

**Queen Mary, University of London
School of Law**

LAW OF PROPERTY II

EQUITY & TRUSTS

Seminar Materials

2009/2010

EQUITY & THE LAW OF TRUSTS

Law of Property II

Seminar Outlines 2009/2010

The structure of this module

The first seminars will be held in rotation starting from weeks 3 and 4 of the winter semester. Seminars are bi-weekly. Students must read chapters 1 and 2 in Hudson's *Equity & Trusts* or a similar textbook by way of introduction to this topic before the first seminar. This module is structured so that these materials will be covered in lectures before students are required to consider them for seminars.

The following 10 seminars will form **the basis of the module**.

Seminar No.	Title	Date, depending on your group, week commencing
1	Introduction, certainty of intention & certainty of subject matter	12 October / 19 October
2	Certainty of objects	26 October / 2 November
3	The beneficiary principle	16 November / 23 Nov.
4	The constitution of trusts	30 November / 7 Dec.
5	Duties of trustees and breach of trust	14 December / 11 Jan.
6	<i>Quistclose</i> trusts	18 January / 25 Jan.
7	Trusts of homes	1 Feb. / 8 Feb.
8	Constructive trusts	15 February / 1 Mar.
9	Dishonest assistance and knowing receipt	8 March / 15 March
10	Tracing	22 March / 29 March

NB: Weeks commencing 9 November and 22 February are *reading weeks* so there are no seminars in those weeks – hence the chronological gaps in the schedule above.

What to read for this course

This document is simply made up of the questions which you will consider for the larger part of your seminars – all of the reading is set out in the Lecture Course Documents. These materials contain cross-references to the Lecture Course Documents to tell you which cases, statutes, textbook and journal material which you are expected to have read. You are given references to Hudson's textbook in the Lecture Course Documents: if you are using other textbooks or other casebooks, then

you should rely on the indexes and tables of cases to identify the appropriate parts of those books.

How to study for this course

You must bring your casebooks, detailed notes and/or copies of judgements (depending on how you are choosing to study) to seminars. Cases with ** *must* be read in full. Cases with * should be read in detail, but a casebook may suffice. All other cases mentioned in the course documents must also be considered to identify their core principles.

It will be assumed that students have a good knowledge of the cases before the seminar. As is mentioned in the Lecture Course Documents, it is not permissible for students to attend seminars unprepared and so seek to rely on the hard work of their colleagues. Students may be excluded from any seminar for which they have not made a genuine effort to be prepared.

The aim of this hand-out is to guide your preparation for seminars. This does not necessarily cover the whole of the course, although the manner in which material is covered in lectures and in seminars should guide you as to material considered to be important enough to be assessed in the examination. The seminars aim to follow the pattern of the lectures. The seminars can only focus on the most important cases and issues: for that, you should be guided by the lectures. The seminar will concentrate on the problems which you are referred to below.

It may not be possible to consider all of the problems for each seminar in class – your seminar leader will guide you on this matter. Your seminar leader will focus on the most important aspects of each topic and therefore you should be guided by their advice. However, you must prepare all of the seminar questions in advance.

Assessment

The problem questions in these seminar materials are either previous year's examination questions or questions which could have been part of an examination paper. Other questions are intended both to guide your attention to the issues which are considered most important in each area and also to give you examples of essay titles from previous years' examination questions. Previous years' examination papers are available on the College web-site and in the library in hard copy.

During the course, students will be set two assessments as contained in these materials: one in each semester.

Key

Abbreviations: AH = Hudson's Equity & Trusts; ME = Modern Equity; HM = Hayton & Marshall; MB = Maudsley & Burn – full references in Lecture Course Documents.

ASH

Seminar 1

Introduction to equity & trusts, certainty of intention and certainty of subject matter

The aims of this seminar are twofold. First to consider the nature of “conscience” within the law, as part of the law of trusts and equity. Second, to consider certainty of intention and of subject matter which are essential to the formation of an express private trust. In particular students could be aware of those forms of action in relation to the treatment of property which will lead to the creation of a trust.

For the appropriate cases for this seminar, you should read Topic 1 in the Lecture Course Documents. You are expected to have prepared all of the material in those sections on the Lecture Course Documents. You should consider in particular the following issues:-

A. THE NATURE OF EQUITY

1. The correction of wrongs:-
Attorney-General for Hong Kong v. Reid [1994] 1 AC 324, [1993] 3 WLR 1143
2. Rights must attach to identified property:-
Re Goldcorp Exchange Ltd [1995] 1 AC 74
MacJordan Construction v. Brookmount [1992] BCLC 350
Re London Wine Co., etc. (1986) Palmer’s Co Law Cas. 121
3. An exception for intangible property?:-
Hunter v. Moss [1994] 1 WLR 452, [1994] 3 All ER 215, (1994) 110 LQR 335

B. THE NATURE OF THE TRUST

1. Dealing with property:-
Paul v. Constance [1977] 1 WLR 527
Re Kayford [1975] 1 WLR 279
2. As opposed to merely moral obligations:-
Re Adams and the Kensington Vestry (1884) 27 ChD 394, ME 96
Comiskey v. Bowring Hanbury [1905] AC 84 HL, ME 96
3. Based on conscience:-
Earl of Oxford’s Case (1615) 1 Ch Rep 1
Westdeutsche Landesbank v. Islington LBC [1996] AC 669

