

INTERNATIONAL AND COMPARATIVE TRUST LAW

University of London LLM

The course is led by:

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

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Queen Mary, University of London

School of Law

LLM: INTERNATIONAL AND COMPARATIVE TRUST LAW

COURSE DOCUMENTS AND READING LIST
2006-2007

About this course

This course will be led for the first term by Prof Hudson and then for the second and third terms by Prof Thomas.

At the beginning of the first term, classes in this course will be held in tandem with Prof Hudson's course *Advanced Equity and Trusts Law*. Thereafter, this course will meet once per week as provided on the timetable.

Most important materials are marked with asterisk.

Useful on-line materials

Most jurisdictions have their own government web-sites where their current legislation may be found. You will find it rewarding to search for and within these web-sites.

The relevant trusts law legislation of all jurisdictions referred to in this Section, with the exception of the Cook Islands, can be found on-line through the Canadian STEP web-site, the address of which is:

http://www.step.ca/category/legislation_international.htm

The trusts legislation of the Cook Islands can be found on-line at the following address:

http://www.pacii.org/ck/legis/num_act/toc-I.html

An index of Cook Island cases can be found at:

<http://www.pacii.org/ck/indices/cases/Collected%20Cases%2076-964.html>

General background reading:

Due to the progressive nature of this course, there is no single textbook in which you will find all of the necessary reading. Rather, this course is a very practical course and so you will need to read the many different sources identified in these materials. You will find that some key texts will be useful for outlining the general principles.

Introductory reading

If you have not studied trusts law in a common law jurisdiction before, then you will need to get up to speed quickly. The introductory lectures on this course may move

more quickly than you may be able to accommodate unless you read an accessible, introductory text. Non-common lawyers should read one of the following introductory works, which are short, which contain the key principles, and which are also full of vitamins:-

- Hudson, *Understanding Equity and Trusts*, 2nd ed, 2004, London: Cavendish
- Hayton, *The Law of Trusts*, 4th ed, 2003, London: Sweet & Maxwell

General textbooks

To understand better the general principles of *the English law of trusts*, you should refer to one or more of the following books, which can be found in the university libraries. Beware, however, that they are set texts for compulsory undergraduate courses and so access to them may be limited at times:

- Alastair Hudson: *Equity and Trusts* (4th ed.: Cavendish Publishing, 2005).
- Hanbury and Martin: *Modern Equity* (17th ed., by Dr J. Martin: Sweet & Maxwell, 2005).
- Parker and Mellows: *The Modern Law of Trusts* (8th ed., by A.J. Oakley: Sweet & Maxwell, 2003).
- Pettit: *Equity and the Law of Trusts* (10th ed.: OUP, 2005).

Practitioners' texts:-

These books are written for practitioners which means that they deal in depth with more cases than many student textbooks, they deal with more practical issues than student textbooks, and they are much more expensive than student textbooks. They are in the university libraries and they will be particularly important for this course.

- GW Thomas and AS Hudson, *The Law of Trusts* (1st ed., Oxford University Press, 2004, 1,907pp)
- DJ Hayton, Underhill and Hayton, *Law Relating to Trusts and Trustees* (16th ed.: Butterworths 2002).
- Mowbray et al, *Lewin on Trusts* (17th ed, Sweet & Maxwell, 2002)
- Ford and Lee, *Principles of the Law of Trusts* (3rd ed., Sydney, 1998)

Course Outline

The following table gives a timetable for this course for the first term. Thereafter, Prof Thomas will provide a timetable for the remaining two terms of the course.

<i>Week: w/c</i>	<i>Topic:</i>
2 / 10	Core principles of equity and the law of trusts
9 / 10	Foundational techniques of express trusts (1)
16 / 10	Foundational techniques of express trusts (2)
23 / 10	Themes in Comparative and International Trusts Law
30 / 10	<i>Shams, revocable trusts and retention of title</i>
6 / 11	<i>No class this week</i>
13 / 11	The nature of the interests and rights of beneficiaries and discretionary objects
20 / 11	Impeaching the exercise of mere powers and powers under discretionary trusts
27 / 11	Beneficiaries' rights to information
4 / 12	Trustee exemption clauses
11 / 12 Term End	Is there an irreducible core minimum of the content of the duties of a trustee?

Abbreviations used in these materials:

austlii:	www.austlii.edu.au
bailli:	www.bailli.org
BOCM:	Butterworths Offshore Cases and Materials
casebase:	www.casetrack.com/casebase
CFILR:	Company Financial and Insolvency Law Review
CILR:	Cayman Islands Law Reports
D&M:	Dicey & Morris, <i>The Conflict of Laws</i> , 13 th ed, 2000
GLJ:	Guernsey Law Journal
Grundy:	Milton Grundy, <i>Trust Casebook</i> , 1998
hague:	www.hcch.net/e/
H&M:	Hayton & Marshall, <i>Commentary and Cases on the Law of Trusts</i> , 12th ed, 2005, Sweet & Maxwell
Hudson:	Alastair Hudson, <i>Equity & Trusts</i> , 4 th ed., Cavendish Publishing, 2005.
ITELR:	International Trust and Estate Law Reports
ITL:	<i>International Trust Laws</i> , ed Glasson
jerseylegalinfo:	www.jerseylegalinfo.je
JITCP:	Journal of International Trust and Corporate Planning
JLR:	Jersey Law Reports
JLRev:	Jersey Law Review
JJ:	Jersey Judgments
JTCP:	Journal of Trust and Corporate Planning
KCLJ:	King's College Law Journal
Lewin:	<i>Lewin on Trusts</i> , 17 th ed. by J. Mowbray, L. Tucker, N. Le Poidevin and E. Simpson (Sweet & Maxwell, 2000).
LRC:	Butterworths' Law Reports of the Commonwealth
MLR:	Manx Law Reports
MR:	Mauritian Reports
M&S:	Matthews & Sowden, <i>The Jersey Law of Trusts</i> , 3rd ed, 1994
NSWLR:	New South Wales Law Reports
OFLR:	Offshore Financial Law Reports (see now ITELR)
OTPR:	Offshore Tax Planning Review (later OTR, Offshore Taxation Review, and now OITR, Offshore International Taxation Review)
P&M:	Parker & Mellows, <i>The Modern Law of Trusts</i> , 8 th ed 2003
PTPR:	Personal Tax Planning Review
Thomas:	<i>Powers</i> (Sweet & Maxwell, 1998)
Thomas & Hudson:	<i>The Law of Trusts</i> (OUP, 2004)
TLI:	Tolley's Trust Law International
trustsandtrustees:	www.trusts-and-trustees.com/library.html
U&H:	Underhill & Hayton, <i>Trusts and Trustees</i> , 16th ed 2003
Willoughby:	Willoughby, <i>Misplaced Trust</i> , 2 nd ed., 2002, by J. Wadham.
WTLR:	Wills and Trust Law Reports

Section (1)

GENERAL TRUST ISSUES

The opening sessions of this course will be concerned with general issues relating to equity and the law of trusts. Section (2) of this course will then proceed to consider issues of particular relevance to Comparative and International Trusts Law, all of which build on issues considered in these introductory sessions.

It is expected that these introductory sessions will serve as a reminder of undergraduate study of trusts law and also as the foundation platform for this course. In these sessions we shall consider a number of key, foundational issues and compare the English law approach with approaches taken both in different jurisdictions and proposed by a variety of jurists. These sessions will comprise the first term and part of the second term. Thereafter, the later sections of the course will consider issues from other jurisdictions.

TOPIC 1. THE FOUNDATIONS OF EQUITY AND THE LAW OF TRUSTS

Aim: This topic is concerned to introduce students to the core principles which underpin equity in general terms and the law of trusts in particular. The difficulty with beginning this LLM course is that there are usually two types of student: those who studied trusts law at undergraduate level and those who never studied trusts law at all before. Therefore, the first three topics of this course aim to teach the basics to novices and to serve as a refresher course for the initiated.

LECTURE MATERIALS

(A) The nature of equity

Reading: **Hudson, section 1.1**

1) Philosophical ideas of equity

The following ideas come from Aristotle's *Ethics*, and should 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 provides 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, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless: and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."

3) The fusion of common law and equity

Judicature Act 1873

4) The structure of English private law

Reading: **Hudson, section 1.2**

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

Common law

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

(B) The structure of the trust relationship.

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

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

- Thomas and Hudson, *The Law of Trusts*

'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**

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**

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

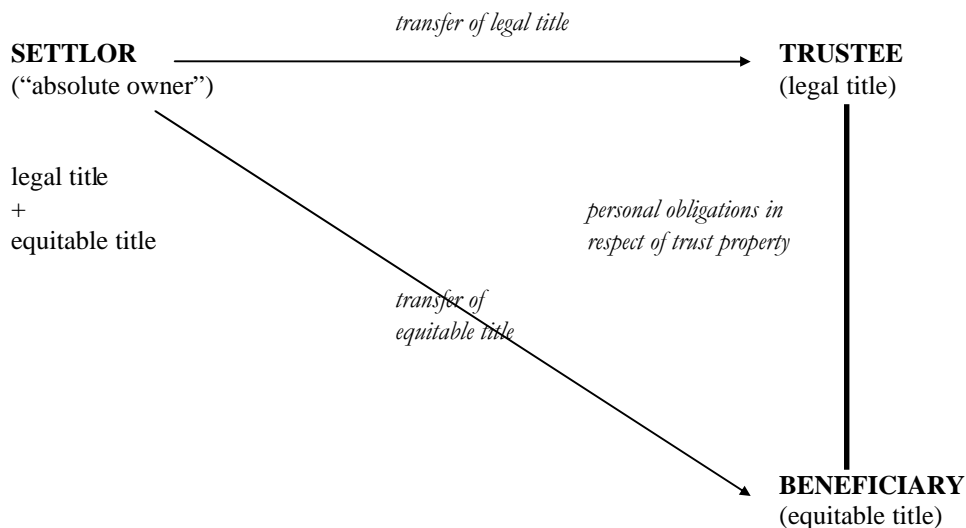
‘A trust comes into existence either by virtue of having been established expressly by a person (the settlor) who was the absolute owner of property before the creation of the trust (an express trust); or by virtue of some action of the settlor which the court interprets to have been sufficient to create 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**

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.



(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.

(H) The core principles of equity

Reading: **Hudson, section 1.4**

The thirteen propositions set out below are culled, as a list, primarily from *Snell's Equity*, (31st ed., 2004) by McGhee, 27.

- 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 2. FOUNDATIONAL TECHNIQUES OF EXPRESS TRUSTS (1)

Aim: *The purpose of this topic is to consider some of the core principles underpinning express trusts law – the area which is most commonly met in practice (before litigation to recover property begins ...) – and to introduce novice students to these core ideas. However, this is not simply an undergraduate lecture. Rather, the intellectual goal here is to present some of these well-known cases on the constitution of express trusts as being a set of techniques which are used by practitioners to develop the forms of trust and “property management vehicles” which their clients need. The textbook considers this set of techniques in Hudson, Equity & Trusts, Chapter 7. It is not expected that we will cover all of this material in detail.*

LECTURE MATERIALS

Lecture plan

A set of techniques

- Avoiding mandatory rules
- Controlling who has rights and who does not
- Retaining flexibility
- The line between trust and contract, proprietary and personal rights
- Regulatory avoidance

Areas covered

- Certainty of intention
- Certainty of subject matter
- Certainty of objects
- The beneficiary principle
- Dispositions of equitable interests
- Covenants to settle property

The need for the three certainties

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

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

(A) Certainty of Intention.

