Queen Mary University of London
School of Law

LAW OF PROPERTY II

EQUITY & TRUSTS

Syllabus

- The nature of equity and the trust
- Express trusts
    - Certainty of intention, subject matter and objects
    - The beneficiary principle
    - The constitution of trusts
    - The duties of trustees and breach of trust
- Resulting trusts
- Quistclose trusts
- Constructive trusts
- Trusts of homes
- Personal liability to account
- Tracing

Lecture - Course Documents

2009-10

Queen Mary University of London
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Aims of the module

The aims of the module are to ensure that students understand and are able to assess critically: the principles associated with equity and with trusts, the application of those principles to factual circumstances, the manner in which these principles affect people in their everyday lives, how they are to be reconciled with the principles governing the creation of express trusts, the imposition of trusts by law, how equity and trusts adapt to changing social conditions, and how the principle of restitution of unjust enrichment challenges the traditional understanding of equity.

Lay-out of materials

These lecture materials cover the module for the entire year.

You are expected to read all statutory material - this will be essential for an understanding of the subject. You are also expected to read all cases marked with an asterisk * at the very least in a casebook but you are advised to read them in full in the law reports. Cases marked ** are essential reading, being leading or very important cases, and so must be read in full in the law reports. All other cases can be read in a casebook or covered in a textbook.

Copies of these materials
Materials for this module can be found on-line at www.alastairhudson.com/trustslaw and on the college student intranet at qmul.ac.uk. It is expected that other materials will be available on Blackboard/WebCT in due course.

Textbooks
Alastair Hudson: *Equity and Trusts* (6th ed.: Routledge-Cavendish, 2009). *The publisher's companion web-site also contains podcasts by Professor Alastair Hudson on various aspects of this module and other materials.* "Hudson"
Hanbury and Martin: *Modern Equity* (18th ed., by Dr J. Martin: Sweet & Maxwell, 2009): "ME".
Pettit: *Equity and the Law of Trusts* (11th ed.: OUP, 2009): "PET".
Parker and Mellows: *The Modern Law of Trusts* (8th ed., by A.J. Oakley: Sweet & Maxwell, 2003).

Further textbooks:-
Virgo, *The Principles of the Law of Restitution* (2nd ed., Oxford University Press, 2006), very good on the restitutionary aspects in chapters 1, 20 and 21.
Pearce and Stevens: *The Law of Trusts and Equitable Obligations* (OUP, 2008).
Penner, *The Law of Trusts* (4th ed.: Core Text, OUP, 2003).

Cases and materials books:-
Maudsley and Burn: *Trusts and Trustees: Cases and Materials* (7th ed.: Butterworths 2008) – an excellent digest of the most significant cases.
Hayton and Marshall: *Cases and Commentary on the Law of Trusts* (12th ed.: Sweet & Maxwell 2005) – the textual elements are dense but they repay close attention; unfortunately in this most recent edition the editors have seen fit to remove a number of useful cases.
Moffat: *Trusts Law: Text and Materials* (4th ed.: CUP 2005) – a very interesting, alternative view of the law.

Introductory reading:-
Hudson, *Understanding Equity and Trusts* (3rd ed, Cavendish, 2008): for introductory reading in those dark, early days or before revision begins.)

Hackney, *Understanding Equity and Trusts* (Fontana, 1987: a good introduction but out of date).
Hayton, *The Law of Trusts* (4th ed.: Sweet & Maxwell, 2003: a very good introduction).

Practitioners' texts:-
In England, the newest practitioner text is **GW Thomas and AS Hudson, *The Law of Trusts* (1e, Oxford University Press, 2004, 1,907pp**; 2e, 2010**)** which not only considers the basic principles of trusts law but also puts them in the context of particular uses of trusts in practice. This is not recommended as a basic text. You may find it useful for essays on specific topics.

The classic practitioner texts have always been as follows. First, **Underhill and Hayton, *Law Relating to Trusts and Trustees*** (17th ed.: Butterworths 2007). This is not recommended as a basic text. You will find it useful for essays on specific topics, but it is not designed for the uninitiated: it provides little by way of explanation or analysis. Secondly, ***Lewin on Trusts*** the former practitioner's first choice was re-published in 2008 in its 18th edition.

There is also **Ford and Lee, *Principles of the Law of Trusts*** (3rd ed., 1998) - despite being an Australian textbook it is a very good work on the English law of express trusts in particular, but it is detailed, now a little out of date and perhaps too difficult for most students; the same is true of **Heydon and Leeming, *Jacob's Law of Trusts in Australia*** (7th ed, Lexis Nexis, 2006).

Background reading:-
Hudson's *Equity & Trusts*, has a long *bibliography* containing a large amount of journal and treatise literature. In the footnotes to your set reading there are cross-references to this bibliography. This is how you will find further reading, as well as the articles to which you are referred in these Course Documents. A number of further files and web-links can be found at www.alastairhudson.com/trustslaw in .pdf format.

Examination
This subject is examined by one three-hour **closed book** examination with fifteen minutes reading time, you will be allowed a clean copy of the reading list for this module in the examination. You are required to answer **three** questions in those three hours. Past papers are available in the library and on-line, and many past exam questions are included in your seminar materials.

Changes to the syllabus for this module
Note that whereas charities law used to form part of trusts law at Queen Mary, it does not any longer. Therefore, questions which were Question 3 under the old exam papers, on charities law, is no longer a part of the module.

Written work
Each student is expected to produce one piece of written work in each semester. These assessments are contained in your separate seminar materials pack. The aim of these assessments is to educate as to what the end-of-year examiners are looking for in a good property law script. Students should also refer to the *Student Handbook* issued at the beginning of the year for details of our marking schemes: i.e. how to get a 2:1, etc.. That marking scheme is included at the end of the Seminar Materials.

Seminars
You will be issued with seminar outlines separately. Your seminar group will meet fortnightly. You are expected to contribute to seminars: there is no doubt that an ability to verbalise your ideas in this subject will help your written work immeasurably. It goes without saying that you are expected to be fully prepared for seminar sessions and able to answer the questions included on the seminar sheets.

Outline of the module

This module outline sets out the sequence of lectures in this topic. Students should be warned, however, that it is susceptible to minor change as the year progresses, particularly if there are new cases. Your own work should be dictated by the order of topics in the Seminar Materials pack although the structure for lectures does compliment that for seminars.

Week: week commencing	***Topic: first lecture / second lecture***
1: 28 / 9	Introduction to equity / The nature of the trust & certainty of intention
2: 5 / 10	Certainty of subject matter / Certainty of objects
3: 12 / 10	Certainty of objects / Certainty of objects & Beneficiary principle
4: 19 / 10	Beneficiary principle / Unincorporated associations
5: 26 / 10	Constituting trusts / Constituting trusts
6: 2 / 11	Dispositions equitable interests / Dispositions equitable interests
7: 9 / 11	***Reading week***
8: 16 / 11	Duties of trustees / Duties of trustees
9: 23 / 11	Duties of trustees / Duties of trustees
10: 30 / 11	Breach of trust - claim / Breach of trust – remedies
11: 7 / 12	Intro: trusts implied by law / Resulting trusts – automatic and presumed
12: 14 / 12	*Quistclose* trusts / *Quistclose* trusts
end of term	
1: 11 / 1	Resulting trusts – illegality / Trusts of homes – common intention constructive trusts
2: 18 / 1	Trusts of homes – 3 alternative approaches / Trusts of homes – the future
3: 25 / 1	Trusts of homes – proprietary estoppel / Trusts of homes – comparative perspectives
4: 1 / 2	Constructive trusts – proprietary (i: secret profits) / Constructive trusts – proprietary (ii: bribes, etc)
5: 8 / 2	Dishonest assistance (i) / Dishonest assistance (ii)
6: 15 / 2	Knowing receipt (i) / Knowing receipt (ii)
7: 22 / 2	***Reading week***
8: 1 / 3	Tracing – at common law / Tracing – in equity (i: basis of claim)
9: 8 / 3	Tracing – in equity (ii: remedies) / Tracing – in equity (iii: defences)
10: 15 / 3	Restitution of unjust enrichment (i) / Restitution of unjust enrichment (ii)
11: 22 / 3	Revision: lecture problems / Revision: lecture problems
12: 29 / 3	*No lectures*
End of term	

How to study for this module

1. University study and education is about developing yourself as an individual; preparing for an examination requires you to learn how *you personally* work best.

2. You *should* read in advance of lectures. You *must* prepare in advance of seminars so that (a) you have consulted your lecture notes, all prescribed reading and any background reading and (b) you must have prepared (in writing) answers to all of the seminar questions.

3. Your seminar should be in the middle of your preparation. It is very important that as soon as practicable after your seminar that you settle your ideas for yourself (in a final set of notes or whatever works best for you), because it is after the seminar that you will understand the material best.

4. There is a lot of *background reading* referred to in Hudson's textbook's footnotes and in that textbook's *bibliography*. You can find commentary and so forth from these sources, as well as in these Course Documents.

5. It is not acceptable to attend seminars unprepared, it is not acceptable to take notes from the work of other students, it is not acceptable to plagiarise the work of other students or of other people. This module is about ethics: it also requires that you understand the ethic bound up with being part of a community of scholars.

6. You learn a lot about yourself in an intellectually demanding, technically-sophisticated and content-heavy module such as *Equity & Trusts*. Your seminars are fortnightly: this does not mean that you only need to do half as much work as for a module with weekly seminars. Rather you should expect to have done between 15 and 20 hours preparation for each seminar.

7. *Equity & Trusts* is a complex way of thinking about and analysing factual situations and theoretical concepts. You will find that it is not simply about learning rules and regurgitating them. Rather this module is about understanding how different arguments and different conceptual models can be deployed to reach different conclusions on the same factual circumstances. These techniques take time to assimilate and so you will need to read the cases, books and articles carefully to absorb and to understand them.

8. The exam requires you not simply to record all the cases you know about. Rather the exam requires you (a) to identify the relevant issues, (b) to set out the relevant (possibly conflicting) legal principles, (c) to apply the various legal principles in a structured fashion to the facts of any given problem or to address the issues raised by an essay title, (d) to use those principles to argue your way to a conclusion (or to reflect competing conclusions), and (e) to incorporate any relevant commentary outwith the legal principles.

9. You will encounter ideas in this module which you will not necessarily understand immediately. You must read them and think about them over and over until you do. This is the character-building aspect of this module. Perseverance is how you grow, it is how you learn, it is why people study for law degrees. While the rest of the world wants things to be easier, smaller and dumber, equity is vast, intricate and subtle. Coming to terms with this module will be an intellectual challenge for you.

INTRODUCTION: CORE PRINCIPLES

General reading: ***Hudson*** **Chapters 1 and 2, especially pp.1-8, 36-62; Martin Chapters 1&2; Pettit Ch 1&3**

(A) The nature of equity

Reading: ***Hudson*****, section 1.1; ME 3-49; PET 1-29**

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."

So it is that equity may provide for a better form of justice than the common law because it provides for a more specific judgment as to right and wrong in individual cases which rectifies any errors of fairness which the common law would otherwise have made:

> "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."

Thus, equity exists to rectify what would otherwise be errors in the application of the common law to factual situations in which the judges who developed common law principles or the legislators who passed statutes could not have intended.

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, invested 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

> The conflicting approaches of various judges: e.g. Lord Nottingham and Lord Mansfield.
> Judicature Act 1873, its effect on equity

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	**Equity**
Examples of claims:	
Breach of contract	Breach of trust
Negligence	Tracing property
Fraud	Claiming property on insolvency
Examples of remedies available:	
Damages	Compensation
Common law tracing	Equitable tracing
Money had and received	Specific performance
	Injunction
	Rescission
	Rectification
	Imposition of constructive trust
	Imposition of resulting trust
	Subrogation
	Account

We will focus, for the time being, on trusts…

(B) The structure of the trust relationship.

Reading: ***Hudson*, sections 2.1 and 2.2; Martin 49-78; Pettit 30-65**

> '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*

> 'A trust is an equitable obligation, binding a person (called a trustee) to deal with property owned by him (called trust property, being distinguished from his private property) for the benefit of persons (called beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation [or for a charitable purpose, which may be enforced at the instance of the Attorney-General, or for some other purpose permitted by law though unenforceable].'
>
> - Underhill and Hayton, *The Law of Trusts and Trustees*, as amended by Pettit

(C) Classification of trusts.

Reading: ***Hudson*, section 2.2; Martin 49-78; Pettit 66-85**

The four types of trust

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

Section 53(2) Law of Property Act 1925 refers to "implied, resulting and constructive 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, Martin 123-154; Pettit 86-99**

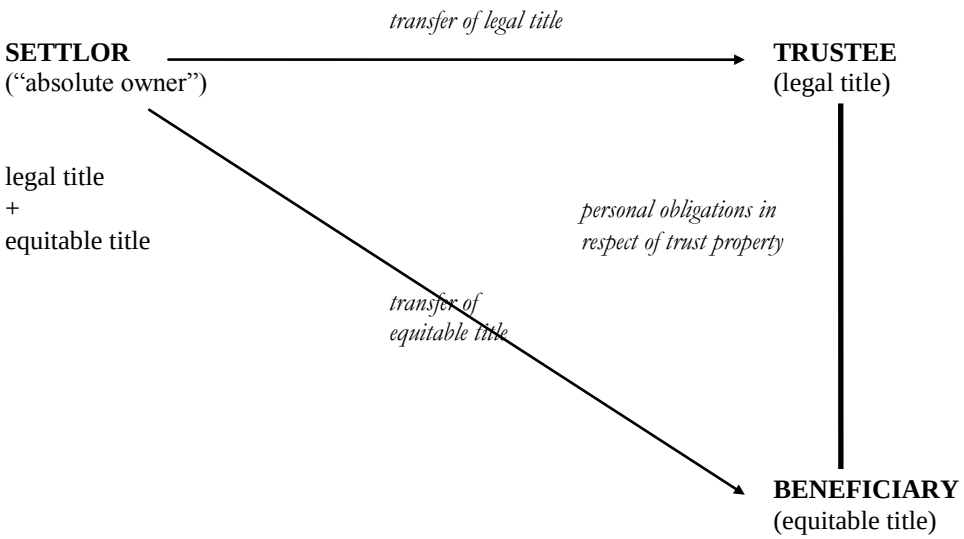
The three forms of trust come into existence in the following ways:

> '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; Martin 79-122; Pettit 86-99**

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.

(F) The concept of fiduciary responsibility.

Reading: ***Hudson*, section 2.3.3; and the essay comprising chapter 14.**

A trustee is an example of a fiduciary, so it is important to understand what the concept of fiduciary responsibility entails.

> '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.'
>
> - *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, *per* Millett LJ

> "A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of his own several interest."
>
> Paul Finn, "Fiduciary Law and the Modern Commercial World",
> in *Commercial Aspects of Trusts and Fiduciary Relationships*
> (ed. McKendrick, 1992), p. 9.

See also: Finn, Fiduciary Obligations (1977);
Finn, "The Fiduciary Principle", in *Equity, Fiduciaries and Trusts* (ed. T.G. Youdan, 1989);
A.J. Oakley, *Constructive Trusts* (1997), Ch. 3; and
A.J. Oakley (ed.), *Trends in Contemporary Trust Law* (1996).

(G) The benefits of trusts

Reading: **Hudson, section 2.5**

A framework for understanding change in the law of trusts: three conceptions of the trust - moralistic, individual property, capital management: see Cotterrell, "*Trusting in Law"* (1993) 46 CLP 75, 86-90.

- Proprietary right in the trust property for beneficiaries, not simply a personal claim against the trustees.
- Important, e.g. in giving priority for beneficiaries in the event of the trustee's bankruptcy
- A range of equitable remedies enforceable against the trustees and any third parties by the beneficiaries in the event of loss.
- Flexibility – useful in commercial and domestic situations, as considered below.
- Usefulness in tax planning and estate planning generally.
- A trust is a "gift over the plane of time" giving the settlor flexibility and control.
- Trusts constitute the most significant players in UK securities markets in the form of pension funds and investment funds (like unit trusts).