The textbook reading can be found at:-

- AH 1 – 114
ME 3 – 77, 94 – 103
HM 1 – 28, 64 – 67, 129 – 161
MB 1 – 89

Questions

1. You find £100 in cash in the street: what should you do with it?
2. You are in a supermarket. You pay £10 for goods which cost £7. Mistakenly, the till operator pays you £13 in change as though you had paid with a £20 note.
 - (a) What should you do?
 - (b) Is there a difference here between what morality or ethics might prompt you to do and what law or equity might require you to do?
 - (c) Does it matter that the supermarket sold you £3 of rotten fruit the week before?
 - (d) Does it make a difference that you are a communist anti-globalisation activist who believes that making profits is immoral?
3. (a) What action or form of words will lead to the creation of a trust? (b) What sort of intention in relation to the property is necessary, e.g. as in *Paul v Constance* or *Re Kayford*?
4. In relation to the cases on certainty of subject matter:
 - (a) Read and be prepared to discuss the judgment of Lord Mustill in *Re Goldcorp* for certainty of subject matter.
 - (b) Read and be prepared to discuss the basis on which Dillon LJ in *Hunter v Moss* justified reaching a different judgment from that suggested by the line of authorities including *Re London Wine* and *Re Goldcorp*.

Read and be prepared to discuss the following cases:

- *Paul v Constance*
- *Re Kayford*
- *Re Adams and the Kensington Vestry*
- *Comisky v Bowring-Hanbury*
- *Midland Bank v Wyatt*
- *Re London Wine*
- *Re Goldcorp*
- *Hunter v Moss*
- *Re Harvard Securities*
- *MacJordan v Brookmount*

Question 6

Dolly collected paintings and sculptures. She wanted to benefit her two children Edward and Fenella as they reached the age of 50. For this purpose she decided to settle two abstract oil paintings (one titled “Pretension” and the other “Self-importance”) and two sculptures on the terms of these trusts. The two sculptures were identical, machine-produced casts of Magritte’s “The Head with Clouds” which were effectively indistinguishable.

Therefore, Dolly decided on 1st January to create two entirely separate trusts: one for the benefit of each of her children. Each separate trust document read: “The trustees shall hold one painting and one sculpture on trust for the individual beneficiary.”

- (a) Advise the executors of Dolly’s estate as to whether or not there is sufficient certainty of subject matter in the oil paintings and the sculptures.
- (b) Would your answer differ if the items of property were shares in an ordinary company? Is that a meaningful distinction?
- (c) Would your answer differ if Dolly had created one trust and provided “both sculptures and both paintings shall be held on trust for Edward and Fenella equally”?

Seminar 2

Certainty of objects

The aim of this seminar is to consider the issue of certainty of objects which is essential to the formation of an express private trust. In particular students should be aware of those forms of action in relation to the treatment of property which will lead to the creation of a trust.

For the appropriate cases for this seminar, you should see Topic 2 in the Course Documents.

For background for this topic you could consider Prof Thomas's seminal work *Powers* or chapter 4 of Thomas and Hudson's *The Law of Trusts*. For the appropriate textbook references for this seminar you should focus on the following:-

AH 115 – 149
ME 103 – 116
HM 161 – 201
MB 89 – 108

QUESTIONS

1. Why is certainty so important in the law of trusts?
2. (a) Explain the distinction between
 - (i) a fixed trust,
 - (ii) a discretionary trust power,
 - (iii) a fiduciary mere power, and
 - (iv) a personal power?(b) Why should each have different rules for certainty?
(c) How can the rigour of these rules be mitigated by using alternative case law?
3. Read and be prepared to discuss the following cases:
 - *Re Gulbenkian*
 - *McPhail v Doulton*
 - *IRC v Broadway Cottages*
 - *Re Baden No 2*
 - *Re Barlow*
 - *Re Tuck's ST*
 - *Re Coxen*
4. Celia declared her intention to settle £100,000 on trust so that "my trustees shall advance a maximum of £10,000 per annum to any of my dear friends who are in financial difficulties".

5. Deborah declared her intention to settle £50,000 “to be held on trust for my relatives equally”.

6. Jack wishes to create the following dispositions by transferring four parcels of £10,000 to his trustees. Each parcel of £10,000 has been separated from all other moneys.
 - (a) so that my trustees shall hold £10,000 for whichever of my relatives they shall consider to be most deserving of it;

 - (b) so that my trustees may pay £10,000 to any of my most loyal customers which they may select, but so that the money shall be spent within eighty years;

 - (c) £10,000 so that my trustees may pay any amount out of that fund to whichever of the inhabitants of east London they shall consider to be the most hard-working; such that the trustees may decide on the application of this money in their personal discretion.

 - (d) £10,000 to my trustees so that they shall divide it as they shall see fit between my close friends whom they may consider to be most deserving of it.

Seminar 3

The Beneficiary Principle

This seminar considers the importance of there being some human or other legal person who can be a beneficiary for there to be a valid trust. The importance of the beneficiary principle relates to the need for certainty (considered in the previous seminar) and for the need to comply with the perpetuity rules and the rules against remoteness. This seminar will introduce you to the ways in which trusts lawyers manipulate trusts concepts to achieve the results their clients require so that they both create valid trusts and put their purposes into effect.

For the appropriate cases for this seminar, you should see Topic 3 in the Lecture Course Documents.

For the appropriate textbook references for this seminar you should focus on the following:-

AH 150 - 209
ME 367 – 395
HM 201 – 229
MB 357 – 403

For further periodical reading, you should read the following:-

*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.

Questions

1. What circumstances will constitute a trust which is created for the benefit of *people* rather than being invalid for a *purpose*?
2. Read and be prepared to discuss the following cases:
 - *Leahy v Att-Gen for NSW*
 - *Re Denley*
 - *Re Lipinski*
 - *Re Grant’s Will Trusts*
 - *Re Recher’s Will Trusts*
 - *Conservative Association v Burrell*
 - *Re West Sussex Constabulary, etc.*
 - *Re Bucks Constabulary, etc.*

3. (a) Would it have been possible to uphold the trust in *Leahy* on the basis that it would have been for the benefit of members of the order of nuns? (b) Could the judgement in *Denley* be used for this purpose? (c) Why were these cases decided differently?