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

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

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

Re Kayford [1975] 1 WLR 279

(2) Sham trusts and trusts intended to defraud creditors

{Considered in detail in this course as a special topic in Topic 5.}

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.

(B) Certainty of Subject Matter.

Reading: Hudson, section 3.4

Overall Point: Trusts are part of the law of property (as well containing equitable obligations on the trustees too) and therefore it is essential that the trust property be segregated from all other property.

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

Palmer v Simmonds (1854) 2 Drew. 221 ("bulk of my... residuary estate").

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...").

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

**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?

***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

Cf. the law of insolvency generally and the need for clear secured rights.

(3) 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

Cf. the law on tracing later in the course

(4) Floating charges (not trusts)

Clough Mill v Martin [1984] 3 All ER 982

(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*

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

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

(C) Certainty of Objects.

Reading: Hudson, section 3.5

Overall point: there are different analyses of ostensibly similar fiduciary obligations over property. Also there are a number of ways of avoiding those rules of formality by structuring the material differently.

1) Introduction

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

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

2) 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
- Personal, non-fiduciary powers

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

3) Certainty rules for personal powers.

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

4) Certainty rules for mere (fiduciary) powers.

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”.*

5) Certainty rules for discretionary trusts.

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

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

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

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

(Re Allen [1953] Ch 810)

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

Re Barlow [1979] 1 WLR 278

8) Mechanisms for eluding the “any given postulant test” (2): use of an expert.

Re Tuck's ST [1978] 2 WLR 411

9) Mechanisms for eluding the “any given postulant test” (3): let the trustees do whatever they want .

(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*)

10) The nature of powers of appointment

*Thomas and Hudson, Chapters 11 and 20

Underhill & Hayton 93-98, 518-519, 631-633

(D) The nature of the beneficiary’s rights in the trust fund

Reading: **Hudson, section 4.1**

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

Re Bowes [1896] 1 Ch 507

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.*’

Gartside v IRC [1968] AC 553 – *when does object of discretionary trust have a proprietary right?*

(E) The beneficiary principle.

Reading: **Hudson, section 4.2**

Overall point: the mandatory rule that there must be some person in whose favour the trust is enforced has spawned a number of imaginative, analytical attempts to circumvent that rule. This topic will be considered in detail in Topic 6.

1) The general principle

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

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

Bowman v Secular Society Ltd [1917] AC 406

2) The strict, traditional principle

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

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

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

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

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

i) Transfer interpreted to be a gift

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

ii) 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"

(F) Is the beneficiary principle justifiable?

Overall point: would the removal of the beneficiary principle aid international trusts law practice? this topic will be considered in Topic 6 in detail.

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 3. FOUNDATIONAL TECHNIQUES OF EXPRESS TRUSTS (2)

This material follows on from the previous lecture ...

(G) Dispositions of equitable interests.

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

Overall point: the creativity of trusts lawyers is endless and a variety of means of structuring transactions can be used to circumvent a mandatory rule of trusts law.

Statutory material

Law of Property Act 1925, 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...*"

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

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

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

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

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

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

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

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

Reading: *Hudson, section 5.7.6*

Re Lashmar (1891) 1 Ch 258

Grainge v Wilberforce (1889) 5 TLR 436

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

Reading: *Hudson, section 5.7.7*

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

c) Contract transfers equitable interest automatically

Reading: *Hudson, section 5.7.8*

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

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

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*)

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

Reading: *Hudson, section 5.7.9*

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

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

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

Reading: *Hudson, section 5.7.5*

Green, (1984) 47 MLR 388.

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

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

Overall Point: Equitable doctrines and considerations, like *Re Rose* and *Rochefoucauld*, may trump clear rules of formality so as to achieve fairness.

1) Methods for the proper constitution of a trust

Reading: *Hudson*, section 5.3

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.'

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

Reading: *Hudson*, section 5.4.3

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

3) Resulting, implied and constructive trusts require no formalities for their creation

General reading: **Hudson, section 5.2**

LPA 1925, s. 53 (2)

Hodgson v. Marks [1971] Ch. 892 - resulting trust.

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

General reading: **Hudson, section 5.2**

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.

(J) Covenants and promises to create a settlement.

Overall Point: Even if property law will not provide a remedy, contract law may provide a personal claim.

Reading: **Hudson, section 5.6**

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

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

Reading: *Hudson*, section 5.6.1

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

b) Mere promise unenforceable if beneficiary gave no consideration:

Reading: *Hudson*, section 5.4.2

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

Re Brook's ST [1939] 1 Ch 993

Re Ralli's WT [1964] 1 Ch 288

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

Reading: *Hudson*, section 5.6.1

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

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

Reading: *Hudson*, section 5.6.1

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

2) Trustee not permitted to enforce the promise?

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

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

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

b) The law of contract

Contract (Rights of Third Parties) Act 1999

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

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

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

Fletcher v. Fletcher (1844) 4 Hare 67.

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

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

TOPIC 4. THEMES IN COMPARATIVE AND INTERNATIONAL TRUSTS LAW

Aim: *The aim of this lecture is to summarise at the outset some of the key thematic and intellectual questions which we will meet in this first term and throughout this course.*

LECTURE MATERIALS

A. Why does “conscience” play little role in civil code uses of the trust?

1. What is meant by “conscience”?
2. Some jurisdictions, e.g. Malta, require registration of trusts, whereas that is not the case in England and Wales.
3. In “new trusts jurisdictions” trusts are used solely for the purposes of property management.
4. In England, trusts law is also used to provide remedies in relation to unconscionable misuse of property:-
 - a. constructive trust over stolen property
 - b. constructive trust for profits made in conflict of interest
 - c. constructive trust for profits realised from bribes in fiduciary office
 - d. purchase price resulting trust
 - e. *cf.* proprietary estoppel: representation, reliance and detriment may lead to an equitable interest in property or compensation for the claimant.
5. Is the English trust in fact comprised of very different devices: e.g. commercial and traditional/domestic – see *Target Holdings v Redfems*

B. The demands of international trusts law practice

1. Can trusts be better understood on the basis of contractual models: e.g. exclusion of liability of trustees?
2. Is the beneficiary principle necessary, or would international trusts law fare better by using protectors and other devices?
3. Is the trust part of property law or of the law of obligations?
4. Do these mooted developments qualify the notion of fiduciary liability?

C. Investment trusts issues in English and international trusts law

1. What manner of right will the beneficiary have? E.g. fixed trust; object of a discretionary trust; object of a power of appointment; no ostensible property right but rather subject to a letter of wishes, etc.?
2. How will certainty of objects be important in practice? Who has the power to give directions to the trustee?

3. Can a protector stand in the place of a beneficiary? If so, will the trust be recognised as being valid under English law?
4. The problem of “limping trusts”: what if the trust is valid under the law of jurisdiction X but not valid under English law? What will be the UK tax and regulatory effect?
5. Will the trust be a sham if the true beneficiary is concealed?
6. NB: the effect of the EC Tax Savings Directive.
7. Are trusts better considered to be a form of contract? Would this facilitate exclusion and exemption of liability?

D. The overlap between trusts law and the law of finance

1. How does financial regulation correlate with the ordinary law of trust? See, for example, regulation of pensions, regulation of unit trusts, and FSA regulation of trustees trading as authorised persons.
2. How do Conduct of Business principles, imposing active obligations on trustees and not permitting exclusion of liability, inter-act with trusts law rules permitting exclusion of liability and imposing no positive obligations (outside the trust instrument)?
3. Will English courts apply financial regulatory principles in deciding trusts cases? What will that mean for offshore trusts using English law as their proper law?

E. Non-English conceptualisations of the trust concept

1. Civil code jurisdictions: the idea of patrimony.
2. The trust requiring registration.
3. The trust as a cell structure.
4. The trust and the interests of investors overseen by a protector but operated by the trustees.
5. The “trust” in fact a company, as in Japan, where the company is an agent for the investors.

TOPIC 5. SHAMS, REVOCABLE TRUSTS AND RETENTION OF CONTROL

The issues in this Topic:

(a) The central issue here is whether or not a trust which is carefully structured so as to generate the minimum liability to tax, or to shelter the assets from regulatory oversight, or to shelter (hide?) assets from other persons, may nevertheless be held not to be a trust at all on the grounds that it is a sham.

(b) There is also a related question as to the effect of a settlor purporting to create a trust such that s/he divests herself of all of her rights in the trust property but in relation to which she appears to retain some right to recover that property at some time in the future; or where the trust can be revoked so that the trust property passes back to the settlor. Will such arrangements be void as shams? And, if so, what would be the regulatory or tax position?

(c) So, in what circumstances and in what ways can the settlor retain control over the trust property without being deemed to be a beneficiary with proprietary rights in that property (either under an express trust or a resulting trust if the express trust fails)?

Shams, revocable trusts and retention of control

It is suggested that you consider as much of this reading as you can, or as much as you can locate easily in your university library. The textbook reading will give you a good foundation.

Textbook reading:

- *Lewin, 78-84
- U&H 57-63, 619-21

Journal literature:

- *Goodman, "Retention of Powers by Settlor", in J. Glasson (ed) *The International Trust* (Jordans: 2002) pp. 531-543
- *Hayton [1992] JITCP 3
- *Hayton (2004) 8 JLRev 6
- *Matthews, 'How Many Shams Make Three', (1988) 4(7) *Trusts & Trustees*, 11
- *Mowbray (1994) 8 TLI 68
- *Mowbray & Field [1994] PCB 291
- *Mowbray [2000] PCB 28, 105
- *Willoughby, Chapters 1 and 2
- (Dunkley, *Trusts & Trustees*, July/August 1998, 32)
- Duckworth (1999) 32 *Vanderbilt Jo Transnat L* 879, 910-917
- (Duckworth [1999] *J Int Tst Corp P* 183)

- Birt (1992) 3 OTPR 81
- Goodwill [1999] JTCP 157
- Grundy, Briggs & Field, *Asset Protection Trusts*, 3rd ed 1997, para 2.5
- Hunter, 'Retrieving the Proceeds of Fraud from Offshore Trusts' (1997) 3(10) *Trusts & Trustees* 13
- Bright, "Beyond Sham and into Pretence", 11 *Oxford Jo Legal Studies* 136
- McFarlane and Simpson, "Tackling Avoidance", in *Rationalizing Property, Equity and Trusts*, ed. J. Getzler (London: LexisNexis UK: 2003), pp. 135-186
- Matthews (1995) 5 OTPR 31, 40
- Pryke: see http://www.11oldsquare.co.uk/articles/docs/sham_trusts.pdf
- Travers, *Trust & Trustees*, September 1998, 17