(H) The core principles of equity

Reading: ***Hudson*, section 1.4; Martin 3-48; Pettit 21-29**

The thirteen propositions set out below are culled, as a list, primarily from *Snell's Equity*, (31st ed., 2004) by McGhee, 27. The trust is built on equitable principles and the following, key equitable principles will emerge again and again in your studies. <u>*We will consider them only in outline at this stage.*</u>

- Equity will not suffer a wrong to be without a remedy
- Equity follows the law
- Where there is equal equity, the law shall prevail
- Where the equities are equal, the first in time shall prevail
- He who seeks equity must do equity
- He who comes to equity must come with clean hands
- Delay defeats equities
- Equality is equity
- Equity looks to the intent rather than to the form
- Equity looks on that as done that which ought to have been done
- Equity imputes an intention to fulfil an obligation
- Equity acts *in personam*

Hudson adds to that list three further principles:-

- Equity will not permit statute or common law to be used as an engine of fraud (e.g.: *Rochefoucauld v. Boustead*);
- Equity will not permit a person who is trustee of property to take benefit from that property *qua* trustee (e.g.: *Westdeutsche Landesbank*);
- Equity abhors a vacuum (e.g.: *Vandervell v. IRC*).

(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.”

Topic 1. CERTAINTY OF INTENTION AND CERTAINTY OF SUBJECT MATTER

General reading: ***Hudson*, chapter 3; Martin 98-106; Pettit 47-58**

Question: When a person seeks to create a trust (the settlor) in what ways must that person's intention be manifested?

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 3.3, and also 2.6; Martin 98-101; Pettit 47-50**

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

Reading: ***Hudson*, section 3.3.1**
***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
Cf. *Re Farepak Food and Gifts Ltd* [2006] All ER (D) 265 (Dec)

(2) Trusts as opposed to merely moral obligations

Reading: ***Hudson*, section 3.3.2**
(*Lambe v. Eames* (1871) L.R. 6 Ch. 597 ("*to be at her disposal in any way she may think best, for the benefit of herself and her family*" = merely moral obligation)).
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) Intending to create express trusts without knowing what a trust is

Paul v. Constance [1977] 1 W.L.R. 527 ("*… we are dealing with simple people, unaware of the subtleties of equity …*").

(4) 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*)

(5) Sham trusts and trusts intended to defraud creditors

Reading: ***Hudson*, section 3.3.3**
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*).

(6) Intention to create a charge not a trust

Reading: ***Hudson*, section 3.3.3**
Clough Mill v Martin [1984] 3 All ER 982 (*floating pool of property*)

(7) Trusts and bank accounts

Foley v Hill (1848) 2 HL Cas 28
Alastair Hudson, *The Law of Finance* (Sweet & Maxwell), para 30-04.

(B) CERTAINTY OF SUBJECT MATTER.

Reading: ***Hudson*, section 3.4; Martin 101-106; Pettit 50-58**

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

Reading: ***Hudson*, section 3.4.2**
Palmer v Simmonds (1854) 2 Drew. 221 ("*bulk of my... residuary estate*"*; not valid*).
Sprange v. Barnard (1789) 2 Bro. C.C. 585 ("*remaining part of what is left, that he does not want for his own wants and use to be divided...*"*; not valid*).
**Re London Wine Co. (Shippers) Ltd.* (1986) Palmer's Co. Cas. 121 Oliver J (*wine bottles to be held on trust not separated from other bottles*):

> 'I appreciate the point taken that the subject matter is a part of a homogenous mass so that specific identity is of as little importance as it is, for instance, in the case of money. Nevertheless, as it seems to me, to create a trust it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property it is to attach.'

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

Reading: ***Hudson*, section 3.4.3**
***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 above.
**White v Shortall* [2006] NSWSC 1379 (criticism of *Hunter v Moss*).

(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*
Cf. the law on tracing later in the course

(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.

Topic 2. CERTAINTY OF OBJECTS

Reading: ***Hudson*, section 3.5; Martin 107-121; Pettit 50-65**

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?

See also *(1982) 98 L.Q.R. 551 (C.T. Emery); (1971) 29 C.L.J. 68 (J.A. Hopkins); and (1974) 37 M.L.R. 643 (Y. Grbich).*

Introduction: the central principle

Reading: ***Hudson*, section 3.5.1**

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*.

- The need for the court to be able to police the trustees' management of the trust
- If the court cannot know with certainty, how can the trustees know and how can the court police the trustees?

***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

The distinction between "powers" and "trusts": permissive and obligatory

- 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 (known as "mere powers" because they are merely powers and not trusts)
- Personal, non-fiduciary powers

Cf. The nature of beneficial entitlements (cf. mere powers) in general and of corresponding trustees' duties.

Burrough v. Philcox (1840) 5 My. & Cr. 72.
**Re Hay's Settlement Trusts* [1982] 1 W.L.R. 202

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

Reading: ***Hudson*, section 3.5.2**

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

A complete list of the beneficiaries must be possible.
Both conceptual and evidential certainty required.

3) Certainty rules for fiduciary "mere powers", e.g. powers of appointment.

Reading: ***Hudson*, section 3.5.3**

Re Gestetner Settlement [1953] Ch. 673 (the old, strict approach).
***Re Gulbenkian's Settlement* [1970] A.C. 508: *the "any given postulant test"; aka the "is or is not test". NB: note uncertainty pre-McPhail v Doulton as to which test the court is said to be advancing here.*

4) Certainty rules for discretionary trusts.

Reading: ***Hudson*, section 3.5.4**

***McPhail v. Doulton* [1971] A.C. 424 (*can it be said with certainty that any given individual is or is not a member of the class?*)

5) Certainty rules for personal powers.

Reading: ***Hudson*, section 3.5.5**

(a) Not void on the ground of uncertainty of objects

**Re Hay's Settlement Trusts* [1982] 1 W.L.R. 202
Re Leek [1967] Ch 1061, 1076
Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587
Cf. Thomas and Hudson, *The Law of Trusts*, 2004, para 4.29

(b) May be held void for excessive exercise of that power

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

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

Reading: ***Hudson*, section 3.5.3, 3.5.4 and also 3.5.7**

(*Re Allen* [1953] Ch 810)
***Re Baden's Deed Trusts (No 2)* [1973] Ch. 9.
***Re Barlow* [1979] 1 WLR 278

7) Mechanisms for analysing the "any given postulant test" (2): "administrative unworkability" in discretionary trusts and powers.

Reading: ***Hudson*, section 3.5.3, 3.5.4 and 3.5.10**

McPhail v. Doulton [1971] AC 424
(*Re Manisty's Settlement* [1974] Ch. 17.)
R. v. District Auditor ex p. West Yorkshire Metropolitan County Council (1986) 26 R.V.R. 24.

8) Some particular concepts causing problems

Reading: ***Hudson*, section 3.5.8**

(a) "Friends"

Re Gibbard [1966] 1 All ER 273 (*"old friends" from the old school = certain*)
**Brown v Gould* [1972] Ch 53 (*"old friends" = uncertain*)
Re Barlow [1979] 1 WLR 278 (*friends and a gift = certain in the circumstances, e.g. long relationship*)

(b) "Customers"

Sparfax v Dommett (1972) *The Times*, 14 July

(c) "Relatives"

McPhail v. Doulton [1971] AC 424
Re Baden's Deed Trusts (No 2) [1973] Ch. 9.

9) Mechanisms for eluding the "any given postulant test" (3): use of an expert.

Reading: ***Hudson*, section 3.5.9**

(*McPhail v. Doulton* [1971] AC 424)
(*Re Manisty's Settlement* [1974] Ch. 17.)
Re Tuck's ST [1978] 2 WLR 411

10) Mechanisms for eluding the "any given postulant test" (4): let the trustees do whatever they want .

Reading: ***Hudson*, section 3.5.9**

(a) Trustees' opinion decisive

Re Coxen [1948] Ch 747 (*trustees' opinion may not replace certainty by itself*)
Re Jones [1953] Ch 125 (*ditto*)

(b) Wide powers

Re Manisty's Settlement [1974] Ch. 17 (*granting wide powers – e.g. "trustees may give to anyone in the world except x" – may be certain if clear who excluded*).

Blausten v IRC [1972] Ch 256 (*if class so wide that it is not really a class at all – e.g. everyone in the world – then uncertain*)

11) When the trust fails, resulting trust for settlor

The result of a trust failing is that the property is held on resulting trust for the settlor. Where part of the gift fails, the whole gift must fail, to give effect to the settlor's intention: (*Re Gulbenkian* [1970] A.C. 508)

Vandervell v IRC [1967] 2 AC 291

Cf Re Leek [1969] 1 Ch 563

12) Considering the various forms of uncertainty

Reading: ***Hudson*, para 3.5.10** on these categories.

"There must be sufficient certainty for the trustees to execute the trust according to the settlor's intentions"

a. Conceptual uncertainty

Where the words are unclear. If impossible to be certain: the trust fails. Test: "is or is not".

b. Evidential uncertainty

Where it is impossible to prove whether or not potential beneficiaries succeed in falling within the category. This will not invalidate the trust (in most circumstances): *Baden No.2*

c. Ascertainability

Where it is impossible to find beneficiaries: perhaps because they have died. This will not necessarily render the trust invalid: *Re Benjamin*; *McPhail v. Doulton*

d. Administrative workability

Where the requirements of the trust make it impossible for the trustees to perform their fiduciary obligations. This will invalidate the trust, per Lord Wilberforce.

Learning point: your role here as a student of law is to analyse sets of facts and to decide (i) which form of power or trust is at issue, then (ii) apply the appropriate test from the appropriate leading case. There may , however, be alternative analyses on some of the cases in the lower courts. You have to be able to apply each analysis in turn and identify (a) the different results each would produce and (b) comment on the desirability of each approach.

(D) Perpetuities and accumulations

Reading: ***Hudson*, para 4.2.7** - *this topic will be dealt with only briefly.*

The maximum period (at common law) for the vesting of interests under trusts: a life or lives in being + 21 years.

*ss. 1, 3 and 4 of the Perpetuities and Accumulations Act 1964.

Perpetuities and Accumulations Bill 2009

Topic 3. THE BENEFICIARY PRINCIPLE & UNINCORPORATED ASSOCIATIONS

I. THE 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; Martin 385-414; Pettit 58-65**
See also (1977) 40 M.L.R. 397 (N. Gravells); and P. Matthews, in *Trends in Contemporary Trust Law* (ed. A.J. Oakley, 1996), Ch. 1.

(A) The nature of the beneficiary's rights in the trust fund

Reading: ***Hudson*, section 4.1**

1) The principle in *Saunders v Vautier*

****Saunders v Vautier* (1841) 4 Beav 115
Re Bowes [1896] 1 Ch 507
Re Smith [1928] Ch 915 (*could compel transfer to beneficiaries even where two classes of beneficiaries under discretionary trusts*)
In re Holt's Settlement [1969] 1 Ch 100, 111, *per* Megarry J:

> 'If under a trust every possible beneficiary was under no disability and concurred in the re-arrangement or termination of the trusts, then under the doctrine in Saunders v Vautier those beneficiaries could dispose of the trust property as they thought fit; for in equity the property was theirs. Yet if any beneficiary was an infant, or an unborn or unascertained person, it was held that the court had no general inherent or other jurisdiction to concur in any such arrangement on behalf of that beneficiary.'

2) The proprietary rights of beneficiaries

Saunders v Vautier (1841) 4 Beav 115
Re Nelson [1928] Ch 920
Stephenson v Barclays Bank [1975] 1 All ER 625 (*beneficiary able to take separate share from the trust where property naturally divisible*)
Lloyds Bank v Duker [1987] 3 All ER 193 *(prevention of removal of interest because loss of majority shareholding for other beneficiaries*)

3) The nature of the rights of objects of discretionary trusts

Reading: ***Hudson*, section 4.1.4**
Prof Geraint Thomas, *Powers* (Sweet & Maxwell, 1998), para 6-268
Thomas & Hudson, *The Law of Trusts* (OUP, 2004), p.184 *et seq*., & p.1587 *et seq*.
Saunders v Vautier (1841) 4 Beav 115
Gartside v IRC [1968] AC 553, at 617, *per* Lord Wilberforce
CPT Custodian Pty Ltd v Commissioner of the State Revenue [2005] HCA 53
Richstar Enterprises Pty Ltd v Carey (No.6) [2006] FCA 814

4) Protective trusts (*note only*)

Re Detmold (1889) 40 Ch D 585 (*all property to be transferred to wife in the event of bankruptcy*)
Cf. *Midland Bank v Wyatt* [1995] 1 FLR 696 (*sham and Insolvency Act 1986, s. 423*)
Trustee Act 1925, s.33

5) Resettlement or variation of trusts (*note only*)

Variation of Trusts Act 1958
In re Holt's Settlement Trusts [1969] 1 Ch 100

(B) 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.*

3) Illustrations of the traditional general principle

Re Nottage [1885] 2 Ch 649 (*yachting cup held to be for the purpose of promoting yachting and <u>not</u> for the benefit of people who participated*)
Re Wood [1949] 1 All ER 1100
**Re Astor's S.T.* [1952] Ch. 534. (*'trust' intended inter alia for 'the maintenance of … good understanding sympathy and co-operation between nations' & for the maintenance of high standards in newspapers (The Observer) = void purpose trust (per Roxburgh J) because (1) the terms used are too uncertain (2) a trust must have a beneficiary (3) these purposes are not charitable*)
Re Shaw (*development of a new alphabet = void purpose trust)*
Re Endacott [1960] Ch. 232 ("*no principle has greater sanction or authority*").
***Leahy v. Att.-Gen. for New South Wales* [1959] A.C. 457 (*This case is considered again below – trust over a small farmhouse and a sheep station for an "order of nuns" constituted a void purpose trust* .)
***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*).

4) Effect of the beneficiary principle

- An abstract purpose trust will be void and so all of the equitable rights in the property will remain with the settlor. A trust will only be valid if it is for the benefit of people.
- In this section we have considered examples of the strict, traditional principle. However, there are other interpretations which are considered in the next section.

(C) Alternative interpretations of the beneficiary principle

Reading: ***Hudson*, section 4.2**

It is important to understand that whereas the traditional principle continues in effect, there have nevertheless been alternative analyses accepted by some courts of ostensibly similar factual circumstances. Your role here is to understand the effect of applying these various approaches to factual circumstances, who wins and who loses in such circumstances, and why different courts might take different approaches.

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

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

> I think there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any locus standi to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust, quite apart from any question of uncertainty or perpetuity. Such cases can be considered if and when they arise. The present is not, in my judgment, of that character … Where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle.

2) Interpret the power to be something other than a trust

a) Transfer interpreted to be a gift

***Re Lipinski's W.T.* [1976] Ch. 235, Oliver J:-

> There would seem to me to be, as a matter of common sense, a clear distinction between the case where a purpose is prescribed which is clearly intended for the benefit of ascertained or ascertainable beneficiaries, particularly where those beneficiaries have the power to make the capital their own, and the case where no beneficiary at all is intended (for instance, a memorial to a favourite pet) or where the beneficiaries are unascertainable: as in the case, for instance, of *In re Price* [1943] Ch. 422. If a valid gift may be made to an unincorporated body as a simple accretion to the funds which are the subject matter of the contract which the members have made inter se - and *Neville Estates Ltd. v. Madden* [1962] Ch. 832 and *In re Recher's Will Trusts* [1972] Ch. 526 show that it may - I do not really see why such a gift, which specifies a purpose which is within the powers of the association and of which the members of the association are the beneficiaries, should fail.

Cocks v Manners (1871) LR 12 Eq 574 (*similar facts to Leahy but different interpretation, trust held by Mother Superior deemed to be gift in favour of individual nuns*)

b) Transfer interpreted to be for other purposes

Re Osoba [1979] 2 All ER 393 – (*"for the maintenance and training of my daughter up to university …" interpreted as a gift to the three women mentioned in the instrument*)
Re Abbott Fund [1900] 2 Ch 326 – (*trust for the maintenance of old ladies – surplus funds on heir death held on resulting trust – i.e. impossible purpose = resulting trust*)

c) Use of the principle in *Saunders v Vautier*

Re Bowes [1896] 1 Ch 507 – (*use of Saunders v Vautier to allow human beneficiaries to displace settlor's stated intention*)
Re Nelson [1928] Ch 920 *"the principle in Saunders v Vautier is that where there is what amounts to an absolute gift, it cannot be fettered by prescribing a mode of enjoyment"*

3) The strict approach still in rude health

Cf. *Leahy v. Att.-Gen. for New South Wales* [1959] A.C. 457
***Re Grant's WT* [1979] 3 All ER 359 (*"for the benefit of Chertsey CLP …" not a people trust*).

