

**University of Southampton
Law School**

EQUITY & TRUSTS LAW

Seminar Materials

2012/2013

EQUITY & TRUSTS

Seminar Outlines 2012/2013

The structure of this module

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

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

| Seminar No. | Title | Week commencing, depending on your group: |
|-------------|--|---|
| 1 | Certainty of intention & certainty of subject matter | 15 Oct / 22 Oct |
| 2 | Certainty of objects | 29 Oct / 5 Nov |
| 3 | The beneficiary principle | 12 Nov / 19 Nov. |
| 4 | The constitution of trusts | 26 Nov / 3 Dec. |
| 5 | Duties of trustees and breach of trust | 10 Dec / 7 Jan. |
| 6 | Constructive trusts | 28 Jan / 4 Feb. |
| 7 | Trusts of homes | 11 Feb. / 18 Feb. |
| 8 | Dishonest assistance and knowing receipt | 25 February / 4 Mar. |
| 9 | Tracing | 11 Mar / 15 Apr |
| 10 | Charities | 22 Apr / 29 Apr |

What to read for this module

This document contains the questions which you will consider for the larger part of your seminars, together with some further journal reading – while the core reading is set out in the Lecture Materials. These materials contain cross-references to the Lecture Materials to tell you which cases, statutes, textbook and journal material you are expected to have read. You are given references to Hudson's textbook *Equity & Trusts* and to two other textbooks in the Lecture Materials: if you are using other textbooks or other casebooks, then you should rely on the indexes and tables of cases to identify the appropriate parts of those books.

How to study for this module

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

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

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

The lay-out of these materials

The materials for each seminar follow a set format. Each Seminar Topic correlates exactly with each of the Topics in the Lecture Materials. One of the most significant features of these seminars is that having only one hour per fortnight means that *you must* be well-prepared so that none of this precious time is lost. Therefore, each of these Seminar Materials are set out in the following order:

- The “**Self-test Questions**” are intended to guide your preparation *before* the seminar. You should be able to answer these questions as you go through your reading. Being able to answer them will lead you through a basic comprehension of the law. Your seminar leader may choose to begin with some or all of these questions to test your group’s comprehension of the law.
- The “**Seminar Questions**” are the questions which will form the principal focus of your seminars. You must prepare them in advance of your seminar. The shorter problem questions are intended to allow your seminar leader to assess how well your group has understood the law, and to enable you to practice your skills. By contrast, the longer problem questions and the essay titles allow you to practice the skills which you will need to perform well in the examination: these questions give you an indication of the type of questions (if not necessarily the exact subject matter of the questions) which are likely to be asked in the final examination.
- The “**Further Questions**” are examples of the sorts of questions which might be asked in the examination, and as such they will enable you to practice and to assess your progress at revision time.

Importantly, your seminar leader may choose to focus on some questions more than others within your seminar, or they may introduce different questions entirely. You should be guided by them.

A suggestion for your work method

You should think of seminars as being *in the middle* of your preparation, and not as being the last time you look at the material; just as you have been advised to read in advance of lectures. You are advised to find some time as soon as possible after your seminars finish to write up your notes, or to perform whatever operation works best for your mind so that you will be able to pick up the threads of the seminar topic again when revising before the examination.

Extra materials to help you with your preparation

You might (or you might not!) find it helpful to use Professor Hudson's trusts law podcasts on www.alastairhudson.com as an introduction to your studies. The summary podcasts – which last on average for 10 or 15 minutes – are designed to help you to understand “the big picture” in relation to each area of law *before you start your reading* and to understand how to structure a problem answer. It is always easier to prepare for a seminar if you understand the outline of the material first. Recordings of Professor Hudson's lectures will also be put online some time after the lectures have been delivered. There are other podcasts on that website setting out pathways to further reading and probing further into some of the individual cases. However, these podcasts are not intended to be a replacement for reading the material.

Assessment

The problem questions and essay titles in these seminar materials are intended both to guide your attention to the issues which are considered most important in each area and also to give you examples of potential examination questions. Previous years' examination papers are available through the College web-site and through the library in the usual way.

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

Key

Abbreviations: AH = Hudson's *Equity & Trusts* (full references are in the Lecture Materials); ME = Modern Equity; HM = Hayton & Mitchell; MB = Maudsley & Burn.

ASH

Seminar 1

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

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

For the appropriate cases for this seminar, you should read the Introductory material and Topic 1 in the Lecture Course Documents. You are expected to have prepared all of the material in those sections on the Lecture Materials.

The textbook reading can be found at:-

- AH 1 – 146
- ME 3 – 77, 94 – 103
- HM 3 – 58, 141 – 163
- MB 1 – 89

Self-test Questions

These questions are intended for you to follow through your preparation in advance of the seminar.

1. How do the following people understand equity:
 - (a) Aristotle,
 - (b) Lord Ellesmere in the *Earl of Oxford’s Case*,
 - (c) Charles Dickens in *Bleak House*,
 - (d) Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington*?
 - (e) Why was the Judicature Act 1873 important?
 - (f) An idea to think about throughout the course: “what is a conscience?” (See Hudson, section 32.2, at p.1305)

2. When a trust comes into existence:
 - (a) What are the respective rights of the settlor, trustees and beneficiaries?
 - (b) What are the benefits of a trust?
 - (c) What is a “fiduciary”?

3. In relation to the cases on certainty of intention:
 - (a) What action or form of words will lead to the creation of a trust?
 - (b) What sort of intention in relation to the property is necessary, e.g. as in *Paul v Constance* or *Re Kayford*?
 - (c) How were the principles in *Re Kayford* adopted in *Brazzill v Willoughby* and in *Mills v Sportsdirect.com*?

4. In relation to the cases on certainty of subject matter:
 - (a) Read and be prepared to discuss the judgment of Lord Mustill in *Re Goldcorp* on certainty of subject matter.
 - (b) Read and be prepared to discuss the basis on which Dillon LJ in *Hunter v Moss* justified reaching a different judgment from that suggested by the line of authorities including *Re London Wine* and *Re Goldcorp*.

- (c) How does *White v Shortall* criticise *Hunter v Moss*, and what approach does it adopt instead?
- (d) Why did the Court of Appeal and the Supreme Court in the *Lehman Bros* cases reach the decisions that they did? To what extent do those cases affect the traditional trusts law principles?

Read and be prepared to discuss the following cases:-

Certainty of Intention

- *Paul v Constance*
- *Re Kayford*

With the following cases, focus on the certainty of intention points specifically:

- *Brazzill v Willoughby*
- *Mills v Sportsdirect.com Retail Ltd*

Certainty of Subject Matter

- *Re Goldcorp*
- *Hunter v Moss*
- *Re Harvard Securities*
- *MacJordan v Brookmount*
- *White v Shortall*

With the following cases, focus on the certainty of subject matter points specifically:

- *Re Global Trader Europe Ltd*
- *Re Lehman Bros International (Europe)(No2)*
- *Re Lehman Brothers International (Europe)(in administration) v CRC Credit Fund Ltd*

Seminar Questions

Question 1

(a) Dick owes Mervyn £100,000 as part of a business transaction. Mervyn wants to ensure that he is protected against the risk that Dick's business will go into insolvency before payment is made. Advise Mervyn, precisely, how Mervyn should insist that Dick organises his affairs so that Mervyn is protected under trusts law before payment is made.

(b) Consider whether or not it would be sufficient to create a trust if Dick says: "Your money is protected. It's safe. Think of it as being in your box."? If you think that it is not sufficient, what should Mervyn require that Dick does?

(c) If Dick tells Mervyn that he has opened a new bank account with £100,000 in it, but if the money is not actually paid into such an account, then what is Mervyn's legal position?

Question 2

Dolly collected paintings and sculptures. She wanted to benefit her two adult children Edward and Fenella. For this purpose she decided that her children should take a benefit in two abstract oil paintings (one titled "Pretension" and the other "Self-importance") and two sculptures, in her words, "so that they got one each". The two sculptures were identical, machine-produced casts of Magritte's "The Head with Clouds" which were effectively indistinguishable from one another.

Therefore, Dolly decided to send an email to her personal assistant on 1st January in the following terms: "I don't understand the legal niceties, but I want Edward and Fenella to be able to benefit from Pretension and Self-Importance and my sculptures. I want it sorted out, please. One painting each, one sculpture each. Completely ring-fenced for them. Arrange a meeting with my solicitors to tie it all up."

On 2nd January, Dolly decided to write identical letters to Edward and Fenella. Each letter read: “Uncle Charlie will hold one painting and one sculpture for you as soon as I get it sorted out with the solicitors.”

Dolly died on 2nd February. The solicitors had not met with Dolly before that time.

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

Question 3

If equity is a flexible doctrine which is concerned with “good conscience” and morality, then why does trusts law begin with a study of the rigidity of the three “certainties”? How can this paradox be resolved?

Question 4

Following on from Question 3 above, why on earth does Hudson think (*Equity & Trusts*, section 1.3.3, p.24) that equity is like “cool jazz” if it involves so much certainty?