Case law:-

- **Snook v. London and West Riding Investments Ltd.* [1967] 2 QB 786 at 802
- **Midland Bank plc v Wyatt* [1995] 1 FLR 696, [1997] 1 BCLC 256
- *R. v. Allen* [1999] STC 846
- *Hadjiloucas v. Crean* [1988] 1 WLR 1006
- **Chase Manhattan Equities Ltd. Goodman* [1991] BCLC 897
- *Beecher v. Major* (1865) 2 Dr & Sm 431
- **Rahman v Chase Bank (CI) Trust Co Ltd* 1991 JLR 103, 146-69, Grundy 207
- **Hitch v Stone* [2001] STC 214, 229-230
- *Commissioner of Stamp Duties (Queensland) v. Joliffe* (1920) 28 CLR 178, esp. at 182-194
- *Re Cunningham & Frayling* [1891] 2 Ch 567
- *Re Arnott* [1899] IR 201
- *Kirby v Wilkins* [1929] 2 Ch 444
- *Cook v Cocks* (1866) LR 1 P & D 241, 243
- *Abacus (CI) Ltd. and Grupo Torras SA v. al Sabah* [2004] 6 ITEL 368
- *IRC v Silverts Ltd* [1951] Ch 521, 530
- *Re Marriage of Ashton* (1986) 11 Fam LR 457
- *Re Marriage of Keith and Miriam Davidson* (1990) 14 Fam LR 817, 101 FLR 373 (austlii)
- *Re Marriage of Leonard and Angela Goodwin* (1990) 14 Fam LR 801, 101 FLR 386 (austlii)
- **Minwalla v. Minwalla* [2004] 7 ITEL 457
- *Re TR Technology Investment Trust plc* [1988] BCLC 256, 263-4, (1988) 4 BCC 244, 251
- *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897, 920-924
- *Re MacInnes* [1935] 1 DLR 401 2 DLR 123
- *Re Pfrimmer Estate* [1936] 2 DLR 123, Grundy 203
- *Western Smallwear & Stationery Co. Ltd. v. Bell* (1966) 55 DLR (2d) 193
- *Anderson v Patton* [1948] 2 DLR 202
- *Re Evans* (1956) 7 DLR (2d) 445, 453
- (*Browne v Browne* [1989] 1 FLR 291)

- *Grupo Torras v Private Trust Corporation* (1997) 1 OFLR 443, Bahamas CA
- *Wily v Fuller* (2000) 3 ITEL 321
- *Lund v Csr of Internal Revenue* (2000) 2 ITEL 343, US Tax Ct; (www.ustaxcourt.gov/ustcweb.htm) (historical opinions, search "lund")
- **Re Esteem Settlement* 2003 JLR 188 (13 June 2003)(jerseylegalinfo)
- *Shalson v Mimran* [2003] EWHC 1637 (Ch), [2003] WTLR (Oct), paras 183-217
- *Carman v. Yates* Lawtel, November, 2004.
- *Re Sharrment Pty Ltd.* (the Wynyard case), Aus Bankruptcy No. G348 of 1987 (referred to in Willoughby 4-5).
- *Scott v. Federal Commissioner of Taxation (No.2)* (1966) ALJR 265
- *Re Moody Jersey A Settlement* (1990) JLR 264 (rectification)
- *Re Madge's Settlement* (1994) JLR (rectification)

Specific statutes in specific jurisdictions with a bearing on this topic:-

- Cook Islands' International Trusts Act 1984, s. 13C
- Trustee Act 1998, s 3 (Bahamas)
- British Virgin Islands' Trustee Ordinance, s. 2(4)
- Trusts (Amendment) (Immediate Effect and Reserved Powers) Law 1998, s. 12B (Cayman Islands)

TOPIC 6. THE NATURE OF THE INTERESTS AND RIGHTS OF BENEFICIARIES AND DISCRETIONARY OBJECTS

Aim: *The aim of this Topic is to identify the circumstances in which the object of a power or a trust will or will not have proprietary rights in any trust property or other property, and how the courts conceive of those rights in general terms.*

NB: *A key aspect of the rights of beneficiaries will be (a) their ability to control the trustees through the courts and (b) their right to receive information. Both of these issues are considered in turn in the two Topics to follow this one.*

Specific reading

Thomas and Hudson, Chapter 7

Thomas, *Powers* (Sweet & Maxwell, 1998) pp. 377-388

A) The nature of a beneficiary's right in property in the abstract

Saunders v. Vautier ((1841) 4 Beav 115

Murphy v. Murphy [1999] 1 WLR 282

Re Smith [1928] Ch 915 and *Re Nelson (Note)* [1928] Ch 920

B) The nature of the right of the object of a discretionary trust

**Gartside v. I.R.C.* [1968] AC 553 esp. at 605-606

**Sainsbury v. I.R.C.* [1970] Ch 712

**Re Weir's Settlement Trusts* [1971] Ch 145

**Re Trafford's Settlement* [1985] Ch 34

C) Mere powers, discretionary trusts and certainty of objects

1) In general terms

Re Hay's Settlement Trusts [1982] 1 WLR 202

2) The "any given postulant" test

Re Gulbenkian's Settlements [1970] AC 408

McPhail v. Douulton [1971] AC 424 at 449

3) The nature of the right and the creation of the right

Tailby v. Official Receiver (1888) 13 App Cas 523

**Re Coleman* (1888) 39 Ch D 443

Re Ellenborough [1903] 1 Ch 697, at 700

Re Brooks' Settlement Trusts [1939] Ch 993

TOPIC 7. IMPEACHING THE EXERCISE OF MERE POWERS AND POWERS UNDER DISCRETIONARY TRUSTS

(A) The issue

1) The natures of mere powers and powers under discretionary trusts

Re Hay's ST [1981] 3 All ER 786, [1982] 1 WLR 202

2) Liability for breach of trust (in outline)

Target Holdings v Redferns [1996] AC 467

3) Illustrations of the general principles

Re Beloved Wilkes' Charity (1851) 3 Mac & G 440

Wilson v Law Debenture Trust [1995] 2 All ER 337

Lady Hood of Avalon v Mackinnon [1909] 1 Ch 476

Turner v Turner [1984] Ch 100

(B) Trustees taking into account irrelevant considerations, etc.

Reading: **Hudson, section 8.3.13**

1) The basis of the principle in *Hastings-Bass*

(i) The original, negative form of the principle

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

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

(ii) The positive form of the principle

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

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

also be clear that, had they had a proper understanding of it, they would not have acted as they did.'

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

(iii) The requirement for a breach of trust

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

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

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

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

(iv) The *Abacus v Barr* version of the test

a) That there might have been a different decision reached

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

'[This principle] does not require that the relevant consideration unconsidered by the trustee should make a fundamental difference between the facts as perceived by the trustee and the facts as they should have been perceived and actually were. All that is required in this regard is that the unconsidered relevant consideration would or might have affected the trustee's decision, and in a case such as the present that the trustee would or might have made a different appointment or no appointment at all.'

Lightman J suggested four pre-requisites

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

b) Does this test set the barrier too low?

[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*)

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*)

(C) Judicial control of trustees' actions.

Reading: **Hudson, section 8.6.2**

1) Basis for judicial review of trustees' actions

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.

2) Discretionary trust: no interference if exercise of power in good faith

Gisborne v Gisborne (1877) 2 App Cas 300, 305, *per Lord Cairns*
Re Schneider (1906) 22 TLR 223, 226, *per Warrington J*

3) Review where exercise of power not in best interests of beneficiary

Tabor v Brooks (1878) 10 Ch D 273, *per Malins V-C*.
Cf. Re Schneider (1906) 22 TLR 223.

4) Where the exercise of the power relates to the rights of children

Re Hodges (1878) 7 Ch D 754 (*capriciously in excess of powers*)
Tabor v Brooks (1878) 10 Ch D 273 (*ditto*).
Klug v Klug [1918] 2 Ch 67 (*improper reasons*)

5) The form of behaviour justifying judicial review

Turner v Turner (1978) 122 SJ 696 (*failure to examine trust instrument*)
Re Chapman (1895) 72 LT 66 (*acting vexatiously*)
**Mettoy Pensions Fund* [1990] 1 WLR 1587, *per Warner J* (*review only if exercise of power performed capriciously or outside the scope of the trust – fiduciary power more reviewable than personal power, infra*)
Stannard v Fisons [1992] IRLR 27 (*trustees must consider all appropriate information, including actuarial information where necessary to reach an appropriate decision in relation to a pension fund*)

6) Absolute versus permissive powers

**Breadner v Granville-Grossman* [2001] Ch 523 (*permissively drafted power led to validation of exercise even though exercise on date other than that specified in trust instrument*)

Maybe absolute powers cannot be interfered with by the court. E.g. a personal power might be non-justiciable if it is provided that the power-holder “may do whatever she pleases”; however, a fiduciary power may not be exercised capriciously even if it is worded equally broadly: see e.g. *Re Hay’s ST* [1981] 3 All ER 786, [1982] 1 WLR 202

(D) Comparative case law on impeachment, with particular reference to pension funds.

Maciejewski v Telstra Super Pty Ltd (1998) 44 NSWLR 601 (austlii);
subsequently 9 April 1999, [1999] NSWSC 341 (austlii)
Netherton v Netherton (1999) 2 ITEL 241, [2000] WTLR 1171
Kerr v. British Leyland (Staff) Trustees Ltd. (1986) [2001] WTLR 1071
Re the Green GLG Trust (2002) 5 ITEL 590 (RC of Jersey)
*Sieff v. Fox [2005] WTLR 891
Cloutte v. Storey [1911] 1 Ch 18
Telstra Super Pty Ltd v Flegeltaub, CA Victoria, 28 September 2000 (austlii)
AMP (UK) plc v Barker (2001) 3 ITEL 1237, [2001] Pensions LR 77 (bailii)

(E) Detailed reading on this topic

It is suggested that you consider as much of this reading as you can, or as much as you can locate easily in your university library. The textbook reading will give you a good foundation.

1) Textbook literature on impeaching exercise of powers:-

*Thomas and Hudson, 382-399.
Thomas, Chapter 6.
U&H 688-703, esp. 694-699.
Snell, 544-547, 562-567
P&M 212-225, 230-234

2) Journal literature on impeaching exercise of powers:-

*Green (2003) TLI 114
Hayton [2005] 69 Conv 229
Mowbray [1998] PCB 239
*Nugee [2003] PCB 173
*Walker, “Some Trust Principles in the Pensions Context”, in Trends
in Contemporary Trust Law, ed AJ Oakley (OUP: 1996), 123
*Walker [2002] PCB 226

TOPIC 8. BENEFICIARIES' RIGHTS TO INFORMATION

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

Reading: *Hudson*, section 8.4

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

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

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

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*

Wilson v The Law Debenture Trust Corporation Plc [1995] 2 All ER 337

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's 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.

Cf. e.g. Gartside v IRC [1968] AC 553 – *when does object of discretionary trust have proprietary right?*

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) 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

6) 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

7) Duty to render accounts

Hudson, para 8.4.8

8) Liability in relation to investment of trusts

Nestle v National Westminster Bank plc (1988) 10 TLI 112, 124

(B) Comparative literature on the trustee's duty to provide information and to account to the beneficiaries.

It is suggested that you consider as much of this reading as you can, or as much as you can locate easily in your university library. The textbook reading will give you a good foundation.

