Cliffnotes

Equity and Trusts

The University of Hong Kong

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Case References

Introduction to Equity

History

An action required a writ, a rigid legal form.

Courts dealt judgments swiftly but 'justice' might not be perpetuated with rules being enforced so rigidly.

Appeals might be made to the king/Lord Chancellor.

A set of courts became established: the Court of Chancery intervening where there are problems of mistake (e.g. contract in writing), fraud and conscience.

Where decisions might be overruled, Courts of Equity would not explicitly say so – instead, the person with the legal right granted by the Common law Court would be prohibited from enforcing it by equitable rules.

[Earl of Oxford] Conflict between the two courts.
Equity prevails over the common law.

1873-5
Curial reform: Administration of common law and equity fused but they remain two distinct principles.

Advantages and disadvantages of Equitable Jurisdiction

Equity looks more into individual cases, a clear-cut rule is rare. Judges rule differently.

Equity is flexible, complimenting the rigidity of common law.

Relationship between Equity and Trusts

Equity is the jurisdiction.

Trusts is a subset of that jurisdiction, about handing *property* to someone else's custody.

Setting up Trusts

Trusts are set up mainly to 'plan' tax in the settlor's country – inheritance tax, profits tax, etc. However if that is the *only* reason to set up a trust, the courts would strike it down.

Exercising Equity in Trusts:

Settlor (S) transfers a title of property to trustee (T) under the condition that the property is managed for the benefit of S's beneficiaries, B. There is a breach.

Under common law, S might sue T for breach of contract but B gets nothing and cannot sue T due to privity of contract. $S \rightarrow T$

$B \not\rightarrow T$ [case of common law]

Under equity, that condition would be enforced disregarding privity and B would be allowed to sue. $S \rightarrow T$

$B \rightarrow T$ [case of equity]

If T's successors took the legal title of the property, what then?

Under equity, B could sue them too. This notion expanded to include everyone except bona fide purchasers of a legal interest for value without notice: Equity's Darlings. That is, if an innocent person buys up trust property, then B cannot sue.

This is in substance, a proprietary right. B has equitable ownership over trust property.

Rights in Rem and in Personam

In Rem:

Right enforceable against a thing. A person is sued but **remedy is of the particular object** so long as the object still exists.

In Personam:

Right enforceable against a particular person, e.g. contract. **Person has to perform an obligation**. If he is bankrupt, the action would mean nothing. An action in-rem would be more beneficial. If the item is destroyed, however, an action in-personam would be more meaningful.

Despite of equity acting in personam, the above greatly expanded example (trusts) concerning property would be a right in rem.

The beneficiaries have a right in personam against trustees if they fail in their duties but beneficiaries also have equitable rights in rem in the trust property. Note that equity's darlings (consideration + no-notice) are not affected by possible claims.

Applications of Trusts

Family

Succession planning.

Estate duty/tax mitigation.

Trusts are confidential.

Commercial

Unit trusts: Link REIT.

Pension Trusts: MPF.

Nominee holdings / bare trusts: in share ownership because shares are usually not held by you personally and the bare trustee must take your instructions…

Management, raising of public funds

Charity trusts.

Classification of Trusts

Dictates the conditions necessary for a trust.

+ Intentional trusts (Express Trusts)

- For persons : persons to benefit from the trust

Classified according to time the trust takes effect.

- Testamentary (after death and administration of estate)

- Inter-vivos (any time before death)

Also classified into…

- Discretionary trusts are where the funds can be allocated according to the trustee's discretion. Usually there is a class of beneficiaries from whom to choose.

- Fixed trusts have shares of beneficiary interests predetermined.

- Bare trusts have minimal terms. The trustee does not have much discretion e.g. money and shares to a broker.

- For purposes

Public (charitable) defined by law – beneficiary/enforcer is the attorney general or secretary of justice.

Private (non-charity) VOID for having an unregulated trustee as the required beneficiary does not exist.

+ Trusts by law (common or statute) | Resulting/Constructive

Setting up a Trust (Express Trusts)

1. Declaration of trustee by settlor (settlor can be trustee also).
2. Transfer of the property title to trustee.

Then the trust will be **completely constituted**, the beneficiary's rights arise then and there. Trusts cannot be revoked by the settlor (unless excepted in the declaration) and is enforceable only by beneficiaries. The settlor drops from the scene.

S → T

|

B

Can a declaration [of myself] be made in secret?
Yes except if challenged, it is impossible to prove this.

Can I declare someone else to be a trustee in secret?
Yes except that if he denies it, you have no recourse.

If I make a promise to transfer property in trust at a certain future date and the beneficiary has not paid consideration for this 'promise', there is no law against revocation [see contract].

Equity will not enforce a volunteer-act/promise without consideration (sham consideration e.g. love and affection). Specific performance is otherwise possible to compel the settlor to constitute the trust..

Substantive Validity - the 3 certainties

Legal capacity, sound mind.

No sham.

Trust must be for human beneficiaries, animals or charity.

Trust must not infringe upon rules of perpetuities.

Trust must be free of vitiating factors like illegality and harm against public policy.

Certainty of subject matter

Specific property to be transferred and specific beneficial interests.

Certainty of intention

To set up a certain type of trust. The words employed in a trust must show that a trust is created (compelled to dispose of trust property) as opposed to an absolute gift made to the transferee (mere power to transfer to beneficiaries).

Courts will give effect to true intention of trust gathered from trust document as a whole.

Certainty of Objects/Beneficiaries

Applies only to private trusts – to clearly define beneficiaries via linguistic prima facie certainty.

Beneficiaries must actually exist.

Trustees do not need to be clearly defined as they can be defined by a court of equity.

Trustee can be *one of* the beneficiaries.

Trusts and Powers

A trust *compels* the trustee to do his duty.

A power *allows* the person to exercise that power.

Discretion in appointment of beneficiaries within a fixed class.

Bare Power

Fiduciary Power

Exercised subject to fiduciary duties.

Types of Trust and Power

POWER	TRUST
Bare power (rare)	Non-discretionary trust
Fiduciary power	Discretionary trust [power]

Non-discretionary trusts

Beneficiaries are fixed and all known.

Beneficiaries have fixed entitlements, therefore compulsion to distribute.

