive trust

**Lonrho v Al Fayed (No 2)* [1992] 1 WLR 1; [1991] 4 All ER 961, per Millett J:
‘A contract obtained by fraudulent misrepresentation is voidable, not void, even in equity. The representee may elect to avoid it, but until he does so, the representor is not a constructive trustee of the property transferred pursuant to the contract, and no fiduciary relationship exists between him and the representee. It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it, the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim.’

4) Is the doctrine of constructive trust coherent?

Consider the various competing forms of constructive trust we have encountered:-

- *Westdeutsche Landesbank v Islington* – based on conscience
- *Att-Gen Hong Kong v Reid* – based on (i) equity looks upon as done that which ought to have been done (ii) the evil practice of accepting bribes and (iii) may lead to a personal liability over and above the proprietary liability
- *Boardman v Phipps* – avoidance of conflicts of interest
- *Lloyds Bank v Rosset* – common intention by agreement or by understanding
- *Neville v Wilson / Jerome v Kelly* – contract transfers equitable interest by constructive trust although nature of obligations take effect sub modo
- *Rochefoucauld v Boustead* – based on avoidance of fraud
- *Royal Brunei Airlines v Tan* – a personal liability to account (see next section)

Given that these forms of constructive trust arise on different bases, is the doctrine coherent? If not, does it matter?

16. Resulting trusts – automatic resulting trusts

Reading: **Hudson, section 11.1**

The term “resulting” comes from the Latin ‘resalire’ meaning to ‘jump back’.

1) The leading case on the definition of a “resulting trust”

****Westdeutsche Landesbank v. Islington LBC* [1996] 2 All ER 961, [1996] AC 669, per Lord Browne-Wilkinson.

Lord Browne-Wilkinson in *Westdeutsche Landesbank v. Islington*:-

‘Under existing law a resulting trust arises in two sets of circumstances:

(A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A’s intention to make an outright transfer.

(B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.

Megarry J. in Re Vandervell’s Trusts (No.2) suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as bona vacantia.”

AUTOMATIC RESULTING TRUSTS

This category of resulting trust arises automatically by operation of law. Where some part of the equitable interest in property is unallocated by S after transferring property to T, the equitable interest automatically results back to S.

Reading: **Hudson, section 11.2**

No declaration of trust, by mistake

***Vandervell v. IRC* [1966] Ch 261; [1967] 2 AC 291

17. Resulting trusts – presumptions and illegality

PRESUMED RESULTING TRUSTS

Reading: Hudson, section 11.4

Where S transfers property to T without intending T to take that property beneficially, and where there is no presumption of advancement, there arises a presumed resulting trust over that property in favour of S.

1) Purchase

Dyer v. Dyer (1788) 2 Cox Eq 92

2) Presumption of advancement - special relationships

- a. father and child
- b. husband and wife

3. Rebutting the Presumption

a. Generally

Fowkes v. Pascoe (1875) 10 Ch App Cas 343

b. Illegality

Gascoigne v. Gascoigne [1918] 1 KB 223

Tribe v. Tribe [1995] 4 All ER 236; [1995] 3 WLR 913; [1995] 2 FLR 966

Tinsley v. Milligan [1993] 3 All ER 65, [1993] 3 WLR 36; M&B 225

Midland Bank v. Wyatt [1995] 1 FLR 696; [1995] 3 FCR 11

18. Trusts of homes – *Stack v Dowden* and the structure of the law

General Reading for this topic: *Hudson*, chapter 15

The area of trusts of land, specifically in relation to family homes, is particularly vexed. The following lectures will consider the manner in which Equity allocates rights in the home and will also consider the theoretical bases on which that allocation takes place. Any categorisation of the possible claims in this area will be controversial - the lay-out is therefore one possible way of categorising this subject.

Trusts of Land and Appointment of Trustees Act 1996
s.37 Matrimonial Property and Proceedings Act 1970

A missed opportunity

Reading: *Hudson*, section 15.2

***Stack v Dowden*

Express trust of land

Reading: *Hudson*, section 15.2

Goodman v. Gallant [1986] FLR 106

Dyer v Dyer (1788) 2 Cox Eq Cas 92

Pettit v. Pettit [1970] 1 AC 777

Gissing v. Gissing [1971] AC 886; [1970] 3 WLR 255

19. Trusts of homes – *Lloyds Bank v Rosset*

Common intention constructive trust

Reading: *Hudson*, section 15.4

The core test ...