1) The issues relating to beneficiaries' rights to information

a) Textbook literature

- *Thomas and Hudson, Chapter 12
- U&H 671-80, 684-87
- H&M 674-682
- P&M 581-90, 711-12

b) Journal literature

- Browne-Wilkinson (1992) 6 TLI 119, 125
- Cottis, *Trusts & Trustees*, July/August 1998, 36
- Hayton (2001) 117 LQR 96
- Hayton [2005] 69 Conv 229
- Matthews, *From Obligation to Property and Back Again?* in Hayton (ed), *Extending the Boundaries of trusts etc*, 2002, Kluwer, 206-213
- Willoughby, Chapter 12

- Willoughby [1996] PCB 302, 304-307

2). Case law from various jurisdictions

Jersey

West v Lazard Brothers (Jersey) Ltd 1987-88 JLR 414, 420
Re a Settlement 1994 JLR 139
 **Re Rabaiotti 1989 Settlement* 2000 JLR 173, [2000] WTLR 953,
 H&M 685 (jerseyinfo)
Re The Internine Trust [2004] 7 ITEL 308 (Jersey)

Cayman Islands

Re Ojeh Trust 1992-93 CILR 348, Grundy 188
Lemos v Coutts & Co 1992-93 CILR 460, Grundy 118

Australia

Tierney v King [1983] 2 Qd R 580
Spellson v George (1987) 11 NSWLR 300, 315-6
 **Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405
Morris v Morris (1993) 9 WAR 150
Rouse v IOOF Australia Trustees Ltd (1999) 2 ITEL 289 (austlii)
Global Custodians Ltd v Mesh (1999) 2 ITEL 327 (austlii)
Jacobson v Dafna Nominees Ltd, unreported, 17 December 1999
 (austlii)
Gray v. Guardian Trust Australia [2003] NSWSC 704
 **Crowe v. Stevedoring Employees Retirement Fund Pty. Ltd.* [2003]
 VSC 316, [2003] PLR 343

Canada

Jones v Shipping Federation of British Columbia (1963) 37 DLR (2d)
 273, 274-5
AG for Ontario v Stavro (1994) 119 DLR (4th) 750

New Zealand

**Foreman v. Kingstone* [2003] ITEL 841 (CA of NZ)

3) Statutes on point

Pension Schemes Act 1993, ss 113-115
 Pensions Act 1995, s 41
 Bahamas Trustee Act 1998, s 83

TOPIC 9. TRUSTEE EXEMPTION CLAUSES (& THE CORE DUTIES OF TRUSTEES, IN OUTLINE)

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

(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

iii) Liability for breach of trust

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

iv) What it means to be a fiduciary

Reading: **Hudson, section 8.6**

**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.’

(v) The general principles against secret profits, self-dealing and conflicts of interest in general terms

Reading: *Hudson*, para 8.3.9

Keech v Sandford (1726) Sel Cas Ch 61

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*)

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.”

Boardman v. Phipps [1967] 2 AC 46

3) Validity of exclusion clauses

Reading: *Hudson*, section 8.5

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

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

**Walker v Stones* [2001] QB 902

Further textbook literature:-

U&H 591-97
H&M 720-724
Lewin, pp. 1222-1230

Journal literature:-

- Ashton (1998) 8 OTR 81
- Brownbill [1993] JITCP 164, 169
- *Goodhart [1980] Conv 333
- *Goodhart (1966) 10 TLI 38
- Hayton [1992] JITCP 3, 5-6
- Hayton [2000] JITCP 71
- Hayton, *Law Reform and Trustee Exemption Clauses*, 2003
- Kessler (1998) 6 PTPR137(www.khpplc.com/reviews/rev3sampl.html)
- Lehane (1994) 3 JITCP 134
- *Matthews [1989] Conv 42
- *Matthews (2000) 14 TLI 103
- Nobles (1996) 10(2) TLI 66
- *Willoughby, Chapter 8

Law Commission proposals:-

Law Commission Consultation Paper No 171: *Trustee Exemption Clauses* (2003): go to <http://www.lawcom.gov.uk/files/cp171.pdf>

Detailed, comparative case law:-

- *Wilkins v Hogg* (1861) 31 LJ Ch 41
- *Pass v Dundas* (1880) 43 LT 665
- *Knox v Mackinnon* (1888) 13 App Cas 753, 765
- *Rae v Meek* (1889) 14 App Cas 558
- *Robertson v Howden (No 2)* (1892) 10 NZLR 609
- *Browning v Fidelity Trust Co*, 250 Fed 321 (1918)
- *Clark v Clark's Trustees* 1925 SC 693
- *Re Poche* (1984) 6 DLR (4th) 40
- *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 628, 640-641

- *Roywest Trust Corporation (Bahamas) Ltd v Savannah NV*, Bahamas unreported, 22 July 1987 (esp at pp 26-30) (see Brownbill [1993] JITCP 164, 170-1) BOCM vol 1, 61-97, Grundy 218
- *Froese v Montreal Trust Co* (1996) 137 DLR (4th) 725
- *Baskerville v Thurgood* (1992) 100 Sask LR 214
- *West v Lazard Brothers & Co (Jersey) Ltd* 1993 JLR 165, 286-292
 - , Grundy 281
- *Galmerrow v National Westminster Bank plc* (1990) 14 TLI 158, H Ct, at pp 176-179
- *Midland Bank (Jersey) Trustee Ltd v Federated Pension Services* 1995 JLR 352, [1996] PLR 179, Jersey Court of Appeal, Grundy 164
- **Armitage v Nurse* [1998] Ch 241, [1997] 2 All ER 705, Grundy 22 H&M 730 (casebase)
- *Cf Hayim v Citibank NA* [1987] AC 730
- *Seifert v Pensions Ombudsman* [1997] 1 All ER 214, 225; cf CA, [1997] 4 All ER 947 (casebase)
- **Bogg v Raper* (1998) 1 ITELR 267, *The Times*, 22 April 1998 (casebase)
- *Wight v Olswang* (1999) 1 ITELR 783, *The Times*, 18 May 1999
- *Lutea Trustees v Orbis Trustees* 1997 SCLR 735, 2 OFLR 227, Grundy 146
- *Walker v Stones* [2000] 4 All ER 412, CA
- *Twinsectra Ltd v Yardley* [2002] 2 AC 164, HL

Specific pieces of legislation with a bearing on this topic:-

Companies Act 1985, s 192
 Financial Services Act 1986, s 84 (now the Financial Services and Markets Act 2000, s 253)
 Pensions Act 1995, s 33
 Trusts (Jersey) Law 1984, Art 26(9) (as substituted)
 Trusts (Guernsey) Law 1988, s 34(7)
 (Belize) Trusts Act 1992, s 50(6)
 Turks & Caicos) Trusts Ordinance 1990, s 29(10)
 (Bahamas) Trustee Act 1998, s 82

TOPIC 10. IS THERE AN IRREDUCIBLE CORE MINIMUM CONTENT OF THE DUTIES OF A TRUSTEE?

1). Irreducible core minimum?

U&H 672-677

*Hayton, *The Irreducible Core Content of Trusteeship* [1996] JITCP 3
and in Oakley (ed), *Trends in Contemporary Trust Law*, 1996

Jones v Shipping Corporation of British Columbia, above

AG for Ontario v Stavro (1994) 119 DLR (4th) 750

Tierney v King [1983] 2 Qd R 580

West v Lazard Brothers & Co (Jersey) Ltd 1993 JLR 165, 291-2

**Hayim v Citibank* [1987] AC 730

Cf IRC v Lloyds Private Banking Ltd [1998] STC 559, [1999] 1 FLR
147

Re Arnott [1899] 1 IR 201

Cf Public Trustee Act 1906, s 4(2)

Trustee Act 1998, s 82 (Bahamas)

Re Marriage of Davidson (1990) 101 FLR 373, 14 Fam LR 817

**Armitage v Nurse* [1998] Ch 241, [1997] 2 All ER 705, Grundy 22

(*Walker v Stones* [2001] 2 WLR 623, [2000] 4 All ER 412, CA)

(*Re Murphy's Settlement* [1999] 1 WLR 282, [1998] 3 All ER 1,
Grundy 178)

2) Competing accounts of the nature of the trust

a) Civilian accounts of the trust

Lupoi, *Trusts: a Comparative Study* (CUP)

Baraudo, *Trusts in Civil Law* (2nd ed., Geneva: Academy & Finance SA, 2006)

b) Trusts as contracts, or trusts subject to protectors

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

11. Letters of wishes

U&H 680-84

Hayton [1992] JITCP 3, 8-9

Hayton (1999) 32 Vanderbilt Jo of Transnat Law 555, 573-577

*Matthews, *Letters of Wishes* (1995) 5 OTPR 181

Ray (1998) 6 PTPR 133

Willoughby [1996] PCB 302, 307-308

*Willoughby, Chapter 10

Bank of Nova Scotia Trust Co (Bahamas) Ltd v de Barletta, Bahamas unreported, 11 March 1985 (see [1994] JITCP 35 and 1 BOCM 5-20), Grundy 186

Re TR Technology Investment Trust plc (1988) 4 BCC 244, 251, [1988] BCLC 256, 263-4

**Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, Grundy 93

M&S paras 8.22-8.23

West v Lazard Brothers & Co (Jersey) Ltd 1993 JLR 165, 201-5

Re Rabaiotti 1989 Settlement 2000 JLR 173, R Ct Jersey (jerseyinfo)

Trustee Act, ss 83, 85 (Bahamas)

Trusts Act 1992, s 13 (Belize)

12. Protectors

- *U&H 29-34
- *Ham, Campbell, Tenny in ITL, Ch B3
- * M&S paras 10.34-10.38
- *Willoughby, Chapter 10
- Bove, *The Protector: Trust(y) Watchdog or Expensive Exotic Pet?*
- *Duckworth, *Protectors; Fish or Fowl* (1995) 4 JITCP131; [1996] PCB 169, 245, 328
- Games & Wright (1995) 4 JITCP 165
- Conder, *Trusts & Trustees*, March 1995, 12 (also [1995] PCB 288)
- Hartnett & Norris [1995] PCB 109
- Hayton (1999) 32 Vanderbilt Jo of Transnat Law 555, 579-590
- *Matthews, *Protectors: Two Cases, Twenty Questions* (1995) 9 TLI 108
- Mowbray (1995) 5 OTRP 152
- Penney [1995] JITCP 31
- Rosen [1995] PCB 36
- STEP Colloquium on Protectors [1995] PCB 24, 122
- Venables, *Non-Resident Trusts*, paras 3.6.1-3.6.3
- *Waters, *The Protector: New Wine in Old Bottles?* in *Trends in Contemporary Trust Law*, ed Oakley, 1996, ch 4
- *Waters [2000] JITCP 237
- Willoughby [1996] PCB 302, 308-311

- Dickenson v Teasdale* (1862) 1 De G J &S 52
- Re Skeats Settlement* (1889) 42 Ch D 522
- Re Somes* [1896] 1 Ch 250
- Re Rogers* [1929] 1 DLR 116
- Gathright's Trustee v Gaut*, 276 Ky 562, 124 SW2d 782 (1939)
- Re Hart's WT* [1943] 2 All ER 557, Grundy 98
- **Vestey's Executors v IRC* [1949] 1 All ER 1108
- Crocker-Citizens National Bank v Younger*, 93 Cal Rptr 214, 481 P2d 222 (1971)
- Schroder v IRC* [1983] STC 480, 500, 502
- Bond v Integritas Trust Management* (1988) 16 TLI 186
- Rawson Trust v Perlman*, Bahamas unreported, 25 April 1990 (see *Von Knierem*, below, and 1 BOCM 31-54), Grundy 212
- Re X's Settlement*, Jersey unreported, 28 January 1994 (see BOCM, vol 1, 600, 608), Grundy 285
- Von Knierem v Bermuda Trust Co Ltd*, Bermuda unreported, 13 July 1994 (see 1 BOCM 116-125), Grundy 276
- Steele v Paz Ltd* 1993-1995 MLR 426, IOM CA (see also 1 BOCM 338-418), Grundy 238
- Re Burton* (1994) 126 ALR 557
- Re Osiris Trustees Ltd & Goodways Ltd* (1999) 2 ITEL 404, IOM
- Re the A Irrevocable Trust* (1999) 2 ITEL 482, Cook Is H Ct
- Cf Boyce v Boyce* (1849) 16 Sim 476
- Saipem v Rafidain Bank* [1994] CLC 253