Discretionary trusts

The trustee has a limited power of selection to exclude certain beneficiaries.

Compulsion to distribute exists.

Fiduciary Power

Trustee obliged to consider whether he will exercise his authority, but is not compelled to do so.

E.g. Wife… trustee… husband for life, to children if trustee so decides, but if not to children, then to charity.

General test (for certainty of beneficiaries): Must be possible for the trustee to say whether a given individual is within the class of beneficiaries.

Limits on power of trustee in Fiduciary Power:

Must decide whether to exercise it occasionally;

Stay within the defined objects;

No malafides (fraud on the power).

Bare Power

The power to select beneficiaries is given to the trustee. There is no duty on the trustee to nominate anyone as beneficiary.

Also known as gift over in default of appointment.

E.g. In trust for my spouse for life and on her death to be divided among my children as the trustee may select, in default of appointment to my brother.

Types of bare powers:

Special: Arises when the trustee is given the property and is asked to make a distribution to a particular class of persons. There is no obligation on the part of the trustee to make a distribution.

Test for certainty is "in/out" test as long as those in the class can determine whether the trustee is making an unauthorized distribution.

Intermediate: Trustee is asked to make a distribution to anyone in the world except for certain nominated people.

Intermediate power will probably be held as certain where the trustee is not included in the class of beneficiaries (due to conflict of interest).

Duty for the donee not to act capriciously/unfaithfully and to make a conscientious survey, if the donee acts accordingly, the intermediate power will not fail.

General: Arises when the property is transferred to a trustee and he is asked to make a distribution to anybody except himself. This is usually **void** for uncertainty, based on the conflict of interest and duty principle.

Formal Validity

Inter vivos trust

If the property is real land, the declaration must be in writing.

Other property may be declared orally.

Testamentary trusts

Declaration in writing and in presence of 2 witnesses.

Persons involved:

Settlor (can be trustee and *one of the* beneficiaries as well since if the settlor is the sole beneficiary, he would be both duty bearer and rights holder. Equity does not allow this).

Trustee

Beneficiaries

Protectors

Persons appointed by settlor to supervise the trustee. In documents, approval from protectors may be required before certain decisions are implemented [veto powers].

The settlor should not be the protector as the courts might infer a sham.

The ultimate gains and losses of the trust fund accrue to the beneficiaries.

The trustee is seen to be the absolute/(legal?) owner of the properties held in trust. He is free to manage the fund.

Trust Characteristics

Trust property is **separate** from general assets of a trustee. All recipients of the trust property are subordinate to the interest of the beneficiaries *unless* he is equity's darling (bona-fide purchaser for value without notice).

There are **stringent duties** imposed on the trustee.

E.g. abuse in the power, theft, etc, therefore trustees are subject to stringent duties: fiduciary…

If the trustee owns multiple properties e.g. land, the trust property might go to the trustee's heirs or creditors. Therefore, trustees must keep trust property **separate from his other assets**. For example, separate accounts. That way, the trust property will not go outside the trust fund.

Modern Trusts and Their Problems

Trust Documents

The Trust Deed is a *standard document* setting out terms of the trust.

Names of the [fake] settlor [usually partner of the trust's accountant]

Amount settled upon trust [usually $100]

Many details discretionary.

Beneficiaries usually hidden.

Letter of wishes

Contains real intentions of the settlor plus details.

Said to be "not binding".

Purpose?

Binding effect?

Reliability of the trust?

Usually obeyed to promote business of trustee.

Beneficiary's Rights to Information

Accountability vs. Discretion

What is the legal position?

RE LONDONDERRY'S SETTLEMENT [CA, obsolete]

Family arrangement involving fiduciary powers of appointment. Trustee exercised that power. Info wanted: records of meetings by trustees; correspondence between trustees and beneficiaries.
HELD: confidentiality maintained. **Beneficiaries entitled to see trust documents except when they disclose reasons for trustees in exercising their discretion**.

Technical reason: trust documents are part of trust property – beneficiaries own trust property and so have a proprietary right to access to the documents.

Policy reason: if reason for discretion is allowed to be disclosed, trusteeship would be burdensome and family politics would be publicized. Trustee protection.

Defining trust document: "A trust document is a document possessed by the trustee containing information about the trust that beneficiaries are entitled to see". {Circular} This gives courts more discretion.

Position different where trustee has breached trust and all documents are subject to disclosure.

A trust document is widely agreed to consist of a trust deed; trust records; trust accounts. Not containing reasons for discretion.

Is a letter of wishes a trust document?

Does it disclose the reasons of discretion of the trustee?

HARTIGAN NOMINEES [CA, Aus]

Discretionary trust prejudiced plaintiff.

Kirby, J: Londonderry is outdated – should disclose reasons for discretion as modern trustees are professionals and should have higher accountability. Also because trust document 'is subordinate' to the trust deed and is therefore trust documentation [subsequently quashed]. Except where there was express statement of confidentiality.

Sheller, J: Should disclose under Londonderry as it did not show reasons for discretions but letter **assumed to be confidential**.

Mahoney, J: Letter of wishes not trust document (property of trust) and it discloses reasons for trustees' discretions. Letter also **assumed to be confidential**.

Documents not disclosed. Subsequent cases affirm that *most* trust documents can be assumed to be confidential.

RE RABAIOTTI'S SETTLEMENT [2001]

Most letters **reveal reasons** for trustees' discretions. Beneficiaries not entitled by right to see it. If it does not prejudice beneficiary class as a whole, then it may be disclosed.

Courts have the **discretion to override the confidential nature of letters** (e.g. where it does not prejudice beneficiary class as a whole). Courts must monitor the trustee and hold them accountable – this **discretion will be exercised if it is essential** on the facts to do so.

Family embarrassment not encountered as the disclosure was needed by court for divorce proceedings against a third party. Other (relevant) beneficiary **supported** the move.

SCHMIDT V ROSEWOOD TRUST [2003]*

Fiduciary power: do the objects of fiduciary power have rights to information? If it were a discretionary trust, beneficiaries have a proprietary right to information but in this case, beneficiaries do not have a proprietary interest in the trust.

HELD: objects of power may be entitled to seek disclosure depending on the courts' discretion.