***Lloyds Bank v. Rosset* [1990] 1 All ER 1111, [1990] 2 WLR 867

the requirement of detriment

Grant v. Edwards [1986] Ch 639

Lloyds Bank v. Rosset [1990] 1 All ER 1111, [1990] 2 WLR 867

20. Trusts of homes – the balance sheet approach

The “balance sheet” approach

Reading: **Hudson, section 15.5**

Bernard v. Josephs [1982] Ch 391

Springette v. Dafoe (1992) HLR 552; [1992] 2 FLR 388

Huntingford v. Hobbs [1993] 1 FLR 936

What can be included: deposits, discounts and washing-up

- 1 Long-term relationships
**Springette v. Dafoe* (1992) HLR 552; [1992] 2 FLR 388
**Midland Bank v. Cooke* [1995] 4 All ER 562
- 2 Wedding gifts
McHardy v. Warren [1994] 2 FLR 338
**Midland Bank v. Cooke* [1995] 4 All ER 562
- 3 Discounts on the purchase price
Springette v. Dafoe (1992) HLR 552; [1992] 2 FLR 388
Evans v Hayward [1995] 2 FLR 511 (*negotiating reduction in price does not acquire right in property*)
Cox v Jones [2004] 3 FCR 693 (*obtaining reduction in price can be taken into account*)
- 4 Conservatories and building work
**Huntingford v. Hobbs* [1993] 1 FLR 936;

21. Trusts of homes – the family assets approach

The “family assets” approach

Reading: Hudson, section 15.6

Hammond v. Mitchell [1991] 1 WLR 1127 (this case is well worth a read!)

Midland Bank v. Cooke [1995] 4 All ER 562 (undertake a survey of the entire course of dealing)

22. Trusts of homes – the unconscionability approach

The “unconscionability” approach

Reading: Hudson, section 15.8

**Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P&CR 100

***Oxley v Hiscock* [2004] 2 FLR 669, [2004] Fam Law 569

**Cox v Jones* [2004] 3 FCR 693, [2004] EWHC 1486 (*this case is well worth a read!*)

Stack v Dowden

Crossley v Crossley

Cf. Australia

23. Equitable estoppel

General reading – Hudson, Chapter 13.

Reading: Hudson, sections 13.3 and 15.7.

See generally:

Cooke, *The Modern Law of Estoppel* (OUP)

Pawlowski, *The Doctrine of Proprietary Estoppel* (Sweet & Maxwell)

Wilken and Villiers *Waiver, Variation and Estoppel* (Wiley).

There is an extended and detailed discussion of the doctrine of equitable estoppel generally in **Hudson**, Chapter 13 which goes into greater detail on the cases relating to this topic than the material in chapter 15 which considers many of those cases more briefly and only in the sense that they relate to trusts of homes.

Establishing the estoppel

The representation can be formulated over time, it need not be a single representation

Re Basham [1987] 1 All ER 405, [1986] 1 WLR 1498

Gillett v. Holt [2000] 2 All ER 289

Jennings v Rice [2002] EWCA Civ 159, [2003] 1 P&CR 100

Lissimore v Downing [2003] 2 FLR 308

24. Trusts of homes – commentary

Suggestion on how to go about answering questions on trusts of homes:

The suggested outline for answering problems on this topic is to follow this structure:

First apply the presumptions in *Stack v Dowden* and then discuss the following to see if those presumptions can be displaced:

1. apply the test in *Lloyds Bank v Rosset* literally and consider who wins and who loses;
2. apply the balance sheet / resulting trusts cases and see if the result is any different from 1;
3. apply the family assets cases and see if the result is any different from 1 or 2;
4. apply the unconscionability cases and see if the result is any different from 1, 2 or 3;
5. apply the doctrine of proprietary estoppel and see if the results are different from the above;
6. consider how any theoretical approaches would impact on the facts of the problem.