Re Freiburg Trust [2004] JRC 056

Fines and Recoveries Act 1833, ss 22, 32, 34, 36

Trusts Act 1992, ss 16, 23, 48, 58 (Belize)

Trustee Ordinance s 86 (BVI)

International Trusts Act 1984, s 2 (as amended) (Cook Islands)

Trustee Act 1998, s 81 (Bahamas)

Trusts of Land and Appointment of Trustees Act 1996, s 11

Section (2)

INTRODUCTION TO THE OFFSHORE TRUST WORLD

(2) INTRODUCTION TO THE OFFSHORE TRUST WORLD

1. The "offshore" finance industry

(Baker (1991) 2 OTPR 51)
(Barton (1992) 2 OTPR 188)
(Costa (1992) 3 OTPR 15)
*Grundy (1995) 5 OTPR 1
Edwards, *Review of Financial Regulation in the Crown Dependencies*,
Cm 4109, Part I Chapter 12 (Internet URL:
www.official-documents.co.uk/document/cm41/4109/a-chap12.htm)
OECD *Report on Harmful Tax Competition*, May 1998; see at
www.oecd.org/daf/fa/harm_tax/harmtax.htm
Jersey's view: www.jerseyfsc.org/releas19.htm
Hay [1999] PCB 345
(Powell (1999) 3 JLRev 22)
(*The Economist*, 4 March 2000, 107)
Grundy (2000) 9 OITR 149
Morris and Campbell [2000] CFILR 73
Huxley, *Rhodes, Arakan, Grand Cayman - Three Versions of Offshore*,
2000
(Duckworth (1999) 32 Vanderbilt Jo Transnat L 879, at 880-85)
Dwyer, *Offshore Investment*, July/Aug 2000, 11-24
Matthews, *Offshore is a Foreign Country...*
Powell (2001) 5 JLRev 161
OECD *Report on Corporate Secrecy: Behind the Corporate Veil*

2. "Freezer" trusts

Soares, *Non-Resident Trusts*, 4th ed 1993, 246-247

3. Trusts in Finance Structures

M & S Ch 12
Langbein (1997) 107 Yale LJ 165
Willoughby, Chapter 9
Conyers, Dill & Pearman, *The Use of Trusts in Finance Structures*
Norton Rose, *Securitisation*

4. "Black Hole" (or "Blind") trusts

M&S paras 8.3, 11.15
(Matthews (1998) 2 JLRev 143)
*Matthews, *The Black Hole Trust: Uses, Abuses and Possible Reforms*
[2002] PCB 42, 110
Hayton [2000] PCB 94 at 244-246
Re TR Technology Investment Trust plc (1988) 4 BCC 244, 251,
[1988] BCLC 256, 263-4
Re Gea Settlement, Jersey (1992) 13 TLI 188, R Ct Jersey

Hayton [1992] JITCP 3
Grundy, Briggs and Field, *Asset Protection Trusts*, 3rd ed 1997, para 2.5.1
Steele v Paz Ltd, 1993 MLR 426, BOCM vol 1, 338-418, Grundy 239
(cf *Vandervell v IRC* [1967] 2 AC 291)
(*Ahuja v Scheme Manager, Depositors Compensation Scheme*, 1996-8 MLR 278, CA of IOM, Grundy 13)
(Matthews, *Amicus Curiae*, January 1998, 22-23)
Wily v Fuller (2000) 3 ITEL 321 (austlii)

5. “Pourover” trusts and “dummy” settlors

Re TR Technology Investment Trust plc (1988) 4 BCC 244, 251, [1988] BCLC 256, 263-4
**Re Harvey* [1941] 3 All ER 284
(*Re Playfair* [1951] Ch 4)
**Re Rydon’s Settlement* [1955] Ch 1
Hartigan Nominees (Pty) Ltd v Rydge (1992) 29 NSWLR 405
West v Lazard Brothers & Co (Jersey) Ltd 1993 JLR 165, 201-5 TMCPL, para 15.9
Cf *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399
Hague Convention, art 3 (see M&S new 4th ed draft para 4.70)

6. Private trust companies

Arnold, *Private Trust Companies*

Section (3)

OFFSHORE TRUSTS

(3) OFFSHORE TRUSTS

1. Perpetuities and accumulations

- *U&H 189-209
- *M&S paras 11.16–11.18, 15.2–15.9
- Law Comm 251 (1998) (summary at:
www.open.gov.uk/lawcomm/library/lc251/lc251sum.htm
main report at:
www.open.gov.uk/lawcomm/library/lc251/lc251ind.htm)
- Trusts (Jersey) Law 1984, Arts 11, 34
- *Venables (1997) 7 OTR 171
- **Scott on Trusts*, paras 62.10-62.11
(*Bogert on Trusts*, ss 213-218)
American Restatement, para 62
- Dynasty Trusts and the Rule against Perpetuities* (2003) 116 Harv LR 2588

2. The beneficiary principle and purpose trusts

- *Thomas and Hudson, Chapters 39 and 40, Section A
Thomas, ITL, B.4
- *Matthews, *The New Trust – Obligations without Rights?* in
Oakley (ed), *Trends in Contemporary Trust Law*, 1996, ch1
U&H 110-129
(Francombe [1993] JITCP 154)
Hayton [2000] PCB 94, 168-173
Cushen, *Purpose Trusts*, at www.crills.com/purpose.htm
- *Special Trusts (Alternative Regime) Law 1997 (Cayman Islands)
(www.webcom.com/offshore/shlaw/laws.htm) (now Trusts
Law 2001 revision, Part VIII)
- *Duckworth, *STAR Trusts*, 1998
- *Matthews, *Shooting STAR* (1997) 11 TLI 67
- *Duckworth, *STAR WARS: The Colony Strikes Back* (1998) 12 TLI 16
- *Matthews, *STAR: Big Bang or Red Dwarf* (1998) 12 TLI 98
- *Duckworth, *STAR WARS: Smiting the Bull* (1999) 13 TLI 158
- *Hayton, “STAR Trusts” (1998) 8 OTR 43
Bennett, *Trusts & Trustees*, Aug 95, 7 (trustsandtrustees)
- **Scott on Trusts*, paras 112, 123–124
Bogert on Trusts, ss 161, 164–166
American Restatement, paras 112, 123–124
(Cf Bermudian Trusts (Special Provisions) Amendment Act 1998)
(Baxendale-Walker, *Purpose Trusts*, 1999)
(Duckworth (1999) 32 Vanderbilt Jo Transnat, 932-951)
Duckworth, *Trusts & Trustees*, Nov 2000, 12; Dec 2000, 11; Feb 2001, 9
- O’Hagan & Stein (2000) 10 OITR 89
- O’Hagan and Anderson, “Purpose Trusts and Charitable Trusts in Securitisation and Other Structured Finance Transactions”, in Hayton

(ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer: 2002) 181
 Hayton (2001) 117 LQR 96
 Parkinson [2002] CLJ 657
 *Matthews, *From Obligation to Property and Back Again? The Future of the Non-Charitable Purpose Trust*, in Hayton (ed) *Extending the Boundaries of Trusts*, 2002
 Anderson, “Bermuda Purpose Trusts: A New Feature of Offshore Trust Planning”, (1991/92) 2 OTRP 1
 Hilliard (2003) 17 TLI 144
 Moerman, “Non-charitable Purpose Trusts”, (1999/2000) *Trusts and Trustees* 7
 Moerman, “BVI Purpose Trusts”, in (Feb 2000) *Trusts & Trustees*, 18-26
 Gould, ‘Jersey and Non-Charitable Purpose Trusts: The Product of an Evolutionary Process’, (1996) 5(2) JITCP 88
Re C.A. Settlement [2002] JLR 312.
Alan Stuart-Hutcheson v. Spread Trustee Co. Ltd. [2002] WTLR 1213 (Guernsey CA).
 Howard and Wiltshire, ‘Some Channel Island Case Law Developments’, in [2003] PCB 233
 Miller, ‘The Commercial and Corporate Applications of Trust Planning in Labuan’, (1997) 4(1) *Trusts and Trustees* 1
 Honore, ‘Trusts: The Inessentials’, in J Getzler (ed.) *Rationalizing Property, Equity and Trusts* (London: Butterworths: 2003) 7.
 Waters, “The Future of the Trust From a Worldwide Perspective”, in Glasson (ed) *The International Trust* (Jordans: 2002) pp. 597-641.
 Willoughby, “International Trusts Under Fire:-The Increasing Scope for Litigation” [1996] PCB 226 (Part I) and 302 (Part II)
 US Uniform Trust Code, ss 405, 408-9

3. Asset protection trusts

*Thomas and Hudson, Chapter 38
 Thomas, in ITL, Ch B6
 H&M, 289-292
 Grundy, Briggs & Field, *Asset Protection Trusts*, 3rd ed, 1997 (Chap 1 is at: www.khplc.com/books/book1samp.html)
 U&H, 287-98, 209-14
 Willoughby, Chapter 13
 Duckworth, in ITL, Ch. B1
 Rothschild, “Establishing and Drafting Offshore Asset Protection Trusts”, in Bove (ed) *Asset Protection Strategies* (ABA, 2002), 47-58
 Bove, “The Mechanics of Establishing an Offshore Trust”, in Bove (ed) *Asset Protection Strategies*, 59-72
 Kleinfeld, “Choosing an Offshore Jurisdiction”, in A. Bove (ed) *Asset Protection Strategies*, 73-86.
 Sterk, “Asset Protection Trusts: Trust Law’s Race to the Bottom”, (2000) 85 *Cornell Law Review* 1036

Warda, *Complete Guide to Asset Protection Strategies* (Galt Press, 2003)

Brette and Meckes, *Asset Protection Planning* (Griffin Publishing Group, 1997)

Powell (1999) 3 *Jersey Law Review* 22

Hay [1999] PCB 345

Havard (1992) 2 OTRP 209

(Lawson (1993) 2 OTRP 93)

(Menzies [1993] PCB 127)

Citron & Steiner [1994] PCB 96, 239

Hauser & Chapnick [1994] PCB 378

Norris & Hartnett [1995] PCB 243

Mowbray & Field [1995] JITCP 3

(Osborne [1995] JITCP 12)

*Matthews [1995] KCLJ 62, reprinted (1996) 5 OTRP 57

Matthews, *The Envy of Less Happier Lands*, [2001] 5 *Chase Journal* 15

Wiggin and Schoenblum in McKendrick (ed), *Commercial Aspects of Trusts & Fiduciary Obligations*, 1992, chs 10, 11

Engel, http://profs.lp.findlaw.com/asset_protection/index.html

Adkisson, www.falc.com/assetpro/shysters.htm and www.falc.com/assetpro/apmethds.htm

Matrimonial Causes Act 1973, s 37 (see H&M 273)

Inheritance (Provision for Family and Dependents) Act 1975, s 10 (see H&M 273)

Insolvency Act 1986, ss 339-342, 423-425 (see H&M 293-296)

(*Stileman v Ashdown* (1742) 2 Atk 477)

(*Mackay v Douglas* (1872) LR 14 Eq 106)

**Re Butterworth, ex p Russell* (1882) 19 Ch D 588

Re Burroughs-Fowler [1916] 2 Ch 250 (H&M 292)

Société des Magasins Concorde v Golder (1967) 1 JJ 721

**Re Esteem Settlement* 2002 JLR 53, R Ct Jsy (jerseyinfo)

Lloyds Bank Ltd v Marcan [1973] 1 WLR 1387

(*Chohan v Saggat* [1992] BCC 306)