Further Questions

Question 1 (another self-test question)

Celia was a successful artist who wanted to take a break after an exhibition of her work. So, she went on a round-the-world trip for a year. Celia wanted her close friend and fellow artist, Arthur, to look after her affairs while she was gone. Arthur agreed to look after all of Celia’s valuable chattels (her computer, her customized motorbike, her jewellery, and so forth), and to administer her bank account and her business affairs. Arthur decided to store all of the chattels in one corner of his garage separately from all of his own property. Arthur mixed some of the money from selling Celia’s paintings with his own money for convenience: but he kept a clear and honest note of how much money he owed to Celia. Six months later, Arthur went into insolvency.

- (a) What rights does Celia have (in trusts law terms)?
- (b) What information would you need to know from the parties to reach your decision?
- (c) How might different pieces of information lead you to different conclusions? (Remember, in practice it is usually the case that the parties’ bring you confused accounts of what has happened, and you have to try to impose some order and sense onto them.)

Question 2 (another self-test question)

You are in a supermarket. You pay £10 for goods which cost £7. Mistakenly, the till operator pays you £13 in change as though you had paid with a £20 note.

- (a) What should you do?
- (b) Is there is a difference here between what morality or ethics might prompt you to do, and what law or equity might require you to do?
- (c) Does it matter that the supermarket sold you £3 of rotten fruit the week before?
- (d) Does it make a difference that you are a communist anti-globalisation activist who believes that making profits is immoral?

Question 3 (*a possible exam question, which is continued in other seminars*)

“There is a paradox at the heart of equity: at times it is wilfully flexible, even chaotic; whereas at other times it is rigid and dogmatic.” Discuss.

Question 4 (*a part of a possible exam question*)

Jared learned that he had a terminal illness in January and so embarked on the following dealings with various items of his property.

Jared wanted to settle £300,000, which he kept in cash in a safe in his office, on trust for his two adult children, Ina and Javier. Therefore, on 1 March he declared that: “Henceforth £150,000 shall be held on trust by Jack for Ina as beneficiary absolutely”. On the same day he declared that: “Henceforth, £150,000 shall be held on trust by Jill for Javier as beneficiary absolutely”. On 10 March, Jared changed his mind and decided to declare that Jared would hold the entire £300,000 on trust for his brother, Lionel.

Jared died on 2 April 2010.

Advise the parties as to the ownership of the various items of property.

Seminar 2

Certainty of objects

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

For the appropriate cases for this seminar, you should see Topic 2 in the Lecture Materials.

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

AH 146 – 178
ME 79 – 123
HM 141 – 184
MB 89 – 108

Self-test Questions

1. Why is certainty so important in the law of trusts?
2. (a) What is the distinction between:
 - (i) a fixed trust,
 - (ii) a discretionary trust power,
 - (iii) a fiduciary mere power, and
 - (iv) a personal power?(b) Why should each of the concepts in (a) have different rules for certainty?
(c) How can the rigour of these rules be mitigated by using alternative case law?
(d) Why are there restrictions on simply allowing the trustees to resolve any uncertainty themselves?
(e) Consider the cases on the word "friends". Why is there a problem with using the word "friends" in trusts? Why has it been found to be void in some circumstances, and why has it been found to be valid in other circumstances? How should a settlor qualify the word "friend" to make sure that it is valid?
3. Read and be prepared to discuss the following cases:
 - *Re Hay's Settlement Trusts*
 - *IRC v Broadway Cottages*
 - *Re Gulbenkian*
 - *McPhail v Doulton*
 - *Re Baden No 2*
 - *Re Barlow*

- *Re Tuck's ST*
- *Re Coxen*

Seminar Questions

Consider the trusts law analysis of the following:-

1. Celia declared her intention to settle £100,000 on trust so that “my trustees shall advance a maximum of £10,000 per annum to any of my dear friends who are in financial difficulties”.
2. Deborah declared her intention to settle £50,000 “to be held on trust for my relatives equally”.
3. Jack wishes to create the following dispositions by transferring four parcels of £10,000 to his trustees. Each parcel of £10,000 has been separated from all other moneys.
 - (a) so that my trustees shall hold £10,000 for whichever of my relatives they shall consider to be most deserving of it;
 - (b) so that my trustees may pay £10,000 to any of my most loyal customers which they may select, but so that the money shall be spent within eighty years;
 - (c) £10,000 so that my trustees may pay any amount out of that fund to whichever of the inhabitants of Emsworth they shall consider to be the most hard-working; such that the trustees may decide on the application of this money in their personal discretion.
 - (d) £10,000 to my trustees so that they shall divide it as they shall see fit between my close friends whom they may consider to be most deserving of it.
4. If equity is a flexible doctrine which is concerned with “good conscience” and morality, then why does trusts law begin with a study of the three “certainties”? How can this paradox be resolved? (This was also Question 3 in the last seminar.)

Further Question

Question 1 (*this question is of a type which could form part of an examination question*)

Arthur wishes to settle four, separate sums of £10,000 (which are held in separate bank accounts) on the following terms:-

- (a) So that my trustees shall hold £10,000 on trust for such brave patriots as they shall identify.
- (b) So that my trustees may pay any sum out of £10,000 to whichever of my relatives have shown me the most kindness.

Advise Arthur.

Further reading:-

- Emery, C. “The Most Hallowed Principle-Certainty of Beneficiaries in Trusts and Powers of Appointment” (1982) Vol. 98 LQR 551
- Grub, ‘Powers, Trusts and Classes of Objects’ (1982) Conv. 432
- Matthews, P, “A Heresy and a Half in Certainty of Objects” (1984) Conv 202
- Martin J and Hayton D, *Certainty of Objects - What is Heresy?* [1984] Conv. 307
- Hayton D, “Uncertainty of Subject Matter of Trusts” (1994) Vol.110 LQR 335
- Birks P, ‘The content of fiduciary obligations’ (2002) Tru Law Int 16(1) 34-52 at pp 36-38

Seminar 3

The Beneficiary Principle

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

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

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

AH 179 – 239
ME 391 – 420
HM 185 – 213
MB 357 – 403

By way of periodical reading, you should read the following:-

- *Langbein, “The contractarian basis of the law of trusts” (1995) 105 *Yale Law Journal* 625.
- *Hayton, “Developing the obligation characteristic of the trust” (2001) 117 *LQR* 96.

Self-test Questions

1. What circumstances will constitute a trust which is created for the benefit of *people* rather than being invalid for a *purpose*?
2. Read and be prepared to discuss the following cases:
 - *Saunders v Vautier*
 - *Leahy v Att-Gen for NSW*
 - *Re Denley*
 - *Re Lipinski*
 - *Re Grant’s Will Trusts*
 - *Re Recher’s Will Trusts*
 - *Conservative Association v Burrell*
 - *Re West Sussex Constabulary, etc.*
 - *Re Bucks Constabulary, etc.*
 - *Re Horley Town FC*
3. (a) Would it have been possible to uphold the trust in *Leahy* on the basis that it would have been for the benefit of members of the order of nuns? (b) Could the judgement in *Denley* have been used for this purpose? (c) Why were those two cases decided differently?

4. (a) When a club or association (i.e. any body which is not incorporated as a company) distributes its assets, on what basis are they distributed to which people? (b) Why do we consider cases to do with “clubs” and “associations” in relation to trusts law? (c) How does the law of contract help us to come to a different analysis? (d) Does the law of contract resolve questions of ownership of the property?
5. (a) What are the essential characteristics of a beneficiary’s interest under a trust? (b) How does Viscount Simonds in *Leahy* seem to understand that interest different from Goff J in *Re Denley* and Oliver J in *Re Lipinski*.
6. Why do some people (e.g. Hayton) argue for the abolition of the beneficiary principle?

Seminar Questions

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

1. Celia left £100,000 to an unincorporated association “to be used for the purposes of the association now and in the future”.
2. Dipali left £500 to an unincorporated association “to be used for the enjoyment of the current members in accordance with the terms of the association’s constitutional purposes”.
3. Arthur left £10,000 to an unincorporated association on the following terms: “this £10,000 shall be used by the officers of the association for the purposes of the association as determined by the association’s members in accordance with the club’s constitution.”
4. Jack wishes to create the following dispositions by transferring four parcels of £10,000 to his trustees. Each parcel of £10,000 has been separated from all other moneys.
 - (a) so that my trustees shall hold £10,000 for the purposes of the Southampton Arm-Wrestling Club to provide equipment for the club’s activities;
 - (b) so that my trustees shall transfer £10,000 to the treasurer of the Hampshire Naturists Association as an accretion to the association’s funds to be used for its general purposes.
 - (c) £10,000 to my trustees so that they shall use it for the purpose of constructing a clubhouse for the Highfield Strollers Football Club.
 - (d) £10,000 to be paid by my trustees to the treasurer of the Portsmouth Poker Association subject to a mandate to use the money in accordance with the association’s purposes.
5. Having read the articles by Langbein and by Hayton, should trusts be considered merely to be forms of contract? What would be the effects of such a change of analysis?