Londonderry should not be followed in this modern day and age. No beneficiary have rights anymore. Disclosure should depend on the **courts' jurisdiction and powers to supervise trustees**, **not proprietary rights**.

Factors in exercising discretion: DM supplementary

Modern law is discretionary. Technicalities no longer authoritative.

Summarize the modern position.

Fiduciary Duties

Fiduciaries include: trustees, company directors, partners, solicitors, agents(principles). Trustees are a subset of fiduciaries.

Fiduciary duties include: loyalty and trust; duty to avoid conflicts between duties. What remedies are there?

MOTHEW [CA]

Solicitor acted for both mortgagee and mortgagor.

HELD: no breach

Not every breach is a breach of FD.

Where an F acts for **2 principals**, he must be able to fulfil his obligations to one without failing in his obligations to the other. Otherwise, he should cease to act for both. (Actual conflict rule).

Existence of a fiduciary relationship does not mean every duty owed by a fiduciary is a fiduciary duty. A trustee's duty to exercise reasonable care, although equitable, is not specifically a fiduciary duty.

"Breach of fiduciary duty" connotes disloyalty or infidelity. **Mere incompetence is not enough**. There can be no justification for treating an unconscious failure as demonstrating a infidelity.

Content of Fiduciary Duties

No unauthorized **double employment** where interests may conflict. Consent required by both principles.

Must not intentionally further the interest of one to the detriment of the other.

Must not intentionally allow the performance of your obligations towards one to be influenced by the relationship towards the other, such that you are inhibited from serving one of the principles as if he were your only employer. Principle of no-inhibition

Personal conflict of interests: where personal interests conflict with the duties.

Conflicts of Interest

KEECH V SANFORD

Trustee, using trust funds, tried genuinely to renew a leasehold for an infant but failed. He then renewed it successfully for his own benefit. Infant wanted lease assigned to him.

HELD: He must account for the lease and resulting profits. Because otherwise, a trustee may not use best efforts to get trust property for the trust. Trustee has insider information on the lease because it was held by the trust fund previously.

Prophylactic/preventative measures because evidence is hard to get from the trustee.

Very strict rule where all profits made out of position must be disclosed to the principal.

> Fiduciary standing in a conflict with the best interests of the beneficiary becomes constructive trustee of any profits made by virtue of the trust relationship

No Unauthorized Remuneration

Trustee not entitled to this from principle/beneficiary unless there is authorization.
Trustee cannot claim fees for trust management. Equity rule. Authorization possible by trust deed.

RE DUKE OF NORFOLK'S SETTLEMENT TRUSTS

In the absence of a charging clause in the trust instrument, trustees in the past have not been entitled to charge for the services they perform in the administration of a trust.

(UK) Only the Public Trustee and a number of other trustees acting in an official capacity have a statutory entitlement to charge for fees.

Trustee Ordinance:

Where the court appoints a corporation to be a trustee either solely or jointly with another person, the court may authorize the corporation to charge such remuneration for its services as trustee as the court may think fit.

The right to remuneration may exist because of the presence of a charging clause in the instrument creating the trust. Trust corporations will insist that such a clause is inserted in the trust deed, otherwise they would not be paid for the work undertaken. In other fiduciary situations, for example between directors and a company, the same rule applies. Thus a contract of remuneration entered into by a company with its directors must be one into which the company is empowered to enter.

GUINESS PLC V SAUNDERS [1990] 1 All ER 652 [HoL]:

> Defendants claimed that they were entitled to £5.2 million for advice they had given in the take-over of another company. The purported contract was made by a committee of three directors (which included the defendants).
>
> HELD [HoL]: They were not entitled to the money because the committee did not have the authority to make this contract.

The court has an inherent jurisdiction to authorise remuneration in some circumstances.

BOARDMAN V PHIPPS [1966] 3 All ER 721

RE DUKE OF NORFOLK'S SETTLEMENT TRUSTS [1981] 3 All ER 220, CA:

> HELD: That it had a **statutory power** to authorise remuneration to a prospective trustee for future services and an **inherent jurisdiction** to authorise payment to a voluntary trustee for services upon which he had already embarked. There seemed no logical reason why it should not have the power to authorise increased payment for future services. See also FOSTER V SPENCER [1996] 2 All ER 672.

CRADOCK V PIPER (1850)1 Mac & G 664:

> This is a special **exception for solicitors** which provides that a solicitor trustee may charge for the costs of litigation if he has acted for a co-trustee as well as for himself and provided that the costs have not been increased as a result of his involvement. However, it should be noted that this rule has been disapproved of from time to time and thus **should not be extended**.

BADFINGER MUSIC V EVANS LAWTEL 5/5/2000:

> The claimant re-mastered tapes of a live concert. This resulted in profits which the beneficiaries would not have otherwise gained.
>
> HELD: The court would exercise its jurisdiction to award remuneration to a trustee who owed fiduciary duties to his fellow beneficiaries. This was an exception to the general rule, which prevented remuneration being paid to trustees unless pre-approved.

No self dealing

Where trustee purchases *trust property*… Trustees have legal title over trust property and beneficiaries have beneficial ownership. He may not purchase property held on trust – the seller may not be the purchaser because of separate capacities: Seller wants highest price, purchaser wants the lowest price. Conflict here.

EX PARTE JAMES (1803) and EX PARTE LACEY (1802):

> Where a trustee purchased trust property, the sale could be set aside at the instance of the beneficiary as there was always a possibility that the trustee had information about the property of which other people were unaware.

ABERDEEN RAILWAY V BLAKIE:

> Partner sold chairs to the railway which he was a director of. This was not disclosed. Transactions voidable at option of the beneficiary.

This rule is very strict where trustees are concerned.

WRIGHT V MORGAN [1926] AC 788:

> A trustee who had resigned from the trust purchased trust property at a price which was fixed by an independent valuer. The Privy Council held that there was a conflict of interest and thus the sale had to be set aside.

HOLDER V HOLDER:

> Father --- son/daughter/mother (executors : farm)
> Son does not want to be an executor – failed to renounce his position but believed he wasn't anymore.
> Executors sold farm to son.

HELD: Sale upheld as although son was a fiduciary, he was only technically an executor performing minimal duties and had purported to renounce his executorship.