4. (a) When a club or association (any body which is not incorporated as a company) distributes its assets, on what basis are they distributed to which people? (b) Why do we consider cases to do with “clubs” and “associations” in relation to “trusts” - what are the similarities and the differences between these concepts?

Consider whether or not the following dispositions will constitute valid trusts:

5. Celia left £100,000 to an unincorporated association “to be used for the purposes of the association now and in the future”.

6. Dipali left £500 to an unincorporated association “to be used for the enjoyment of the current members in accordance with the terms of the association’s constitutional purposes”.

7. Arthur left £10,000 to an unincorporated association on the following terms: “this £10,000 shall be used by the officers of the association for the purposes of the association as determined by the association’s members in accordance with the club’s constitution.”

8. Jack wishes to create the following dispositions by transferring four parcels of £10,000 to his trustees. Each parcel of £10,000 has been separated from all other moneys.

(a) so that my trustees shall hold £10,000 for the purposes of the Mile End Arm-Wrestling Club to provide equipment for the club’s activities;

(b) so that my trustees shall transfer £10,000 to the treasurer of the Stepney Naturists Association as an accretion to the association’s funds to be used for its general purposes.

(c) £10,000 to my trustees so that they shall use for the purpose of constructing a clubhouse for the Stepney Strollers Football Club.

(d) £10,000 to be paid by my trustees to the treasurer of the Hackney Poker Association subject to a mandate to use the money in accordance with the association’s purposes.

9. Should trusts be considered merely to be forms of contract? What would be the effects of such a change of analysis?

Property II

First Assessment¹

*To be handed in at the next seminar, being Seminar 4.
Essays which are not handed in at that seminar will not be marked
- absolutely no exceptions.*

Bertie has recently died. All the property he had left in the world was £300,000 in cash which was held in parcels of £100,000 in three separate cash boxes marked A, B and C. In his will he appointed his wife Priscilla and his son Archibald to be his executors and trustees. His will contains the following dispositions:

- ‘(i) I leave the specific sum of £100,000 (held in cash box A) to be held on trust to be divided equally between such servants of the family as have given the family faithful service, so that all the money shall be spent;
- (ii) for twenty years after my death, the trustees shall distribute the money in cash in box B among my stalwart friends in amounts of not more than £10,000 in any one year but so that all of the money shall be spent within eighty years;
- (iii) the trustees shall apply £5,000 from the money in box C in each year after my death to the Mile End Trusts Lawyers’ Club to fund a subscription to the Chancery Division Law Reports and to pay for promoting its activities.’

Advise the following people as to their rights:-

- (a) Jeeves, the family butler for twenty years preceding Bertie’s death;
- (b) Dara, Bertie’s golf partner for the last thirty years and
- (c) Russell, chair of the Mile End Trust Lawyers’ Club.

Format of your answer, your seminar leader will give you instructions on this but for Professor Hudson’s students certainly: (i) your answer can be hand-written or typed (indeed it is better to hand-write your answer and to give yourself only one hour actually to write it out as though you were in an examination); (ii) no footnotes whatsoever; (iii) no bibliography; (iv) there is no need to write more than 2,500 words, if you do so you will have failed to restrict yourself to answering the question; (v) consider the facts of the question in detail in your answer; (vi) do not waffle. You will receive a suggested solution when your assessment is returned to you.

¹ Your seminar leader may or may not use this problem for your assessment.

Seminar 4

The Constitution of Trusts

*This seminar aims to introduce you to some more of the techniques (building on the last seminar) which trusts lawyers use to avoid rules of trusts law. By the end of this seminar you should be able to analyse sets of facts so that you can differentiate between the effect of the various analyses considered in the cases to those sets of facts. First, this seminar considers a complex stream of cases arising out of complex tax avoidance schemes constructed to avoid s.53(1)(c) LPA. This seminar is an important gateway for you into the way in which trusts lawyers manipulate trusts law principles for their commercial ends. What is essential is that you consider the reasons why the court decides whether or not the parties' actions fall within or without s.53(1)(c) LPA and further how you can use these cases to avoid the result in *Grey v. IRC*. . Secondly, we will consider the forms of activity which will, or which will not, lead to the creation of a valid express trust. Students will be expected to understand the occasionally narrow distinctions between the cases. Remember, the most important thing is to remember the reasons why a court has upheld, or invalidated, a trust in certain circumstances.*

For the appropriate cases for this seminar, you should see Topic 4 in the Course Documents.

For the appropriate textbook references for this seminar you should focus on the following:-

AH 206 – 262
ME 117 – 141
HM 68 – 100, 230 – 273
MB 116 – 130, 150 – 169

For further periodical reading, you might consider the following:-

*Green (1984) 47 MLR 388
Harris (1975) 38 MLR 557

Questions

1. When will a disposition fall within s.53(1)(c)? How can the rule in *Grey v. IRC* be eluded by using the following cases and what are the alternative analyses accepted in those cases:-
 - *Vandervell v. IRC*
 - *Oughtred v IRC* and *Neville v Wilson*
 - *Re Lashmar and Grainge v Wilberforce*
 - *Cohen and Moore v IRC*?
2. How do the following cases qualify the rule in *Milroy v Lord*?
 - *Re Rose*
 - *Pennington v Waine*
3. Analyse the following dealings with property in relation to the cases on s.53(1) LPA 1925.
 - a) Timothy is absolute owner of shares. Timothy declares himself to be trustee of the shares for Arnold.