Further Questions

Question 1 (which could be an examination question on the beneficiary principle and certainty of objects combined.)

Arthur wishes to settle four, separate sums of £10,000 (which are held in separate bank accounts) on the following terms.

- (a) So that my trustees shall hold £10,000 on trust for such brave patriots as they shall identify.

- (b) So that my trustees may pay any sum out of £10,000 to whichever of my relatives have shown me the most kindness.
- (c) So that my trustees shall pay £10,000 to the Treasurer of the Mile End Polo Club to advance the club's activities.
- (d) So that my trustees shall pay £10,000 to the Treasurer of the Stepney Cricket Club so that he shall use the money to build a new clubhouse with a kitchen for catering purposes.

Advise Arthur.

Question 2 (*which could be an examination question*)

'If the trust is not to be rendered commercially useless, then it must be understood as being something closer to a contract than a creature of some antiquated notion of "good conscience"'. Discuss.

Question 3

Are the arguments for the abolition of the beneficiary principle entirely moral?

Further reading

- N Gravells, *Public Purpose Trusts* (1977) 40 MLR 397
- B Green, 'The Dissolution of Unincorporated Non-Profit Associations' (1980) 43 MLR 626
- S Gardner, 'New Angles on Unincorporated Associations' [1992] Conv 41
- P Matthews, 'A Problem in the Construction of Gifts to Unincorporated Associations' [1995] Conv 302
- S Gardner, 'A Detail in the Construction of Gifts to Unincorporated Associations' [1998] Conv 8

Note: your first in-course assessment is set out overleaf and, for students of Professor Hudson, it must be handed in at the next seminar.

Equity & Trusts

First Assessment¹

*Your class tutor will give you the hand-in deadline and procedure for this assignment.
For students of Professor Hudson, this assignment must be handed in at the next seminar, being Seminar 4.
(This is a “formative” assignment and as such does not form part of your final grade for this module.)*

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

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

Advise the following people as to their rights:-

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

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

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

Seminar 4

The Constitution of Trusts

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

For the appropriate cases for this seminar, you should see Topic 4 in the Lecture Materials.

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

AH 240 – 299
ME 123 – 154
HM 91 – 139
MB 116 – 130, 150 – 169

By way of periodical reading, you would be well-advised to consider the following:-

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

Self-test Questions

1. When will a disposition fall within s.53(1)(c)? How can the rule in *Grey v. IRC* be eluded by using the following cases and what are the alternative analyses suggested in those cases:-
 - *Vandervell v. IRC*
 - *Oughtred v IRC* and *Neville v Wilson*
 - *Re Lashmar* and *Grainge v Wilberforce*
 - *Cohen and Moore v IRC*?
2. How do the following cases qualify the rule in *Milroy v Lord*?
 - *Re Rose*
 - *Pennington v Waine*
 - *Kaye v Zeital*
 - *Curtis v Pulbrook*
3. Where is the line between a perfect gift, an imperfect gift which fails, an imperfect transfer which takes effect as a trust, and an irrevocable trust, in the following cases:

- *Paul v Paul*
- *Re Brook's ST*
- *Re Ralli's WT*
- *Cannon v Hartley*
- *Re Cook*
- *Fletcher v Fletcher?*

Seminar Questions

1. Analyse the following dealings with property in relation to the cases on s.53(1) LPA 1925. Which of the case law analyses will apply to which dealings?
 - a) Timothy is absolute owner of shares. Timothy declares himself to be trustee of the shares for Arnold.
 - b) Samantha is the absolute owner of shares. She transfers those shares to Tariq and directs Tariq to hold those shares on trust for Asif.
 - c) Tolla holds shares on bare trust for Albert. Albert directs Tolla to hold those shares on bare trust for Brenda instead.
 - d) Trevor holds shares on bare trust for Arthur. Arthur directs Trevor to transfer title in those shares to Xavier to hold on bare trust for Yves.
 - e) Timon holds shares on bare trust for Alexandra. Alexandra directs Timon to terminate the trust and to transfer the absolute title in the shares to Alexandra. Alexandra then declares a new trust over those shares in favour of Evelyn and Edward as beneficiaries.
 - f) Tom is the trustee of shares which he holds on bare trust for Ben. Ben announces that he holds his equitable interest on trust for Sandeep absolutely.
 - g) Tom is the trustee of shares which he holds on bare trust for Ben. Ben announces that he holds his equitable interest on trust for Sandeep except that Ben shall retain the power to decide how much of the dividends payable on those shares shall be advanced to Sandeep immediately.

2. Celia died on 21st April 2012. Her executors seek your advice as to whether or not she retained title in any of the following items of property at the date of her death, based on the following information.
 - (i) On 1st February 2012, Celia was the absolute owner of 200 shares in UK plc. Celia telephoned her cousin Duncan to tell him that she intended to transfer those shares to him immediately. Celia completed part of a share transfer form but she did not sign it and she did not post it off the company as she was required to do.
 - (ii) *In your view, would it have made any difference in question (i) if Celia had died very soon after the conversation with Duncan, and if she had expressed her intention to complete that gift on her deathbed but without having prepared a will?*
 - (iii) On 1st March 2012, Celia was the sole beneficiary under the "B trust". The trust property constituted 300 shares in Lovely plc. Celia wanted to exchange the Lovely plc shares for Nasty plc shares which were held on trust for her friend Eve. Therefore, on 1st March Celia and Eve entered into a contract whereby Celia and Eve agreed to exchange their equitable interests under the two trusts with one another.
 - (iv) On 1st April 2012, Celia purported to deal as follows with any property which she might have received in the future under a power of appointment held by her mother, in an email to her solicitor, Bob: "any property which passes to me by way of my mother's power of appointment shall be held on trust for my perfect cousin, Jimmy". Jimmy had furnished no consideration for this promise. Celia sent a letter to Bob the next day which read: "I intend by this covenant to hold any property I may receive in the future further to my mother's power of appointment on trust for Jimmy; and I intend the benefit of this covenant to be held on trust for him immediately." Celia's mother appointed £30,000 to her on 20th April 2012.

Further Questions

Question 1 (*these issues could form parts of an examination question*)

Jared learned that he had a terminal illness in January 2010 and so embarked on the following dealings with various items of his property.

Jared wanted to re-organise his various shareholdings. On 15 March 2010, Jared decided that 200 shares in Happy plc which were held on bare trust for him by Timothy should be transferred to someone else. So, Jared telephoned Timothy and said: "I want you to transfer the legal title in my 200 Happy plc shares to Trevor to hold on trust for my cousin Bertha."

On 16 March 2010, Jared decided that the 200 shares in Misery plc which were held on bare trust for him by Johnny should be transferred in the following manner. Jared entered into a contract with Dipali to the effect that Jared would transfer his equitable interest to Dipali in exchange for a payment of £1,000.

On 1 April 2010, Jared decided to transfer his 400 shares in Jumpy Ltd to his long-term lover, Bernard. He completed the share transfer form, except that he made a mistake when filling in the form when he wrote down the wrong number of shares. So, mistakenly, the form purported to transfer 4,000 shares. Now, further to a power granted to the directors of Jumpy Ltd by that company's constitution, the directors of the company are refusing to consent to the transfer of the shares.

Jared died on 2 April 2010. Advise the parties as to the ownership of the various items of property.

Question 2 (*this sort of essay title could form an examination question*)

'Equity is said to be a flexible doctrine which is concerned with "good conscience" and morality; and yet many of its trusts law doctrines are characterised by rigidity and questionable dealings by practitioners. This is the paradox which lies at the heart of equity.' Discuss.

(A similar question has been asked in previous seminars. It is almost as though there is a theme developing through our discussion of express private trusts...)

*(There is a discussion of whether or not there is such a paradox in Chapter 7 of Hudson's *Equity & Trusts*. The term "paradox" is defined by the Shorter Oxford English Dictionary, inter alia, to mean: 'A statement or argument which, despite sound reasoning from an acceptable premiss, leads to a conclusion that is against sense, logically unacceptable, or self-contradictory'.)*

Further reading:-

- McKay, 'Share Transfer and the Complete and Perfect Rule' (1976) 40 Conv 139-155
- Battersby, G. 'Formalities for the Disposal of Equitable Interests Under a Trust' (1979) Conv 17
- Green B, 'Grey, Oughtred and Vandervell - A contextual Reappraisal' (1984) MLR 385
- Sparkes P, 'Death Bed Gifts of Land' (1991) Conv. 184
- Lowrie and Todd, 'Re Rose Revisited' (1998) CLJ 46-54
- Baughen, S. "Equality is Equity": or is it?" (2000) Conv 58
- Hopkins, N. "Constitution of Trusts – A Novel Point" (2001) 60(3) CLJ 483
- Ladds D, 'Pennington v Waine' (2003) 17(1) *Trusts Law International*, 35-39
- Garton J, 'The Role of the Trust Mechanism in the Rule in Re Rose' [2003] Conv 364-379
- Doggett, A. "Explaining Re Rose: the Search Goes On?" (2003) 62 CLJ 263
- Youdan, "Formalities for Trusts of Land and the doctrine in *Rochevoucauld v Boustead*" 43 CLJ 306.