(D) Recognised exceptions to the beneficiary principle.

Reading: ***Hudson*, section 4.2**

1) Charitable trusts (public purpose trusts).

- Restricted to legal definition of charity (relief of poverty; promotion of education; advancement of religion; other miscellaneous purposes recognised in case law).
- benefit to a class of the public not defined by personal nexus (except in case of relief of poverty).
  N.B. Charitable trusts will be dealt with in detail, as a distinct topic, later in the course.

2) "Concessions to human weakness or sentiment".

A group of anomalous cases:-

Pettingall v. Pettingall (1842) 11 L.J. Ch. 176 (*maintenance of an identified pet animal – valid*).
Re Dean (1889) 41 Ch. D. 552 (*for the maintenance of testator's horses and hounds for fifty years after his death – valid, time limited, North J can see no objection to use of own property for own purposes*).
Bourne v. Keane [1919] A.C. 426 (*trust for the saying of masses in private may be valid if for a limited perpetuity period – Lord Buckmaster*).
Re Thompson [1934] Ch. 342 (*promotion of fox hunting – valid*).
Re Hooper [1932] 1 Ch. 38 (*for the upkeep of graves and monuments for 21 years, held valid although not charitable*).

Cf. Re Endacott [1960] Ch. 232 (above - *"a useful memorial to myself" was found to be void and the leading view re-instated*).

II. Unincorporated Associations

(A) Conceptual issues with property held for unincorporated associations.

Reading: ***Hudson*, section 4.3**

1) Analytical problems associated with the application of the beneficiary principle and other requirements of certainty and validity for trusts

Transfer to an association is a transfer not to a legal person and therefore someone must hold the property for the benefit of the association: that may render the transfer capable of being analysed as a void purpose trust.

2) 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).
***Re Grant's WT* [1979] 3 All ER 359

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 at 538 *per* Brightman J:

> 'A trust for non-charitable purposes, as distinct from a trust for individuals, is clearly void because there is no beneficiary. It does not, however, follow that persons cannot band themselves together as an association or society, pay subscriptions and validly devote their funds in pursuit of some lawful non-charitable purpose. … Such an association of persons is bound, I would think, to have some sort of constitution; that is to say, the rights and liabilities of the members of the association will inevitably depend on some form of contract inter se, usually evidenced by a set of rules. In the present case it appears to me clear that the [members of the society] were bound together by a contract inter se. Any such member was entitled to the rights and subject to the liabilities defined by the rules. … In my judgment the legacy

in the present case [to the society] ought to be construed as a legacy of that type, that is to say, a legacy to the members beneficially *as an accretion to the funds* subject to the contract which they had made inter se.'

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

****Neville Estates Ltd. v. Madden*** [1962] Ch. 832, 849, *per* Cross J:

'... a gift to the existing members not as joint tenants but subject to their respective contractual rights and liabilities towards one another as members. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift took effect. It will not be open to objection on the score of perpetuity or uncertainty unless there is something in its terms or circumstances or in the rules of the association which preclude the members at any given time from dividing the subject of the gift between them.'

****Conservative and Unionist Central Office v. Burrell*** [1982] 1 W.L.R. 522, [1982] 2 All E.R. 1, at p.6, *per* Brightman LJ:

'No legal problem arises if a contributor (as I will call him) hands to a friend (whom I will call the recipient) a sum of money to be applied by the recipient for political purposes indicated by the contributor, or to be chosen at the discretion of the recipient. That would be a simple case of mandate or agency. The recipient would have authority from the contributor to make use of the money, in the indicated way. So far as the money is used within the scope of the mandate, the recipient discharges himself vis-à-vis the contributor. … No trust arises, except the fiduciary relationship inherent in the relationship of principal and agent. … [If the contribution were made to an unincorporated association and paid to its treasurer then] the treasurer has clear authority to add the contribution to the mixed fund (as I will call it) that he holds. At that stage I think the mandate becomes irrevocable.'

d) A summary of the foregoing approaches

Re Horley Town FC [2006] EWHC 2386

(B) Analytical possibilities of transfers to unincorporated associations

Reading: ***Hudson*, section 4.3.3**

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

Various analyses of transfer to unincorporated association	**Abstract purpose trust**	**"People trust"**	**Gift passing "complete control"**	**An accretion to funds**	**Taking property as agent subject to mandate**
Leading case exhibiting this analysis	*Leahy v Att-Gen NSW*	*Re Denley*	*Re Lipinski*	*Re Recher*	*Conservative Association v Burrell*
Valid or Void?	Void	Valid	Valid	Valid	Valid
Does the transfer retain control of money after transfer?	Yes, but void	Yes, because governed by trustee's fiduciary duties	No, because all title passes	No, because governed only by terms of association's constitution	Yes, because governed by agent's fiduciary duties
Is it clear who owns property?	Yes, but void	Yes, held on trust	Yes	No	No

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.

(C) Winding up unincorporated associations

Reading: ***Hudson*, section 4.3.4**

1) The problem of terminating unincorporated associations

When an association is wound up, how is the property which is held connected to its purposes to be distributed: among the existing members, to identified persons only according to the association's constitution, or to the Crown?

2) Terminating unincorporated associations & the division of property

Re Sick and Funeral Society of St John's Sunday School, Golcar [1973] Ch. 51 (*per capita distribution among members at time of dissolution*).
**Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trust* [1971] Ch. 1 (*the old view – resulting trust*).
**Re Bucks Constabulary Fund (No 2)* [1979] 1W.L.R. 936 (*modern view: contract decisive*)
Re GKN Bolts & Nuts Ltd, etc. [1982] 1 WLR 774 (*the broad sword of common sense*)
Westdeutsche Landesbank v Islington [1996] AC 669 (*the bona vacantia principle*)
Air Jamaica v Charlton [1999] 1 WLR 1399
***Re Horley Town FC* [2006] EWHC 2386
Hanchett-Stamford v Attorney-General [2008] EWHC 330 (Ch), [2008] 4 All ER 323 (*if there was still one member left of a moribund association then the property attributed to that association would not pass bona vacantia to the Crown*)

(D) Is the beneficiary principle justifiable?

1) Problems of enforceability, uncertainty, perpetuity associated with private purpose trusts.

2) Other means of control: the striking down of capricious purposes.

Brown v. Burdett (1882) 21 Ch. D. 667(*a trust, requiring trustees to board up a house for twenty before transferring it to a named beneficiary, was held to be void by striking out the capricious purpose of blocking the house up and instead allowing the named beneficiary to take the house during the twenty years*.)

3) Challenges to beneficiary principle: is the beneficiary principle necessary for the modern trust?

Reading: ***Hudson*, paras 4.2.8 and 21.2.3**

**Langbein, "The contractarian basis of the law of trusts" (1995) 105 *Yale Law Journal* 625.

**Hayton, "Developing the obligation characteristic of the trust" (2001) 117 LQR 96.

Hudson, section 21.2

Topic 4. THE CONSTITUTION OF TRUSTS.

Question: how is an express trust created?

General reading: ***Hudson*, Ch.5; Martin 123-154; Pettit 100-126**

- Transfer of property by settlor to trustee(s) to be held on trust for beneficiaries, or
- Declaration by settlor that property which settlor already holds or will receive is held by settlor on trust for beneficiaries, or
- Declaration by settlor to trustees that property which trustees hold on his/her behalf is henceforth to be held by them for beneficiaries.

N. b. that, in each of the above cases, the settlor's title to the property may be legal or equitable; and that property may be subjected to a trust either by will or through *inter vivos* (lifetime) transactions.

(A) Statutory formalities applicable to the subjection of property to a trust by will: Wills Act 1837 s. 9.

Reading: ***Hudson*, section 5.1.1**

- will in writing
- testator's signature (or equivalent) shows intention to give effect to will
- signature in presence of two or more co-present witnesses
- who attest will or acknowledge signature in testator's presence

(B) Two fundamental principles

Reading: ***Hudson*, section 5.1.2, and 5.2.4**

1) Once a trust is created, it cannot be undone
Reading: *Hudson*, sections 5.1.2
Paul v. Paul (1882) 20 Ch. D. 742

2) Settlor must have appropriate property rights at time of creating trust
Reading: *Hudson*, sections 5.2.4
Re Brooks ST [1939] 1 Ch 993
Re Ralli's WT [1964] 1 Ch 288

(C) Exclusions from the need for formalities.

General reading: ***Hudson*, section 5.3**

a) Resulting, implied and constructive trusts require no formalities for their creation
Reading: *Hudson*, sections 5.3.1
LPA 1925, s. 53 (2)
Hodgson v. Marks [1971] Ch. 892 (*resulting trust, oddly*).

b) "Statute may not be used as an engine of fraud": fraud and unconscionability
Reading: *Hudson*, sections 5.3.2
**Rochefoucauld v. Boustead* [1897] 1 Ch. 196.
Bannister v. Bannister [1948] 2 All E.R. 133
Lyus v. Prowsa [1982] 1 W.L.R. 1044.

(D) The proper constitution of trusts & the problem of incompletely constituted trusts.

General reading: ***Hudson*, sections 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) Methods for the proper constitution of a trust

Reading: *Hudson*, section 5.4

**Milroy v. Lord* (1862) 4 De G. F. & J. 264

2) Imperfect gifts may not be effected by means of a trust …

Reading: *Hudson*, sections 5.4.3

***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.'

3) … except where transferor has does everything necessary for him to do to effect the transfer

Reading: *Hudson*, section 5.4.4

Re Rose [1949] Ch 78

***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*).

Cf. *Re Fry* [1946] Ch 312 (*no agreement by Treasury, still transferor could not rely on having done everything necessary for him to do*)

4) The extent of the *Rose* principle today

Reading: *Hudson*, section 5.4.4

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

Pennington v Waine [2002] 1 WLR 2075

(E) A reminder: how is an effective declaration made by the settlor?

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

These cases have already been considered in relation to certainty of intention.

Jones v. Lock (1865) 1 Ch. App. 25 (no effective declaration).

Richards v. Delbridge (1874) L.R. 18 Eq. 11 (ineffective transfer not to be treated as declaration of trust).

Paul v. Constance [1977] 1 All E.R. 195 (C.A.) ("The money is as much yours as mine").

(F) Covenants and promises to create a settlement.

This topic is not on the course this year, although it has been in the past. It was dropped from the syllabus in 2008-09 to make more space in seminars.

(G) 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

*LPA 1925 s. 52 (1): "All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed".

*s. 53 (1) (b): "A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust..."

**s. 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..."

[Cf. Law of Property (Miscellaneous Provisions) Act 1989 s.2 re contracts relating to land.]

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; Martin 84-95; Pettit 87-96**

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

> "…given its natural meaning, it cannot, I think, be denied that a direction given by Mr Hunter, whereby the beneficial interest in the shares theretofore vested in him became vested in another or others, is a disposition", *per* Viscount Simonds.

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; Martin 84-95; Pettit 87-96**

***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
Cf. *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) now 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.

Topic 5. THE DUTIES OF TRUSTEES & BREACH OF TRUST

I. THE DUTIES OF TRUSTEES

General reading: **Hudson,Ch8&9; Martin,Ch18-19, 23; Pettit,Ch16-17,23**

(A) 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 well as the procedures for the appointment and removal of trustees:

(1) The duties on acceptance of office relating to the need to familiarise oneself with the terms, conditions and history of the management of the trust.

(2) The duty to obey the terms of the trust unless directed to do otherwise by the court.

(3) The duty to safeguard the trust assets, including duties to maintain the trust property, as well as to ensure that it is applied in accordance with the directions set out in the trust instrument.

(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.

(6) Duties in relation to trust expenses.

(7) The duties of investment, requiring prudence and the acquisition of the highest possible rate of return in the context.

(8) The duty to distribute the trust property correctly.

(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.

(11) The duty to act gratuitously, without any right to payment not permitted by the trust instrument or by the general law.

(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
Learoyd v Whiteley (1887) 12 App Cas 727

(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."

iii) Duties to act jointly

Luke v South Kensington Hotel (1879) 11 Ch D 121 – *ordinarily trustees must act jointly*
Trustee Act 2000, s.11 – *the trust instrument may permit some other arrangement*
Consterdine v Consterdine – (1862) 31 Beav 330 – *or the nature of the trust property may require separate holding.*

iv) Liability for breach of trust

**Target Holdings v Redfern* [1996] 1 AC 421
This topic is considered in detail in the next chapter of these Course Documents.

(B) Fiduciary responsibility of trustees.

Reading: ***Hudson*, section 8.6**

Trustee Act 2000
Trusts of Land and Appointment of Trustees Act 1996, ss. 19-21.

1) What it means to be a fiduciary

**White v Jones* [1995] 2 AC 207 at 271, *per* Lord Browne-Wilkinson:

'The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B'.

**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**

(i) The general principle against secret profits and conflicts of interest in general terms

[Considered in detail in relation to "Constructive Trusts" later in the course.]
Keech v Sandford (1726) Sel Cas Ch 61

Boardman v. Phipps [1967] 2 AC 46

(ii) The self-dealing principle

Ex parte Lacey (1802) 6 Ves 625 (*any transaction in which the trustee has a personal interest is voidable at the instance of the beneficiary*)

Holder v Holder [1968] Ch 353 (*the court may not inquire into the trustee's intentions*)

(iii) The fair-dealing principle

Tito v Waddell (No 2) [1977] 3 All ER 129, *per* Megarry V-C:

"... if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable ex debito justitiae, but can be set aside unless the trustee can show that he has taken advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest."

3) Duty of impartiality

Reading: ***Hudson*, section 8.3.4; Pettit Ch.18**

a) The duty in general terms

****Cowan v Scargill* [1985] Ch 270, 286, *per* Megarry V-C:

'It is the duty of trustees to exercise their powers in the best interest of the present and future beneficiaries of the trust, holding the scales impartially between the different classes of beneficiaries.'

b) The duty in relation to trustees' powers of investment

****Nestlé v National Westminster Bank* (1988) [2000] WTLR 795, 802, Hoffmann J:

'A trustee must act fairly in making investment decisions which may have different consequences for differing classes of beneficiaries. … The trustees have a wide discretion. They are, for example, entitled to take into account the income needs of the tenant for life or the fact that the tenant for life was a person known to the settlor and a primary object of the trust whereas the remainderman is a remoter relative or stranger. Of course, these cannot be allowed to become the overriding considerations but the concept of fairness between classes of beneficiaries does not require them to be excluded. It would be an inhuman rule which required trustees to adhere to some mechanical rule for preserving the real value of capital when the tenant for life was the testator's widow who had fallen upon hard times and the remainderman was young and well-off.'

Nestlé v National Westminster Bank plc (1988) [1993] 1 WLR 1260, CA (*deciding between life tenants and remainder beneficiaries*)

c) The duty in relation to pension funds

Edge v Pensions Ombudsman [2000] Ch 602, 627:

'the so-called duty to act impartially … is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If pension fund trustees do that, they cannot be criticized if they reach a decision which appears to prefer the claims of one interest – whether that of employers, current employers or pensioners – over others. The preference will be the result of a proper exercise of the discretionary power.'

4) 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 there 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.'

Bogg v Raper (1998/99) 1 ITELR 267
Wight v Olswang (No.2) (1999/2000) 2 ITELR 689
**Walker v Stones* [2001] QB 902
Barraclough v Mell [2005] EWHC 3387 (Ch), [2006] WTLR 203
Baker v JE Clark & Co (Transport) UK Ltd [2006] EWCA Civ 464

(C) Duty to invest.

General Reading: ***Hudson*, Ch9; Martin Ch18; Pettit Ch17**
See also, **Hudson, *The Law of Finance*** (Sweet & Maxwell, 2009) Ch 7-12 on the regulation of investment.

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').
**Bartlett v. Barclays Bank Trust Co Ltd.* [1980] Ch 515
**Nestle v. National Westminster Bank plc* [1993] 1 W.L.R. 1260.
**Cowan v. Scargill* [1985] 2 Ch. 270, 289, *per* Megarry V-C:

'[the trustee's obligation is to] take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he feels morally bound to provide. This duty includes the duty to seek advice on matters which the trustee does not understand, such as the making of investments, and, on receiving that advice, to act with the same degree of prudence. Although a trustee who takes advice on investments is not bound to accept and act on that advice, he is not entitled to reject it merely because he sincerely disagrees with it, unless in addition he is acting as an ordinary prudent man would act.'