- b) Samantha is the absolute owner of shares. She transfers those shares to Tariq and directs Tariq to hold those shares on trust for Asif.
- c) Tolla holds shares on bare trust for Albert. Albert directs Tolla to hold those shares on bare trust for Brenda instead.
- d) Trevor holds shares on bare trust for Arthur. Arthur directs Trevor to transfer title in those shares to Xavier to hold on bare trust for Yves.
- e) Timon holds shares on bare trust for Alexandra. Alexandra directs Timon to terminate the trust and to transfer the absolute title in the shares to Alexandra. Alexandra then declares a new trust over those shares in favour of Evelyn and Edward as beneficiaries.
- f) Tom is the trustee of shares which he holds on bare trust for Ben. Ben announces that he holds his equitable interest on trust for Sandeep absolutely.
- g) Tom is the trustee of shares which he holds on bare trust for Ben. Ben announces that he holds his equitable interest on trust for Sandeep except that Ben shall retain the power to decide how much of the dividends payable on those shares shall be advanced to Sandeep immediately.

4. Celia died on 21st April 2008. Her executors seek your advice as to whether or not she retained title in any of the following items of property at the date of her death, based on the following information.

(i) On 1st February 2008, Celia was the absolute owner of 200 shares in UK plc. Celia telephoned her cousin Duncan to tell him that she intended to transfer those shares to him immediately. Celia completed part of a share transfer form but she did not sign it and she did not post it off the company as she was required to do.

(ii) *In your view, would it have made any difference in question (i) if Celia had died very soon after the conversation with Duncan, and if she had expressed her intention to complete that gift on her deathbed but without having prepared a will?*

(iii) On 1st March 2008, Celia was the sole beneficiary under the “B trust”. The trust property constituted 300 shares in Lovely plc. Celia wanted to exchange the Lovely plc shares for Nasty plc shares which were held on trust for her friend Eve. Therefore, on 1st March Celia and Eve entered into a contract whereby Celia and Eve agreed to exchange their equitable interests under the two trusts with one another.

Seminar 5

Duties of trustees and breach of trust

This seminar considers (i) some of the key fiduciary duties of trustees and (ii) the various remedies for breach of trust.

For the appropriate cases for this seminar, you should see Topic 5 in the Course Documents.

For the appropriate textbook references for this seminar you should focus on the following:-

- AH As appropriate, the sections in Chapters 8, 9 and 18
ME 537 – 574 (trustees' duties), 655 – 682 (breach of trust)
HM 547 – 704 (given the length of this section, focus on cases in Lecture Course Documents), 704 - 760
MB 681 – 747, 863 – 894 (given the length of this, focus on cases in Lecture Course Documents)

Questions

1. Read and be prepared to discuss the following cases (on the issues relevant to this seminar):
 - *Target Holdings v Redferns*
 - *Armitage v Nurse*
 - *Walker v Stones*
 - *Re Hastings-Bass*
 - *Abacus Trust v Barr*
 - *O'Rourke v Derbyshire*
 - *Schmidt v Rosewood*
2. What is the effect of the decision of the House of Lords in *Target Holdings v Redferns*?
3. Is it conscionable for trustees to be able to limit their liability for negligent breaches of trust?
4. Why should access to information from trustees be restricted only to claimants who can demonstrate that they have some proprietary right in the trust property?
5. Is it conscionable for trustees to be able to get a second bite of the cherry using the doctrine in *Hastings-Bass*, or is it a reasonable protection for beneficiaries?
6. Jeeves was a solicitor who had been in legal practice for twenty-five years. Jeeves was the sole trustee of the Wooster family trust which contained £1 million. The trust was a discretionary trust, of which Bertie and Arthur were the only beneficiaries. Bertie was a forty year-old partner in a successful international advertising firm, whose capital in the advertising firm was estimated at about £10 million at the material time and whose matrimonial home was worth about £5 million. Arthur was a twenty-five year-old, penniless artist living in a squat in Shoreditch in London.

The other relevant provisions of the trust instrument were as follows:

- “(a) the trustee shall have a power to pay any capital from the trust fund to either beneficiary under the trust if their circumstances should deteriorate significantly;
(b) the trustee shall not be liable for any act of gross negligence.”

In December 2007, Bertie decided that he wanted to change career away from the pressures of advertising. He had been divorced in November 2007 and had lost the house in the divorce settlement. Furthermore, Bertie cannot liquidate his capital in the advertising firm until December 2009, and so he has to rely on his salary of £100,000 per annum in the meantime. Therefore, Bertie telephoned Jeeves in December 2007 and told him that Bertie wanted to relocate to Paris. Therefore, Bertie wanted Jeeves to transfer £600,000 from the capital of the trust fund to him so that he could use it to rent an apartment in Paris and start an art business in Paris. Jeeves did as Bertie had asked and paid £600,000 to him after selling off a large number of the trust's investments.

Selling off the trust's investments assets to generate the amount of £600,000 created a large tax bill for the trust. Jeeves had not known that this tax liability would be created. Jeeves maintains, however, that he would have sold these assets to help Bertie even if he had known about the tax bill. Bertie has not yet spent any of the money.

Advise Arthur.

7. Assume that the following facts follow on from the facts of the preceding problem. After this transfer, there was only £400,000 left in the trust fund. Jeeves considered that he should adopt a more adventurous investment policy than he had done previously so as to build up the capital in the trust fund and to generate income for Arthur. After reading a blog on a web-site by a well-known City stockbroker whom Jeeves had known at university, Jeeves decided to invest the whole of the trust fund in X Ltd and Y Ltd as the stockbroker had recommended on the web-site. X Ltd and Y Ltd were both private companies which had only been trading for two years each without yet making a profit. Both companies specialised in internet browser software which they hoped would compete with Google and Yahoo eventually. Both companies have since been involved in litigation with much larger internet companies and their shares have fallen in value by a half.