Seminar 5

Duties of trustees and breach of trust

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

For the appropriate cases for this seminar, you should see Topic 5 in the Lecture Materials.

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

- AH The specific sections in Chapters 8, 9 and 18 set out in the Lecture Materials
ME 565 – 605 (trustees' duties), 691 – 760 (breach of trust)
HM 354 – 417 (focus on the cases in the Lecture Materials), 704 - 760
MB 681 – 747, 863 – 894 (focus on the cases in the Lecture Materials)

Self-test Questions

1. Read and be prepared to discuss the following cases (on the issues relevant to this seminar):
 - *Target Holdings v Redferns*
 - *Armitage v Nurse*
 - *Walker v Stones*
 - *Spread Trustee Ltd v Hutcheson*
 - *Re Hastings-Bass*
 - *Pitt v Holt*
 - *O'Rourke v Derbyshire*
 - *Schmidt v Rosewood*
 - *Breakspear v Ackland*

2. Read and be prepared to discuss the provisions of the Trustee Act 2000 and the following cases on the investment of trusts:
 - *Cowan v Scargill*
 - *Nestle v NatWest*
 - *Bartlett v Barclays Bank*

3. What is the effect of the decision of the House of Lords in *Target Holdings v Redferns*?

4. Is it conscionable for trustees to be able to limit their liability for negligent breaches of trust, further to *Armitage v Nurse*? What if those trustees are professionals?

5. Why should access to information from trustees be restricted only to claimants who can demonstrate that they have some proprietary right in the trust property?

6. Is it conscionable for trustees to be able to get a second bite of the cherry using the doctrine in *Hastings-Bass*, or is it a reasonable protection for beneficiaries? Does *Pitt v Holt* constitute a sensible re-organisation of that principle?

7. What is the impact of moving from a concept of “prudence” to a concept of “reasonableness” in relation to trust investment? Is “portfolio investment theory” a better approach to trust investment in all circumstances? In what circumstances will a trustee be liable for breach of trust as a result of investment of a trust?

Seminar Questions

1. Jeeves was a solicitor who had been in legal practice for twenty-five years. Jeeves was the sole trustee of the Wooster family trust which contained £1 million. The trust was a discretionary trust, of which Bertie and Tuppy were the only beneficiaries. Bertie was a forty year-old partner in a successful international advertising firm, whose capital in the advertising firm was estimated at about £10 million at the material time and whose matrimonial home in rural Hampshire was worth about £5 million. Tuppy was a twenty-five year-old, penniless artist living in a squat in Portsmouth.

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

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

In December 2011, Bertie decided that he wanted to change career away from the pressures of advertising. He had been divorced in November 2009 and had lost the house in the divorce settlement. Furthermore, Bertie cannot liquidate his capital in the advertising firm for another six months, and so he has to rely on his salary of £250,000 per annum in the meantime. Therefore, Bertie telephoned Jeeves and told Jeeves that he wanted to relocate to Paris. Therefore, Bertie asked Jeeves to transfer £600,000 from the capital of the trust fund to him so that he could use it to rent an apartment in Paris and start an art business in Paris. Jeeves did as Bertie had asked and paid £600,000 to him after selling off a large number of the trust’s investments.

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

Advise Tuppy.

2. **Assume that the following facts follow on from the facts of the preceding problem.** After selling off that parcel of trust investments, there was only £400,000 left in the trust fund. There was a term in the trust instrument that the trustee could only invest in companies which were quoted on the London Stock Exchange.

Jeeves considered that he should adopt a more adventurous investment policy than he had done previously so as to build up the capital in the trust fund and to generate income for Tuppy. After reading a blog on a web-site by a well-known City stockbroker whom Jeeves had known at university, Jeeves decided to invest the whole of the trust fund in X Ltd and Y Ltd as the stockbroker had recommended on the web-site. X Ltd and Y Ltd were both private companies which had only been trading for two years each without yet making a profit. In consequence, neither of them was quoted on the London Stock Exchange. Both companies specialised in internet browser software which they hoped would compete with Google and Yahoo eventually. Both companies have since been involved in litigation with much larger internet companies and their shares have fallen in value by a half.

Advise Tuppy.

3. ‘The shift in trusts law from a concept of “prudence” to a concept of “reasonableness” is a monumental change which has dragged the law on the investment of trusts into the 21st century. It is a shame that the global financial crisis has shown how inappropriate concepts such as “portfolio investment theory” really are.’ Discuss.
4. ‘Trustees are not really bound by ties of good conscience if they can limit their liabilities. Moreover, the trustees may actually be the solicitors who draft the terms of the trust instrument containing that exclusion of liability clause for themselves. It is not sufficient to prevent exclusion of liability for dishonesty and still pretend that such a trustee is in truth still a fiduciary in the classic sense of that term.’ Discuss.
5. ‘The decision in *Pitt v Holt* finally remedies the appalling situation in which trustees could reverse their mistakes to the detriment of the public exchequer. This affront to the notion of good conscience in equity will not be missed.’ Discuss.
6. Why must there be secrecy in the operation of a trust’s affairs?

Further Questions

Question 1 (*the following is a type which could be an examination question*)

Tony was the sole trustee of the Curtis family trust. He had no professional qualifications, and worked as a self-employed plumber. He had agreed to act as trustee as a personal favour to members of the Curtis family. The Curtis family trust contained about £100,000. The only two surviving beneficiaries of this trust were Agatha and Jared. Agatha was a successful 55-year-old playwright. She was the life tenant under the trust. Jared was an aspiring 30-year-old heavy metal guitarist with an as-yet unsuccessful rock band. Jared was the remainder beneficiary. Jared had no capital other than his collection of vintage guitars and his rights under the trust fund.

The relevant provisions of the trust instrument were as follows:

- “(a) the trustee shall have a power to pay any capital from the trust fund to any beneficiary so as to protect them from hardship;
- (b) the trustee shall not be liable for any act of dishonesty.”

Agatha had been experiencing difficulties in finding new ideas for her plays and her audiences had been dwindling for some years. Therefore, Agatha telephoned Tony to ask him to use the entire trust fund to buy her a small villa in Spain where she could write plays about English people living there. Tony asked: ‘am I allowed to do that?’ Agatha answered: ‘you are the trustee, and so you can do anything you like. It is my trust fund, and I want that money now.’ Tony attempted to contact Jared, but Jared had changed his mobile telephone number and his e-mail address so that Tony could not track him down that week. Agatha began to chase Tony, even turning up at his house on several occasions, until Tony agreed to pay £90,000 from the trust fund to Agatha.

Tony learned from one of his customers, who was a stockbroker, that a new company called Dodgy Start Up Ltd was a good investment prospect for the future. The stockbroker had mentioned this while Tony was installing a new washing machine for him. Therefore, Tony decided to invest the remaining £10,000 from the trust fund in that company because he had been advised by his customer that this investment would earn ‘big money quick’. However, Dodgy Start Up Ltd never showed a profit and is now due to be wound up as a result of fraud within the company.

Advise Jared.

Question 2 (*the following could be an examination question*)

‘The duties of trustees have hardened into a form which is very different from the flexible concept of equity which Aristotle had in mind. They are more akin to contract than anything else: trustees can limit

their liabilities in the trust instrument; the liabilities of trustees making trust investments are based on a concept of “reasonableness” which is reminiscent of the common law; and the amount of information which must be given to beneficiaries is limited. These are, in truth, commercial trusts which are very different from the traditional family trusts.’ Discuss.

Further reading:-

- Hayton D, ‘Developing the Law of Trusts for the Twenty-First Century’ (1990) 106 LQR 87
- Watt G & Stauch M, ‘Is there liability for imprudent trustee investment?’ [1998] Conv 352
- McCormack G, ‘Widening trustees investment powers’ (1998) Tru Law Int 158
- McCormack G, ‘The Liability of Trustees for Gross Negligence’ [1998] Conv 100
- Garton, ‘Trustee Act 2000’ (2001) 15 Trust Law International 34
- Hicks A, ‘The Trustee Act 2000 and the modern meaning of ‘investment’” (2001) Tru Law Int 15(4) 203-13
- Nugee, E. “*Re Hastings-Bass* Again – Void or Voidable?” (2003) Vol 3 PCB 173
- Hilliard, J. “Limiting *Re Hastings-Bass*” (2004) Conv. 208

Seminar 6

Constructive trusts and aspects of resulting trusts

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

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

For the appropriate cases for this seminar, you should see Topic 7, and those parts of Topic 6 not dealing with *Quistclose* trusts, in the Lecture Materials.