(D) 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.*)
***Sieff v Fox** [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811
Betafence v Veys [2006] EWHC 999 (Ch), [2006] All ER (D) 91.

(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?

[2003] PCB 173 (E Nugee)
(2003) Trust Law Int 114 (B Green)
Thomas and Hudson, *The Law of Trusts*, 2004, 385 *et seq*

c) Is the test based on whether the trustees "would have" or whether they "might have" reached a different decision if they had proceeded properly?

Re Hastings-Bass [1975] Ch 25 (*would have*)
Stannard v Fisons Pension Trust Ltd [1991] PLR 224 (*might have*)
Hearn v Younger [2002] WTLR 1317, 1338, [86], *per* Etherton J (*(a) trustees have failed to take into account a material consideration and (b) that consideration might have materially affected their decision*)
Hunter v Senate Support Services Ltd [2004] EWHC 1085: (*might have is objective, whereas would have is subjective*).

(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*)
Smithson v Hamilton [2008] 1 All ER 1216, Park J (*pension scheme rule fails to take account of actuarial calculations*)

2) The remedy: set aside of the trustees' decision

(i) The traditional remedy

**Re Hastings-Bass* [1975] Ch 25
Scott v National Trust [1998] 2 All ER 705
Edge v Pensions Ombudsman [2000] Ch 602.

(ii) Exercisable of the power voidable but not void

AMP v Barker [2001] PLR 77, *per* Lawrence Collins J
Hearn v Younger [2002] WTLR 1317, 1338, [90], *per* Etherton J
Abacus Trust Company (Isle of Man) v Barr [2003] 2 WLR 1362, [28]-[33], *per* Lightman J
Hunter v Senate Support Services Ltd [2004] EWHC 1085.

(iii) Validation if effect of exercise of power substantively similar

Re Vestey's Settlement [1951] Ch 209, 221, *per* Lord Evershed MR

(iv) Alternative understanding as an excessive exercise of a power

*Thomas and Hudson, *The Law of Trusts*, 2004, 388, para 11.55 *et seq*
Bestrustees v Stuart [2001] PLR 283 (*prospective alterations only permitted, alteration in fact purportedly retrospective too: invalid only to extent excessive*)
Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587 (*considered*)
Burrell v Burrell [2005] EWHC 245, [25], *per* Mann J (*considered*)

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

Reading: ***Hudson*, section 8.4; Martin 592-596; Pettit 402-405**

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)*

> 'I would hold that, even if documents of this type ought properly to be described as trust documents, they are protected for the special reason which protects the trustees' deliberations on a discretionary matter from disclosure. If necessary, I hold that this principle overrides the ordinary rule. This is in my judgment no less in the true interest of the beneficiary than of the trustees. Again, if one of the trustees

> commits to paper his suggestions and circulates them among his co-trustees, or if inquiries are made in writing as to the circumstances of a member of the class, I decline to hold that such documents are trust documents the property of the beneficiaries. In my opinion such documents are not trust documents in the proper sense at all. On the other hand, if the solicitor advising the trustees commits to paper an aide-memoire summarising the state of the fund or of the family and reminding the trustees of past distributions and future possibilities, I think that must be a document which any beneficiary must be at liberty to inspect. … I cannot think that communications passing between individual trustees and appointors are documents in which beneficiaries have a proprietary right.' [1964] 3 All ER 855, 860, *per* Harman LJ

Hawkesley v May [1956] 1 QB 304 – *duty only to inform sui juris beneficiaries of the existence of the trust*
Tito v Waddell (No 2) [1977] Ch 106, 242 – *no duty to explain terms of trust to beneficiaries*

2) The traditional English view: information only for those with proprietary rights

**O'Rourke v Derbyshire* [1920] AC 581, 626, *per* Lord Wrenbury

> [A beneficiary] is entitled to see all the trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else' document. A proprietary right is a right to access to documents which are your own. … A beneficiary has a right of access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents, because they are trust documents, and because he is a beneficiary. They are, in this sense, his own.

3) 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.'

4) Traditional applications of the new approach

Crowe v Stevedoring Employees Retirement Fund [2003] PLR 343
Foreman v Kingstone [2004] 1 NZLR 841

5) Problems with the *Schmidt* and *Londonderry* approaches

**Breakspear v Ackland* [2008] 3 WLR 698, Briggs J

6) No obligation to give reasons for decision

Re Londonderry [1965] Ch 918 (*management information to be given, exercise of discretions not*)
Re Beloved Wilkes Charity (1851) 3 Mac & G 440
Klug v Klug [1918] 2 Ch 67

7) Confidential information

Re Londonderry [1965] Ch 918
(*Lemos v Coutts & Co* (1992) Cayman Islands ILR 460)
***Schmidt v Rosewood Trust Ltd* [2003] 2 WLR 1442

***Breakspear v Ackland* [2008] 3 WLR 698

8) Duty to render accounts; falsification and surcharge of accounts

Hudson, para 8.4.8

Ultraframe (UK) Ltd v Fielding, [2005] EWHC 1638 (Ch), para [1513] *per* Lewison J:

> 'The taking of an account is the means by which a beneficiary requires a trustee to justify his stewardship of trust property. The trustee must show what he has done with that property. If the beneficiary is dissatisfied with the way that a trustee has dealt with trust assets, he may surcharge or falsify the account. He surcharges the account when he alleges that the trustee has not obtained for the benefit of the trust all that he might have done, if he had exercised due care and diligence. If the allegation is proved, then the account is taken as if the trustee had received, for the benefit of the trust, what he would have received if he had exercised due care and diligence. The beneficiary falsifies the account when he alleges that the trustee has applied trust property in a way that he should not have done (e.g. by making an unauthorised investment). If the allegation is proved, then the account will be taken as if the expenditure had not been made; and as if the unauthorised investment had not formed part of the assets of the trust. Of course, if the unauthorised investment has appreciated in value, the beneficiary may choose not to falsify the account: in which case the asset will remain a trust asset and the expenditure on it will be allowed in taking the account.'

(F) Judicial control of trustees' actions.

Reading: ***Hudson*, section 8.6.2**

Re Beloved Wilkes's Charity (1851) 3 Mac & G 440, 448, per Lord Truro:

> '… the duty of supervision on the part of the Court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases.'

II. BREACH OF TRUST

General Reading: ***Hudson*, Ch.18; Martin Ch.23; Pettit Ch.23**

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

Reading: ***Hudson*, section 18.2**

1) The old cases

Re Massingberd's Settlement (1890) 63 LT 296
Re Dawson [1966] 2 NSWR 211, NSW SC
Holder v. Holder [1968] Ch 353, [1968] 1 All ER 665, [1968] 2 WLR 237

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

2 arguments put forward by Target:-

(A) T is *now* entitled to have the 'fund' restored on a restitutionary basis
(B) immediately the moneys were paid way there was an *immediate* loss to trust fund and this should be made good.

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.'

Bristol & West Building Society v. Mothew [1996] 4 All ER 698
Swindle v. Harrison [1997] 4 All ER 705, CA

3) Loss as the foundation for the claim

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

4) 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:

1. specific restitution - proprietary obligation,
2. restore the value of the trust fund, or
3. equitable compensation for losses in general.

1) Specific Restitution

Harris v Kent [2007] EWHC 463 (Ch), Briggs J

2) Restore the value of the trust fund

3) Equitable compensation

Swindle v Harrison [1997] 4 All ER 705

(C) Valuation of loss to the trust.

Reading: ***Hudson*, section 18.3.6**

Parker Tweedale v. Dunbar [1991] Ch 26, [1990] 2 All ER 577
Nestle v. NatWest [1994] 1 All ER 118, [1993] 1 WLR 1260, CA
Jaffray v. Marshall [1994] 1 All ER 143, [1993] 1 WLR 1285
**Target Holdings v. Redferns* [1996] 1 AC 421, [1995] 3 All ER 785 HL

(D) Defences to breach of trust.

Reading: ***Hudson*, section 18.4**

1) Lack of a causal link between breach and loss
Target Holdings v. Redferns [1996] 1 AC 421

2) Breach committed by another trustee
Townley v Sherborne (1633) Bridg 35; (1633) W & TLC 577.
Brice v Stokes (1805) 11 Ves Jr 319

3) Failure by beneficiary to alleviate loss
Nacional del Cobre de Chile v Sogemin Metals Ltd [1997] 1 WLR 1396

4) Release
Lyall v Edwards (1861) 6 H & N 337; (1861) 158 ER 139
BCCI v Ali [2000] 3 All ER 51

5) Trustee exemption clause
Armitage v Nurse [1998] Ch 241
Bogg v Raper (1998) *The Times*, 12 April
Wight v Olswang [2000] WTLR 783
Walker v Stones [2001] QB 902

6) Excuses for breach of trust
*Trustee Act 1925, s.61:

> "If it appears to the court that a trustee … is or may be personally liable for any breach of trust … but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."

Chapman v Browne [1902] 1 Ch 785
Re Evans (Deceased) [1999] 2 All ER 777

7) Action not in connection with fiduciary duties
**Ward v Brunt* [2000] WTLR 731
**Galmerrow Securities Ltd v National Westminster Bank plc* [2002] WTLR 125

8) Concurrence by beneficiary
Re Pauling's Settlement Trusts [1962] 1 WLR 86, at 108, *per* Wilberforce J.

LAW OF PROPERTY II

PART II

Trusts implied by law and tracing

TRUSTS IMPLIED BY LAW

There are four core areas:-

- Resulting trusts
- Trusts of Homes
- Constructive trusts
- Proprietary (equitable) estoppel

The aim of these lectures is to consider the situations in which the English courts will impose trusts (or the office of trustee) in situations where the parties have not sought to create an express trust on those terms.

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.

Topic 6. RESULTING AND *QUISTCLOSE* TRUSTS

I. RESULTING TRUSTS

General reading: ***Hudson*, Ch. 11.**

A. INTRODUCTION

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.

2) Older understanding of resulting trusts on which many cases are based

**Vandervell No. 2* [1974] Ch 269, at 294; [1974] 1 All ER 47, 64; per Megarry J. - his lordship divided resulting trusts between '*automatic*' and '*presumed*' resulting trusts. The introductory lecture will follow this scheme - it should be borne in mind that this lay-out is itself controversial.

There must be a transfer of the property from S to T, without an intention that T take that property beneficially. Where it appears to have been the intention of the donor that the donee should not take property beneficially, there will be a resulting trust to the donor or the donor's estate.

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."

B. 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**

1) No declaration of trust, by mistake
****Vandervell v. IRC*** [1966] Ch 261; [1967] 2 AC 291

2) Incomplete disposal of the beneficial interest
Re Cochrane [1955] Ch 309

3) Failure of trust
Chichester Diocesan Fund v. Simpson [1941] Ch 253
Re Ames' Settlement [1964] Ch 217

4) Surplus property after performance of trust
Re Trusts of the Abbott Fund [1900] Ch 326
Re Gillingham Fund [1958] Ch 300
Re Osoba [1979] 2 All ER 393
Davis v. Richards & Wallington Ltd. [1990] 1 WLR 1511

5) Upon dissolution of unincorporated association
Re West Sussex, etc. Fund Trusts [1971] Ch 1
Re Sick and Funeral Society of St John's [1973] Ch 51
Re The Bucks Fund [1979] 1 All ER 623
Re GKN Sports Club [1982] 1 WLR 774

C. 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
cf. *Lloyds Bank v. Rosset* [1990] 1 All ER 1111, [1990] 2 WLR 867 in relation to trusts of homes, below
Cf. *Hodgson v. Marks* [1971] Ch 892; M&B 216

2) Presumption of advancement - special relationships

a. father and child
Bennet v. Bennet (1879) 10 ChD 474
Brown v. Brown [1993] 31 NSWLR 582, 591
Pecore v Pecore [2007] WTLR 1591, Supreme Court of Canada (*not adult children*)

b. husband and wife
s.2(1) Law Reform (Miscellaneous Provisions) Act 1970
Tinker v. Tinker [1970] P 136
Pettit v. Pettit [1970] AC 777
Gissing v. Gissing [1971] AC 886

Re Densham [1975] 3 All ER 726

3. Rebutting the Presumption

a. Generally

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

b. Illegality

**Gascoigne v. Gascoigne* [1918] 1 KB 223
Tinker v. Tinker [1970] P 136
***Tinsley v. Milligan* [1993] 3 All ER 65, [1993] 3 WLR 36
***Tribe v. Tribe* [1995] 4 All ER 236; [1995] 3 WLR 913; [1995] 2 FLR 966

c. Cases applying *Tinsley* and *Tribe*

Silverwood v. Silverwood (1997) 74 P&CR 453, applying *Tinsley*
Lowson v Coombes [1999] Ch 373, [1999] 1 FLR 799.
Collier v Collier [2002] EWCA Civ 1095, [2002] BPIR 1057.
21st Century Logistic Solutions Ltd (in liquidation) v Madysen Ltd [2004] EWHC 231 (QB), [2004] STC 1535
Painter v Hutchison [2007] EWHC 758 (Ch), [2008] BPIR 170.
Barrett v Barrett [2008] EWHC 1061 (Ch), [2008] BPIR 817.
Q v Q [2008] EWHC 1874 (Fam), [2009] 1 P & CR D12 (also sub nom *S v R*).

d. Sham trusts and insolvency

***Midland Bank v. Wyatt* [1995] 1 FLR 696; [1995] 3 FCR 11
[*Re Butterworth* (1882) 19 ChD 588]

e. Insolvency Act 1986, s.423

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

Section 423 Insolvency Act 1986 provides that:

'(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if –

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration …

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself…'

'(2) (a) restoring the position to what it would have been if the transaction had not been into, and

(b) protecting the interests of the persons who are the victims of the transaction.'

'(3) (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him …'

II. *QUISTCLOSE* TRUSTS

Reading: ***Hudson*, Chapter 22; and summary in section 11.3**

Further 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)

Question: what type of trust is a *Quistclose* trust?

1. The principle in *Barclays Bank v. Quistclose:* taking security against insolvency

Hassall v. Smither (1806) 12 Ves. 119.
Re Rogers (1891) 8 Morr 243, 248, *per* Lindley LJ (*must be a resulting trust to prevent trustee from taking benefit from property*)

***Barclays Bank v. Quistclose* [1970] AC 567; [1968] 3 All ER 651; [1968] 3 WLR 1097: Lord Wilberforce, [1970] AC 567, 581-582:

> It is not difficult to establish precisely upon what terms the money was advanced … to Rolls Razor Ltd. There is no doubt that the loan was made specifically in order to enable Rolls Razor Ltd. to pay the dividend … and for no other purpose. There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose (*In re Rogers*, 8 Morr. 243, *per* both Lindley LJ and Kay LJ): when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan.
>
> I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not. In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it.

Twinsectra Ltd v. Yardley [1999] Lloyd's Rep. Bank 438, Court of Appeal, *per* Potter LJ.
Templeton Insurance Ltd v Penningtons Solicitors LLP [2006] EWHC 685 (Ch)

2. The *Twinsectra* model

S Worthington, *Proprietary Interests in Commercial Transactions*, 43-71

***Twinsectra Ltd v. Yardley* [2002] 2 All E.R. 377, at 398, House of Lords, *per* Lord Millett:

> [81] '… 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.'

> [100] 'As Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth. I would reject all the alternative analyses, which I find unconvincing for the reasons I have endeavoured to explain, and hold the Quistclose trust to be an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset. Contrary to the opinion of the Court of Appeal, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money. Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case.'