Advise Arthur.

Property II

Second Assignment²

*To be handed in before the end of Week 10 in the second semester.
Essays which are not handed into Reception before that time will not be marked - absolutely no exceptions.*

Do whichever question you choose.

(1) 'The law of trusts has a paradox at its heart: on the one hand we are told that the trust is based on conscience, while on the other hand there are large number of technical rules underpinning the law on express trusts which make the trust appear more like a species of contract than anything.'

Discuss.

(2) Stella and Kathleen are a couple who bought a house together on 3rd April 2006 for £400,000. The purchase was funded in part by means of a gift of £50,000 from Stella's parents which was made, according to the card in the envelope containing the cheque, "to both of you as you start your life together". The remainder of the purchase price was provided by way of a mortgage from Profit Bank in Stella's sole name. The property was registered in Stella's sole name at the Land Registry.

The vendor of the house had been a school-friend of Kathleen. Kathleen had convinced the vendor to reduce the price of the property by £20,000 down to the sale price of £400,000.

As Stella said over dinner the night before they signed the paperwork to complete the sale of the house: "This will be our home together." Kathleen agreed. In April 2006, Stella was aged 25 and had a bright career working in a law firm. Kathleen, aged 30, was finding it difficult to find work as a freelance graphic designer. The house was a small terraced house in Hove in south-east England. The couple decided that they wanted to have a baby by artificial insemination. Kathleen was to be the birth-mother. They had bought the house to provide a home for all three of them. In December 2006, Kathleen gave birth to their first child. Kathleen stayed at home to take care of the baby and to supervise the extensive alteration works which were being done on the interior of the property.

Stella made all of the mortgage repayments. Kathleen stopped work to look after the child while she supervised the building work and the decoration of the property. Kathleen and Stella paid for the building work, which cost £50,000, out of their joint savings. The value of the property increased by £200,000 over these two years, at least half of which is considered by professional valuers to be due to the improved decoration and design to the interior.

When the building work was finally finished on 1st April 2008, Kathleen said: "I hope all this work means that I have earned some rights in this house". Stella replied: "You know this is our home. Both of us together, and the baby. It always has been."

² Your seminar leader may or may not use this problem for your assessment.

Stella continued to pay all of the mortgage repayments until she fell suddenly ill in July 2008. Her condition has declined rapidly and she has not been able to work since July 2008. The doctors think it unlikely that she will ever be able to work again. In January 2009 she was made redundant. Kathleen has therefore recommenced work and has made all of the mortgage repayments since January 2009, and has paid for all of the other household expenses (including childcare) since then. Kathleen is however having difficulty earning enough money. The couple fear that Profit Bank will seek a sale of the property.

Advise Kathleen and Stella as to their respective rights in the property.

(3) “The doctrine of constructive trusts is incoherent.”

Discuss.

Format of your answer. your seminar leader will give you instructions on this but for Professor Hudson’s students certainly: (i) your answer can be hand-written or typed, it is better to hand-write your answer and to give yourself only one hour actually to write it out as though you were in an examination; (ii) no footnotes whatsoever; (iii) no bibliography; (iv) there is no need to write more than 2,500 words, if you do so you will have failed to restrict yourself to answering the question; (v) consider the facts of the question in detail in your answer; (vi) do not waffle. You will receive a suggested solution when your assessment is returned to you.

Seminar 6

Resulting and *Quistclose* trusts

The resulting trust is the first category of trusts implied by law that we consider. It is important to understand the manner in which the House of Lords, particularly in the person of Lord Browne-Wilkinson, has started to put their notion of ethics to work in their judgements. This might be compared with older cases like Quistclose which take a slightly different approach.

For the appropriate cases for this seminar, you should see Chapter VII in the Course Documents.

For the appropriate textbook references for this seminar you should focus on the following:-

AH 443 – 485; 928 – 953
ME 239 – 270
HM 289 – 347
MB 180 – 239

For further periodical reading, you might consider the following:-

- 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
- Chambers, *Resulting Trusts* (Oxford, 1997).
- Swadling (ed), *Quistclose Trusts*, (Hart, 2004)
- Worthington, *Proprietary Interests in Commercial Transactions*, (Clarendon, 1997), 43-71

Questions

1. Read and be prepared to discuss the following cases:

- *Westdeutsche Landesbank v Islington* (Lord Browne-Wilkinson, resulting trusts only)
- *Barclays Bank v Quistclose*
- *Carreras Rothmans v. Freeman Mathews Treasure Ltd*
- *Twinsectra v Yardley* (the speech of Lord Millett only)
- *Templeton Insurance Ltd v Penningtons Solicitors LLP*
- *Re Farepak Food and Gifts Ltd*

2. “*Quistclose* trusts are not limited to one form or another. Instead, the term ‘*Quistclose* trust’ is a blanket term for a range of techniques used by banks to take security for loans. Consequently, it comes as no surprise that no single explanation of how *Quistclose* trusts work is wholly satisfying.”

Discuss.

3. 'Quistclose trusts should be understood as being a form of express trust with a power for the borrower to use the loan money for a contractually specified purpose. The models of Quistclose trust which have been suggested by the English courts are riddled with inconsistencies.'

Discuss.

4. What do the differences between the speeches of Lords Goff and Browne-Wilkinson in *Tinsley v Milligan* suggest about the viability of considering the doctrines of equity, such as resulting trusts, to be concerned with ethics or alternatively with purely technical, commercial questions?

5. Maxwell ran a business from a small porta-cabin and a lock-up garage just off Stepney High Street. The business was a jewellery business of which Maxwell was the sole owner.