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

| | |
|----|---|
| AH | 551 – 646 (constructive trusts); 501 – 544 (resulting trusts) |
| ME | 301 – 344 |
| HM | 348 – 379 |
| MB | 278 – 321 |

Self-test Questions

- Read and be prepared to discuss the views of the majority of the House of Lords in *Boardman v Phipps*.
 - What was the approach of the minority in the House of Lords in that case?
- How might a defendant rely on the defence of authorisation in relation to a claim seeking a constructive trust over secret profits?
 - In the operation of this defence in practice, is there a distinction between trustees managing family trusts and directors dealing with the companies which employ them?
 - How would these questions be answered under s.175 of the Companies Act 2006.
- Read and be prepared to discuss the judgment of Lord Templeman in *Attorney-General for Hong Kong v Reid*.
 - How did Lord Templeman indicate in *Reid* that he would have treated decreases in the value of any property acquired with the bribe?
 - What is the effect of the decision of the Court of Appeal in *Sinclair v Versailles Trading*?
- Consider the basis on which the constructive is awarded in the following cases (and any others which you have met) and consider whether or not there is in truth a single, coherent basis for constructive trusts in English law:
 - Westdeutsche Landesbank v Islington*
 - Boardman v Phipps*

- *Attorney-General for Hong Kong v Reid*
- *Sinclair Investment Holdings v Versailles Trading (2011)*
- *Lloyds Bank v Rosset*
- *Paragon Finance v Thackerar*.

5. Read and be prepared to discuss the following cases on the nature of the resulting trust:

- *Westdeutsche Landesbank v Islington* (Lord Browne-Wilkinson, resulting trusts only)
- *Re Vandervell No.2*
- *Tinsley v Milligan*
- *Tribe v Tribe*
- *Midland Bank v Wyatt*

6. What was the model of resulting trusts which Prof. Birks had proposed; and why was it rejected by the House of Lords in *Westdeutsche Landesbank v Islington LBC*? See the following:

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

Seminar Questions

1. John is trustee of a family trust. The trust fund contained £40,000 in cash. A stockbroker, who was hired by the trust, advised John to invest £30,000 in a private company. John decided to invest £25,000 of the trust's money and £5,000 of his own money in that company. Shares in the company doubled in value. Advise the beneficiaries of that trust.

2. Michael was the accountant advising the trustees of a family trust. The trust fund comprised £2 million and a minority shareholding in Flex Ltd, a private company. The trustees tended to defer to Michael in relation to investment decisions.

While attending a meeting of Flex Ltd on behalf of the trust in January 2011, Michael learned of an opportunity to generate large profits for Flex Ltd. It would, however, require taking over the company and replacing its management. To acquire a majority shareholding would require £1.5 million. In previous years the trustees had always told Michael that they wanted to keep at least £1 million in free cash or in liquid investments in case the beneficiaries ever needed money in an emergency. Therefore, Michael decided to use £1 million of trust money and to use £500,000 of his own money so as to acquire a majority shareholding between himself and the trust. Michael was dismissive of the commercial abilities of the trustees. Therefore, he decided that he would not explain his plan to the trustees because he considered that they would not have understood it.

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

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

In 2011-12, Flex Ltd generated huge profits and Michael personally earned £200,000 in profits from this transaction by 1st January 2012.

On 1st June 2012, the £200,000 in profits were paid into a bank account which was held in Michael's name and which Michael maintained for many trusts which he advised. Due to poor investment of this money, the account holds only £150,000 at the present date.

Advise the beneficiaries of the family trust.

3. "Even though the cases on constructive trusts appear at first glance to be based on different principles, when analysed more closely it is clear that they are all in truth predicated on a single, coherent notion of good conscience." Discuss.

4. "The doctrines of equity are simply too muddled to be of any real use in English law. What is needed is a clear structure to organise doctrines like constructive trusts, resulting trusts, and equitable estoppel." Discuss (with reference to any or all of those doctrines).

Further Questions

Question 1

"The concept of conscience provides all the clarity and conceptual coherence which is required from equity." Discuss (with reference to any or all of the doctrines of constructive trusts, resulting trusts, and equitable estoppel).

Question 2

'In truth, there is no single doctrine of "constructive trust" at all. Rather there are a jumble of incoherent equitable doctrines which purport to bear the same label.' Discuss.

Question 3

Tariq was a solicitor who advised the Griffin family trust. Tariq was also a director of Yummy Ltd, a private company.

Tariq learned of an opportunity for him to invest personally in a new internet technology start-up company, Double Tech Ltd. However, to be allowed to participate in Double Tech Ltd, Tariq was required to invest £500,000, even though he could only raise £200,000 from his own funds. The trustees of the Griffin family trust had no professional qualifications and so had tended to rely entirely on Tariq's advice relating to all trust dealings for the last ten years. Therefore, Tariq procured £300,000 from the Griffin family trust to invest in Double Tech Ltd. In the financial year 2011/12, Tariq earned personal profits from Double Tech Ltd of £20,000; while the Griffin family trust earned profits of £30,000. At the end of that financial year, Tariq wrote a six page letter to the trustees explaining his investment decisions for that year, and on page five he wrote: "I decided to invest heavily in Double Tech Ltd because they promised such a high rate of return, and indeed they produced a very creditable 10%". He made no other mention to the trustees of this investment at any time.

While Tariq was working on behalf of Yummy Ltd, he learned of an opportunity to import a new low-calorie sweetener for use in cake products. Tariq realised that this new product could be very popular indeed and that it could make its importer a huge profit. If Yummy Ltd acquired the contract to become the sole importer then Tariq could not earn a personal profit. However, he realised that Yummy Ltd was focusing its production on biscuits as opposed to cakes. Therefore, Tariq decided to present the opportunity to import the new sweetener to the board of directors of Yummy Ltd and to hope that they would decide not to exploit it.

To ensure that the directors would not decide to pursue the opportunity, Tariq paid £20,000 to Lenny, a chemist, to prepare a report for the board of directors which would show that the sweetener could not be used successfully in biscuit products on the spurious basis that it would produce an unpleasant after-taste. Lenny's report also included the truthful statement that the sweetener had not yet acquired authorisation to be included in food products in the UK. As a consequence of accepting that both items of information were significant, the board of directors voted not to acquire the rights to import the sweetener in June 2012. The board of directors also voted to approve the following resolution: "Tariq may act in relation to the rights over the cake sweetener product on the basis of the information submitted to the board of directors".

Therefore, Tariq acquired the rights. When the authorisation to use the sweetener in food products in the UK was procured in July 2012, Tariq was able to sell those rights for a profit of £40,000. Lenny invested his money in Glum plc shares, which have since halved in value.

Advise the beneficiaries of the Griffin family trust and Yummy Ltd.

Further reading:-

Constructive trusts

Birks P, *Introduction to the Law of Restitution* (Clarendon Press, 1989), p.89.

Elias, *Explaining Constructive Trusts* (Clarendon Press, 1990)

Millett P, "Bribes and secret commissions" (1993) *Restitution Law Review* 7

Birks P, "Trusts raised to avoid unjust enrichment: the Westdeutsche case" [1996] *RLR* 3

Grantham R, "Restitution, property and ignorance: A reply to Mr Swadling" [1996] *2 LMCLQ* 463

Millet P. "Restitution and Constructive Trusts" (1998) *Vol.118 LQR* 399

Etherton, "Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle" (2009) *Conv.* 104-126

Resulting trusts

Rickett, C, "Different Views on the Scope of the Quistclose Analysis" (1991) *107 LQR*, 608

Robert Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997)

Rickett, C & Grantham R, "Resulting trusts: the true nature of the failing trust cases" (2000) *116 LQR* 15

Ho L, 'Re-interpreting the Quistclose Trust: a critique of Chambers' analysis' (2001) *OJLS* 267

Penner J, 'Twinsectra: the Quistclose trust' (2002) *Tr Law Int* 16(3) 165-173

Yeo TM, 'The Quistclose Trust' (2003) *119 LQR* 8

Glisters J, 'The Nature of Quistclose Trusts: Classification and Reconciliation' (2004) *CLJ* 632-655

Swadling W, 'Explaining Resulting Trusts' (2008) *LQR* 72 – 102

Seminar 7

Trusts of homes

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

For the appropriate cases for this seminar, you should see Topic 8 in the Lecture Materials.