The suggested outline for essays is a matter for you. You could (i) create your own set of facts and through your essay reflect on how the different case law models would produce different results (perhaps by changing the facts of your own hypothetical example for emphasis) or (ii) consider some of the ideas set out in section (c) immediately below.

IDEAS ABOUT TRUSTS OF HOMES

There is a large literature on this topic. You could refer generally to Hudson (ed), *New Perspectives on Property Law Human Rights and the Home* (Cavendish, 2004) and in particular to the following essays:

- Alastair Hudson, "Equity, individualisation and social justice: towards a new law of the home", p.1-36
- Rebecca Probert, "Family law and property law: competing spheres in the regulation of the family home", p.37-52
- Anne Barlow, "Rights in the family home – time for a conceptual revolution", p.53-78
- Simone Wong, "Rethinking *Rosset* from a human rights perspective", p.79-98.

The footnotes to these essays contain an extensive bibliography of recent articles and books on this topic and are an excellent source of further reading. Choose the themes which interest you most.

a) Conflation or separation?

Reading: **Hudson, section 15.10**

b) Social justice and trusts of homes

Reading: **Hudson, section 17.5**

c) Human rights and trusts of homes

Reading: **Hudson, sections 17.4**

d) Family law and the law of the home

Reading: **Hudson, sections 17.4**

25. Trustees' duties – general

General reading for this topic: **Hudson, chapters 8 and 9.**

The trustees' duties in outline.

1) The core trustees' duties

This chapter of the course considers a selection of the key duties of trustees. Hudson, 2005, chapter 8 considers 13 general duties [as set out in the textbook], as well as the procedures for the appointment and removal of trustees:

(4) The duty to act even-handedly between beneficiaries, which means that the trustees are required to act impartially between beneficiaries and to avoid conflicts of interest.

(5) The duty to act with reasonable care, meaning generally a duty to act as though a prudent person of business acting on behalf of someone for whom one feels morally bound to provide.

(9) The duty to avoid conflicts of interest, not to earn unauthorised profits from the fiduciary office, not to deal on one's own behalf with trust property on pain of such transactions being voidable, and the obligation to deal fairly with the trust property.

(10) The duty to preserve the confidence of the beneficiaries, especially in relation to Chinese wall arrangements.

(12) The duty to account and to provide information.

(13) The duty to take into account relevant considerations and to overlook irrelevant considerations, failure to do so may lead to the court setting aside an exercise of the trustees' powers.

There are other duties considered in *Hudson*, section 8.1 and in chapter 9 (relating specifically to investment of the trust property); and there are also general powers for trustees considered in *Hudson*, chapter 10. We will be focusing only on those duties with emboldened numbers.

2) Key concepts in the obligations of trustees

i) The requirement of good conscience

Reading: **Hudson, para 8.2.4**

Westdeutsche Landesbank v Islington [1996] AC 669.

ii) The general duty of care and prudence

Reading: **Hudson, para 8.3.5**

(a) Under case law:-

Speight v Gaunt (1883) 9 App Cas 1

(b) Under statute:-

Trustee Act 2000, s.1:

"(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard, in particular –

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession."

Liability for breach of trust

**Target Holdings v Redfern* [1996] 1 AC 421

Fiduciary responsibility of trustees.

Reading: **Hudson, section 8.6**

1) What it means to be a fiduciary

**Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, *per* Millett LJ:

'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.'

2) Conflicts of interest not permissible

Reading: **Hudson, para 8.3.9**

Keech v Sandford (1726) Sel Cas Ch 61

Boardman v. Phipps [1967] 2 AC 46

Validity of exclusion clauses

Reading: **Hudson, section 8.5**

***Armitage v. Nurse* [1998] Ch 241, *per* Millett LJ:

'[T]here is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient ... a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.'

**Walker v Stones* [2001] QB 902

Trustee's duty to provide information and to account to the beneficiaries.

Reading: **Hudson, section 8.4**

1) No general obligation for the trustees to give full information to anyone who considers themselves entitled to an equitable interest under the trust

***O'Rourke v Derbyshire* [1920] AC 581 – *right to information only if proprietary right*

**Re Londonderry* [1965] Ch 918 – *no obligation to give reasons for decisions nor to disclose confidential information*

2) The new approach

***Schmidt v Rosewood Trust Ltd* [2003] 2 WLR 1442, 1463, *per* Lord Walker

... no beneficiary ... has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place.