Re Margaretta Ltd [2005] All ER (D) 262, *per* Deputy Judge Crystal QC (*following the above*)
Cf. Chambers, *Resulting Trusts*, 68-91

3. Different understandings of a *Quistclose* trust

a. Analysed as a resulting trust …

Barclays Bank v. Quistclose [1970] AC 567; [1968] 3 All ER 651; [1968] 3 WLR 1097
Twinsectra Ltd v. Yardley [2002] 2 All E.R. 377 (*considered below*)

b. … 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
Cf. *Templeton Insurance Ltd v Penningtons Solicitors LLP* [2006] EWHC 685 (Ch)

c. … or a non-charitable purpose trust (express trust) with beneficial interest in suspension? …
**Carreras Rothmans v. Freeman Mathews Treasure Ltd* [1985] 1 Ch 207
Re Northern Development Holdings Ltd (unreported, 6 October 1978, Megarry V-C)

d. … or even a constructive trust dealing with unconscionable breach of loan contract? …
Carreras Rothmans v. Freeman Mathews Treasure Ltd [1985] 1 Ch 207
Cf. Westdeutsche Landesbank [1996] 1 AC 669

e. … other commercial-contract law analyses of retention of title…
Cf. **Aluminium Industrie Vassen v. Romalpa Aluminium* [1976] 1 Lloyd's Rep 443, [1976] 1 WLR 676

4. Other issues

a. Can the intended recipient of the loan money sue?
Re Northern Development Holdings Ltd (unreported, 6 October 1978, Megarry V-C)

b. What are the terms of the contract in a banking law context?

c. 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?

d. Can this technique apply beyond loan contracts?
Re Farepak Food and Gifts Ltd [2006] All ER (D) 265 (Dec).
Cooper v PRG Power Ltd [2008] EWHC 498, [2008] BCC 588

e. Useful as a means of commencing an equitable tracing claim.
See "equitable tracing" later in the course.

Topic 7. TRUSTS OF HOMES

General Reading: ***Hudson*, Ch.15 (&13); Martin Ch.11; Pettit 190-215**

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.

A. THE POSITION UNDER ENGLISH LAW

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

1. Express trust of land

Reading: ***Hudson*, section 15.2**
Goodman v. Gallant [1986] FLR 106

2. The decision in *Stack v Dowden*

Reading: ***Hudson*, section 15.1.4**

***Stack v Dowden* [2007] UKHL 17, [2007] 2 WLR 831
Baroness Hale held, para [60]:

> *[60]* 'There is no need for me to rehearse all the developments in the case law since *Pettitt v Pettitt* and *Gissing v Gissing* [*all of that is done in these Course Documents below*], discussed over more than 70 pages following the quoted passage, by Chadwick LJ in *Oxley v Hiscock*, and most importantly by my noble and learned friend, Lord Walker of Gestingthorpe in his opinion, which make good that proposition. The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.'

In expressing the idea that the court is concerned with identifying the parties' common intention, Baroness Hale held the following, para [61]:

> *[61]* '*Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 was, of course, a different case from this. The property had been conveyed into the sole name of one of the cohabitants [whereas in *Stack v Dowden* the property had been conveyed into joint names]. The Claimant had first to surmount the hurdle of showing that she had any beneficial interest at all, before showing exactly what that interest was. The first could readily be inferred from the fact that each party had made some kind of financial contribution towards the purchase. As to the second, Chadwick LJ said this, at para 69:
>
> > ". . . in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have - and even in a case where the evidence is that there was no discussion on that point - the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And in that context, the whole course of dealing between them in relation to the property includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

Oxley v Hiscock has been hailed by Gray and Gray as "an important breakthrough" (K Gray and S Francis Gray, *Elements of Land Law* (Oxford University Press, 2005) p 931, para 10.138). The passage quoted is very similar to the view of the Law Commission in *Sharing Homes* (Law Commission, *Sharing Homes,* 2002) on the quantification of beneficial entitlement:

> "If the question really is one of the parties' 'common intention', we believe that there is much to be said for adopting what has been called a 'holistic approach' to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended."

That may be the preferable way of expressing what is essentially the same thought, for two reasons. First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* without even the fig leaf of s 17 of the 1882 Act.'

Cases on *Stack v Dowden*

***Abbott v Abbott* [2007] UKPC 53
**Holman v Howes* [2007] EWCA Civ 877, [2007] BPIR 1085, Lloyd LJ
The 'Up Yaws' [2007] EWHC 210 (Admlty), [2007] 2 FLR 444
James v Thomas [2008] 1 FLR 1598
Williams v Parris [2008] EWCA Civ 1147
Laskar v Laskar [2008] EWCA Civ 347, [2008] 2 FLR 589

3. Contribution to purchase price - resulting trusts

Reading: ***Hudson,* section 15.3**

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
Tinsley v Milligan [1994] 1 AC 340
Cf: *Westdeutsche Landesbank v. Islington L.B.C.* [1996] AC 669
Curley v Parkes [2004] All ER (D) 344 (*resulting trust cannot be altered after purchase*)

4. Acquisition of equitable interest otherwise than by contribution to purchase price - constructive trusts

Reading: ***Hudson,* para 15.4.1**

Gissing v. Gissing, op cit.
**Cowcher v. Cowcher* [1972] 1 All ER 948-951, 954-5
Burns v. Burns [1984] Ch 317, [1984] 1 All ER 244, [1984] 2 WLR 582
**Grant v. Edwards* [1986] Ch 639, 654D, Browne-Wilkinson VC:

> "If the legal estate in the joint home is vested in only one of the parties ('the legal owner') the other party ('the claimant'), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; (b) that the claimant has acted to his or her detriment on the basis of that common intention."

5. Common intention constructive trust

Reading: ***Hudson,* section 15.4**

Mee, *The Proprietary Rights of Co-habitees* (Hart, 1999).

5.1 The core test …

***Lloyds Bank v. Rosset* [1990] 1 All ER 1111, [1990] 2 WLR 867
Burns v. Burns [1984] Ch 317, [1984] 1 All ER 244, [1984] 2 WLR 582
Ivin v. Blake (1994) 67 P&CR 263

5.1.1 the requirement of detriment

Grant v. Edwards [1986] Ch 639
Lloyds Bank v. Rosset [1990] 1 All ER 1111, [1990] 2 WLR 867
Chan Pu Chan v Leung Kam Ho [2003] 1 FLR 23 (*working in defendant's business acquires right in property*)

5.1.2 the meaning of "detriment"

Grant v. Edwards [1986] Ch 639
Coombes v. Smith [1986] 1 WLR 808

5.1.3 the meaning and nature of "common intention"

Gissing v. Gissing [1971] AC 886; [1970] 3 WLR 255
***Lloyds Bank v. Rosset* [1990] 1 All ER 1111, [1990] 2 WLR 867
Ungarian v Lesnoff [1990] Ch 206 (*where no intention that a person acquires an interest, there will not be a common intention*)
**McHardy v Warren* [1994] 2 FLR 338 (*transmission of intention to subsequent purchases*)
Drake v Whipp [1996] 1 FLR 826 (*contribution of one-fifth of purchase price may acquire one-half interest if that was deemed to be the common intention*)
Churchill v Roach [2004] 3 FCR 744 (*the courts will not make up an intention where none exists*)
Koulias v Makris [2005] All ER (D) 352 (*ditto*)

5.1.4 "interest consensus" and "money consensus"

**Cowcher v. Cowcher* [1972] 1 All ER 948-951, 954-5
Midland Bank v. Cooke [1995] 4 All ER 562

5.2 Application of that test: what is the nature of the constructive trust now?

Huntingford v. Hobbs [1993] 1 FLR 936
Midland Bank v. Cooke [1995] 4 All ER 562

5.3 … and its remedial, as opposed to institutional, potential

*Hayton [1990] Conv. 370; [1993] LQR 485
Oakley *Constructive Trusts* (Sweet & Maxwell, 1997), 64-84
cf. Hudson, *Swaps, restitution and trusts* (1999), ch.12 - a place for common intention in commercial transactions?

6. Identifying an equitable interest: three alternative approaches.

6.1 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

6.2 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*)

6.3 The "unconscionability" approach

`Reading: **Hudson, section 15.8`

6.3.1 The drift towards unconscionability

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

***Oxley v Hiscock* [2004] 2 FLR 669, [2004] Fam Law 569, *per* Chadwick LJ:

> '… what the court is doing in cases of this nature, is to supply or impute a common intention as to the parties' respective shares (in circumstances in which there was in fact no common intention) on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition) is

shown to be fair … and it may be more satisfactory to accept that there is no difference in cases of this nature between constructive trust and proprietary estoppel.'

Crossley v Crossley [2005] EWCA Civ 857
Tuner v Jacob [2006] EWHC 1317 (Ch)

6.3.2 Cases illustrating how *Rosset* does not apply
****Cox v Jones** [2004] 3 FCR 693, [2004] EWHC 1486 (*this case is well worth a read!*)
Kean v McDonald [2006] All ER (D) 348

6.3.3 Traditional constructive trust models
Van Laetham v Brooker [2005] EWHC 1478 (Ch), [2006] 2 FLR 495
Oates v Stimson [2006] EWCA Civ 548
Cf. Australia

6.3.4 The tacit approval for this approach in *Stack v Dowden*

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

6.4.1 Long-term relationships
**Springette v. Dafoe* (1992) HLR 552; [1992] 2 FLR 388
**Midland Bank v. Cooke* [1995] 4 All ER 562

6.4.2 Wedding gifts
McHardy v. Warren [1994] 2 FLR 338
**Midland Bank v. Cooke* [1995] 4 All ER 562

6.4.3 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*)

6.4.4 Conservatories and building work
**Huntingford v. Hobbs* [1993] 1 FLR 936;

6.5 Can these various approaches be reconciled?

Reading: ***Hudson*****, section 15.10**
Thompson, 'Constructive trusts, estoppel and the family home', (2005) *Conveyancer*
Gardner (2004) 120 LQR 541.
Oxley v Hiscock [2004] 2 FLR 669, [2004] Fam Law 569

7. Proprietary estoppel.

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.

7.1 Establishing the estoppel

7.1.1 The nature of the test: representation, reliance and detriment
**Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498
cf. *Coombes v. Smith* [1986] 1 WLR 808

7.1.2 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

7.1.3 Irrevocability of assurances

A-G Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd [1987] AC 114, PC
Gillett v. Holt [2000] 2 All ER 289, CA
Thompson [1998] Conv. 210; Swadling [1998] RLR 220; cf. Dixon [1999] Conv. 46.

7.1.4 The nature of the estoppel now

Cobbe v Yeomans Row [2008] 1 WLR 1752 HL
Macfarlane and Robertson, 'The Death of Proprietary Estoppel' [2008] LMCLQ 449.
****Thorner v Major*** [2009] 1 WLR 776 HL

7.2 Identifying the appropriate remedy

7.2.1 A remedial approach - (i) "minimum equity necessary"

Crabb v Arun DC [1976] Ch 179
Pascoe v. Turner [1979] 2 All ER 945
Re Basham [1987] 1 All ER 405, [1986] 1 WLR 1498

7.2.2 A remedial approach - (ii) proprietary claim but personal remedy

Baker v. Baker [1993] 25 HLR 408
Wayling v. Jones (1995) 69 P&CR 170
Campbell v Griffin [2001] EWCA Civ 990, [2001] WTLR 981
Jennings v Rice [2002] EWCA Civ 159, [2003] 1 P&CR 100
(*Cobbe v Yeoman's Row Management Ltd* [2005] All ER (D) 406)

7.2.3 The avoidance of detriment …

Lim v. Ang [1992] 1 WLR 113
Walton Stores v. Maher (1988) 62 ALJR 110
Lloyds Bank v. Rosset, *supra*, *op cit.*

7.2.4 … or the enforcement of promises / representations …

Pascoe v. Turner [1979] 2 All ER 945

7.2.5 … or to avoid unconscionability? All these cases identify unconscionability as the principle

Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133, 151.
Johnson v Gore Wood & Co (No.1) [2002] 2 A.C. 1; [2001] 2 W.L.R. 72, [2001] B.C.C. 820 at 842, *per* Lord Goff:

> "In the end, I am inclined to think that the many circumstances capable of giving rise to an estoppel cannot be accommodated within a single formula, and that it is unconscionability which provides the link between them."

Jennings v Rice [2002] EWCA Civ 159, [2003] 1 P&CR 100
Knowles v Knowles [2008] UKPC 30, para [27], *per* Sir Henry Brooke (reading the judgment of the entire court)

7.3 The nature of proprietary estoppel: fusion with constructive trust?

Hayton [1990] Conv. 370; [1993] LQR 485
Ferguson (1993) 109 LQR 114
Stokes v. Anderson [1991] 1 FLR 391; H&M 527
****Yaxley v. Gotts*** [2000] 1 All E.R. 711 (c.i.ct. and p.e. 'almost indistinguishable'!)
****Cobbe v Yeomans Row*** [2008] 1 WLR 1752 HL

B. DIFFERENT APPROACHES IN THE COMMONWEALTH

The Commonwealth jurisdictions have taken a different approach since the decision in *Gissing*. The common intention constructive trust approach in *Rosset* has not found favour generally. Each jurisdiction has developed its own approach.

Reading: ***Hudson*, section 15.9.**

1. Unjust enrichment - Canada

Pettkus v. Becker (1980) 117 DLR (3rd) 257
Sorochan v. Sorochan (1986) 29 DLR (4th) 1
Peter v. Beblow (1993) 101 DLR (4th) 621, 642-653

2. Unconscionability - Australia

Austin v. Keele (1987) 61 ALJR 605, 610 (PC)
Baumgartner v. Baumgartner [1988] Conv. 259, (1988) 62 ALJR 29, 164 CLR 137
Walton Stores v. Maher (1988) 62 AJLR 110; 164 CLR 387
Commonwealth of Australia v. Verwayen (1990) 64 ALJR 540, 546; 170 CLR 394, 411-412

3. Reasonable expectations and fairness - New Zealand

Gillies v. Keogh [1989] 2 NZLR 327
Phillips v. Phillips (1993) 3 NZLR 159, 167-171

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

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

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.

C. 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**

e) Lord Denning's view of the case law

> Lord Denning, *The Due Process of Law* (Butterworths, 1980), at p.194:
> 'No matter how you may dispute and argue, you cannot alter the fact that women are different from men. The principal task in life of women is to bear and rear children: and it is a task which occupies the best years of their lives. The man's part in bringing up the children is no doubt as important as hers, but of necessity he cannot devote so much time to it. He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds. …'

Topic 8. CONSTRUCTIVE TRUSTS

General Reading: ***Hudson*, Ch.12 & 20; Martin Ch.12; Pettit Ch.8, 10**

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.

See generally Oakley '*Constructive Trusts*' (Sweet & Maxwell, 1997). Note, Oakley disagrees on many points with the restitution lawyers like Birks. For a briefer account, see Parker and Mellows' *Modern Law of Trusts* Chap. 8, written by Oakley.

A. PROPRIETARY CLAIMS

1) 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

2) Fiduciary making unauthorised profits ("secret profits"), and conflicts of interest

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 nature of the constructive trust

CMS Dolphin Ltd v. Simonet [2001] 2 BCLC 704
**Sinclair Investment Holdings SA v Versailles Trade Finance Ltd (No 3)* [2007] EWHC 915, 10 ITELR 58 *per* Rimer J:

> "… any identifiable assets acquired by fiduciaries in breach of their fiduciary duty are, and can be declared to be, held upon constructive trust for the principal (*Boardman v Phipps*, *AG Hong Kong v Reid*, *Daraydan Holdings Ltd v Solland*) … There will in practice often be no identifiable property which can be declared by the court to be held upon such a constructive trust, in which case no declaration will be made and the principal may at most be entitled to a personal remedy in the nature of an account of profits. In *Boardman's* case the court made a declaration that the shares that had been acquired by the fiduciaries were held on constructive trust (a proprietary remedy), and directed an account of the profits that had come into their hands from those shares (a personal remedy). *Boardman's* case can be said to have been a hard case as regards the fiduciaries, whose integrity and honesty was not in doubt; and it well illustrates the rigours of the applicable equitable principle. The recovery by the trust of the shares was obviously a valuable benefit to it; and equity's softer side was reflected in the making of an allowance to the fiduciaries for their work and skill in obtaining the shares and profits. On the very different facts of *Reid's* case, there was no question of any such allowance being made."

Markel International Insurance Co Ltd v Surety Guarantee Consultants Ltd [2008] EWHC 1135 (Comm)

(d) 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
Equiticorp Industries Group Ltd v The Crown [1998] 2 NZLR 485 (*only shareholders may authorise*)
Q: All of these cases relate to companies, only *Boardman v Phipps* does not: so, in what way does authorisation fall to be obtained in relation to trusts as opposed to corporate situations as in the corporate opportunity doctrine considered next?