Pinewood Joinery v Starelm Properties Ltd [1994] 2 BCLC 412, 418-419

(*Re Heginbotham's Petition* (1999) 2 ITEL 95, 2 BOCM 546)

(*Law Society v Southall* [2001] WTLR 719 at 729-737, revsd by CA on facts, 14 December 2001)

Garner v Bermuda Trust Co Ltd, Bermuda unreported, 1 BOCM 110-115, Grundy 224, noted [1992] JITCP 51, 113, and see ITL, paras B1.236-1.244

**Midland Bank plc v Wyatt* [1995] 1 FLR 696

Barclays Bank v Eustice [1995] 4 All ER 511

(*E v A* (2003) 5 ITEL 760, CA of Cook Islands)

Alsop Wilkinson v Neary [1995] 1 All ER 431, Grundy 16

Re Beddoe [1893] 1 Ch 547

Adams v The Queen [1995] 1 WLR 52, [1995] 2 BCLC 17

Hess v Line Trust Corporation Ltd (1998) 1 ITEL 249, 2 BOCM 385

Re the A Irrevocable Trust (1999) 2 ITEL 482, Cook Is H Ct

Re the Lemos Trust Settlement (1992-93) CILR 26

Lemos v Coutts & Co. (Cayman) Ltd 1992-93) CILR 5
Golder v. Societe des Magasins Concorde Ltd. [1967] JJ 721
In the Matter of Tucker (1987-88) JLR 473
Abacus (CI) Ltd. v. Al Sabah (2001) JLR 7 and, on appeal (2001) JLR 540; [2000] 4 ITEL 555. These judgments are available at:
<http://www.jerseylegalinfo.je/Judgments/JerseyLawReports/Case/s/JLR2001/default.asp?JLR010007.asp>
<http://www.jerseylegalinfo.je/Judgments/JerseyLawReports/Case/s/JLR2001/default.asp?JLR010540.asp>
Grupo Torras SA v. Al Sabah (2002) JLR 53. This judgment is available at:
<http://www.jerseylegalinfo.je/Judgments/JerseyLawReports/Case/s/JLR2002/default.asp?JLR020053.asp>
Abacus (CI) Ltd. and Grupo Torras SA v. al Sabah [2004] ITEL 368. This judgement is available at:
<http://www.google.co.uk/search?q=cache:FMSyEihHIkYJ:www.assetprotectiontheory.com/Abacus.pdf+Abacus+v+Al+Sabah&hl=en>
(Dougherty [1999] J Int TCP 177)
IRC v Hashmi [2002] WTLR 19

4. **Forced heirship and offshore trusts**

*Duckworth, “Forced Heirship and the Trust”, in Glasson (ed) *The International Trust* (Jordans: 2002), Chapter 4
*Thomas and Hudson, para. 41.87
U&H 231–232, 287–297, 1047-1048
Lewin paras. 11.59-11.61
Harris, *The Hague Trusts Convention* (Hart Publishing: 2002) 54-56
M&S paras 11.25–11.30
Hayton [1993] JITCP 3
Hayton (1993–94) 4 KCLJ 12
*Duckworth [1995] PCB 270, 334, 408
(Mackintosh [1996] PCB 161)
Cushen, *Asset Protection Trusts in Jersey*, at www.crills.com/asset.htm
**Midland Bank plc v Wyatt* [1995] 1 FLR 696, [1997] 1 BCLC 256
Law Society v Southall [2001] WTLR 719 at 729-737, revsd by CA on facts, 14 December 2001
Inheritance (Provision for Family and Dependants) Act 1975, ss 10, 13
Matrimonial Causes Act 1973. s 37
Trusts (Jersey) Law 1984, Art 8A
Bankruptcy (Désastre) (Jersey) Law 1990, Art 17
Loi (1880) sur la propriété foncière, art 52
Matthews & Nicolle, *The Jersey Law of Property*, 1991, paras 7.73–7.75, 7.85–7.91
*Matthews [1995] KCLJ 62, reprinted (1996) 5 OTPR 57
Rahman v Chase Bank (CI) Trust Co Ltd 1991 JLR 103
*International Trusts Act 1984 (as amended) (Cook Islands) ss 13A–13K (see Grundy, Briggs & Field, at pp 66–75)

South Orange Grove Owners Associations v Orange Grove Partners
 (1995) 15 TLI 41, Cook Islands Court of Appeal
 **South Orange Grove Owners Associations v Orange Grove Partners*
 (No 2) (1996) 1 OFLR 3, Grundy 229, 2 BOCM 369
 (Miller, in Withers (ed), *International Trust Precedents*,
 paras N.006–N.013)
 (Grundy, Briggs & Field, *Asset Protection Trusts*, 2nd ed 1993,
 paras 5.1–5.2.3)
 Hayton (ed), *European Succession Laws*, 1.65–1.68
Picarda v Picarda (1995) 12 Trust Law Intl 240 (see Part 9)
Pouey v Hordern [1900] 1 Ch 492; but cf 16 TLR 191, 192, and 69
 LJCh 231, 232)
 (Duckworth, ITL, paras B 1.203–1.207, B 1.210–1.215)
 (Duckworth, *The Problem of Blowing Hot and Cold* [1996] PCB 97)
Lemos v Coutts & Co 1992-93 CILR 460
(Re ABC Ltd 1984 CILR 130)
(AG v Bank of Nova Scotia 1985 CILR 418)
 Pease [1998] PCB 21
(Federal Trade Commission v Affordable Media LLC (1999) 2 ITEL
 73, US 9th Cir Ct of Apps, 15 June 1999, Case No 9816378:
<http://laws.findlaw.com/9th/9816378.htm>
(Riechers v Riechers (1998) 679 NYS2d 233; see at
<http://www.geocities.com/andygr/riechers.rtf>)
 Engel & Sanderson, *Shore to Shore*, Summer 1999, 67
Fiducia, Vol 7 No 1 (trustee's view)
(Re Lawrence (1999) 2 ITEL 283, US Bankruptcy Ct)
Re the A Irrevocable Trust (1999) 2 ITEL 482
 (Duckworth (1999) 32 Vanderbilt Jo Transnat L 879, 900-909)
 **Re Esteem Settlement* 2002 JLR 53, paras 1-11, 247-351 (available at
www.kcl.ac.uk/depsta/law/pgrad/teach/llm/trust_law/resources/esteem.pdf)

5. VISTA: The Virgin Islands Special Trust

*Virgin Islands Special Trust Act 2003
 *Thomas and Hudson, Chapter 40, Section B
Bartlett v Barclays Bank Trust Co Ltd [1980] Ch 515
Re Lucking's Will Trusts [1968] 1 WLR 866

6. Migration of trusts

U&H 770-74, 1041
 *Matthews, TMCPL, Part I (generally) (section 1 is at:
www.khpplc.com/books/book10samp.html)
 Venables, *Non-Resident Trusts*, chs 5, 8
 Hendrickson & Silverman, *Changing the Situs of a Trust*
 *P&M, ch 24
The Use of Offshore Jurisdictions, paras B22
Chamberlain v IRC [1945] 2 All ER 351
Re Whitehead's WT [1971] 1 WLR 833
 **Richard v MacKay* (1987) 11 Trust Law International 22

Bramwell (1990) 1 OTRP 1
Re Beatty's WT (No 2) (1991) 11 Trust Law International 77
 Trustee Act 1925, ss 36(1), 37(1)(c), 39, 41 (as amended in 1996)
(Mettoy Pension Trustees Ltd v Evans [1991] 2 All ER 513, 534,
 [1990] 1 WLR 1587, 1607)
 Matthews, TMCPL, section 9
 Venables, *Non-Resident Trusts*, para 8.2.2
 **LRT Pension Fund Trust Co Ltd v Hatt* [1993] PLR 227
(Adam & Co International Trustees Ltd v Theodore Goddard [2000]
 WTLR 349, *The Times*, 17 March 2000)
 (Barlow [2003] Conv 15)
 (Soares, *Non-Resident Trusts*, 4th ed 1993, ch 16)
Schroder v IRC [1983] STC 480
(Katz v Moore (1997) 1 OFLR 500, IOM CA (see
www.contiadvocates.com/katzapp/katzapp1.htm)
 Hayton (2000) 8 J Int TCP 71
 *McCall [1995] PCB 419
Virani v Guernsey International Trustees Ltd, 4 December 2002,
 Guernsey CA

7. Regulation of trusts

Charities Act 1993
 Pensions Act 1995
 (P&M Ch 12)
 Proceeds of Crime Act 2002, Part VII
 Bisson (1995)
 M&S para 9.4
 *Gleeson, "The Involuntary Launderer" in Birks (ed), *Money
 Laundering and Tracing*, 1995
 Gidley, in (ed) Hayton, *Extending the Boundaries of Trusts*, 397-412
 (Radmore (1995) 16 Company Lawyer 155)
(Finers v Miro [1991] 1 WLR 35, [1991] 1 All ER 182, Grundy 75)
Moss v Integro Trust (BVI) Ltd (1997) 1 OFLR 427 (noted by
 Goldsworth, *Trusts and Trustees*, September 1997, 19 (M)),
 Grundy 170, 2 BOCM 173
United Mizrahi Bank Ltd v Doherty [1998] Ch 435, Grundy 266
 Trustee Companies Act 1964(New South Wales)
 Trust Corporations Act 1971(Belize)
 Trust Property Control Act 1988(South Africa)
 Banks and Trust Companies Law 1989 (Cayman Is)
 Financial Services (Extension)(Jersey) Law 2000 (jerseyinfo)
 Jersey Financial Services Commission Guidance Notes: see at
<http://www.jerseyfsc.org/span.htm>
 Edwards, *Review of Financial Regulation in the Crown
 Dependencies*, Cm 4109, Part I Chapters 12, 13, 14, 16, and
 Part II chap 11 : see at
www.officialdocuments.co.uk/document/cm41/4109/4109.htm

KPMG, *Review of Financial Regulation in the Caribbean Overseas Territories and Bermuda*, Cm 4855, Chapters dealing with trusts; see at <http://www.official-documents.co.uk/document/cm48/4855/4855.htm>
Territories' responses: <http://www.hm-treasury.gov.uk/pdf/2001/AnguillaGovtResponse.pdf>
Anderson and O'Hagan (1999) 9 OITR 81
Morris & Campbell [2000] CFILR 73
Collas Day, *Regulation of Fiduciaries in Guernsey*, 2001

Section (4)