26. Trustees' duties – Hastings-Bass

Trustees taking into account irrelevant considerations, etc.

Reading: **Hudson, section 8.3.13**

1) The basis of the principle in Hastings-Bass

(i) The original, negative form of the principle

***Re Hastings-Bass** [1975] Ch 25, 40, *per* Buckley LJ

'... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he had achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.'

(ii) The positive form of the principle

***Mettoy Pensions Trustees v Evans** [1990] 1 WLR 1587, 1624, *per* Warner J

'If, as I believe, the reason for the application of the principle is the failure by the trustees to take into account considerations which they ought to have taken into account, it cannot matter whether that failure is due to their having overlooked (or to their legal advisers having overlooked) some relevant rule of law or limit on their discretion, or is due to some other cause. ... [I]t is not enough that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of it, they would not have acted as they did.'

***Burrell v Burrell** [2005] EWHC 245, [15], *per* Mann J

(iii) The requirement for a breach of trust

***Abacus Trust Company (Isle of Man) v Barr** [2003] 2 WLR 1362, [23] *per* Lightman J

'In my view it is not sufficient to bring the rule into play that the trustee made a mistake or by reason of ignorance or a mistake did not take into account a relevant consideration or took into account an irrelevant consideration. What has to be established is that the trustee in making his decision has ... failed to consider what he was under a duty to consider. If the trustee has, in accordance with his duty, identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect. ... [T]he rule does not afford the right to the trustee or any beneficiary to have a decision declared invalid because a trustee's decision was in some way mistaken or has unforeseen and unpalatable consequences.'

***Burrell v Burrell** [2005] EWHC 245, [22], *per* Mann J (*the principle could be invoked in either case because there had been a breach of duty.*)

Gallaher v Gallaher [2004] EWHC 42, [2005] All ER (D) 177, [162] *et seq.*, *per* Etherton J (*point raised but not disposed of because not necessary on the facts.*)

(iv) The Abacus v Barr version of the test

a) That there might have been a different decision reached

***Abacus Trust Co (Isle of Man) v Barr** [2003] 2 WLR 1362, 1369, *per* Lightman J

'[This principle] does not require that the relevant consideration unconsidered by the trustee should make a fundamental difference between the facts as perceived by the trustee and the facts as they should have been perceived and actually were. All that is required in this regard is that the unconsidered relevant consideration

would or might have affected the trustee's decision, and in a case such as the present that the trustee would or might have made a different appointment or no appointment at all.

Lightman J suggested four pre-requisites

- (1) whether or not the trustee's actions were sufficiently fundamental;*
- (2) whether the trustee had failed to consider something which she was duty-bound to consider and failed to act with sufficient diligence in identifying that necessary information;*
- (3) whether the trustee was at fault for failing to give effect to the settlor's objectives; and*
- (4) whether the exercise of the power was void or voidable.*

b) Does this test set the barrier too low?

Thomas and Hudson, *The Law of Trusts*, 2004, 385 *et seq*

(v) Examples of considerations taken into account or not taken into account

Stannard v Fisons Pension Trust Ltd [1991] PLR 224 (*failure to take an up-to-date valuation of assets held in a pension fund before transferring assets between funds*)

Green v Cobham [2002] STC 820 (*failing to take into account the fiscal consequences of a decision & considerations in relation to a single beneficiary may differ from the considerations applicable in relation to a power over a large class of potential beneficiaries*)

Burrell v Burrell [2005] EWHC 245 (*failing to take into account the fiscal consequences of a decision: inheritance tax*)

Abacus Trust Company (Isle of Man) v Barr [2003] 2 WLR 1362 (*failing to take the settlor's wishes into account correctly*)

27. Trustees' duties – investment of trusts

(C) Duty to invest.

General Reading for this section: *Hudson, chapter 9*

1) The power of investment under TA 2000

*Trustee Act 2000, s 3(1)

'...a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.'

2) The statutory duty of care

**Trustee Act 2000, s.1

'(1) Whenever the duty under this subsection applied to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular –

- (a) to any special knowledge or experience that he has or holds himself out as having, and
- (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) In this Act the duty under subsection (1) is called "the duty of care".'