(e) Equitable compensation for a defendant acting in good faith

Boardman v. Phipps [1967] 2 AC 46
Guinness v. Saunders [1988] 2 All ER 940

3) 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
**Companies Act 2006, s.175

(b) Cases in which there was no maturing business opportunity

Island Export Finance Ltd v Umunna [1986] BCC 460
Balston v Headline Filters Ltd [1990] FSR 385
In Plus Group Ltd v Pyke [2002] 2 BCLC 201
Ultraframe v Fielding [2005] EWHC 1638 (Ch)

(c) Cases in which 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

(d) Recent company law cases preferring a relaxation of the doctrine

**In Plus Group Ltd v Pyke* [2002] 2 BCLC 201
**Murad v Al-Saraj* [2005] EWCA Civ 959 *per* Arden LJ
**Foster v Bryant* [2007] Bus LR 1565 *per* Rix LJ

(e) Companies Act 2006, s.175.

**s.170 Scope and nature of general duties*

(1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.

(2) A person who ceases to be a director continues to be subject–

(a) to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director, and

(b) to the duty in section 176 (duty not to accept benefits from third parties) as regards things done or omitted by him before he ceased to be a director.

To that extent those duties apply to a former director as to a director, subject to any necessary adaptations.

(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
(4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

***s.175 Duty to avoid conflicts of interest*

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed–

(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b) if the matter has been authorised by the directors.

(5) Authorisation may be given by the directors–

(a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or

(b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.

(6) The authorisation is effective only if–

(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

4) Profits from bribes

Reading: ***Hudson*, para 12.4.1**

(a) 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."

(b) Who will be a fiduciary in these circumstances?

Reading v Att-Gen [1951] 1 All ER 617 (*Army officer*)
Brinks v Abu-Saleh (No 3) [1996] CLC 133 (*security guard*)
Brown v. Bennett [1999] B.C.C. 525
Petrotrade Inc v Smith [2000] 1 Lloyd's Rep 486 (*no fiduciary office, no constructive trust*)

(c) Applications of the *Reid* principle

Mercedes Benz AG v Leiduck [1996] AC 284, 300 (*in relation to interim relief*)
Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289
Fyffes Group Ltd v Templeman [2000] 2 Lloyd's Rep 643 (*where this case was obiter*)
Dubai Aluminium Company Ltd v Alawi [2002] EWHC 2051
**Tesco Stores v Pook* [2003] EWHC 823
***Daraydan Holdings Ltd v Solland International* [2004] EWHC 622, [2004] 3 WLR 1106, [2005] Ch 1
Hurstanger Ltd v Wilson [2007] EWCA Civ 299, [2007] 1 WLR 2351
Yugraneft v Abramovich [2008] EWHC 2613 (Comm), [2008] All ER (Comm) 299, para [373], *per* Clarke J: liability is "as a fiduciary unconscionable for him to retain the benefit of it"

(d) Alternative approaches not following *Reid*
nb: *Lister v. Stubbs* (1890) 45 ChD 1 [now over-ruled by *Reid*]
Halifax Building Society v Thomas [1996] Ch 217, 229 (*applying Lister v Stubbs*)
A-G v Blake [1997] Ch 84, 96, *per* Sir Richard Scott V-C

(e) Avoidance of liability by directors under Companies Act, s.176

***s.176 Duty not to accept benefits from third parties*

(1) A director of a company must not accept a benefit from a third party conferred by reason of–

(a) his being a director, or

(b) his doing (or not doing) anything as director.

(2) A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.

(3) Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.

(4) This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

(5) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

5) Agreements to develop property, constructive trust and equitable estoppel

Reading: ***Hudson***, **sections 12.3.2 and 13.3**

Pallant v Morgan [1953] Ch 43
Holiday Inns v Broadhead (1974) 232 EG 951
**Banner Homes Group plc v Luff Development Ltd* [2000] Ch 372
Thames Cruises v George Wheeler Launches [2003] EWHC 3093 (Ch)
Kilcarne Holdings v Targetfellow (Birmingham) Ltd [2005] EWCA Civ 1355
Button v Phelps [2006] EWHC 53 (Ch)
***Cobbe v Yeoman's Row* [2008] 1 WLR 1752
**Thorner v Major* [2009] 1 WLR 776

6) Profits from theft

Reading: ***Hudson***, **para 12.4.3**

Attorney-General's Ref (No 1 of 1985) [1986] QB 491; Theft Act 1968, s.5(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*)

7) Profits from killing

Reading: ***Hudson***, **para 12.4.2**

In the Estate of Crippen [1911] P 108

8) Contract for the sale of property

Reading: ***Hudson*, para 12.6.2**

**Lysaght v Edwards* (1876) 2 Ch D 499 (*contract for sale of land*)
Lloyds Bank v Carrick [1996] 4 All ER 630 (*assumption of constructive trust*)
Neville v Wilson [1997] Ch 144 (*ditto, personalty*)

Shaw v Foster (1872) LR 5 HL 321 (*any fiduciary obligations are limited: trustee may protect own position*)
Chang v Registrar of Titles (1976) 137 CLR 177 (*doubts Lysaght because purchase may not be completed but constructive trust may nevertheless seem to bite*)
**Jerome v Kelly* [2004] 2 All ER 835, [2004] UKHL 25 (*may be merely a trustee sub modo*)

9) Statute may not be used as an engine of fraud

Reading: ***Hudson*, para 12.3.4**
**Rochefoucauld v Boustead* [1897] 1 Ch 196
***Paragon Finance plc v. Thakerar & Co* [1999] 1 All E.R. 400 (*the equity in Rochefoucauld is a constructive trust*)

10) 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)
- *Cobbe v Yeoman's Row* – remedial constructive trust?

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

Topic 9: DISHONEST ASSISTANCE & KNOWING RECEIPT

General Reading for this topic: ***Hudson*, chapter 20**

Exceptionally, the principle of constructive trust will impose a personal liability to account in certain circumstances. Oakley describes this jurisdiction as being based on equitable compensation - that is, Equity's equivalent of common law damages in making orders for payment of money. The principal category of this personal liability to account is in the area of 'dishonest assistance', considered below. Reference should also be made to the topic of Breach of Trust and in particular to the case of *Target Holdings v. Redferns* [1996] 1 AC 421, [1995] 3 All ER 785 HL where Lord Browne-Wilkinson sets out the application of equitable compensation.

STRANGERS TO THE TRUST

A "stranger" in this context is someone who is not a trustee of that trust.

1. Introduction.

Reading: ***Hudson*, section 20.1**

You should read first the introduction to chapter 20 to understand the background to these claims. The remedy is personal liability to account as a constructive trustee on the basis of being a dishonest assistant to a breach of trust or being a recipient of property knowing of a breach of trust.

2. Dishonest Assistance

Reading: ***Hudson*, section 20.2**

a). The basis for the action

Lord Selborne LC in **Barnes v. Addy* ((1874) 9 Ch. App. 244, 251-252):

> "… strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustee …"

Agip Africa v. Jackson [1990] Ch 265

b). The objective test for dishonesty

***Royal Brunei Airlines v. Tan* [1995] 2 A.C. 378, [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."

[1995] 2 A.C. 378, 389:

> Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *Reg. v. Ghosh* [1982] Q.B. 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At

first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

Smith New Court v. Scrimgeour Vickers [1997] A.C. 254
Brown v Bennett [1999] 1 BCLC 659
Twinsectra Ltd v. Yardley [1999] Lloyd's Rep. Bank 438, Court of Appeal
**Dubai Aluminium v Salaam* [2002] 3 WLR 1913
***Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [2006] 1 WLR 1476
**Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] Bus LR 220.

c). An alternative test for dishonesty based on subjectivity

R v. Sinclair [1968] 3 All ER 241, applied in *Baden Delvaux v. Societe Generale* [1992] 4 All ER 161, 234
R v. Ghosh [1982] QB 1053, applied in *R v. Clowes* [1994] 2 All ER 316

***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
**Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2005] All ER (D) 397, para [1481], *per* Lewison J: *effect of Twinsectra is to change the test*

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

> "… subjective characteristics of dishonesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."

Cf. *Walker v Stones* [2000] 4 All ER 412, 444, *per* Sir Christopher Slade:

> "A person may in some cases act dishonestly, according to the ordinary use of language, even though he genuinely believes that his action is morally justified. The penniless thief, for example, who picks the pocket of the multi-millionaire is dishonest even though he genuinely considers the theft is morally justified as a fair redistribution of wealth and that he is not therefore being dishonest."

d). Applications of the objective test

Corporacion Nacional Del Cobre De Chile v. Sogemin Metals [1997] 1 WLR 1396
Twinsectra Ltd v. Yardley [1999] Lloyd's Rep. Bank 438

Grupo Toras v. Al-Sabah [1999] C.L.C. 1469
Wolfgang Herbert Heinl v. Jyske Bank [1999] Lloyd's Rep. Bank 511
**Houghton v. Fayers* [2000] 1 BCLC 571, CA
Tayeb v HSBC Bank plc [2004] 4 All ER 1024
***Dubai Aluminium v Salaam* [2002] 3 WLR 1913

***Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [2005] UKPC 37,

> para [10]: 'The judge stated the law in term largely derived from the advice of the Board given by Lord Nicholls of Birkenhead in *Royal Brunei Airlines v Tan*. In summary, she said that liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge: see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469. Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.'
>
> [para 12] "[Henwood had an] exaggerated notion of dutiful service to clients, which produced a warped moral approach that it was not improper to treat carrying out clients' instructions as being all important. Mr Henwood may well have thought this to be an honest attitude, but, if so, he was wrong".

**Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] Bus LR 220.

e) Persistent shoots of subjectivity

Clarke, "Claims against professionals: negligence, dishonesty and fraud" [2006] 22 *Professional Negligence* 70-85:

> 'The test is an objective one, but an objective one which takes account of the individual in question's characteristics, experience, knowledge etc.. It is a test which requires a court to assess an individual's conduct according to an objective standard of dishonesty. In doing so, a court has to take account of what the individual knew, his experience, intelligence and reasons for acting as he did. Whether the individual was aware that his conduct fell below the objective standard is not part of the test.'

AG Zambia v Meer Care & Desai & Others [2007] EWHC 952 (Ch), para [334], *per* Peter Smith J:

> "[It] is essentially a question of fact whereby the state of mind of the Defendant had to be judged in the light of his subjective knowledge but by reference to an objective standard of honesty" … "The test is clearly an objective test but the breach involves a subjective assessment of the person in question in the light of what he knew at the time as distinct from what a reasonable person would have known or appreciated"

Markel International Insurance Co Ltd v Surety Guarantee Consultants Ltd [2008] EWHC 1135 (Comm), [2008] All ER (D) 10, Toulson J
(Bryant v Law Society [2009] 1 WLR 163)

f). Dishonesty and investment 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."

3. Knowing Receipt

Reading: ***Hudson*, section 20.3**

a). The basis of liability for knowing receipt

Re Diplock [1948] Ch 465, 478-479
**Re Montagu's Settlements* [1987] Ch 264
**Agip v. Jackson* [1990] Ch 265, 286, *per* Millett J.; CA [1991] Ch 547
**El Ajou v. Dollar Land Holdings* [1994] 2 All ER 685
Meridian Global Funds v. Securities Commission [1995] 3 All ER 918

Westdeutsche Landesbank v Islington [1996] AC 669, [1996] 2 All ER 961, 990, *per* Lord Browne-Wilkinson:

> "If X has the necessary degree of knowledge, X may himself become a constructive trustee for B on the basis of knowing receipt. But unless he has the requisite degree of knowledge he is not personally liable to account as trustee. Therefore, innocent receipt of property by X subject to an existing equitable interest does not by itself make X a trustee despite the severance of the legal and equitable titles".

b). 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.

(i) knowledge can be forgotten

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

(ii) ought you to have been suspicious in the circumstances?

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

(iii) account officers are not detectives

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

(iv) knowledge in complex fraud and money laundering cases

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

c). The new test of "unconscionable receipt"

**BCCI v Akindele* [2000] 4 All ER 221, *per* Nourse LJ:

> 'What then, in the context of knowing receipt, is the purpose to be served by a categorisation of knowledge? It can only be to enable the court to determine whether, in the words of Buckley LJ in *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405], the recipient can "conscientiously retain [the] funds against the company" or, in the words of Sir Robert Megarry V-C in *In re Montagu's Settlement Trusts* [1987] Ch 264, 273, "[the recipient's] conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee". But, if that is the purpose, there is no need for categorisation. All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.
>
> For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge

for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. A test in that form, though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led. Moreover, it should better enable the courts to give commonsense decisions in the commercial context in which claims in knowing receipt are now frequently made…'

**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*)
**Charter plc v City Index Ltd* [2008] 2 WLR 950, Carnwath LJ:

'liability for "knowing receipt" depends on the defendant having sufficient knowledge of the circumstances of the payment to make it "unconscionable" for him to retain the benefit or pay it away for his own purposes'.

d). Cases suggesting that the test should be 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 suggests knowledge and so attracts liability*)
Cf. Niru Battery Manufacturing Co v Milestone Trading Ltd [2004] 2 WLR 1415, [188], *per* Sedley LJ (*dishonesty not a requirement of liability*)

e) The requirement of receipt

(i) traceable proceeds beneficially owned

El Ajou v Dollar Land Holdings [1994] 2 All ER 685, 700, *per* Hoffmann LJ:

'For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.'

Charter plc v City Index Ltd [2007] 1 WLR 26, 31, *per* Morritt C (approved *El Ajou*)
Uzinterimpex JSC v Standard Bank plc 2008] EWCA Civ 819, [2008] Bus LR 1762, para [37] *et seq*., *per* Moore-Bick LJ.

(ii) possession and control is enough

Agip (Africa) Ltd v Jackson [1990] Ch 265, 286, Millett J

"… there is receipt of trust property when a company's funds are misapplied by any person whose fiduciary position gave him control of them or enabled him to misapply them."

Academic commentary:-
Birks [1993] LMCLQ 318;
Gardner (1996) 112 LQR 56
Millett, "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399: arguing for replacing constructive trusteeship by restitution. Also (1998) 114 LQR 214.
Fox, "Constructive Notice and Knowing Receipt: an Economic Analysis" [1998] C.L.J. 391: considering what form of "notice" is required in knowing receipt.
Smith, "Constructive trusts and constructive trustees" [1999] C.L.J. 294.

4. 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

Tesco v Nattrass [1972] AC 153 (*controlling mind test*)
***El Ajou v. Dollar Land Holdings* [1994] 2 All ER 685, CA, overruling Millett J (*controlling mind in relation to the particular transaction at issue*)
Crown Dilmun v Sutton [2004] EWHC 52 (Ch), [23] (*controlling mind test*)

b) Liability of employee

Royal Brunei Airlines v. Tan [1995] 2 AC 378
Brown v Bennett [1999] 1 BCLC 649 (*assisting a director*)
Standard Chartered Bank v Pakistan National Shipping Corp [2003] 1 AC 959

c) 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."

Catch-22: *Tayeb v HSBC Bank plc* [2004] 4 All ER 1024 (*bank may breach contract if it refuses to accept payment*)
Cf. Criminal Justice Act 1988, s.93A (*bank may commit offence to accept payment from suspicious client*)

d) Standard commercial conduct in the context in that market

Reading: Alastair Hudson, 'The Liability of Trusts Service Providers in International Finance Law', in J Glasson and GW Thomas (eds), *The International Trust* (Jordans Publishing, 2006), 638 *et seq*.

**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*)
**Royal Brunei Airlines v. Tan* [1995] 2 AC 378
Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd's Rep Bank 511, at 535, *per* Colman J (*contravention of financial regulation*)
Bank of Scotland v A Ltd [2001] 3 All ER 58 (*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*).
**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.
Hudson, *Securities Law* (Sweet & Maxwell, 2008), para 3-60 *et seq*.
Hudson, *The Law of Finance* (Sweet & Maxwell, 2009), para 27-23 *et seq*.

Topic 10. THE LAW ON TRACING

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.

For general reading in this area see the excellent '*The Law of Tracing*' by Lionel Smith (Oxford, 1997). A bit longer and more thorough than you need but really very good. You should also read Millett, 'Tracing the proceeds of fraud' (1991) 107 LQR 71; and Birks, 'Necessity of Unitary Law of Tracing' in *Making Commercial Law*, ed. Cranston (Oxford, 1997), 239.