TRUSTS IN THE CONFLICT OF LAWS

(4) TRUSTS IN THE CONFLICT OF LAWS

1. Proper law of a trust

*D&M ch 29
*Thomas and Hudson, Chapters 41 and 42
P&M 854-65
U&H 1031-1045
H&M 1036-1042
M&S paras 4.1-4.12, 4.17-4.31
*Matthews, *Trusts: Migration and Change of Proper Law*, 1997
(hereafter "TMCPL"), Part II
Re Wilks [1935] Ch 26
Re Oldfield (No 2) [1949] 2 DLR 175
Re Nanton [1948] 2 WWR 113
Duke of Marlborough v AG (No 1) [1945] Ch 78, 85
Re Kehr [1952] Ch 26
Iveagh v IRC [1954] Ch 409
**Chellaram v Chellaram* [1985] Ch 409
(*Sharp v Thomson* 1995 SLT 837, 1997 SLT 636)
(*Re The Continental Foundation and the Aall Foundation* 1996 CILR
52 (*sub nom Bridge Trust Co Ltd v A-G*), revsd CA,
(1997) 1 OFLR 787, Grundy 278, 2 BOCM 350)
Recognition of Trusts Act 1987, Sch, Arts 6-10 (Hague Convention
Ch II) (www.hcch.net/e/conventions/text30e.html)
Re Barton deceased [2002] WTLR 496, 4 ITEL 715 (bailii)
**Chellaram v Chellaram (No 2)* (2002) 4 ITEL 729, paras 160-1
(bailii)
IRC v Botnar [1999] STC 711, 72 TC 205, paras 11, 16-29 (bailii)
(Brownbill [1994] JITCP 50, 167)
Brussels and Lugano Conventions on Jurisdiction and Judgments, 1968
and 1988, Art 17(2) : see Civil Jurisdiction and Judgments Act
1982, Sch 1, or
europa.eu.int/eur-lex/en/lif/dat/1968/en_468A0927_01.html (Brussels)
europa.eu.int/eur-lex/en/lif/dat/1988/en_488A0592.html (Lugano)
(also Council Regulation (EC) No 44/2001 of 22 December 2000, art
23(4), making similar provision)
(O'Sullivan [1993] JITCP 65)
Schoenblum [1994] JITCP 5
Hayton [1994] JITCP 23
Duckworth (1999) 32 Vanderbilt Jo Transnat L 879, 885-898
Glasson, *Trusts & Trustees*, Dec 2001/Jan 2002, 12

2. Capacity to create a trust

*Thomas and Hudson, Chapter 41
U&H 231-32, 270, 1022-25
D&M 1076-1078, 1088-89
Glasson, *Trusts & Trustees*, Jan 1995, 11; Apr 1995,
(trustsandtrustees)

*Harris, “Launching the Rocket – Capacity and the Creation of *Inter Vivos* Transnational Trusts”, in ITL, chap C2 and also in Glasson (ed), *The International Trust* (Jordans, 2002), Chapter 2; and [1997] JTCP 118

*Matthews, *Capacity to Create a Trust* [2002] Ed LRev 176

AG v Bellilos [1928] 1 KB 798, 826-7

Jacobs’ Law of Trusts in Australia, 5th ed 1986, paras 2803, 2805

Picarda v Picarda (1995) 12 TLI 240, CA

Robertson v Lazard Trustee Co (CI) Ltd 1994 JLR 103

M&S paras 4.13-4.16

Recognition of Trusts Act 1987, Sch, Art 4
www.hcch.net/e/conventions/text30e.html)

Trusts Law (1998 Revision), ss 90, 91 (Cayman) (1996 Revision, ss 86, 87: see www.webcom.com/offshore/shlaw/laws.htm)

Trusts (Jersey) Law 1984, Art 8A (Jersey)

(*Garner v Bermuda Trust Co Ltd*, Bermuda unreported, noted [1992] J Int P 51, 113, and see ITL, paras B1.236-1.244, BOCM vol 1, 110-15, Grundy 224)

Matthews, *Trusts & Trustees*, June/July 1996, 6

Duckworth (1999) 32 Vanderbilt Jo Transnat L 879, 885-898

3. Jurisdiction over trusts and trustees

*D&M ch 11, esp paras. 11-001, 013, 020, 074, 106, 193-4, 196, 199, 202

*Thomas and Hudson, Chapters 41 and 42

Briggs and Rees, *Civil Jurisdiction and Judgments* (3rd ed, LLP, 2002) P&M, 847-53

TMCPL, 1997, sec 2

M&S, ch 17

Ewing v Orr-Ewing (1883) 9 App Cas 34

Re Colonial Bishoprics Fund [1935] Ch 148

**Chellaram v Chellaram* [1985] Ch 409

**Chellaram v Chellaram (No 2)* (2000) 4 ITEL 729, esp at paras 128-179

Adams v Cape Industries plc [1990] Ch 433, 513-531

Civil Procedure Rules 1998, Part 6, esp r 6.20
<http://www.hrothgar.co.uk/YAWS/framecpr/part-06.htm>)

Civil Jurisdiction and Judgments Act 1982, s 45, and Sch 1, Arts 5, 6, 16, 17, 52, 53 (Brussels and Lugano Conventions:
 europa.eu.int/eur-lex/en/lif/dat/1968/en_468A0927_01.html (Brussels)
 europa.eu.int/eur-lex/en/lif/dat/1988/en_488A0592.html (Lugano)

Council Regulation (EC) No 44 of 2001, of 22 December 2000, Arts 5, 6, 16, 17, 59, 60 (replacing Brussels, except for Denmark)

**Webb v Webb* [1994] QB 696, ECJ

Casio Computer Co Ltd v Sayo, *The Times*, 6 February 2001, CA

Trusts (Guernsey) Law 1989, s 4 (as amended) (Guernsey)

Cf Trusts (Jersey) Law 1984, art 8A

EMM Capricorn Trustees Ltd v Compass Trustees Ltd 2001 JLR 205, 4 ITEL 34, R Ct Jsy

Royal Court Civil Rules 1989, rr 1, 7 (Guernsey)
(Booilushagg Trust Co Ltd v Kaye (1992) 13 GLJ 14)
(Rothmer v Hill Samuel (CI) Trust Co Ltd 1991 JLR 74)
 Code Civil, Arts 14, 15 (France) (www.rabenou.org/civil/L1T1.htm)
(Fondation Guggenheim v Helion [1997] I L Pr 45)
(Delaage v Bloom [1997] I L Pr 150)
 Zivilprozessordnung, s 23 (Germany)
 (Cf Dannemann (1992) 41 ICLQ 632)
 L. 31 maggio 1995, n 218, Arts 3-5, 9 (Italy)
 Private International Law Act 1984, Arts 4, 15 (Switzerland)
 Civil Jurisdiction and Judgments Act 1992, Sch 8, para 2(8) (Scotland)
 (Harris [2000] JITCP 37)
 *Harris, “Jurisdiction and the Enforcement of Foreign Judgments in
 Transnational Trusts Litigation”, in Glasson (ed), *The International
 Trust* (Jordans, 2002), Chapter 1
Re International Administrative Services Inc (1997) 211 BR 88 (US
 Bkcy Ct)
EMM Capricorn Trustees v Compass Trustees 2001 JLR 205, 4 ITEL
 34 (jerseylegalinfo)
Koonmen v Bender, unreported, 14 November 2002, Jsy CA
 (jerseylegalinfo)
 *Matthews, *What is a Trust Jurisdiction Clause?* (2003) 7 JLR 232
 (plus comments by Harris)
Green v Jernigan (2003) 6 ITEL 330, Sup Ct BC
Royal Trust Corporation v AS(W)S (2004) 6 ITEL 1082

4. Recognition and enforcement of trust judgments

*Thomas and Hudson, Chapter 42
 *D&M ch 14
 *Harris “Transnational Trusts Litigation – Jurisdiction and
 Enforcement of Foreign Judgments” in J Glasson (ed) *The
 International Trust* (Jordans, 2002).
 *Hayton, “The International Recognition of Trusts”, in Glasson (ed)
The International Trust (Jordans, 2002), Chapter 3
 Civil Jurisdiction and Judgments Act 1982, Sch 1, Arts 26, 27, 31
 (Brussels and Lugano Conventions:
europa.eu.int/eur-lex/en/lif/dat/1968/en_468A0927_01.html (Brussels)
europa.eu.int/eur-lex/en/lif/dat/1988/en_488A0592.html (Lugano))
 Council Regulation (EC) No 44 of 2001, arts 33, 34, 38
 Recognition of Trusts Act 1987, Sch, Arts 11-14 (Hague
 Convention ch III); see also Arts 2, 4, 8 :
www.hcch.net/e/conventions/text30e.html)
Le Marquand v Halls 1987-88 JLR 86
 cf *Blum v Bruce Campbell & Co* 1992-93 CILR 591
(Re F & O Finance AG, Representation of Urs Burgi, unreported, 17
 January 2000, R Ct Jersey (jerseyinfo)
Re Bankruptcy of First International Bank of Grenada Ltd, 23 January
 2002, unreported, R Ct Jsy (jerseyinfo)

(*Re Regatta Trading Ltd*, unreported, January 1999, IOM CA (see www.contiadvocates.com/wbhol/wbhol1.htm))
Owens Bank Ltd v Bracco [1992] 2 AC 443, [1992] 2 All ER 193
Re Hayward [1997] 1 All ER 32
(Pollard v Ashurst [2001] 2 WLR 722, [2001] 2 All ER 75)
Re State of Norway [1990] 1 AC 723
Muhl v Ardra Insurance Co Ltd (1997) 1 OFLR 198
(Re Tucker (1989) 7 GLJ 8; 1 BOCM 266)
 Matthews, *Trusts & Trustees*, June/July 1996, 6
(Re Walmsley (1983) JJ 35, 38)
Re X's Settlement, 1 June 1994, Jersey, 1 BOCM 600
Williams & Humbert Ltd v W & H Trademarks (Jersey) Ltd [1986] AC 368, 440-441
(Stringham v Dubois (1992) 135 Alta R 64)
 *Matthews, *When is a Revenue Claim not a Revenue Claim?* (1999) 3 JLRev 56 (2000) 4 JLRev 300
 (Hochberg (2000) 9 OITR 189)
 (Ladkin (2000) 7 PTPR 215)
 **Kleinwort Benson (Guernsey) Trustees Ltd v Wilson* (2002) 17 TLI 198
 Venables (2003) 11 OITR 91

5. **The Hague Convention on Trusts (H&M 1047-1051)**

(www.hcch.net/e/conventions/text30e.html)

A full status report on the Convention, regularly updated, is to be found at <http://www.hcch.net/e/status/stat30e.html>

*U&H Ch 23

Dyer and Van Loon, *Report on Trusts and Analogous Institutions*, 1982

Von Overbeck, *Report*, 1984

Thévenoz, *Trusts in Switzerland*, 2001, Schulthess (in Fr and Eng)

Harris, *The Hague Trusts Convention*, 2002, Hart Publishing

Lupoi, *Trusts – A Comparative Study*, 2000, Ch 6

*Hayton, “The International Recognition of Trusts”, ITL, C.3; also in Glasson (ed) *The International Trust* (Jordans, 2002), Chapter 3

Dyer, “International Recognition and Adaptation of Trusts: The Influence of the Hague Convention”, (1999) 32 *Vanderbilt Journal of Transnational Law* 989

Gaillard and Trautman, “Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts”, [1987] 35 *American Journal of Comparative Law* 307

Recognition of Trusts Act 1987

Recognition of Trusts Act 1987 (Overseas Territories) Order 1989, SI 1989/673

Hayton, “The Hague Convention on the Law Applicable to Trusts and on Their recognition”, (1987) 36 *ICLQ* 260