3) The duty to prepare standard investment criteria.

**Trustee Act 2000, s.4.

'4(1)... a trustee must have regard to the standard investment criteria.

(3) The standard investment criteria in relation to a trust are –

- (a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and
- (b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.'

4) The duty to take expert advice.

**Trustee Act 2000, s.5.

'(1) Before exercising any power of investment ... a trustee must ... obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised.

(3) The exception is that a trustee need not obtain such advice if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.'

5) General duties regarding protection and investment of trust assets on the case law.

(i) Seek the highest available return

**Cowan v. Scargill* [1985] 2 Ch. 270.

(ii) Act as though a prudent person of business investing on behalf of someone for whom one feels morally bound to provide

Learoyd v Whiteley (1887) 12 App. Cas. 727 (HL) (the 'prudent businessman').

**Nestle v. National Westminster Bank plc* [1993] 1 W.L.R. 1260.

28. Breach of Trust

General Reading for this topic: **Hudson, chapter 18.**

This section on Breach of Trust focuses on the leading decision, Target Holdings, and two issues specifically:- (1) in what circumstances a loss can be remedied by a claim based on breach of trust, and (2) at what level should the loss be valued? This topic follows on from the material in the last chapter of these Course Documents relating to the duties of trustees.

(A) The basis of liability for breach of trust.

Reading: **Hudson, section 18.2**

The modern law

Clough v Bond (1838) 3 My & C 490.

****Target Holdings v. Redferns** [1996] 1 AC 421, [1995] 3 All ER 785 HL, per Lord Browne-Wilkinson in *Target Holdings*:- ‘... in my judgement it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trust of quite a different kind.’

Loss as the foundation for the claim

Target Holdings v. Redferns [1996] 1 AC 421
Re Massingberd’s Settlement (1890) 63 LT 296

Loss in relation to investment

Nestle v National Westminster Bank plc (No 2)[1993] 1 WLR 1260, [1994] 1 All ER 118

(B) Remedies for breach of trust.

Reading: **Hudson, section 18.3**

****Target Holdings v. Redferns** [1996] 1 AC 421, [1995] 3 All ER 785 HL per Lord Browne-Wilkinson:-

‘Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate. If specific restitution of the trust property is not possible, the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed. Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred. Thus the common law rules of remoteness of damage and causation do not apply. However, there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz the fact that the loss would not have occurred but for the breach.’

There are therefore three forms of remedy here:

- proprietary obligation,
- obligation to restore trust fund,
- compensation.

29. Dishonest assistance

Reading: **Hudson, section 20.2**

a). The objective test for dishonesty

Royal Brunei Airlines v. Tan [1995] 3 WLR 64; [1995] 3 All ER 97, per Lord Nicholls:

“... acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstance. This is an objective standard. ... All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own.”

Dubai Aluminium v Salaam [2002] 3 WLR 1913

Barlow Clowes v Eurotrust [2005]

c). An alternative test for dishonesty based on subjectivity

Twinsectra Ltd v. Yardley [2002] 2 All E.R. 377, 387, per Lord Hutton:

“There is, in my opinion, a further consideration [than deciding whether the test is one of knowledge or dishonesty as set out by Lord Nicholls] which supports the view that for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men. A finding by the judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor. Notwithstanding that the issue arises in equity law [sic] and not in a criminal context, I think that it would be less than just for the law to permit a finding that a defendant had been ‘dishonest’ in assisting in a breach of trust where he knew of the facts which created the trust and its breach but had not been aware that what he was doing would be regarded by honest men as being dishonest.”

Manolakaki v Constantinides [2004] EWHC 749, [167], per Peter Smith J

e). Another wrong turn ...

Abou-Rahmah v Abacha [2007] Bus LR

f). Dishonesty and risk

Royal Brunei Airlines v. Tan [1995] 2 AC 378, 387, per Lord Nicholls

“All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own.”

30. Knowing receipt

1. Knowing receipt

Reading: **Hudson, section 20.3**

a). What type of knowledge?