The sale was **a good deal** for the testamentary trust.
No undue influence.

RE THOMPSON'S SETTLEMENT [1986]:

Vinelott, J: The self-dealing rule is an application of the wider principle that a man must not put himself in a position where duty and interest conflict or where his duty to one conflicts with his duty to another. HOLDER was a decision in which, on the facts, there was no such conflict.

Where the trust instrument **specifically authorises** the trustee to purchase trust property, the trustee is entitled to do so – SARGEANT V NATIONAL WESTMINSTER BANK [1990].

Reconciling EX PARTE JAMES, EX PARTE LACEY, WRIGHT V MORGAN and HOLDER V HOLDER

Self-dealings are voidable at the instance of the beneficiaries no matter how fair the price unless:

Acquiesced by the beneficiary; or
when very special circumstances exist as in HOLDER.

Harman LJ referred to EX PARTE LACEY and extracted the following: "The rule I take it is this: **not that a trustee cannot buy from his beneficiary, but, that he shall not buy from himself**. If a trustee will so deal with his beneficiary that the amount of the transaction shakes off the obligation that attaches upon him as trustee, then he may buy. If that case is rightly understood, it cannot lead to much mistake. The true interpretation of what is reported there does not break in upon the law as to trustees. The rule is this: A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself."

The other authority, EX PARTE JAMES stands for the following proposition: the doctrine concerning trustees stands upon more general principles than upon the circumstances of an individual case. It rests upon this, that the **purchase is not permitted in any case, however honest the circumstances**, the general interests of justice requiring it to be destroyed in every case." These are strong words, but Harman looks at their context: They were cases where the purchaser was at the time of sale acting for the vendors. In the present case the defendant was no so acting – as pointed out above, his **interest with the estate was minimal**; moreover, all the parties involved in the case **assumed that the defendant's renunciation had been effective**, even though it was not. Moreover, **the beneficiaries themselves were not looking to the defendant to protect their interest**. They knew that he was in the market as a purchaser.

Fair dealing rule

To prevent a beneficiary avoiding the trustees purchase of the beneficial interest, trustees need to ensure that:

- They disclose the material facts before the purchase;

- The transaction is fair and honest;
- They can show that they took no advantage and that the beneficiary exercised an independent judgement and was not the subject of undue influence.

A trustee may purchase his beneficiary's equitable interest under a trust – subject to making full disclosure and negativing undue influence so as to acquire the trust property himself when he has acquired all the equitable interests.

TITO V WADELL [1977]:

Megarry: The 'fair dealing' rule is that "If a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable ex debito justitiae, however fair the transaction, [as under the self dealing rule]. Such transactions may be set aside by the beneficiary unless the trustee can show that he has:

- taken no advantage of his position;
- has made full disclosure to the beneficiary; and
- that the transaction is fair and honest".

Loans by fiduciaries

SWINDLE V HARRISON:

Old lady wanting to buy property retained solicitor for advice. Shortly after date of completion, she went to the solicitor to get a loan. He took out a loan himself and loaned the money to the lady without telling her he was making a profit from interest.

HELD: There was a breach of fiduciary duty.

Breach of FD to make disclosure when dealing with the principle.
Conflict of interest ∴ full disclosure mandatory.

No secret bribes

Benefits received by a beneficiary to not act in the best interests of the principle.

READING V AG:

Sergeant took bribes to smuggle goods out of Cairo

HELD: **Any position which enabled a servant to earn money by its use gave the master a right to receive the money so earned even though it was earned through a criminal act**.

This right was derived from an implied promise by the servant, made at the time of employment-contract, that he would account to his master for any moneys he might receive by reason of his employment, and it was not open to the servant to set up his own wrong as a defence to the masters claim.

The appellant was using his position as a sergeant in HM's armed forces and the uniform for which his rank entitled him, to obtain the money which he receive and there fore the crown, his master was entitled to the money.

To clarify this reasoning an earlier case was referred to – BOSTON DEEP SEA FISHING V ANSWELL (1888).

> The duty of the servant to pay the money back does no depend on a relationship of privity between the principal and the opposite party. The duty arises because of the relationship between the principal and the agent himself. It is because it is contrary to equity that the agent or the servant should retain the money so received without the knowledge of the master...

"There is an equitable right as between the principal and the agent that the agent is liable for money received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity."

AG v REID:

Reid was in a position to decide whether to charge certain criminals. He took bribes and blocked charges. This amounted to $12.4M and was invested in three properties in NZ which were registered in the names of Reid, his wife and his solicitor. The value of the properties had risen since the time of their purchase.

ARGUED: That the **rise in value was held on a constructive trust** in the crown's favour. The respondents claimed that the crown had no equitable interest in the properties. The case went on appeal to the Privy Council

HELD: When a fiduciary accepted a bribe as an inducement to betray his trust, he held the bribe in trust for the person to whom he owed the duty as fiduciary and, if property representing the bribe increased in value, the fiduciary was not entitled to retain any surplus value in excess of the initial value of the bribe because he was not allowed by any means to make a profit out of a breach of duty.

A bribe was a secret benefit which the fiduciary received from trust property or obtained from knowledge which he acquired in the course of acting as a fiduciary and he was accountable under a constructive trust for the secret benefit as soon as the bribe was received.

If property representing the bribe increased in value or if a cash bribe was invested advantageously, the false fiduciary was accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe since otherwise he would receive a benefit from his breach of duty. Accordingly, the three properties so far as they represented bribes accepted by R were held in trust for the Crown.

Lord Templeman reasoned as follows. When a bribe is offered and accepted, the money or property comprising the bribe, in law, belongs to the recipient. I.e. money paid to the false fiduciary belongs to him. Equity, however, acts in personam. It asserts that it would be unconscionable for a fiduciary to obtain a benefit in breach of his duty. The **briber cannot recover the bribe, because he has committed a criminal offence. The false fiduciary must pay and account for the bribe to the person to whom the duty was owed**.

On the facts: as soon as R received the bribe he became a debtor in equity to the crown. What about the increase in value? **Equity considers as done what ought to be done**: as soon as the bribe is received. The false fiduciary held it on constructive trust for the person injured.