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

| | |
|----|-----------|
| AH | 700 – 800 |
| ME | 287 – 325 |
| HM | 645 – 633 |
| MB | 321 – 347 |

Self-test Questions

1. Formulate the tests in the following cases:-

The leading case

- *Jones v Kernott*
- *Stack v Dowden*
- *Oxley v Hiscock*
- *Gissing v Gissing*

Rigid common intention constructive trust

- *Lloyds Bank v Rosset*

Resulting trusts – ‘balance sheet cases’

- *Springette v Dafoe*
- *Huntingford v Hobbs*

Family assets approach

- *Hammond v Mitchell*
- *Midland Bank v Cooke*

Unconscionability cases

- *Jennings v Rice*
- *Cox v Jones*

Proprietary estoppel

- *Re Basham*
- *Baker v Baker*
- *Gillett v Holt*
- *Lissimore v Downing*

- *Thorner v Major*
 - *Porntip Stallion v Albert Stallion Holdings Ltd*
2. Distinguish between the following doctrines as they relate to trusts of homes:
 - Express trusts
 - Resulting trusts
 - Common intention constructive trusts
 - Ordinary constructive trusts
 - Proprietary estoppel
 - Unjust enrichment (Canada)
 3. To what extent can the case law be reconciled? Or is it preferable to treat *Jones v Kernott* as having replaced all of the previous case law?
 4. Do you prefer the formalism and rigidity of *Lloyds Bank v Rosset* and the judgment of Lord Neuberger in *Stack v Dowden*; or the attempt to set out principles in a quasi-legislative style in *Jones v Kernott*; or the open-textured, principles-based approaches of cases like *Jennings v Rice* and *Midland Bank v Cooke*? Why? What does this tell you about your personal preferences in relation to different intellectual approaches to law? For example, do you think you are a “positivist” or a “natural law” enthusiast?
 5. Why did feminist theorists dislike *Lloyds Bank v Rosset*? Has *Jones v Kernott* effected any great change in that context?

Seminar Questions

1. What change did *Jones v Kernott* effect to the law on trusts of homes? What problems had there been with *Stack v Dowden*, and what problems had there been previously with *Lloyds Bank v Rosset*?
2. Larry and Cheryl are an unmarried couple who acquired a house in rural Devon in May 2010 for their joint occupation. The house was registered in Larry’s sole name. Larry explained to Cheryl that it was a condition of the mortgage contract that this was done. He said this knowing that it was not true because he was unsure about their future together.

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

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

Two months ago, Cheryl learned that Larry had become romantically involved with one of his work colleagues. She confronted Larry and they effected a reconciliation. Cheryl asked Larry to “place the rights of myself and the children on a more secure footing, or else I will need to take legal advice”. Larry reassured her that “this house has always been as much your home as mine”.

However, Larry continued with his affair. The couple have now separated. Advise Cheryl.

3. ‘The English courts’ approach to trusts of homes is merely the search for the “phantom of common intention”. A better approach would be to identify the detriment suffered by the plaintiff and make awards on that basis alone.’ Discuss.

4. Is it possible to reconcile the cases on trusts of homes, as the Court of Appeal attempted in *Oxley v Hiscock*? Or are they simply irreconcilable?
5. Could the law on trusts of homes be made more certain? Would that even be desirable?

Further Questions

Question 1 (*this question is of the kind which could be an examination question*)

Jack and Diane were an unmarried couple who bought a house together in May 2010. The legal title in the house was registered in their joint names. Diane was a doctor who earned £150,000 per annum. Jack was a comic book illustrator who struggled to earn more than £10,000 per annum.

Jack had been at university with the vendor, Charles. At a dinner party at the house in March 2010, Charles had told everyone that he wanted to sell the house, and that he had had a valuation of £420,000 for it. Jack and Diane had decided immediately that they wanted to buy it. Jack offered Charles £400,000 for an immediate sale without expenses like estate agents' fees. Charles agreed.

Therefore, the purchase price of the house was £400,000 when the purchase was completed in May 2010. Diane paid £100,000 in cash from her savings. The remainder of the purchase price was funded by a mortgage of £300,000 from Profit Bank which was taken out in the parties' joint names. The mortgage was an interest-only mortgage, such that no repayments of capital were made. Diane made all of the interest payments out of her personal bank account. There was no discussion between the parties. Instead they accepted that only Diane could have afforded the payments.

The couple had a child in May 2011. Jack agreed to take on all of the childcare responsibilities so that Diane could return to work as soon as possible.

In March 2012, Jack earned £100,000 from the sale of the rights to make a film of one of his comic books. He asked Diane: "Should I use the money to extend the house to make a playroom for the baby?" Diane answered: "Well, it is as much your house as mine, darling, and it is your money from the film". So, Jack spent all of the £100,000 on building an extension onto the house.

The couple decided to separate in December 2012. Advise them as to their rights in the house.

Question 2 (*this question is of the kind which could be an examination question*)

"The attempt to clarify the law relating to trusts of homes in *Jones v Kernott* was always doomed to failure. It leaves many questions unanswered. In particular, it lacks the sort of central, organising principle which was present in much of the earlier case law." Discuss.

Further reading:-

- Barlow, A & Lind, C, 'A Matter of Trust: The Allocation of Rights in the Family Home', (1999) 19 *Legal Studies*, 468.
- Bottomley, "From Mrs Burns to Mrs Oxley: Do Cohabiting Women (Still) need Marriage Law?" (2006) *Feminist Legal Studies* 181
- Cooke E, "Cohabitants, Common Intention and Contributions (Again)" (2005) *Conv* 555
- Dixon M, "Stack v Dowden" (2007) *Conv* 352
- Gardner S, "Rethinking Family Property" (1993) 109 *LQR* 263.
- Gardner S, "Quantum in Gissing v Gissing Constructive Trusts", (2004) *LQR*, 541.
- Gardner S, 'The Remedial Discretion in Proprietary Estoppel- Again', (2006) 122 *LQR* 495

- Piska N, 'Two Recent Reflections on the Resulting Trust' (2008) Conv 441
- Probert R. "Sharing Homes – a Long Awaited Paper" (2002) Family Law 834
- Probert R, "Land, Law and Ex- Lovers", (2005) Conv. 168
- Thompson MP, 'Constructive Trusts, Estoppel and the Family Home' (2004) Conv 496
- Wong S, "Trusting in Trust(s): The Family Home and Human Rights" (2003) *Feminist Legal Studies*, 119.
- Wong S, 'Constructive trusts over the family home: lessons to be learned from other commonwealth jurisdictions?' (1998) 18 *Legal Studies* 369

Equity & Trusts

Second Assignment²

*Your tutor will specify the hand-in deadline and the hand-in procedure for your assignment.
This is a “formative” assignment and does not form part of your final grade for this module.*

Do whichever question you choose.

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

(2) Stella and Kathleen are a couple who bought a house together on 3rd April 2010 for £400,000. The purchase was funded in part by means of a gift of £50,000 from Stella’s parents which was made, according to the card in the envelope containing the cheque, “to both of you as you start your life together”. The remainder of the purchase price was provided by way of a mortgage from Profit Bank in Stella’s sole name. The property was registered in Stella’s sole name at the Land Registry.

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

As Stella said over dinner the night before they signed the paperwork to complete the sale of the house: “This will be our home together.” Kathleen agreed. In April 2010, Stella was aged 25 and had a bright career working in a law firm. Kathleen, aged 30, was finding it difficult to find work as a freelance graphic designer. The house was a small terraced house in Hove in south-east England. The couple decided that they wanted to have a baby by artificial insemination. Kathleen was to be the birth-mother. They had bought the house to provide a home for all three of them. In December 2010, Kathleen gave birth to their first child. Kathleen stayed at home to take care of the baby and to supervise the extensive alteration works which were being done on the interior of the property.

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

When the building work was finally finished on 1st April 2012, Kathleen said: “I hope all this work means that I have earned some rights in this house”. Stella replied: “You know this is our home. Both of us together, and the baby. It always has been.”

² Your seminar leader may or may not use these problems for your assessment.

Stella continued to pay all of the mortgage repayments until she fell suddenly ill in July 2012. Her condition has declined rapidly and she has not been able to work since July 2012. The doctors think it unlikely that she will ever be able to work again. In January 2013 she was made redundant. Kathleen has therefore recommenced work and has made all of the mortgage repayments since January 2013, and has paid for all of the other household expenses (including childcare) since then. Kathleen is however having difficulty earning enough money. The couple fear that Profit Bank will seek a sale of the property.

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

(3) "The doctrine of constructive trusts is incoherent." Discuss.

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

Seminar 8

Dishonest assistance and unconscionable receipt

For the appropriate cases for this seminar, you should see Topic 9 in the Lecture Materials.

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

- AH 953 – 1032
- ME 309 – 324
- HM 502 – 532
- MB 968 – 1007

Self-test Questions

1.
 - (a) Read and be prepared to discuss the conception of dishonest assistance set out by Lord Nicholls in *Royal Brunei Airlines v Tan*.
 - (b) How is this test reinterpreted by Lord Hutton in *Twinsectra v Yardley*?
 - (c) What is the effect of Lord Nicholls's judgment in *Dubai Aluminium v Salaam*?
 - (d) What is the effect of the Privy Council's judgment in *Barlow Clowes v Eurotrust*?
 - (e) How has the case law persisted with the idea of considering the defendant's personal characteristics in cases such as *Starglade v Nash*? Is this in keeping with the original judgment of Lord Nicholls in *Royal Brunei Airlines v Tan*?