Maxwell was concerned that his jewellery business would soon go into insolvency. Therefore, in November he transferred all of the jewels he held in stock for the business to his son Kevin telling him 'keep quiet about this, son, I'll explain later'.

Maxwell continued to run the business as before, dealing with all of its property as though entirely his own - buying and selling jewels as usual. The jewellery business did go into insolvency. Maxwell now wants to recover all of the jewels. Kevin wants to go to Thailand and is refusing to transfer the property back.

Advise Maxwell on his rights in respect of the jewels.

6. Maxwell was the registered proprietor and sole equitable owner of a freehold house in Gant's Hill in which he lived with his wife Sandra and son Kevin, and of a small cottage in Devon which the family used for holidays.

In September 2004, an accountant's report suggested that Maxwell would not be able to pay his debts within 12 months and therefore would go into personal bankruptcy. In October, Maxwell transferred the house into Sandra's name without telling her. The first she heard about it was when Maxwell asked her to sign a form agreeing to a mortgage over the property.

Maxwell wanted to sell the family cottage but was worried about the tax consequences. Therefore, he transferred the cottage into Kevin's name telling him it was 'a tax thing - I'll explain later'. The cottage was sold for £80,000 and the money passed to Kevin as registered owner without capital gains tax being paid.

Maxwell did not go bankrupt. Therefore, Maxwell now wants to recover the Gant's Hill house and the proceeds of the sale of the cottage. Sandra wants a divorce and is refusing to transfer the property back.

Advise Maxwell on his rights in respect of the different items of property.

Seminar 7

Trusts of homes

This seminar considers the complicated law relating to rights in the family home. The student should attempt to distinguish the different approaches offered by the courts one from another. This topic is amenable both to essays as well as to problems. Students must attempt to grapple with the academic commentary on this topic as well as with the cases simpliciter.

For the appropriate cases for this seminar, you should see Chapter IX in the Course Documents.

For the appropriate textbook references for this seminar you should focus on the following:-

AH 609 – 690
ME 271 – 300
HM 382 – 423
MB 321 – 347

Questions

1. Formulate the tests in the following cases:
 - *Stack v Dowden*
 - *Lloyds Bank v Rosset*
 - *Springette v Dago*
 - *Huntingford v Hobbs*
 - *Hammond v Mitchell*
 - *Midland Bank v Cooke*
 - *Re Basham*
 - *Baker v Baker*
 - *Gillett v Holt*
 - *Jennings v Rice*
 - *Lissimore v Downing*
 - *Oxley v Hiscock*
 - *Cox v Jones*
 - *Abbott v Abbott*
 - *Thorner v Major*

2. Distinguish between the following doctrines as they relate to trusts of homes:
 - Express trusts
 - Resulting trusts
 - Common intention constructive trusts
 - Ordinary constructive trusts
 - Proprietary estoppel
 - Unjust enrichment

3. Larry and Cheryl are an unmarried couple who acquired a house in Kent in May 1996 for their joint occupation. The legal title in the house was entered in their joint names.

The house cost £300,000. The house was acquired by the following means. £20,000 was provided to Larry as a birthday present from his parents. £30,000 was contributed by Larry in cash. The remaining £250,000 was provided by means of a mortgage which was taken out in their joint names, but the parties had agreed that Larry would make all of the repayments because Larry was the only one in full-time work. They did not reach any further understanding about their home.

Cheryl gave birth to their first child within one month of the couple moving into their first house. Cheryl took sole responsibility for their child while Larry was required to travel with work. Larry was abroad for about fifteen days each month. Cheryl also took sole responsibility for the renovation of approximately half of the house and for the entire redecoration of the house.

The couple sold their first house for £600,000 in May 2000. They bought a new house in Sussex for £700,000 with the following funds: a new mortgage for £300,000 taken out in Larry's sole name; the balance of the sale proceeds from the first house; and a legacy of £50,000 left to Cheryl by her grandmother.

The Sussex house was registered in Larry's sole name. Larry explained to Cheryl that it was a condition of the mortgage contract that this was done. He said this knowing that it was not true because he was unsure about their future together. Cheryl gave birth to three more children in the meantime.

In May 2007, Cheryl learned that Larry had become romantically involved with one of his work colleagues. She confronted Larry and they effected a reconciliation. Cheryl asked Larry to "place the rights of herself and the children on a more secure footing, or else I will need to take legal advice". Larry reassured her that the property was half hers.

However, Larry continued with his affair. The couple separated in May 2008.

Advise Cheryl.

4. Is it possible to reconcile the remaining cases in the list in Q.1 with the decision in the speech of Lord Bridge in *Lloyds Bank v Rosset*, as the Court of Appeal attempted in *Oxley v Hiscock*?

5. 'The English courts' approach to trusts of homes is merely the search for the "phantom of common intention". A better approach would be to identify the detriment suffered by the plaintiff and make awards on that basis alone.'

Discuss.

Seminar 8

Constructive trusts

In this seminar we will be focusing on (i) constructive trusts as they arise in relation to secret profits taken by fiduciaries and in relation to bribes and (ii) we will be considering briefly the tests for knowing receipt and dishonest assistance to introduce the next seminar.

You should think of this seminar and the next seminar as being linked. We are concerned in general terms with situations in which there is some value lost to a trust as a result of misfeasance by a fiduciary or by some “stranger to the trust”, which will lead the beneficiaries either to seek a proprietary remedy against that fiduciary or whoever holds the trust property, or to seek a personal claim against some third party. There is too much material in this field to fit into one seminar and therefore it has been spread across two seminars.

For the appropriate cases for this seminar, you should see Chapter X in the Course Documents.