There are two objections: If a person is a debtor in equity, he cannot be a trustee. However, there is no reason why there should not be two forms of remedy, as long as there is not dual recovery.
Secondly: if the false fiduciary holds property in trust for the person injured, and the false fiduciary becomes insolvent- the unsecured creditors will be deprived of their right to share in the proceeds of the property. But, the unsecured creditors cannot be in a better position than their debtor. However, it is more correct to see the property belonging to the beneficiary rather than the trustee personally whether he is solvent or insolvent.

"The decision in LISTER V STUBBS is not consistent with the principle that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done what ought to be done. From these principles it would appear to follow that the bribe and the property representing the bribe are held on constructive trust for the person injured."

No competition with the beneficiary

Re Thomson

No Obtaining Secret Profits

A fiduciary cannot enter into transactions where there is a real or possible conflict between fiduciary duty and personal interest – KEECH V SANFORD. Also applies where he was taking advantage of his fiduciary position to get that transaction – PESO SILVER.

Fiduciaries cannot divert maturing business opportunities actively pursued by the principal – CANAERO.

Whether the beneficiary is hurt does not matter – IDC V COOLEY, REGAL HASTINGS.

KEECH V SANFORD:

Any profits by the fiduciary shall be held liable. A fiduciary cannot enter into engagements in which a personal interest may conflict with the interests he is bound to protect.

PESO SILVER MINES V CROPPER [1966]:

A board of directors bona-fide disregards a new venture for the benefit of the company.

HELD: is not a breach of FD nor is it a secret profit. There was no confidential information available to the fiduciary by reason of his office.

CANADIAN AERO (CANAERO):

Fiduciaries attempting to secure contract for plaintiff. Fs resigned and secured it in their new capacity.

HELD: Fs cannot divert to another person a '**maturing business opportunity**' which his company was **previously actively pursuing**. He cannot do so **even if the plaintiff company could not secure the opportunity**. See: IDC V COOLEY. More generally, if a director has profited from the misuse of his position to profit, he is liable to account regardless of whether the company has been damaged or not. See: REGAL HASTINGS. **Resignation before benefit not relevant** if it was prompted by that opportunity..

KISHIMOTO:

'Maturing business opportunity' concept considered as above.

HELD: no breach of FD because business opportunity pursued by Fs did not correlate to business opportunity pursued by plaintiffs. The MBO was too prospective at the time F severed his relationship with the plaintiff.

KAO LEE & YIP [2003]:

F set up a new law firm taking business from the plaintiff.
Claims:

1. F in breach of FD in advising/assisting BOC in the establishment of the law centre and recruiting plaintiff's employees.
2. F failed to persuade BOC to use the plaintiff's services when it abandoned the idea of establishing the law centre and instead use the services of a friendly outside law firm. F then diverted the work from the BOC to F's company.
3. F neglected the business of the plaintiff.
4. F-employees in breach by failing to inform plaintiff of the F's activities
5. All were in breach of FDs by taking steps to set up the second company during the time they were still under employment of P.

Nominal damages and account of profits.

HELD:

F held to be in breach by not informing the plaintiff of BOC's decision to form a law centre.
When the BOC intended to use the services of a friendly outside law firm, this opportunity could be termed a business opportunity. It was sufficiently tangible and mature needing little planning to implement. F breached his FDs in not communicating this opportunity to the plaintiffs, see: IDC V COOLEY.
Claim 4 should be dismissed: there is no duty in general for an employee to report a fellow employee's misconduct or breach of contract. Whether a duty existed depends on employment terms and other circumstances. Nothing in this case and even if there was, the defendants did not know that F was in breach of his fiduciary duties.

Account of profits: not to penalize F. Time limit to be imposed as profits became more and more remote from the MBO presented to the plaintiff in the first place.

Can F use his **spare time to do other things**? Yes, generally provided that those are not inconsistent with the duties he owes. The making of **arrangements** in spare time during employment to **compete** with employer after termination of employment **does not always involve a breach** of duty – CMS DOLPHIN V SIMONET. It is a question of degree.

Can F use **company time to do other things**? He **cannot** – WESSEX DAIRIES. He must not use 'company time' other than for 'company' purposes.

Solicitation of clients even in spare time is not permissible – WESSEX DAIRIES.

Merely to show an intention to compete is no breach – BALSTON V HEADLINE FILTERS – where **preparatory steps** like consulting solicitors and accountants, approaching banks for finance and inspecting premises were held to be permissible.
In LAUGHTON V BAPP, employees **informing client suppliers** used by their employers

that they intended to set up a rival business after termination and asking for product details were held not to be in breach.

In MARSHALL V ISC, it was held that the approaching of an **important client** and attempted recruitment of a **key employee** was not acceptable.
Further, in LANCASHIRE FIRES, seeing clients and **asking clients for financial assistance** was held to be unacceptable.

BHULLAR V BHULLAR [2003]

Company decided that it shall not purchase properties. One director bought a piece of land contrary to this agreement using personal funds in the name of the company. The land was adjacent a major piece of land owned by the company.

HELD: Breach because: "as reasonable men would see it, there was a real sensible possibility of conflict." The information should have been passed on to the company. The breach was not in the purchase but in the information and capacity of F using his position to purchase the land.

TEST: **whether reasonable men looking at the facts would think there was a real sensible possibility of conflict**. Where an F exploited commercial opportunity for his own benefit, the question is not whether the principal has real interest in the property but whether the F's exploitation of this attracted the application of the rule.

Duty of Disclosure

Take this as a safety net such that if action of MBO fails, this can be taken.

Own Misconduct

The fiduciary should disclose his own misconduct to the principal.

IS V FASSIHI:

F was a director and he encouraged the MD to act in a bad way to scare away business (so he could do it himself).

HELD: F should disclose this misconduct.

Principal's Interests

IDC V COOLEY:

F was an MD and was offered a commercial opportunity in his private capacity. He resigned and exploited that opportunity for his benefit. Had the company known he had been offered that opportunity, it would not have agreed to release him.

HELD: Information of use to principal must be disclosed. Whether obtained in private capacity or not irrelevant.

BRITISH MIDLAND TOOL V MIDLAND IT

Active solicitation of employees.