2.
 - (a) Read and be prepared to discuss the judgment of Megarry V-C in *Re Montagu*.
 - (i) what are the three forms of knowledge accepted by Megarry V-C?
 - (ii) why does his lordship restrict the possible forms to those three?
 - (b) How is this test reinterpreted in *BCCI v Akindele*?
 - (c) How does Scott LJ conceive of this concept of knowledge in *Polly Peck v Nadir (No 2)*?
 - (d) How is a company fixed with liability based on "knowledge", "dishonesty" or "unconscionability" in cases such as *El Ajou v Dollar Land Holdings*?

3. In what sense does personal liability to account for a loss caused by a breach of trust operate as a constructive trust?

Seminar Questions

1. Marcus, a stockbroker with Profit Fund Management ("PFM"), had lunch with an old school-friend, Toby. Toby was the trustee of a pension fund. Marcus convinced Toby during lunch to invest all

of the fund's spare cash in a speculative diamond mining company in South Africa. Toby told Marcus that the trust's investment powers limited it to investment in the UK. Marcus assured Toby that this could not be the case. What Marcus did not reveal was that he would receive 2% of the investment as a bonus. The investment was paid through PFM's accounts and PFM took a 5% fee for arranging the investment. The investment was worthless. Advise Toby.

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

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

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

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

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

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

Advise the beneficiaries of the trust.

3. 'The liabilities of strangers to account for losses caused by breaches of trust have become more commercially useful now that they have broken away from the test of "knowledge". The test of dishonesty and the test of unconscionability both offer a more coherent form of liability.' Discuss.

Further Questions

Question 1

Douglas was a senior trader at Mammoth Bank, an investment bank, in London. He was one among two hundred traders, but he was responsible for all investments involving Ruritania and had a team of ten traders who reported to him. He was not a member of the board of directors.

In May, Douglas was approached at a conference by Agnes. Agnes said that she represented a reclusive billionaire from Ruritania and that she was responsible for investing a fund of £50 million on his behalf. She said that she had instructions to invest “really sexy amounts of money” in derivatives markets in London. However, she told Douglas that she could not reveal the identity of the billionaire to Mammoth Bank because he would not want it to be known in the marketplace that he was moving his money out of Ruritania.

Douglas decided to take investment instructions from Agnes because after the global financial crisis, he wanted to rebuild his profits and he needed new clients to do that. Agnes therefore organised that £5 million was to be paid to Mammoth Bank on 1 June so that it could be invested under Douglas’s instructions.

Agnes had agreed to a larger than usual fee for Mammoth Bank if Douglas did not embark on an intrusive investigation of the billionaire’s funds. Douglas thought he knew the identity of the billionaire and was reassured because it was well-known that that billionaire already did some of his personal banking with Mammoth Bank. Nevertheless, the legal department in Mammoth Bank insisted on knowing more about the source of Agnes’s funds. However, because it was so overworked by the litigation begun as a result of the financial crisis, the legal department failed to chase Douglas for this information until early November.

The £5 million was transferred into one of the funds operated by Mammoth Bank which was held on trust by Mammoth Bank for the benefit of its investors. On 1 November, Agnes asked that the profits from these investments and the original £5 million be paid into a bank account in Panama over which Agnes was the only signatory. Douglas telephoned Agnes to say: “I am worried that this is not entirely regular”. Agnes answered: “How I manage the fund is my prerogative”, and immediately hung up.

On the next day, it transpired that Agnes was not authorised to invest the £5 million and that she has now disappeared with the money from the Panamanian bank account. The money was in fact originally taken from a charitable trust in Ruritania. At today’s date, Douglas has personal assets worth £2 million in total.

Advise the trustees of the Ruritanian charitable trust.

Question 2

‘Lord Nicholls made it clear that the liability of strangers to account in relation to breaches of trust is not based on negligence, nor on unconscionability. However, the concept of dishonesty which has been developed is becoming increasingly confused.’ Discuss.

Question 3

‘The development of a concept of unconscionability has left the law on “knowing receipt” in a state of great confusion. It is simply incoherent.’ Discuss.

Further reading:-

- Birks P, (1993) LMCLQ 318;
- Gardner S, “Knowing Assistance & Knowing Receipt: Taking Stock”, (1996) 112 LQR 56
- Millett P, “Restitution and Constructive Trusts” (1998) 114 L.Q.R. 399: arguing for replacing constructive trusteeship by restitution. Also (1998) 114 LQR 214.
- Martin, J “Recipient Liability after *Westdeutsche*”, (1998) Conv, 13
- Fox F, “Constructive Notice and Knowing Receipt: an Economic Analysis” (1998) C.L.J. 391
- Smith L, “Constructive trusts and constructive trustees” (1999) C.L.J. 294.
- Birks and Pretto (eds), *Breach of Trust* (Hart, 2002)
- Yeo, “Dishonest Assistance: Restatement from the Privy Council”, (2006) LQR 122

Seminar 9

Tracing and *Quistclose* trusts

For the appropriate cases for this seminar, you should see Topic 10 in the Lecture Materials.

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

- AH 889 – 953 (tracing); 1060 – 1090 (*Quistclose* trusts)
- ME 719 – 758
- HM 534 – 570
- MB 894 – 947

Self-test Questions

1. What is the availability of common law tracing after *FC Jones, etc. v Jones*?
2.
 - (a) What is the pre-requisite for equitable tracing in *Re Diplock, Westdeutsche Landesbank, etc.*?
 - (b) What are the possible approaches if the trustee has mixed trust money with her own money in *Re Hallett* and in *Re Oatway*?
 - (c) How does *Foskett v McKeown* deal with the problem of a trustee mixing trust money with her own money, even if the people claiming through the trustee are innocent volunteers?
 - (d) Explain the distinction between *Clayton's Case* and *Ontario Securities / Barlow Clowes*.
 - (e) How does *Russell-Cooke v Prentis* circumvent *Clayton's Case*?
 - (f) What are the available remedies in relating to equitable tracing? Which remedies would you use in which sorts of situation?
 - (g) What are the available defences in relation to equitable tracing?
3. Read and be prepared to discuss the following cases on the nature of the *Quistclose* trust:
 - *Barclays Bank v Quistclose*
 - *Twinsectra v Yardley* (the speech of Lord Millett on *Quistclose* trusts only)
 - *Templeton Insurance Ltd v Penningtons Solicitors LLP*
 - *Re Farepak Food and Gifts Ltd* (on *Quistclose* trusts only)

Seminar Questions

1. Hazel was a trustee who held a painting worth £100,000 on trust for Brenda under a bare trust. Hazel sold the painting in breach of trust and paid the sale proceeds of £100,000 into a bank account in which she already held £50,000 on trust for her adult child, Jeremy. The next day, Hazel used the money in that bank account to buy a Jaguar XF motor car for £50,000 and then on the following day Hazel used the remaining money in that bank account to buy a Ferrari motor car. The Ferrari was destroyed in a road accident two days later. Advise Brenda.

2. Gordon held three abstract paintings on trust for the Darling family trust: the paintings were called “*One*”, “*Two*” and “*Three*” respectively. The terms of the trust were that Gordon was not permitted to sell the paintings but rather that he should seek to earn income for the trust by exhibiting them. Gordon was the sole trustee.

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

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

On 1 October, Gordon sold *Two* to Bea for £500,000. Tragically, *Two* was destroyed in a fire at the warehouse in which it had been stored. On 2 October, Gordon paid the £500,000 into a bank account in which he already held £20,000 on trust for his mother. The following payments were then made out of that account. On 3 October, £10,000 was used to buy shares in a company, Business Undertaker plc, which specialised in providing insolvency services. The shares in that company have now quadrupled in value. On 4 October, £30,000 was taken out of that account to invest in Static plc, whose shares have not changed in value. On 5 October, the remaining money was invested in the shares of Waffle Bank. Shares in Waffle Bank are now worth only 5% of their value on 5 October.

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

Gordon, Arthur, Bea, and Carol are now all personally bankrupt. Advise the beneficiaries of the Darling family trust.

3. David handed Tracey his jacket and smartphone while he went swimming. Tracey sold both of these items for £50 to a stranger on the beach, Mersault. Tracey used the £50 to buy a small wrap of cocaine from a drug dealer on the beach. How should the law deal with this situation? What if Mersault and the drug dealer cannot be found?

4. “In *Twinsectra v Yardley*, Lord Millett described the *Quistclose* trust as an orthodox type of resulting trust, but that hardly does justice to the complexity of the concept and it overlooks the many shortcomings in that judgment. Furthermore, it could be said that none of the English cases have managed to set out a coherent understanding of *Quistclose* trusts.” Discuss.

Further Questions

Question 1 (*the following could be an examination question*)

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

Question 2

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

Question 3: this question combines tracing, dishonest assistance and knowing receipt ... just for fun:-

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

Bingo was a substantial shareholder in Whizz Ltd. In 2010 Bingo advised that the total trust fund (£500,000) be invested in Whizz Ltd. Bingo knew that Whizz Ltd was about to enter into a risky business venture at that time in an area in which Whizz Ltd had no experience. Margaret, the managing director and controlling mind of Whizz Ltd, had asked Bingo to look into raising money for this business venture. When Bingo procured £500,000 from the Taylor family trust and presented the payment to Whizz Ltd, Margaret asked: 'where did you manage to find such a large investment?' Bingo replied, cryptically: 'Ask me no questions, and I will tell you no lies.' Margaret said nothing more.