**Baden v. Societe Generale* (1983) [1993] 1 W.L.R. 509 *per* Peter Gibson J, the five types of knowledge:

- (1) actual knowledge;
- (2) wilfully shutting one's eyes to the obvious;
- (3) wilfully and recklessly failing to make inquiries which an honest person would have made;
- (4) knowledge of circumstances which would indicate the facts to an honest and reasonable man;
- (5) knowledge of circumstances which would put an honest and reasonable man on inquiry.

***Re Montagu's Settlements* [1987] Ch 264 (*only first three categories of knowledge; forgetfulness*)

***Polly Peck v. Nadir* [1992] 4 All ER 769, [1993] BCLC 187

El Ajou v. Dollar Land Holdings [1994] 2 All ER 685

Macmillan Inc. v. Bishopgate Investment Trust [1995] 1 WLR 978, 1000, 1014; [1995] 3 All ER 747, 769, 783.

b). Changing the test (i): dishonesty

Twinsectra Ltd v. Yardley [1999] Lloyd's Rep. Bank 438, Court of Appeal

Bank of America v. Kevin Peter Arnell [1999] Lloyd's Rep. Bank 399

Grupo Toras v. Al-Sabah [1999] C.L.C. 1469

Ali v Al-Basri [2004] EWHC 2608, [195] (*dishonesty is likely to suggest knowledge and so attract liability*)

Cf. Niru Battery Manufacturing Co v Milestone Trading Ltd [2004] 2 WLR 1415, [188], *per* Sedley LJ (*dishonesty not a requirement of liability*)

c). Changing the test (ii): unconscionability

Houghton v. Fayers [2000] 1 BCLC 571

**BCCI v Akindele* [2000] 4 All ER 221

**Criterion Properties plc v Stratford UK Properties LLC* [2003] 2 BCLC 129, [38] (*expresses preference for flexibility of a test of conscionability*)

**Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 2 WLR 1415, [188], *per* Sedley LJ

Citadel General Assurance v. Lloyds Bank Canada [1997] 3 SCR 805, 152 DLR (4th) 385

Cf. Crown Dilmun v Sutton [2004] EWHC 52 (Ch), [23] (*criticises looseness of conscionability test*)

2. Liability to account in corporate contexts.

Reading: **Hudson, section 20.5**

If an individual is dishonest or has knowledge, then the claimant can claim against that individual. However, if that individual is employed by a company, then there is a question as to whether or not that company can also be said to have been dishonest or to have had knowledge so that the claimant could claim against the company instead.

a) Controlling mind test

El Ajou v Dollar Land Holdings [1994]

Royal Brunei Airlines v. Tan [1995] 2 AC 378

Crown Dilmun v Sutton [2004] EWHC 52 (Ch), [23] (*controlling mind test*)

b) Risk in commercial transactions

Royal Brunei Airlines v. Tan [1995] 2 AC 378

“All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own. ... [Where a person] takes a risk that a clearly unauthorised transaction will not cause loss ... If the risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly.”

c) Standard commercial conduct in the context in that market

Cowan de Groot Properties Ltd v Eagle Trust plc [1992] 4 All ER 700, 761, *per* Knox J (*a person guilty of “commercial unacceptable conduct in the particular context” is likely to be held to have been dishonest*)

Polly Peck v Nadir (No 2) [1992] 4 All ER 769 (*liability of financial advisors dependent on context and whether they ought to have been suspicious*)

Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd’s Rep Bank 511, at 535, *per* Colman J (*contravention of financial regulation*)

Sphere Drake Insurance Ltd v Euro International Underwriting Ltd [2003] EWHC 1636 (Comm) (*taking unacceptable risk in contravention of conduct of business regulation = dishonesty*).

Tayeb v HSBC Bank plc [2004] 4 All ER 1024 (*contravention of financial regulation*)

Manolakaki v Constantinides [2004] EWHC 749 (*clear dishonesty where contravention of financial regulation, backdating of documents and including untrue statements in documents; absence of personal profit would militate against finding of dishonesty*)

E.g. Financial Services and Markets Act 2000 – FSA Conduct of Business Rules: Hudson, 20.5.2

31. Tracing – in outline

General Reading on this topic: **Hudson, chapter 19**

The law relating to tracing is not straightforward. There is a need to distinguish between common law tracing and equitable tracing. These lectures will focus on equitable tracing for the most part.