HELD: employees owe a duty to tell principal they were being solicited as it was information of interest to the parent company.

Duration of Duty

How long do the duties last after one's resignation?

CANAERO: An F cannot divert to another person a maturing business opportunity which his principal was actively pursuing even after his resignation .

KISHIMOTO: Where the F leaves the principal and the business opportunity is in its formative stage, there is no breach of FD.

Sample Fact Pattern

Director with close connection with bidder gives business to him, resigns and then receives some form of indirect payment. This gives rise to disclosure (p21) and bribery (p17) concerns.
There could be a diversion of a remote mature business opportunity. Some technicalities in the new contract can stop it from being a business opportunity (p19).
There are arrangements in and out of company time to set up competing business (p19).
There could be solicitation by the employee of employees and clients (p19).
There could be a non-report of misconduct by an employee (p21, KAO LEE).

Main Trustee Duties

Duty to account for the trust and give information

Duties specified under trust terms (like contract)

Duty to act as an ordinary prudent businessman would

SPEIGHT V GAUNT:

> Lay trustee supposed to buy shares under trust. He used a broker recommended by the beneficiaries, giving a cheque. In return, the broker gave a bought-note. There was neither a settlement-date nor commission-rate. Did the trustee breach his duty of reasonable prudence?
>
> HELD: Trustee acted in the **ordinary course of business** (using a broker) and was not liable for the loss caused by the broker.
>
> The note may have raised a broker's suspicions but we are not dealing with brokers here but **reasonable men**.
>
> Should the trustee have paid the company as opposed to the broker? Not in the ordinary course of business.
>
> Broker ran away too quickly for the trustee to do anything at all.

This rules applies to lay trustees, what is the **duty for professional trustees**?

BARTLETT V BARCLAY'S BANK

> Bank/trustee was 99% shareholder in a private company. The private company invested in a very risky project that caused a loss. "Had the bank acted in time, it could have stopped this."

What was the duty of the bank and was the bank in breach?

Duty to act as a prudent man of business – raised to **duty required of a trust corporation**. Where facts come to his knowledge which tell him that the company's affairs are funny, he should **enquire**. Prudent men (majority shareholders) do not content themselves with ordinary shareholder information. Trustees should receive adequate flow of information to safeguard beneficiaries' interests. Bank in breach as it neglected to ensure it received adequate information.

Did the breach cause the loss suffered and to what extent should the bank be liable?

Causation: had the bank received more info, it could have stopped the loss. Even if it did not receive, it should have enquired.

Extent: depreciation of share value in comparison with that had the project not been pursued. Plus reduction of dividends through loss of income.

Extra: Duty of trustee not only involves care of his *own* property but also should be morally bound for the benefit of other people – RE WHITELEY. Trustees should therefore avoid investments of hazard but not investments involving a prudent degree of risk – RE GODFREY. Mere error of judgement coupled with reasonable care is not actionable – RE CHAPMAN.

Investments

Do investments as opposed to general trust management warrant extra duties?

RE WHITELEY

Trustee invested 3000 in brickfield and 2000 in housing. The brickfield investment was over-paid with respect to the land.

HELD: Duty of trustee not only involves care of his *own* property but also should be morally bound for the **benefit of other people**. Trustees should **avoid investments of hazard**. Normal risks are OK.

Lender must exercise unusual vigilance where the price paid exceeds the actual value of the thing paid for (where premium in this case was paid for possibility of selling bricks).

In the case of housing, there was enough evidence to suggest that the trustee had acted prudently and he was not found to be liable for the loss.

Note that the English Trustee Act 2000 requires that:

A trustee "must exercise such care and skill as is reasonable in the circumstances, having regard in particular:

To any special knowledge or experience that he has or holds himself out as having; and

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

Duty to act personally

Subject to powers to delegate as authorized under the trust deed or Trustee Ordinance CAP29 CF English Trustee Delegation Act 1999.

Duty of Impartiality

Where there are different beneficiaries, conflicts may arise. Some investments can give a better yield to profits than to capital and vice versa.

Duty to Act Fairly

As a trustee, the default rule is not to delegate. Contrary powers may be given in the trust deed. Trustee Ordinance s25, s27. Also where it is reasonably necessary in the course of business with due care in agent selection and supervision.

Relief from Liability

Exemption Clauses

An exemption clause might purport to exclude trustees from all loss incurred to the trust fund unless committed fraudulently. This is an 'Armitage Clause'. These are common enough such that it can be strongly argued that the protection offered to beneficiaries (a prime concern of trust law), is weaker than in the past.

ARMITAGE V NURSE [1998]:

> "No Trustee shall be liable for any loss or damage which may happen to the trust fund… at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud."
>
> HELD: Exclusion of liability for ordinary and even gross negligence is acceptable.
> A deliberate/reckless breach of trust (consciously acting beyond their powers) is **not fraudulent where the trustee honestly believed it was for the good of the beneficiary**'s interests.
> Effect of exclusion clauses does not counter public policy.

WALKER V STONES [2001]:

> Qualification of the law *"honest belief"* stated by Millet, LJ above.
>
> HELD:A solicitor-trustee who deliberately commits a breach of trust which no **reasonable solicitor-trustee could have thought to be in the interests of the beneficiaries** would be acting dishonestly.
>
> {Use as analogy to all professional trustees}.

BOGG V RAPER [1998]:

> A testator appointed by his will a solicitor and an accountant to be his executors and his trustees. He was survived by his widow and two children. The Court of Appeal

considered whether a solicitor and accountant, who acted as executors and as trustees, should have the benefit of a clause in the will exempting them from liability. There was a breach of trust by the trustees.

ARGUED: The solicitor and accountant trustees, in **assisting the testator to draw up his will and to include in it the benefit of exemption** from the ordinary consequences of their own negligence, they had obtained a benefit at his expense. The plaintiffs considered that they had to prove affirmatively that the testator had received full and independent advice about the effect of the exemption clause and the wisdom of including it in the will. Unless they could prove that, then they should not have the benefit of the clause.