H&M 985-993

Hayton, in *Trust and Trust-like Arrangements*, at 58-65

Matthews, TMCPL, paras 14.6-14.11

Hague Conference on Private International law, Full Status Report
 Convention 30 (<http://www.hcch.net/e/status/stat30e.html>)
 (O'Sullivan [1993] JITCP 65)
 (Albisinni & Gambino [1993] JITCP 73)
 (Matthews (1993) 3 OTPR 137)
 J. Schoenblum, "The Hague Convention on Trusts: Much Ado About
 Very Little", (1994) 3(1) JITCP 5
 Hayton [1994] JITCP 23
 Paton & Grosso (1994) 43 ICLQ 654
 D&M ch 29
 (Boutin, *Trusts and Trustees*, Nov 1994, 24)
 Lupoi, *Trusts and Trustees*, Feb 1995, 15 (trustsandtrustees)
 *Lupoi, *Trusts and Trustees*, June 1998, 15
 (Matthews, *Trusts & Trustees*, July 1995, 25, 30)
 Gretton, *Trusts without Equity*, (2000) 49 ICLQ 599
 Hayton [2000] JITCP 159
 (Law 214 of 1936, amended by Law 1216 of 1999 (Monaco)(text in
Trusts e Attivita Fiduciarie, 2000, vol 1, 103))
 Walford, *Trusts & Trustees*, Feb 1996, 20
 (*Harrison c Credit Suisse*, RO 96 II 79 (1970) (in French))
 (*Code des Obligations*, Art 401 (Switzerland))
 Forbes-Jaeger and Stormann [1996] JITCP 5, [2000] JITCP 141
O-D Bank in liquidation v WKR [2000] JITCP 141 at 144-56
 (*Sohège c Singer*, CI 1910-1229, Rev Dr Int Privé 1907-239 (in
 French))
Piercy c Etfas, Foro it, 1956, I, 1020 (in Italian)
 (*Caron c Odell*, R 1983, 282; R 1986, 66; R 1991, 92
 (in French))
 (*Zieseniss c Zieseniss* Cass Civ. 1ère, 20.2.96, La Semaine Juridique
 22647 (in French))
 (Patarin, Rev trim dr civ 1996, 454)
Re an Isle of Man Trust (1998) 1 ITELRL 103
 (*Austin v Bailey* 1962 MR 113)
 Béraudo, *Les trusts anglo-saxons et le droit français*, 1992, 215-232
 (Convention text 235-239) (in French)
 Lupoi, *Introduzione ai trusts*, 1994, 125-153 (convention text 187-
 198) (in Italian)
 Vischer [1995] JITCP 82
 (*Faillite Four Seasons Overseas NV v SA Finimtrust* 1973 Rev Crit de
 Droit Int Priv 51 (in French))
ABN-Amro Bank Luxembourg v Trustees of Clore Foundation 1994
 and 1996: see Kinsch, *Trusts in a Civil Law Environment* [1996] J
 Int P 121
 (Luxembourg) Law of 27 July 2003
 Dyer, *Trusts & Trustees*, Feb 1996, (trustsandtrustees)
 Von Overbeck, *Trusts & Trustees*, Apr 1996, 6
Cofintec case (1997) 11 Trust Law International 20
Re AY and BY Trust (1998) 1 ITELRL 703
 Hayton [1996] JITCP 127

*Matthews, *Un Trust per l'Italiano* (1998) 12 Trust Law International
104
Lupoi, *Trusts & Trustees*, October 1998, 24
Casani c Mattei (1997) 1 ITEL 925, Trib di Lucca (another
translation is at www.italiantaxes.co.uk/memo12.htm) (decision
affirmed by Florence CA on 23 January 2001)
AY and BY Trust (1998) 1 ITEL 703
Dyer (1999) 32 Vanderbilt Jo Transnat Law 989
Hayton [2000] JITCP 159
Re Barton deceased [2002] WTLR 496, 4 ITEL 715
Chellaram v Chellaram (No 2) (2002) 4 ITEL 729, paras 142-7
(bailii)
Landini c Trombetti, 1 October 2003, Trib di Bologna
Wilson [2004] J Int TCP 17

Section (5)

TRUST-LIKE DEVICES

(5) TRUST-LIKE DEVICES

1. General

De Wulf, *The Trust and Corresponding Institutions in the Civil Law*, 1965
M&S, paras 1.1–1.23
*Matthews (1995) 5 OTR 31
Dyer & Van Loon, *Report on Trusts and Analogous Institutions*, in
Proceedings of 15th Session of Hague Conference, vol II

2. Usufruct and Bare Ownership

Buckland, *A Textbook of Roman Law*, 3rd ed 1963, 268-275
*Thomas, *Textbook of Roman Law*, 1976, 202-207
Bell, Boyron, Whittaker, *Principles of French Law*, 1998, 298-299
Ebke and Finkin (eds), *Introduction to German Law*, 1996, 243
Watkin, *The Italian Legal Tradition*, 1997, 212-214
*Watkin, *An Historical Introduction to the Civil Law*, 1999, 259-262

3. Fideicommissa

(Buckland, *Equity in Roman Law*, 1911)
Buckland, *A Textbook of Roman Law*, 3rd ed 1963, 353-364
*Thomas, *Textbook of Roman Law*, 1976, 511–515
Johnstone, *The Roman Law of Trusts*, 1988
Johnston, in *Itinera Fiducia*, 1998, 45-56
*M&S paras 2.6–2.23, 2.26–2.33
Keeton & Sheridan, *The Comparative Law of Trusts*, 1976, 81–82, 236–238,
241
(Cooray, *The Reception in Ceylon of the English Trust*, 1971, 66–75)
(Honoré, *The South African Law of Trusts*, 4th ed, 1992, 42–48)
(Lee, *An Introduction to Roman–Dutch Law*, 5th ed, 1953, 373–390)
Waters, *Law of Trusts in Canada*, pp 1096 – 1102
Benoit, “Trusts in a Civil Law Jurisdiction: a Unique Canadian Environment
for Pension Fund Fiduciaries”, (1994) 8(1) TLI 3
(Fortin, *Trusts & Trustees*, Dec 1998, 22, and Feb 1999, 20)
(Civil Code of Quebec, Book 4 Title 5 Chap 2 – Substitution)
(*Code Civil*, Arts 897–899 (France))
(*Codice Civile*, Art 692 (Italy))
(*Code Civil*, Arts 488–492 (Switzerland))
Batthyany v Walford (1887) 36 Ch D 269
**Abdul Hameed Sitti Kadija v De Saran* [1946] AC 208, PC
**Abeyawardene v West* [1957] AC 176, PC

4. Foundations

Neuhoff & Pavel (eds), *Trusts and Foundations in Europe*, 1971

(Jersey) *Loi (1862) sur les teneures en fideicommiss et l'incorporation des associations* (M&S paras 16.2–16.8)
 *Hirschbaeck [1993] JITCP 158
 Keeton & Sheridan, *The Comparative Law of Trusts*, 1976, 208–213
 Merric, “The Civil Foundation”, in A. Bove (ed.) *Asset Protection Strategies* (ABA, 2002), pp. 457-470
 Cooray, *The Reception in Ceylon of the English Trust*, 1971, 163–164
 (Swiss Civil Code, Art 335)
 (Civil Code 1994, Arts 118–119 (Russia))
 Biederman [1993] PCB 283
 Honoré, *The South African Law of Trusts*, 4th ed 1992, 49–57
 *Domah (1994) 2 CLPR 219
 Aguilar Alfú, *Panamanian Private Foundations*
 Morgan & Morgan, *Material on Panamanian Private Foundations*
 (Monauni, *The Nature of a Founder’s Rights in a Liechtenstein Foundation, Trusts & Trustees*, Oct/Nov 96, 23)
 Mossack and Brownbill [1996] JITCP 3
 (Tribaldes, *Trusts & Trustees*, April 1996, 21)
 Hirschbaeck [1997] JITCP 61
 (Bahamas) Foundations Act 2004, ss 3-9
 Baker, *Offshore Investment*, May 2004, 13-14

5. Establishments

*Biedermann (1993) 7 TLI 65

6. Fiduciary Contracts

*Buckland, *A Textbook of Roman Law*, 3rd ed 1963, 431-433
 ITL, paras A52.22-48 (Switzerland), A51.13-26 (Italy)
 (Tripet, *Trusts patrimoniaux anglo-saxons et le droit fiscal français*, 1989, 53–61 (in French))
 Koele, in Sonneveldt & von Mens (eds), *The Trust: Bridge or Abyss*, 1992, ch 6
 (Béraudo, *Les trusts anglo-saxons et le droit français*, 1992, paras 49–55 (in French))
 Dyson [1992] Conv 407
 Urquhart (1993) 3 OTPR 35
 Vischer, “The Fiduciary in Continental Europe”, (June, 1999) *Trusts and Trustees* 13
 Waters [1999] JTCP 131
 (Witz, *La fiducie en droit privé français*, 1980 (in French))
 *Pezard, *The Fiducie*
 *Dyer and Van Loon, *Report on Trusts and Analogous Institutions*, in Proceedings of 15th session of Hague Conference, vol II, paras 53 ff.
 Waters [1999] JTCP 131
 Johnston, in *Itinera Fiduciae*, 1998, 45-51
 Matthews, *The Dangers of Overclassification in Trust Law*, 2001
 *Grundmann (1999) 47 Am Jo Comp Law 401
 ((Luxembourg) Law of 27 July 2003)

*Matthews, *Fiducia and the HagueTrusts Convention: the New Luxembourg Law* (2003) 17 TLI 188
Braun, *Caught in the Crossfire* (2004) 18 TLI 26

7. Benami

Keeton & Sheridan, *The Comparative Law of Trusts*, 1976, 202, 227–229
Cooray, *The Reception in Ceylon of the English Trust*, 1971, 138
(*cf Anand v IRC* [1997] STI 100, [1996] Sp C 107)

8. Waqf

Fyzee, *Outlines of Muhammadan Law*, 4th ed 1974, Ch IX
*Pearl, *Muslim Family Law*, 3rd ed 1998, 493-503
Mulla, *Principles of Mahomedan Law*, 19th ed 1990, Ch XII
Waqf Act 1941 (Mauritius)
Powers (1999) 32 Vanderbilt Jo Transnat Law 1167
Schoenblum (1999) 32 Vanberbilt Jo Transnat Law 1191
Lim, *The Waqf in Trust*, in (ed Scott-Hunt and Lim) *Feminist Perspectives on Equity and Trusts*, 2001
Freeland (2001) 15 TLI 13

Section (6)

THE TRUST FROM A WORLDWIDE PERSPECTIVE

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Gretton, "Trusts without Equity", (2000) 49 *International and Comparative Law Quarterly*, pp. 599-620

Honore, "Trusts: The Inessentials", in J Getzler (ed.) *Rationalizing Property, Equity and Trusts* (Butterworths: 2003) pp. 7-20.

Gaillard and Trautman, "Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts", [1987] 35 *American Journal of Comparative Law* 307.

Hayton, "English Trusts and Their Commercial Counterparts in Continental Europe", in Hayton (ed.) *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer, 2002) 203.

Waters, "Convergence and Divergence: Civil Law and Common Law", in Hayton (ed.) *Extending the Boundaries of Trusts* 59

Waters, "Reaching for the Sky: Taking Trust Laws to the limit", in Hayton (ed.) *Extending the Boundaries of Trusts* 243

Waters, "The Future of the Trust From a Worldwide Perspective", in Glasson (ed) *The International Trust* (Jordans, 2002), Chapter 14

Alfred von Overbeck, "Switzerland", in J. Glasson (ed) *The International Trust* (Jordans, 2002), Chapter 12, pp. 547-563.

Luc Thevenoz, "Civil Law Jurisdictions on Their Way to Trusts: A Swiss Viewpoint", in D.J.Hayton (ed.) *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, 2002) 115.

L. Thevenoz, *Trusts in Switzerland* (Schulhess, 2001).

Ferdinando Albissini and Regina Gambino, "Italy", in J. Glasson (ed) *The International Trust* (Jordans, 2002), Chapter 13, pp. 565-593.

Maurizio Lupoi, "The Development of Protected Trust Structures in Italy", in D.J.Hayton (ed.) *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, 2002) 85.

D.J.Hayton, S.E.J. Kortmann and H.L.E. Verhagen, *Principles of European Trust Law* (Kluwer, 1999).

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