There is a second distinction to be made: that is, between 'following' claims and 'tracing' claims. A following claim requires simply that a specific piece of property is followed and identified by its original common law owner, thus being returned to that original owner. A tracing claim concerns the identification of property or value in which the claimant has some pre-existing interest which the court is then asked to recognise.

Tracing is a process. It does nothing more than trace a right in an original piece of property into subsequent items of property or value. Tracing is concerned specifically with tracing value, not necessarily specific items of property. That is, it identifies property. There is then the further issue as to the form of remedy which should be granted or the form of trust which arises on institutional principles.

Reading: **Hudson, section 19.1**

***Boscawen v. Bajwa [1995] 4 All ER 769 - tracing is the process of identification, the appropriate claim is something else.*

**Westdeutsche Landesbank v. Islington LBC [1996] AC 669, [1996] 2 All ER 961 - equitable proprietary rights are based on 'conscience + knowledge'.*

32. Tracing at common law

Reading: **Hudson, section 19.2**

**Lipkin Gorman v. Karpnale* [1991] 3 WLR 10, [1992] 4 All ER 512, [1991] 2 AC 548 -
can trace at common law into bank accounts where money identifiable.

**Agip Africa v. Jackson* [1991] Ch 547, [1991] 3 WLR 116; [1992] 4 All ER 451 -
common law tracing only possible in clean, physical substitutions.

***FC Jones & Sons v. Jones* [1996] 3 WLR 703; [1996] 4 All ER 721 - *common law tracing
operates into substitutions.*

Millett, 'Tracing the Proceeds of Fraud' (1991) 107 LQR 71.

33. Tracing in equity – the tracing process

Reading: *Hudson*, sections 19.3 and 19.4

1. Need for prior equitable interest / proprietary base

Reading: *Hudson*, para 19.3.2

Re Diplock [1948] Ch 465

Boscawen v. Bajwa [1995] 4 All ER 769

Westdeutsche Landesbank v. Islington LBC [1996] AC 669, [1996] 2 All ER 961

2. Mixture of trust money with trustee's own money

Reading: *Hudson*, para 19.4.1

a) Honest trustee approach

Re Hallett's Estate (1880) 13 ChD. 695 - *presumption of trustee honesty.*

b) Beneficiary election approach

Re Oatway [1903] 2 Ch. 356 - *beneficiary election.*

Foskett v. McKeown [2000] 3 All E.R. 97 - *fraudster mixing innocent volunteers' money with own money; disapproving Hallett in part, now there is no restriction to a lien.*

34. Tracing in equity – tracing into bank accounts

Mixture of two trust funds or mixture with innocent volunteer's money

Reading: **Hudson, paras 19.4.2 and 19.4.3**

a) The traditional rule

**Clayton's Case* (1816) 1 Mer 572 - *first in, first out w.r.t current accounts*

Re Diplock, supra - 'Where an innocent volunteer (as distinct from a purchaser for value without notice) mixes 'money' of his own with 'money' which in equity belongs to another person, or is found in possession of such a mixture, although that other person cannot claim a charge on the mass superior to the claim of the volunteer, he is entitled, nevertheless, to a charge ranking *pari passu* with the claim of the volunteer ... Such a person is not in conscience bound to give precedence to the equitable owner of the other of the two funds.' [1948] Ch 465, 524.

b) The retreat from Clayton's Case

Re Ontario Securities Commission (1985) 30 DLR (4d) 30 - *proportionate share*.

Re Registered Securities [1991] 1 NZLR 545

***Barlow Clowes International v. Vaughan* [1992] 4 All ER 22, [1992] BCLC 910; noted Birks [1993] LMCLQ 218 - *rolling charge*.

***Russell-Cooke Trust Co v Prentis* [2003] 2 All ER 478

Commerzbank AG v IMB Morgan plc [2004] EWHC 2771

c) Tracing into pension fund rights

Clark v Cutland [2003] 4 All ER 733, [2003] EWCA Civ 810

Cf. Foskett v McKeown [2000] 3 All ER 97

4. Loss of right to trace

Reading: **Hudson, para 19.5.5**

Roscoe v. Winder [1915] 1 Ch. 62 - cannot claim more than lowest intermediate balance.