HELD: The clause did not confer benefit on the person responsible for advising the testator on the will's of contents (presumably as opposed to drafting the will). Also the will did not discriminate between persons who advised in connection with the will and other persons who became trustees and executives who had no part in the will's preparation. Then there was no real conferment of the benefit, but it merely defined the extent of their potential liabilities. The fundamental point was that **the clause was not a transaction in which the testator and those advising him had conflicting interests**. One would not expect in this transaction that the testator should be separately represented. The solicitor was entitled to tell the testator that he would insist on the wide exemption clause and would not accept office without it.
It was not the law that the solicitor was not allowed to take a benefit under the will which he himself had procured. However, **where the benefit was relatively large, he had to show that the testator knew and approved of the will's contents and that there was nothing in the way of advantage taken or influence exercised by the solicitor.** No suspicion arose where a solicitor, even in the contemplation that he might be appointed an executor and trustee, included an exemption clause. The solicitor and accountant would therefore be entitled to protection of the clause.

COMMENT: Trustees are accustomed to including exemption clause in trust deeds and expecting them to be valid. This case shows the position to be correct. Caution should be exercised in not making the clause too wide. In this case, Millett, LJ confirmed that **no suspicion would arise if a trustee included an exemption clause "no wider than many similar clauses found in precedent books"**. This suggests that in normal circumstances a normal clause is effective but **care is required when unusual exemption clauses are seen**.

Statutory Relief

S60, Trustee Ordinance:

Where the trustee is personally liable for a breach of trust but has acted **honestly**, ***reasonably*** and ***ought fairly be excused*** for the breach and for omitting to obtain the directions of the court in the matter, the court may relieve him of part or whole of the liability.

S56, Trustee Ordinance | Power of court to authorize dealing with trust property:

Where the management of any property vested in trustees is in the opinion of the court appropriate but not permitted without actual trust-conferred power, the court may order the necessary power for that. This is qualified on terms and subject to provisions the court may think fit. The court may direct how money may be expended and the costs of any transaction to be paid or borne as between capital and income.

Sample Fact Pattern

Express breach of trust terms. Was it an 'honest' breach? See ARMITAGE test qualified by WALKER V STONES. Relevant to exclusion clauses
Family friend and professional person acting as trustee – is he a professional trustee or a lay trustee? Payment is a consideration. Relevant to duty of prudence: BARTLETT V BARCLAY'S BANK.
Exclusion clause states to exclude trustee from all liability. ARMITAGE, WALKER V STONES, s60 and s56 Trustee Ordinance.

Judicial Control of Trustee Powers

Trustees may be given discretionary powers by trust deeds.

Appointment of trustees, beneficiaries

Dispositive powers (distribution of property).

As noted before, **trusts are obligations** [e.g. discretionary trusts: duties to take into account relevant considerations to exercise powers]. Duties to choose beneficiaries but only power to choose a specific person.

If all the class of possible beneficiaries collaborate, they can compel the trustee to distribute – SAUNDERS V VAUTIER.

A father died leaving trust for the benefit of his nephew (a minor) and that the trust property would go to the nephew upon reaching the age of 25. Being the sole beneficiary of the trust, he asked the court to **terminate the trust and have all the property transferred** over to him. The court agreed and this has become known as the "rule in SAUNDERS V VAUTIER".

Restated today, beneficiaries of a trust may end the trust and call in the property from the trustee if [1] all beneficiaries are **sui juris** (i.e. under no legal incapacity such as being under-age or with a mental incapacity); and [2] if the beneficiaries are **unanimous** and constitute the **only persons entitled** to the trust property.

So widespread is the practise now that court authority is not even needed; trustees are willing to hand over the property if the conditions of the rule apply without any petition to the court. This is also sometimes referred to as the "doctrine of acceleration".

The Trustee Ordinance also gives them numerous administrative powers to administer the trust.

BURROUGH V PHILLCOX

In a discretionary trust, the trustee has such discretion as the trust may determine. The trustee is given the ability to determine the individual shares within that class. A non-discretionary trust is where a trustee has no discretion as to which of a class of beneficiaries shall receive benefits nor the amounts or timing of such benefits.

Bare Powers:

Where a 3rd party has no duties to take into account relevant considerations/ignore irrelevant considerations in exercising a power.

Bare Trusts:

If no appointment was made, the court considered that it had to carry into effect the trust element but could only do so by making an **equal division** amongst all the members.

The House of Lords had to consider the validity of the following clause: "the trustees shall apply the net income of the fund in making at their discretion - grants to any of the officers and employees and ex-employees to the company or to any relatives or dependents of any such persons in such amounts".

It thus followed that **if no complete list could be drawn up, the discretionary trust will fail**. It was accepted as a fact that it was impossible to draw up a complete list.

Further, it would fail even if the trustees were perfectly willing to exercise the power given to them. This means that the mere possibility of future intervention by the court and the impossibility of drawing up a complete list rendered the trust void from the outset. The House of Lords held that the distinction as to the tests for certainty of objects between mere powers and discretionary trusts was arbitrary, illogical and embarrassing. They **overruled the complete list requirement with regard to discretionary trusts**.

When will the court scrutinize a trustee's exercise of discretion?

~ Notions of judicial review in Administrative law?

RE HASTINGS V BASS

Bad faith.

The action was **not authorised** by the power conferred upon him; or

Where it is clear that he would have acted otherwise…

Had he **ignored irrelevant considerations**; or

Had he **considered relevant considerations**.

ABACUS TRUST V BARR

Trustee had power to appoint capital and income of the trust fund to one or more of the discretionary objects. Settlor told his tax adviser who told the trustee to do 40% but he did 60% instead. Was the trustee's action open to challenge?

HELD: Whether the breach or 'mistake of 20%' was serious does not affect the court. A **'fundamental breach' was irrelevant**. The **RE HASTINGS rule** on considerations does not apply where it was the trustee's bona-fide mistake - **a breach of fiduciary duty was required.**.

There was a breach of fiduciary duty since the tax adviser was an **agent** to the trustee

and the trustee did not consider the true wishes of the settlor. The trustee **failed to take adequate measures to ensure that he received correct information**.
A **decision reached on a breach of fiduciary duty is voidable** ~ ordinary principles of equity. 10-year time lapse considered. Turner v Turner distinguished on the grounds that this case is less serious since the trustees did exercise their discretions but failed to consider properly.