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

- (i) First, £150,000 was placed in a current bank account No. 100. That account went overdrawn in 2011; the money was used to pay off the mortgage on the company headquarters. There was £80,000 in the account by April 2012.
- (ii) Second, £50,000 was placed in current bank account No. 200 in July 2011. Account No. 200 already contained £10,000. Out of account No. 200, £20,000 was spent on a lavish Christmas party for clients. No further amounts have been paid out of the account no. 200 since then.
- (iii) Third, £275,000 was used to purchase machinery which the company has kept.
- (iv) Fourth, £25,000 was used to buy operating equipment and donated to a medical charity.

Advise Tick and Tock generally.

Further reading:-

- Birks 'Mixing and Tracing: Property and Restitution' (1992) 45 CLP 69
- Birks (ed.), *Laundering and Tracing* (Oxford: Clarendon Press, 1995): inc. Hayton, 'Equity's Identification Rules', and Birks 'Overview: Tracing, Claiming and Defences', p.289-322.
- Smith L, *The Law of Tracing* (Oxford: Clarendon Press, 1997)
- Rotherham C, *Proprietary Remedies in Context : A Study in the Judicial Redistribution of Property Rights*, (OUP, 2002).
- Millett P, "Tracing the Proceeds of Fraud" (1991) 107 LQR 71.
- Simon Evans, 'Rethinking Tracing and the Law of Restitution' (1999) 115 LQR 469
- Oakley AJ, 'Proprietary Claims and Their Priority in Insolvency' (1995) CLJ 377
- Jones A, 'Identification of improperly appropriated trust money – mixing and Maxwell' (1996) Conv 129
- Pawlowski M, "The Demise of the Rule in Clayton's Case" (2003) Conv, 339

Seminar 10

Charities

This seminar considers the stand-alone topic of charities. Many students find the easier structure of this topic more straightforward than many other areas of trusts law. It is important to remember that charities are public trusts with different rules from other areas concerning private trusts. The objective is to understand the rules for the four separate categories of charity, and then to allocate any set of facts between those four heads of charity by applying the relevant principles to each category.

The objectives of this seminar are:

- (1) to be able to decide whether a given object would be classed as a charitable object. This requires an understanding of the scope of the term 'charitable' and a determination of whether, in reaching decisions, the judges take into account the advantages associated with charitable giving;*
- (2) to understand the basis for the Charity Act 2011, and to determine whether the Act made significant in-road into the common law on charity;*
- (3) to analyse the rule that prevents a political purpose from being charitable*

For the appropriate cases for this seminar, you should see Topic 11 in the Lecture Materials.

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

AH 1096 – 1164

ME 421 – 502

HM 214 – 301, focus on cases listed in the *Lecture Materials*

MB 409 – 622, focus on the cases listed in the *Lecture Materials*

Self-test Questions

1. What are the advantages of charitable status? Why are charities not invalid purpose trusts?

Formulate the analyses in the following cases:

- *Dingle v Turner*
- *Joseph Rowntree Memorial, etc. v A-G*
- *Re Compton*
- *Oppenheim v Tobacco Securities*
- *IRC v Educational Grants Association*
- *Re Hopkins*
- *Re Shaw*
- *ICLR v A-G*
- *Re South Place Ethical Society*
- *Re Hetherington*
- *National Anti-Vivisection Society v IRC*

2. Is the concept of a “public benefit” used differently in relation to different types of charitable purpose?
3. Should the approach in *Dingle v. Turner* be applied to charities created for educational purposes? What would be the effect of such an approach?
4. Why are sport, communal activities and research considered to be charitable educational purposes in some circumstances but not others in the case law? What will be the effect of the Charities Act 2011 on this area of law?
5. In what circumstances, if any, can a charity pursue political purposes?

Seminar Questions

1. Consider the following purposes and advise whether or not they are charitable:-
 - a) “the furtherance of alternative medicine, and in particular, faith-healing and acupuncture”
 - b) “the benefit of the customers who assemble annually to drink beaujolais nouveau at Oriel’s in Sloane Square, London”
 - c) “educating the children of Cabinet ministers at private schools”
 - d) “a gymnasium for lazy law students in Portsmouth”
 - e) “research into the reform of the law of charities”
 - f) “the relief of harm to farm animals and a change in the law on carriage of animals by rail”
 - g) “£100,000 for the benefit of Widgets Ltd Working Men’s Club” [Widgets Ltd employs 500 people.]
 - h) “£100,000 for the benefit of the Sunderland Public Working Person’s Club” [Where that club is open to “any working person”.]
 - i) “£100,000 for the provision of a hostel for members of Widgets Ltd Working Men’s Club who have fallen on difficult times”
 - j) “£100,000 to provide a hostel for 12 occupants at any time who have fallen on difficult times”
 - k) “£100,000 for the private education of any child in the world, with a power for the trustees to apply the money solely for the benefit of the children of the employees of Tubby Clarke Tobacco Products Ltd”
 - l) “£5,000 for the erection of a granite statue in Southampton’s West Quay shopping complex to facilitate the worship of the divine Cheryl Cole and thus raise the spirits of local people”
2. ‘Judges are programmed to validate charitable purposes whenever possible and so the notion of public benefit had widened accordingly. It is now a meaningless concept.’ Discuss.
3. Advise on whether the following gifts in Joanna’s will create valid and charitable trusts:
 - (a) my shares to my cat;
 - (b) my house to form the site for a social and recreational centre where Roman Catholics resident in Southampton can meet;
 - (c) £10,000 to Southern University for the promotion of research into a simplified alphabet;
 - (d) my residue to the residents of Hampshire.
4. Consider the validity of the following as a charitable trust both under the common law and Charities Act 2006 law:
 - (a) A fund to acquire and preserve as much land as possible bordering upon an estuary so as to prevent its commercial development and to try to forestall the construction of a new road, with the aim of safeguarding the estuary’s present use as an important staging post and wintering ground for migratory birds.
 - (b) A gift to augment a fund established by former employees of a company, made redundant for economic reasons, which they set up for themselves and other similarly placed people in the area,

to pay for counselling and advice on whether to use their redundancy payments to start up small businesses.

(c) A trust to subsidise the sale of condoms to young people, to help prevent the spread of AIDS?

Further Questions

Question 1

David wanted to benefit the following purposes by settling £10,000 on each purpose by way of trust. Advise him as to whether or not they would constitute valid charitable trusts:-

“1. To relieve the poverty of my cousins who have been made redundant after closure of the Sunderland shipyards.

2. To provide education for the people of Sunderland in the need to change the law governing strike action by trade unions.

3. To provide for the construction of a new railway bridge over the River Wear in Sunderland.

4. To provide for the payment of a priest to hold a prayer service for the eleven men comprising the Sunderland Football Club team before each Saturday home fixture.”

Question 2

‘The notion of public benefit in the law of charities is a disreputable one: in truth judges twist this idea both to validate any generally benevolent purpose and also to prevent tax avoidance.’ Discuss.

Further reading:-

- *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector*, Strategy Unit Report, September 2002
- www.cabinet-office.gov.uk/innovation/2002/charity/report/02.htm
- *Charities and Not-For-Profits: A Modern Legal Framework*, The Government’s Response to ‘Private Action, Public Benefit’, Home Office, July 2003
- www.homeoffice.gov.uk/docs2/charitiesnotforprofits.pdf
- *The Public Character of Charity*, The Charity Commission Publication, RR8 (www.charity-commission.gov.uk)
- *For the public benefit? A consultation document on charity law reform*, (London, National Council for Voluntary Organisations, January 2001) (to be found in the Reserve Collection, Hartley Library)
- *Review of Charity Taxation Consultation Document*, HM Treasury, March 1999
- M. Chesterman, *Charities, Trusts and Social Welfare* (London: Wiedenfeld & Nicolson, 1979)
- J. Hackney, *The Politics of Chancery* (1981) 34 C.L.P. 113, 119-123
- Chesterman, *Foundations of Charity Law in the New Welfare State* [1999] 62 MLR 333
- Jean Warburton, *Charitable Trusts – Unique?* [1999] 63 Conv 20
- N Gravells, *Charitable Trusts and Ancillary Purposes* [1978] Conv 92
- Cohen. *Charities – A Utilitarian Perspective* (1983) CLP 241
- S Bright, *Charity and Trusts for the public benefit – time for a re-think?* [1989] 30 Conv 28
- Histed, *Rectification of Wills and Charitable Trusts for Poor Relations* [1996] Conv 379
- Hackney, (2008) “Charities and Public Benefit” LQR 347
- Rahmatian, A. (2009) “The Continued Relevance of the ‘poor relations’ and the ‘poor employees’ Cases Under the Charities Act 2006” *Conv* 12

THE END

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