**Bishopsgate Investment Management v. Homan* [1995] Ch 211

35. Tracing in equity – remedies

Reading: *Hudson*, section 19.5

1. Introduction to tracing remedies – charge, lien or constructive trust?

Reading: *Hudson*, para 19.5.1 and 19.5.2

2. Charges, liens and proportionate shares

Reading: *Hudson*, paras 19.5.1 and 19.5.3

Re Ontario Securities Commission (1985) 30 DLR (4d) 30 - proportionate share.
Barlow Clowes International v. Vaughan [1992] 4 All ER 22, [1992] BCLC 910

3. Constructive trusts in relation to tracing: is unconscionability necessary?

Reading: *Hudson*, para 19.5.2

Westdeutsche Landesbank v Islington [1996] AC 669

Re Diplock [1948] Ch 465

Allen v Rea Brothers Trustees Ltd [2002] EWCA Civ 85

4. Subrogation

Reading: *Hudson*, para 19.5.4

Subrogation is the substitution of one claim for another - e.g.: where X uses Y's money to pay off a debt owed to Z, Y can occupy the place of Z and claim the money as though the debt were owed to Y instead.

Boscawen v. Bajwa [1995] 4 All ER 769

36. Tracing – defences

Reading: *Hudson*, section 19.6

1. Change of Position

Reading: *Hudson*, para 19.6.1

a) The test for change of position

Lipkin Gorman v. Karpnale, supra; per Lord Goff:- *‘Where an innocent defendant’s position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.’*

b) Bad faith as a barrier to change of position

Niru Battery Manufacturing Co and anor v Milestone Trading Ltd and ors [2003] EWCA Civ 1446

c) Activity which will constitute a change of position

Philip Collins Ltd v Davis [2000] 3 All ER 808
Scottish Equitable plc v. Derby [2001] 3 All ER 818

2. Is change of position now to be understood in terms of estoppel by representation?

Reading: *Hudson*, para 19.6.2

National Westminster Bank plc v Somer International [2002] QB 1286, CA.
Niru Battery Manufacturing Co and anor v Milestone Trading Ltd and ors [2003] EWCA Civ 1446

3. Bona fide purchaser for value without notice of the defendant’s rights

Reading: *Hudson*, para 19.6.4

Westdeutsche Landesbank v Islington [1996] AC 669

37. Quistclose trusts

Reading: **Hudson, chapter 22.**

Specific reading:

- Thomas and Hudson, *The Law of Trusts*, (Oxford University Press, 2004), 292-304; and 1,542-1,550.
- Thomas, *Powers*, (Sweet & Maxwell, 1998), 194-210
- Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004)

1. The core principle ... a resulting trust ...

Barclays Bank v. Quistclose [1970] AC 567; [1968] 3 All ER 651; [1968] 3 WLR 1097

Twinsectra Ltd v. Yardley [1999] Lloyd's Rep. Bank 438, Court of Appeal, *per* Potter LJ.

2. ... or an express trust with two limbs, or a mere power to use the money? ...

Re Elizabethan Theatre Trust (1991) 102 ALR 681, Gummow J

3. ... or retention of title by lender?

Twinsectra Ltd v. Yardley [2002] 2 All E.R. 377, at 398, House of Lords, *per* Lord Millett: ‘... *the Quistclose trust is a simple, commercial arrangement akin ... to a retention of title clause (though with a different object) which enables the borrower to have recourse to the lender’s money for a particular purpose without entrenching on the lender’s property rights more than necessary to enable the purpose to be achieved. The money remains the property of the lender unless and until it is applied in accordance with his directions, and in so far as it is not so applied it must be returned to him. I am disposed, perhaps predisposed, to think that this is the only analysis which is consistent both with orthodox trust law and with commercial reality.*’

4. What would be the most sensible commercial method?

- Vagueness of resulting trust biting only once the money has been misapplied, or
- Vagueness of constructive trust biting only once the money has been misapplied, or
- “Retention” (/ creation?) only of equitable interest in the money, or
- Exactness of express trust in a trust instrument, or
- Lender retains absolute title in the money and lender pays the money to the intended recipient?