A. THE PROCESS OF TRACING, AND *THEN* CLAIMING

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'.*

B. COMMON LAW TRACING

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.

C. EQUITABLE TRACING

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 - *fiduciary relationship required to base equitable proprietary claim.*

Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd [1981] Ch 105; [1980] 2 WLR 202; [1979] 3 All ER 1025 - *mistake grounds a 'proprietary tracing claim*'.

Agip Africa v. Jackson [1991] Ch 547, [1991] 3 WLR 116; [1992] 4 All ER 451 - *fiduciary relationship / equitable interest a pre-requisite for equitable tracing.*

***Boscawen v. Bajwa* [1995] 4 All ER 769 - *fiduciary relationship / equitable interest a pre-requisite for equitable tracing.*

**Westdeutsche Landesbank v. Islington LBC* [1996] AC 669, [1996] 2 All ER 961 - *semble, 'conscience + knowledge' is enough, no expressed need for prior interest*.

Academic commentary:- Birks 'Mixing and Tracing: Property and Restitution' (1992) 45 CLP 69; *Birks 'Overview: Tracing, Claiming and Defences' in Birks, *Laundering and Tracing* (1995) 289-322; and Hayton, 'Equity's Identification Rules' also in Birks, *Laundering and Tracing* (1995).

Criticisms of requirement for equitable interest before a tracing claim:- Birks, *Introduction to the Law of Restitution*, 380-4; Goff & Jones, *The Law of Restitution*, 83-6; Oakley, 'The Prerequisites of an Equitable Tracing Claim' (1975) 28 *CLP* 64; Pearce, 'A Tracing Paper' (1976) 40 *Conv.* 277.

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*.

c) Other approaches

Roscoe v. Winder [1915] 1 Ch 62

Re Tilley W.T. [1967] Ch. 1179

d) The modern approach – a question of property law, not justice nor unjust enrichment

***Foskett v. McKeown* [2001] 1 AC 102, [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.*

Clark v Cutland [2003] 4 All ER 733

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

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

a) The general rule

Re Diplock [1948] Ch 465, 524:

> '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.'

b) The specific rule for current bank accounts

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

c) The retreat from *Clayton's Case* in relation to current bank accounts

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, *per* Woolf LJ:

> There is no reason in law or justice why his depredations upon the fund should not be borne equally between [the parties]. To throw all the loss upon one, through the mere chance of his being earlier in time, is irrational and arbitrary, and is equally a fiction as the rule in *Clayton's Case*. When the law adopts a fiction, it is, or at least it should be, for some purpose of justice. To adopt it here is to apportion a common misfortune through a test which has no relation whatever to the justice of the case.

***Russell-Cooke Trust Co v Prentis* [2003] 2 All ER 478
Commerzbank AG v IMB Morgan plc [2004] EWHC 2771
Birks [1993] LMCLQ 218

d) 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
Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2005] All ER (D) 397

5. Theft

Reading: ***Hudson*, section 19.8.3**

Bishopsgate v. Maxwell [1993] Ch 1, 70 - stolen money can be traced in equity
Westdeutsche Landesbank v. Islington (*supra*) L. B-W: '*I agree that stolen monies are traceable in equity.*'

D. CLAIMING: TRUSTS AND REMEDIES

Reading: ***Hudson*, section 19.6**

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

Reading: ***Hudson*, para 19.6.1**

2. Charges, liens and proportionate shares

Reading: ***Hudson*, paras 19.6.1 and 19.6.3**

Re Tilley [1967] Ch 1178
Paul Davies Pty Ltd v. Davies [1983] 1 NSWLR 440
Re Ontario Securities Commission (1985) 30 DLR (4d) 30 - proportionate share.
**Barlow Clowes International v. Vaughan* [1992] 4 All ER 22, [1992] BCLC 910 - rolling charge approach.

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

Reading: ***Hudson*, para 19.6.2**

***Westdeutsche Landesbank v Islington* [1996] AC 669

Re Diplock [1948] Ch 465
Cf. *Chase Manhattan v Israel-British Bank* [1981] Ch 105
Cf. *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324
**Foskett v McKeown* [2001] AC 102
Allen v Rea Brothers Trustees Ltd [2002] EWCA Civ 85

4. Subrogation

Reading: ***Hudson*, para 19.6.4**

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
Wenlock v. River Dee Co. (1887) 19 QBD 155

5. Swollen assets theory

Reading: ***Hudson*, para 19.6.5**

Space Investments Ltd v. Canadian Bank [1986] 3 All ER 75, 76-77; [1986] 1 WLR 1072, 1074 - *per* Lord Templeman:-
'*In these circumstances it is impossible for the beneficiaries interested in trust money misappropriated from their trust to trace their money to any particular asset belonging to the trustee bank. But equity allows the beneficiaries, or a new trustee appointed in place of an insolvent bank trustee … to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank … that equitable charge secures for the beneficiaries and the trust priority over the claims of customers … and … all other unsecured creditors.*'

Bishopsgate Investment Management v. Homan [1995] Ch 211, [1995] 1 All ER 347, [1994] 3 WLR 1270 – *Space Investments analysis not possible where an overdrawn account.*

E. DEFENCES

Reading: ***Hudson*, section 19.7**

1. Change of Position

Reading: ***Hudson*, para 19.7.1**

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
Maersk Air Ltd v Expeditors International (UK) Ltd [2003] 1 Lloyd's Rep 491

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
Barros v MacDaniels Ltd [2004] 3 All ER 299, [2004] EWHC 1188
Campden Hill Ltd v Chakrani [2005] EWHC 911

d) When must the change of position have taken place?

South Tyneside MBC v Svenska International plc [1995] 1 All ER 545
Pearce v Lloyds Bank plc [2001] EWCA Civ 1097
**Dextra Bank and Trust Co v Bank of Jamaica* [2002] 1 All ER (Comm) 193

e) Is change of position now equitable as opposed to restitutionary?

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

2. Is change of position now to be understood in terms of estoppel by representation?
Reading: ***Hudson*, para 19.7.2**

(*Jorden v Money* (1854) V HLC 185, 10 ER 868)
(*Avon CC v Howlett* [1983] 1 WLR 605)
**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 19.7.4**

**Westdeutsche Landesbank v Islington* [1996] AC 669

Further Reading: UNJUST ENRICHMENT

These lectures consider the law of restitution of unjust enrichment which received a renewed lease of life principally due to work done at the University of Oxford to challenge the existing principles of equity in English law. Students on Law of Property II are not required to know these principles, but their study is a requirement of professional exemption for lawyers in England and Wales and the theory of unjust enrichment forms an intellectual counterpoint to traditional equity which may be of interest of Property II students. The focus of this topic is therefore on (i) the intellectual nature of restitution and (ii) how restitution claims to offer intellectual coherence in a way equity (it is said) does not.

Literature

Some treatise / textbook literature:-

Virgo, *The Principles of the Law of Restitution* (2nd ed., Oxford University Press, 2006)
Goff and Jones, *The Law of Restitution* (7th ed, London: Sweet & Maxwell, 2006)
Birks, *Unjust Enrichment* (2nd ed, Clarendon Press, 2005)
Burrows, *The Law of Restitution* (2nd ed, London: Butterworths, 2002)
Birks, *Introduction to the Law of Restitution* (revised edition, Clarendon Press, 1989)

Some journal literature:-

Birks, 'The English recognition of unjust enrichment' [1991] LMCLQ 473
Birks, 'Equity in the Modern Law: an exercise in taxonomy', (1996) 26 UWALR 1
Burrows, 'Understanding the law of restitution: a map through the thicket', in *Understanding the Law of Obligations*, (Oxford: Hart, 1998), 45
Burrows, 'Proprietary restitution: unmasking unjust enrichment' (2001) 117 LQR 412
Grantham and Rickett, 'On the subsidiarity of unjust enrichment' (2001) 117 LQR 273
Jones, 'Unjust enrichment and the fiduciary's duty of loyalty' (1968) 84 LQR 472
Smith, 'Unjust enrichment, property, and the structure of trusts' (2000) 116 LQR 412

Some dissenting voices:-

Hedley, 'Unjust enrichment as the basis of restitution – an overworked concept' (1985) 5 LS 56
Hedley, 'The taxonomy of restitution', in Hudson (ed.), *New Perspectives on Property Law, Obligations and Restitution* (London: Cavendish Publishing, 2004), 151.
Hudson, www.alastairhudson.com/trustslaw/restitutionofunjustenrichment (formerly Ch. 35 of *Equity & Trusts*, 3rd ed, 2003).
Hudson, 'Rapporteur: Between morality and formalism in property, obligations and restitution', in *New Perspectives on Property Law, Obligations and Restitution* (London: Cavendish Publishing, 2004), 359.

A. Fundamentals of Private Law

1. The current division of English private law

"Private law": not criminal law and not public law (judicial review, constitutional law, etc.)

Involving fundamental *concepts* and also the applications of those concepts to particular *contexts*: that is, there are the conceptual underpinnings of the law (such as rights to enforce contracts or to protect private property) which are the bedrock of legal principle and which are then deployed by the case law, often in tandem with legislative developments, in new contexts. Frequently, these contextual developments are a result of social development. For example, company law grew out of contract law and property (trusts) law and, coupled with legislation, developed its own principles.

Concepts Contexts

Contract	Family law
Torts	Company law
Property	Labour law
Fiduciary law	Finance law
(Criminal law)	Revenue law
(Public law)	etc., etc.

2. The division suggested by Prof. Peter Birks

2.1 *To emulate Justinian's Institutes* in Roman law (actions, people, things), Birks suggested the following division of private law:

- *Consent*: contract, express trusts, etc. (*remedy: damages, specific performance, etc.*)
- *Wrongs*: torts, breach of contract, breach of trust, etc. (*remedy: damages, restitution wrongdoing.*)
- *Unjust enrichment*: restitution of unjust enrichment, considered below

The aim was to introduce order (and possibly a minimalist elegance?) to the law.

2.2 *On the emulation of Roman law*

- Birks, 'Definition and division: a meditation on *Institutes* 313', in Birks (ed), *The Classification of Obligations*, (Oxford: Clarendon, 1997), 1.
- Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford: OUP, 1996) generally.

2.3 *Looking for restitution in legal history*

- Ibbetson, *A Historical Introduction to the Law of Obligations*, (Oxford: OUP, 1999).

3. The suspicion of equity among commercial lawyers and restitutionists

- Hudson, *Equity & Trusts*, (Cavendish, 2005), Ch 21, section 21.2: *on commercial law.*
- Beatson, *The Use and Abuse of Unjust Enrichment*, (Clarendon Press, 1991), 245.
- Jaffey, *The Nature and Scope of Restitution* (Hart, 2000), 421.
- Burrows, 'We do this at common law but that in equity' (2002) 22 OJLS 1.

B. The Basics of Restitution

1. The foundation of restitution of unjust enrichment ("RUE")

- The principle was identified by Goff and Jones in *The Law of Restitution* first published in 1966.
- It is a principle which has existed in US law since before the enactment of the *Restatement of Restitution* in 1939, and was known to civil law before that.
- Peter Birks developed the idea in *Introduction to the Law of Restitution*, first published in 1985, revised in 1989. Restitution law moved beyond "quasi-contract".

2. The original* categories of restitution

** by "original" I mean the matrix adopted in England after 1985.*

- Restitution for unjust enrichment
- Restitution for wrongdoing
- Restitution to vindicate property rights – Virgo, *The Principles of the Law of Restitution*

3. How the 1992 model of unjust enrichment works: "Restitution Mk 1"

3.1 *The classic three-step*

- There must have been an enrichment
- That enrichment must have been made at the claimant's expense
- That enrichment must have arisen as a result of some unjust factor

3.2 An enrichment

3.3 The concept of an "unjust factor"

- So, do we have a complete list of the unjust factors?
- Answer: no.
    - There are either 43 of them (Birks and Chambers, *Restitution Research Resource*, (Mansfield Press, 1997)); or
    - There is only 1 (Meier and Zimmerman (1999) 115 LQR 556).

3.4 The nature of the restitutionary response

- Restitution is not interested in "compensation" nor in "remedies", but rather in "subtraction of the unjust enrichment".
- The approach of restitution lawyers is centred around the development of responses which require a defendant to give up an enrichment received at the plaintiff's expense. The appropriate response is then one which requires the defendant to give up to another an enrichment received at the other's expense or its value in money.
- Birks declares his central concern to be with 'the second sense of "restitution" ... that is, with gains to be given up, not with losses to be made good.' (Birks, *Introduction to the Law of Restitution* (Oxford, 1989), 11.)
- The law of restitution creates a new right, rather than giving effect ex post facto to a pre-existing right. That right is generated by the receipt of the unjust enrichment with the effect of depriving the defendant of the value received at the plaintiff's expense. (The issue which arises in the context of the swaps cases is whether I am deprived of that value if I have already contracted to give it to you.)
- In Birks' terms: 'Restitution is that active or creative response at the moment of enrichment.' (Birks, *Introduction to the Law of Restitution* (Oxford, 1989), 14.)

3.5 The principal defence: change of position

3.6 The Quadration Thesis

- The "quadration thesis" of restitution of unjust enrichment suggests that whenever there is an unjust enrichment some restitution is to be made, and that wherever restitution is made that is in response to the presence of an unjust enrichment.
- The question has become whether or not restitution might also arise (a) in relation to wrongdoing and (b) in vindication of someone's rights.

3.7 Examples of doctrines which do not work under unjust enrichment

- Proprietary estoppel – because it is remedial; possibly aimed at compensating detriment.
- Constructive trust – to deal with unconscionable behaviour, etc., is not addressed at the enrichment but rather at the unconscionability: see below.
- Common law damages – because they are aimed at "wrongs" and not at subtraction of unjust enrichment.

4. The early spring of restitution

4.1 Early cases

- *Orakpo v Manson Investments Ltd* [1978] AC 95, 104, *per* Lord Diplock ('*There is no general doctrine of unjust enrichment in English law.*')
- *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61, *per* Lord Wright: "*It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.*"

4.2 The modern development

- **Lipkin Gorman v Karpnale* [1991] 2 AC 548, *per* Lord Goff ('*I accept that the solicitors' claim [for money had and received] in the present case is founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club was indeed unjustly enriched at the expense of the solicitors.*') *A claim for common law tracing was also upheld.*
- *Woolwich v IRC* [1993] AC 70 (*an incorrect claim for tax is "the paradigm of a case of unjust enrichment" p.197, per Lord Browne-Wilkinson)*

5. What went wrong

5.1 The pivotal case

- *Westdeutsche Landesbank v Islington* [1996] AC 669
- Birks, 'Trusts raised to avoid unjust enrichment: the *Westdeutsche* case' [1996] RLR 3
- Hudson, *Swaps, Restitution and Trusts* (Sweet & Maxwell, 1999)

5.2 The response

- E.g. Burrows, *The Law of Restitution*, 2nd ed.: sees *Westdeutsche Landesbank* as a case which advances personal claims in restitution, i.e. money had and received.
- A little like being knocked out by a boxer and then claiming to have hurt his fist with your nose.

6. "Restitution Mk 2"

6.1 Rethinking proprietary unjust enrichment

- Do not consider property to have left the claimant if the defendant is unjustly enriched.
- E.g. theft, no property leaves the victim of the crime.
- E.g. common law tracing: vindication.

6.2 The means of effecting restitution of unjust enrichment

- Birks identifies three approaches to establishing a proprietary claim over property which has passed from the original, absolute owner to another party.
  1. The first is a following claim where the original owner is able to identify the specific property and say "that's mine".
  2. The second approach is to establish that the defendant has committed a wrong, further to a tort of conversion.
  3. The third approach would be to establish some unjust enrichment in the current possessor of that property.
- Jettisoning the quadration thesis: Birks, 'Misnomer', Cornish et al (eds), *Restitution, Present and Future* (Hart, 1998), 1.

6.3 A right necessarily carries its remedy

- Birks, 'Rights, wrongs and remedies' (2000) OJLS, 1

7. "Restitution Mk 3"

7.1 The mistake analogy

- Peter Birks, *Unjust Enrichment* (2nd ed, Clarendon Press, 2005)

- This book was, tragically, published posthumously and so we must extrapolate from it what it might have meant for the future of restitution.