For the appropriate textbook references for this seminar you should focus on the following:-

- AH 486 – 566 (constructive trusts); and also 842 – 848 (intro to dishonest assistance and knowing receipt)
- ME 301 – 344
- HM 348 – 379
- MB 278 – 321

Questions

1. (a) Read and be prepared to discuss the views of the majority of the House of Lords in *Boardman v Phipps*.
(b) What was the approach of the minority in the House of Lords in that case?
2. (a) How might a defendant rely on the defence of authorisation in relation to a claim seeking a constructive trust over secret profits?
(b) In the operation of this defence in practice, is there a distinction between trustees managing family trusts and directors dealing with the companies which employ them?
3. (a) Read and be prepared to discuss the judgment of Lord Templeman in *Attorney-General for Hong Kong v Reid*.
(b) How did Lord Templeman indicate in *Reid* that he would have treated decreases in the value of any property acquired with the bribe?
4. John is trustee of a family trust. The trust fund contained £40,000 in cash. A stockbroker, who was hired by the trust, advised John to invest £30,000 in a private company. John decided to invest £25,000 of the trust’s money and £5,000 of his own money in that company. Shares in the company doubled in value. Advise the beneficiaries of that trust.
5. To what extent does the principle in *Keech v Sandford* persist in the modern law?

6. Michael was the accountant advising the trustees of a family trust. The trust fund comprised £2 million and a minority shareholding in Flex Ltd, a private company.

While attending a meeting of Flex Ltd on behalf of the trust in January 2006, Michael learned of an opportunity to generate large profits for Flex Ltd. It would, however, require taking over the company and replacing its management. To acquire a majority shareholding would require £1.5 million. In previous years the trustees had always told Michael that they wanted to keep at least £1 million in free cash or in liquid investments in case the beneficiaries ever needed money in an emergency. Therefore, Michael decided to use £1 million of trust money and to use £500,000 of his own money so as to acquire a majority shareholding between himself and the trust. Michael was dismissive of the commercial abilities of the trustees. Therefore, he decided that he would not explain his plan to the trustees because he considered that they would not have understood it.

In his annual accounts prepared for the trustees, Michael included the following information on page 12 of the fifteen page document which comprised the accounts: “to ensure the acquisition of the shares which were necessary to acquire a majority shareholding in Flex Ltd, the trust’s accountant decided to contribute personally to the necessary expenditure”. Further, Michael asked the trustees to sign a certificate which read: “the trustees hereby consent to Michael making investments on his own account in relation to any opportunities about which he may acquire intelligence while working for this trust.”

Having taken control of Flex Ltd, Michael was also able to direct the board of directors of Flex Ltd to use Michael as their accountant. The Chief Executive of Flex Ltd, Jeremy, was initially reluctant to change accountant but Michael offered to pay him £30,000 if he agreed to divert all of the company’s accountancy work to Michael. Jeremy took the money and did as Michael asked. Jeremy used the money to buy more shares in Flex Ltd – those shares are now worth £40,000.

In 2007, Flex Ltd generated huge profits and Michael personally earned £200,000 in profits from this transaction by 1st June 2008.

On 1st June 2008, the £200,000 in profits were paid into a bank account which was held in Michael’s name and which Michael maintained for many trusts which he advised. Due to poor investment of this money, the account holds only £150,000 at the present date.

Advise the beneficiaries of the family trust.

7. Consider the basis on which the constructive is awarded in the following cases (and any others which you have met) and consider whether or not there is in truth a single, coherent basis for constructive trusts in English law:

- *Westdeutsche Landesbank v Islington*
- *Boardman v Phipps*
- *Attorney-General for Hong Kong v Reid*
- *Lloyds Bank v Rosset*
- *Paragon Finance v Thackerar*.

Seminar 9

Dishonest assistance and knowing receipt

For the appropriate cases for this seminar, you should see Chapter IX(B) in the Course Documents.

For the appropriate textbook references for this seminar you should focus on the following:-

AH	841 – 896
ME	309 – 324
HM	760 – 799
MB	968 – 1007

1.
 - (a) Read and be prepared to discuss the conception of dishonest assistance set out by Lord Nicholls in *Royal Brunei Airlines v Tan*.
 - (b) How is this test reinterpreted by Lord Hutton in *Twinsectra v Yardley*?
 - (c) What is the effect of Lord Nicholls’s judgment in *Dubai Aluminium v Salaam*.
 - (d) What is the effect of Lord Hoffmann’s judgment in *Barlow Clowes v Eurotrust*?

2.
 - (a) Read and be prepared to discuss the judgment of Megarry V-C in *Re Montagu*.
 - (i) what are the three forms of knowledge accepted by Megarry V-C?
 - (ii) why does his lordship restrict the possible forms to those three?
 - (b) How is this test reinterpreted in *BCCI v Akindele*?
 - (c) How was this test reinterpreted by Potter LJ in the Court of Appeal in *Twinsectra v Yardley*?
 - (d) How does Scott LJ conceive of this concept of knowledge in *Polly Peck v Nadir (No 2)*?
 - (e) How is a company fixed with liability based on “knowledge”, “dishonesty” or “unconscionability”?

3. Dipali was a senior trader with Credit Bank, a bank with 100 traders in the UK, and also one of the thirty member of the board of directors. Dipali had personal responsibility within the bank for all investments made through Freedonia.

Johnny contacted Dipali in March 2007 by telephone. He introduced himself as the trustee of a group of Freedonian investment trusts which collected investments from Freedonian investors. Johnny asked Dipali to invest £5 million on behalf of this trust. The documentation which Johnny provided to Dipali disclosed that the investors were ordinary members of the public in Freedonia. That documentation also disclosed that the trust’s total investment capital was about £100 million.

During 2007 the first investments came from Johnny as anticipated and was paid into accounts held by Credit Bank. The profits were returned to Freedonia and were paid into the trust's accounts in Freedonia.