8. Where is restitution now?

8.1 Recent case law

- There are fewer cases decided recently citing "unjust enrichment" on LexisNexis than one might have expected.
- Nevertheless, among the academics it is still thriving: see Neyers, et al (eds) *Understanding Unjust Enrichment* (Hart, 2004) and Hudson (ed), *New Perspectives on Property, Obligations and Restitution* (Cavendish, 2004).
- *NEC Semi-Conductors Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] All ER (D) 252; (*the most recent case at the time of writing; citing the view that an incorrect claim for tax is "the paradigm of a case of unjust enrichment" p.197, per Lord Browne-Wilkinson*).

8.2 A retreat from unjust enrichment, and a restoration of equitable thinking?

- *Niru Battery v Milestone* [2003] EWCA Civ 1446, *per Sedley LJ* and *per Clarke LJ: difficulties with change of position as being, perhaps, an equitable doctrine*
- *National Westminster Bank v Somer* [2002] QB 1286*: is change of position now to be replaced by estoppel by representation?*

8.3 Is the principle of unjust enrichment merely a part of natural justice and so a part of equity?

- See e.g. *Moses v Macferlan* below at C2.

C. Restitution and the Law of Obligations

1. The early cases – looking for the matrix

Moses v Macferlan (1760) 2 Burr 1005, *per* Lord Mansfield CJ:
'*[The action for money had and received] lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.*'
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, HL (*approving the above*)

2. Thinking *Moses v Macferlan* through again

- The speech delivered by Lord Mansfield begins: "*The action for money had and received, an equitable action to recover money which the defendant ought not in justice to keep* …" In what way is this (a) restitutionary or (b) to do with the common law? (It is the list of claims that matters.)
- What is particularly interesting is that the judges in these cases do not use the expression "unjust enrichment" – instead they talk of "equity": rather the restitutionists have reinterpreted these cases to fit their matrix.

3. The theory of the law of obligations

In any of the following categories of case (taken broadly from Goff and Jones' *The Law of Restitution*), it is said that if the defendant takes an enrichment as a result of this list of actions, then the claimant should be entitled to a remedy which subtracts that enrichment from the defendant (as opposed to imposing damages simpliciter).

- Mistake
  - Recovery of money paid under mistake of fact
  - Recovery of money paid under mistake of law
  - Restitution in respect of services rendered under a mistake

- Restitution in relation to chattels transferred under a mistake
- Restitution in relation to land transferred under a mistake
- Reponses: rescission, rectification and reopening accounts

- Compulsion
  - Recovery of benefits conferred under undue influence*
  - Recovery of benefits conferred under duress*
  - Relief from unconscionable bargains*
  - The right to contribution or recoupment
- Necessity
- Ineffective transactions
  - Frustration
  - Transfers void for lack of formality
  - Lack of authority
  - Lack of capacity
- Illegality*
- Acquisition of a benefit through a wrongful act
  - Breach of fiduciary relationships*
  - Breach of confidence*
  - Property acquired through tortious acts
  - Benefits accruing from crime*

*The starred items are already well-known in equity. So, why are they *necessarily* restitutionary in *all* circumstances?

D. Restitution and Property Law

1. Resulting trusts

- Birks, 'Restitution and resulting trusts', in Goldstein (ed), *Equity: Contemporary Legal Developments* (Jerusalem University, 1992), 335.
- Swadling, 'A new role for resulting trusts?' (1996) 16 *Legal Studies* 110.
- Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997).

2. Tracing

- Argued for by Smith, L, *The Law of Tracing* (Oxford: Clarendon Press, 1997).
- Again, tracing is said to effect restitution because it makes restitution of the property whereas otherwise the defendant would have been unjustly enriched.
- Birks, P, 'Mixing and tracing' (1992) 45(2) *Current Legal Problems* 69.
- Birks, P, 'On taking seriously the difference between tracing and claiming' (1997) 11 *Trusts Law International* 2.
- However, Virgo, *Principles of the Law of Restitution* (OUP, 1999) and *Foskett v. McKeown* [2001] 1 AC 102 tells us that tracing operates to vindicate one's property rights. (Birks complained that vindication merely expresses one's motivation for imposing tracing but does not explain the legal basis on which it arises.)
- In *Foskett v McKeown*, Lord Millett tells us that tracing is not part of unjust enrichment.

3. Constructive trusts

- Disliked by restitutionists because, they say (Birks, *Introduction to Restitution* (Clarendon Press, 1989)) it is not possible for one to know on what legal basis the constructive trust has been imposed. Conscience enthusiasts, however, see the constructive trust as being a means of policing conscience in a range of circumstances.
- Elias, *Explaining Constructive Trusts* (Clarendon Press, 1990) considered that one of the bases on which the constructive trust might arise is to effect restitution but that there were other bases too.
- See, however, Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington*: '*Although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward.*' ([1996] 2 All E.R. 961, 999).

4. Subrogation

- A part of unjust enrichment says Mitchell, *The Law of Subrogation* (Oxford: OUP, 1994).
- *Banque Financiere v. Parc (Battersea) Ltd* [1999] 1 AC 221: although the House of Lords failed to realise that subrogation is meant to effect restitution, not that there is a call for restitution and therefore subrogation is one of a choice of remedies.

E. Sceptical perspectives on unjust enrichment

1. How is restitution thinking better than conscience thinking?

- The fundamental question is whether restitution does offer a more coherent re-ordering of equity and common law: what of express trusts? Specific performance? Interim injunctions? Trusts of homes? Restitution of unjust enrichment has nothing (certainly not yet) to say about these areas.
- Many cases taken to be foundational in restitution of unjust enrichment are actually cases on equity, e.g. *Moses v Macferlan* (1760) 2 Burr 1005. So, most of this restitution of unjust enrichment scholarship is prescriptive, not descriptive.

2. Hedley's approach

- See S Hedley, "The taxonomic approach to restitution", in Hudson ed., *New Perspectives on Property, Obligations and Restitution*, Cavendish Publishing, 2004:-
  'Indeed, a noticeable recent tendency [in restitution scholarship] has been to accuse equity lawyers of being no better than Nazis. This (slightly surprising) argument relies on the point that, like one famous Nazi, they sometimes appeal to conscience. It appears that Reinhard Heydrich, chief of the Gestapo and director of the 'final solution', once used justified his conduct by reference to his conscience.
  > "*For the fulfilment of my task I do fundamentally that for which I can answer to my conscience ... I am completely indifferent whether others gabble about breaking the law*" (Quoted in AH Campbell 'Fascism and legality' (1946) 62 LQR 141, 147).

  This is, apparently, too uncomfortably close to the reasoning employed by others who do not subscribe to restitution of unjust enrichment.'
- The accusation was initially made against 'beginners' and 'the young' (P Birks 'Trusts raised to reverse unjust enrichment: The *Westdeutsche* case' [1996] RLR 3, 20-21), though it was soon made also against law teachers generally, or at least those of them who are 'realists or post-realists'.
- Opposition to restitution of unjust enrichment is thought to risk 'persecutions and pogroms every time the community's conscience is set on fire by some passing demagogue' (P Birks 'Equity in the modern law: An exercise in taxonomy' (1996) 26 WALR 1, 98).'

3. Hudson's approach

- See generally the essay on restitution in earlier editions of *Equity & Trusts* and now on www.alastairhudson.com/trustslaw/restitutionofunjustenrichment
- The following are the key points:
  - It is not possible to legislate in the abstract with certainty.
  - Recovery of an enrichment will not compensate the loss suffered by a claimant.
  - Restitution is a jumble of currently existing odds and ends which will cause more confusion by leaving ragged, unattached elements of equity, etc..
  - The word "unjust" is given a purely "technical meaning", which overlooks its jurisprudential force (e.g. Rawls, *A Theory of Justice*).
  - Restitution has nothing to say about non-pecuniary, non-proprietary claims.
  - Judges require flexibility to achieve fair results.
- See *Equity & Trusts*, 4th ed., Chapter 37:

    - Human beings are fragile and need someone to "listen to their story"
    - The world is fundamentally chaotic and equity is required to meet that chaos
- See e.g. Story's *Equity Jurisprudence* (1886), 4: the concept of equity was a part even of Roman law in the *Pandects*.
- "Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance." (Story, *op cit*., 6) – e.g. is family law a part of equity?
- Law functions by using fictions and artificial models to achieve desirable effects: Fuller, *Legal Fictions* (Stanford University Press, 1967).

F. Topics on which unjust enrichment thinking has little to say

1. Family Law

1.1 Family law is focused on needs, not enrichments

- Family is focused on needs – e.g. the needs of children, and the needs of the spouses (spice?).
- Focus on any "unjust enrichment" would not give all of the parties who are within the focus of family law the discretionary rights which the courts consider necessary.

1.2 Other models of unjust enrichment?

- The English courts could, however, emulate the Canadian cases on trusts of homes in *their* use of unjust enrichment.
- Significantly, the Canadian approach to the home is *very, very* different from the positivism of English restitution.

2. Avoidance through company law

Under company law, each company in a group is a distinct person. It is only in very rare circumstances that company law will pierce the veil of incorporation: e.g. *Saloman v A Saloman & Co Ltd* [1897] AC 22. If the defendant organises that the enrichment is passed to A Ltd but the unjust act is committed by B Ltd, then the matrix will not seem to apply.

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LECTURE PROBLEM QUESTIONS

1. Trusts of homes

In 2000, Gerald and Daphne were a married couple who had decided to move away from London. Daphne's mother Thelma was growing old and so all three of them decided to live together in a bigger house in the country.

All three of them decided to buy a house in the Essex countryside for £120,000. The Essex house was bought with £100,000 provided by way of mortgage in the names of Gerald and Daphne. As a pensioner Thelma was entitled to a £20,000 relocation grant on giving up her council flat: this also went towards to acquisition of the Essex house.

From 2000, Thelma required daily medical attention at the Essex house. Gerald and Daphne both worked as teachers and both earned £1,000 per month. The mortgage cost £600 per month and Thelma's daily care cost £600 per month. It was decided after a family meeting that Gerald would pay for the mortgage and Daphne would pay for the medical costs.

In 2000, before completing the purchase of the Essex house, Gerald had promised Thelma that she could live there for the rest of her life. He said: "I want you to think of this house as being as much your home as ours". Meanwhile Thelma looked after all the housework, looked after her two grandchildren, and in 2005 used all her savings of £3,000 to repair the basement after a freak flood.

In March 2008 Gerald and Daphne realised that they could no longer cope with Thelma and so have decided that she must be relocated to a full-time old persons' nursing home for which Thelma will be required to pay.

Advise Thelma

2. Secret profits and bribes

William was managing director of Cake Ltd, a company which manufactured high quality sponge cakes. While on company business, William was told that there were big opportunities for biscuit manufacturers who manufactured high volumes of biscuits for family size boxes. Cake Ltd had never been involved in biscuit manufacture.

William employed a consultant, Tariq, to conduct research for him into this opportunity. William was told that to establish Cake Ltd in the biscuit business would require an initial investment of about £10 million and would generate profits of about £2 million per annum. William knew that the board of directors of Cake Ltd had previously only agreed to invest in new businesses which would generate £2.5 million in annual profits after an initial investment of £8 million.

However, William had decided that he wanted to exploit this opportunity for himself. He was concerned that the board of directors might choose to invest in this opportunity in spite of its previous practice. Therefore, William paid Tariq £20,000 to inflate the estimate of the start-up costs to £12 million and to depress the profits estimate to £1.5 million. Tariq did as he was paid to do.

William presented Tariq's revised estimates to the next meeting of the board of directors. The minutes of that meeting show that the board 'does not wish Cake Ltd to pursue this biscuit manufacture opportunity because its profit estimate is below £2.5 million and the initial investment will be more than £8 million.' William resigned from Cake Ltd the next week and began to manufacture biscuits six months later.

William earned personal profits of £2 million in 2006. On 5th April 2007 he paid these profits into a current bank account in which he held £500,000 on trust for his mother. On 6th April he spent £400,000 on acquiring Go Tech plc shares, which have now trebled in value. On 7th April he spent

£200,000 on Static plc shares which have not changed in value. On 8th April he invested the remaining £1.9 million with conmen who absconded with the money and cannot now be found.

Tariq paid his £20,000 into his personal bank account and mixed it with £10,000 of his own money. He then spent £10,000 on a round-the-world cruise and the remaining money was invested on his behalf by Profit Bank. These investments have increased in value by 5%.

Advise the directors of Cake Ltd.

3. Dishonest assistance and knowing receipt

Arthur was the trustee of the Davis family trust. The trust fund contained a valuable sculpture by Claudin. The terms of the trust provided that the trustees 'must continue to hold the sculpture on trust throughout the life of the trust'.

Arthur sought an up-to-date valuation of the sculpture from Bernard. Bernard was employed by Shelley's Ltd, a company which specialised in dealing in artworks. Bernard was one of five dealers retained by the company, although he was not on the board of directors.

Arthur told Bernard that he expected that the sculpture was worth about £50,000. Bernard knew that the sculpture was worth much more than that. However, Bernard refused to give Arthur a valuation on the basis, Bernard said, that Bernard might want to buy the sculpture and therefore did not think it was ethical to give Arthur a valuation himself. Instead Bernard directed Arthur to his friend Colin, who worked as a self-employed art dealer, so that Colin could give Arthur an independent valuation.

In the time it took for Arthur to walk to Colin's shop, Bernard telephoned Colin to tell him that he had sent Arthur round with a sculpture which Bernard believed to be 'a Claudin sculpture worth about £50,000.' Colin was puzzled: 'surely, Bernard, a Claudin should be worth at least £100,000.' Bernard answered: 'well, yes, Colin, that may be true but I want to buy the sculpture off him and make a good profit for Shelley's Ltd. So, I'm sure you'll agree with my valuation when you see the sculpture – I will even give you double your ordinary fee for valuing the sculpture for us.'

Colin told Arthur that the sculpture was not a particularly interesting Claudin which would only receive £50,000 on the open market. Shortly afterwards, Bernard telephoned Arthur and said that he would pay Arthur £55,000 for the sculpture. Arthur was sure that this was a good deal for the trust and so agreed to the sale.

Shelley's Ltd has a business motto of which the dealers are reminded every morning: 'Your only duty is to the shareholders of Shelley's Ltd. Your only duty is to make them as much money as possible.' Bernard will claim that this is his principal business ethic.

Bernard paid Colin his fee and subsequently sold the sculpture for £100,000. Bernard made a personal commission from his employer of £10,000 on this sale. Arthur has been declared personally bankrupt.

Advise the beneficiaries of the Davis family trust.

4. Tracing

Trevor was trustee and also one of the beneficiaries of the Brand family trust. The trust was created by the successful playwright Squirrel Brand who died in 2005 settling £20 million on the terms of this trust. The beneficiaries were ten members of the Brand family. The terms of the trust provided that the trustee was not permitted in any circumstances to take any capital from the trust, nor was the trustee permitted to advance any amount of capital to any of the beneficiaries. Instead income was to be accumulated from stock market investments and divided equally between the beneficiaries.

Trevor decided that he was tired of always working for the benefit of the other beneficiaries. Therefore, on 20th July 2007, Trevor took £2 million from the trust fund, which he considered to be his share of the capital.

Trevor paid the £2 million into bank account No.100 on 21st July. Trevor already held £100,000 in that account on trust for his children, Jeremy and Alan. On 22nd July Trevor spent £150,000 from account No.100 to acquire Gotech plc shares, which have since trebled in value. On 23rd July Trevor spent £50,000 from account No.100 to acquire Static plc shares which have not changed in value. On 24th July Trevor spent the remaining money on a large house in the South of France which was destroyed in a freak forest fire before Trevor had insured it and which is now worthless.

Trevor's children, both of whom are aged 18 or over, were informed on 1st March 2008 by Trevor that their trust fund was now worth £450,000, since the increase in value of the Gotech plc shares. In reliance on this news, Jeremy entered into a contract to acquire £225,000 worth of recording equipment with which to start his intended career as a pop music producer. Also in reliance on the same news, Alan made plans to go on a luxury round-the-world cruise costing £20,000, but he has not yet spent any money on that cruise. Alan has, however, spent £10,000 refitting the bathroom in his flat in reliance on this anticipated windfall.

Advise the beneficiaries of the Brand family trust.

The end
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