Then in December 2007 Johnny flew to London to meet Dipali for the first time. He told Dipali that he expected the trust's activities and investor base to expand hugely in the coming months and that he would be passing all of his investment business through Credit Bank. Dipali said she was very interested in providing whatever services Johnny needed. Johnny then told Dipali that he wanted to invest the entire £100 million from the Freedonian investment trust through Credit Bank over the next five months, in amounts of £20 million per month. The capital investments and their profits were, however, to be exchanged into US dollars and paid in small parcels into a number of different bank accounts in Johnny's name in Panama, in the Cayman Islands and in the British Virgin Islands.

Dipali agreed to the arrangement. She asked no further questions about the trust's activities. She earned her usual commission from Credit Bank in relation to this business. When asked by her fellow directors how she had acquired such large investments from Johnny, she replied: "My personal moral code in relation to clients is that I follow their instructions completely. Johnny has instructed me to maintain complete confidentiality." The other directors were very angry at this but Dipali refused to change her mind.

Later that day, it transpired that Johnny had stolen the entire £100 million from the trust. Both he and the money have now disappeared.

Advise the beneficiaries of the trust.

Seminar 10

Tracing

For the appropriate cases for this seminar, you should see Chapter X in the Course Documents.

For the appropriate textbook references for this seminar you should focus on the following:-

AH	777 – 840
ME	682 – 719
HM	799 – 840
MB	894 – 948

Questions

1. What is the availability of common law tracing after *FC Jones, etc. v Jones*?
2.
 - (a) What is the pre-requisite for equitable tracing in *Re Diplock, etc*?
 - (b) What are the possible approaches if the trustee has mixed trust money with her own money in *Re Hallet* and in *Re Oatway*?
 - (c) How does *Foskett v McKeown* deal with the problem of a trustee mixing trust money with her own money, even if the people claiming through the trustee are innocent volunteers?
 - (d) Explain the distinction between *Clayton's Case* and *Ontario Securities / Barlow Clowes*.
 - (e) How does *Russell-Cooke v Prentis* circumvent *Clayton's Case*?
 - (f) What are the available remedies in relating to equitable tracing?
 - (g) What are the available defences in relation to equitable tracing?
3. Gordon held three abstract paintings on trust for the Darling family trust: the paintings were called “*One*”, “*Two*” and “*Three*” respectively. The terms of the trust were that Gordon was not permitted to sell the paintings but rather that he should seek to earn income by exhibiting them. Gordon was the sole trustee.

Gordon had a gambling addiction and so had run up enormous debts. In desperation, Gordon decided to sell the paintings to meet his debts.

In September 2008, Gordon sold *One* to Arthur for £100,000. Gordon has since lost all of these sale proceeds through gambling. Arthur sold *One* for £120,000 on 1 December 2008. Arthur used the entire amount to buy an Aston Martin DB9 motor car which cost £120,000.

In October 2008, Gordon sold *Two* to Bea for £500,000. Tragically, *Two* was destroyed in a fire at the warehouse in which it had been stored. On 2 October 2008, Gordon paid the £500,000 into a bank

account in which he already held £20,000 on trust for his mother. The following payments were then made out of that account. On 3 October, £10,000 was used to buy shares in a company, Business Undertaker plc, which specialised in providing insolvency services. The shares in that company have now quadrupled in value. On 4 October 2008, £30,000 was taken out of that account to invest in Static plc, whose shares have not changed in value. On 5 October 2008, the remaining money was invested in the shares of Waffle Bank. Shares in Waffle Bank are now worth only 5% of their value in October 2008.

In November 2008, Gordon sold *Three* to Carol for £20,000. This money was paid into a bank account which is now overdrawn. The £20,000 had been used to pay off the final instalment on Gordon's own mortgage over his home. Carol has now spent £1,000 in renting gallery space to display *Three* to the public with a view to selling it.

Gordon, Arthur, Bea, and Carol are now all personally bankrupt.

Advise the beneficiaries of the Darling family trust.

This final question combines tracing, dishonest assistance and knowing receipt ... just for fun:-

4. Bingo was a well-established stockbroker and investment advisor to the Taylor family trust. The trustees of that trust were Tick and Tock. He gave advice the trustees to invest in the following terms: at that time, the trust fund was worth a total of £500,000. The trustees were not professional investors and so took Bingo's advice. The trust expressly prohibited investment in shares in private, "ltd" companies.

Bingo was a substantial shareholder in Whizz Ltd. In 1996 Bingo advised that the total trust fund (£500,000) be invested in Whizz Ltd. Bingo knew that Whizz Ltd was about to enter into a risky business venture at that time in an area in which Whizz Ltd had no experience. Margaret, the managing director and controlling mind of Whizz Ltd, had asked Bingo to look into raising money for this business venture. When Bingo procured £500,000 from the Taylor family trust and presented the payment to Whizz Ltd, Margaret asked: 'where did you manage to find such a large investment?' Bingo replied, cryptically: 'Ask me no questions, and I will tell you no lies.' Margaret said nothing more.

The £500,000 was then used in the following four ways:-

- (i) First, £150,000 was placed in a current bank account No. 100. That account went overdrawn in 1997; the money was used to pay off the mortgage on the company headquarters. There was £80,000 in the account by April 1998.
- (ii) Second, £50,000 was placed in current bank account No. 200 in July 1997. Account No. 200 already contained £10,000. Out of account No. 200, £20,000 was spent on a lavish Christmas party for clients. No further amounts have been paid out of the account no. 200 since then.
- (iii) Third, £275,000 was used to purchase machinery which the company has kept.
- (iv) Fourth, £25,000 was used to buy operating equipment and donated to a medical charity.

Advise Tick and Tock generally.

The End
ASH