COMMENT: It is debateable whether, to show a breach of FD, it must be shown that the trustee did not use all proper care and diligence in obtaining information and advice relating to the consideration in question. There is no authority for this.

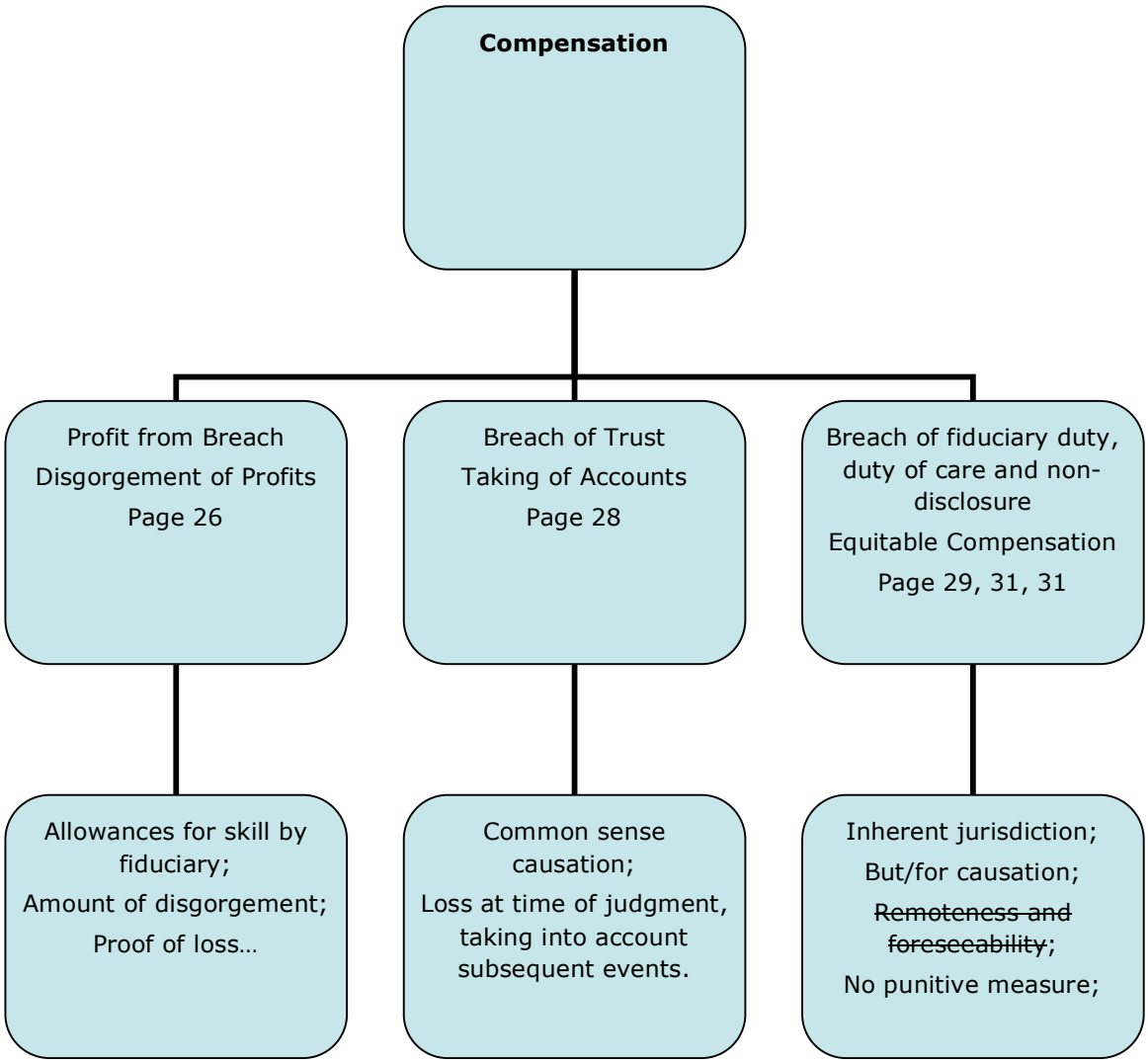
RE MANISTY'S SETTLEMENT

Capricious/random exercising of power.

Liabilities for Breach of Trust

Introduction

"Breach of Trust": lay term for breach of any duty by a trustee.



Nature of Loss

Loss to trust property:

> Wrongdoer must make good the loss – restoration of trust fund back to as when the wrong was not done. Remedy is procedural, not simple compensation. "Taking of accounts".

Loss to beneficiaries:

> Equitable compensation – to make good the loss to beneficiaries.

Any personal profit?

> Typically an account of profits. This requires the wrongdoer to disgorge/give up his profits.

Non-monetary Remedies

Injunction

Interlocutory

Permanent

Orders to stop a person from committing a breach. Likelihood…

Principles similar to tort law.

E.g. KISHIMOTO – Principal got an injunction to stop the F from developing the contract.

Rescission

Restoration to position they were in before entry into contract. Release from future obligations. Law not protecting the bargain.

E.g. Self-dealing rule: F buying trust property – rescission and restoration of property as if transaction had not occurred.

Voidable breach of trust transaction – e.g. if good bargain, may choose not to act.

PESO MINES:

Account of profits - Disgorgement

Primary remedy in equity.

Deterrence, not punishment. Suppose you are an F and you divert an **MBO** to make profits. If remedy was just to compensate loss, it would make sense to try your chances. Since if profits > loss, compensation is worthwhile.

Common law damages not adequate + discretionary remedies of injunctions, specific performance etc. in 2001, the HoL decided that where those remedies are inadequate on those facts, the court can take into account all relevant circumstances to give an account of profits.

AG V BLAKE:

A former spy wrote a book about his life breaching his contractual duty 30 years after service.

HELD: Breach of FD failed. Lord Woolf invited council to argue for account of profits in exceptional circumstances. Note national security. Commercial situations not well founded unless extreme.

Accounting as a **(constructive) trustee**.

Personal (**in persona**), not proprietary remedy. If F is bankrupt, the principal does not have priority over other secured creditors – BOARDMAN V PHIPPS; KAO LEE; WARMAN INTERNATIONAL.

'Unjust Enrichment': Defendant's gain corresponds to plaintiff's loss. E.g. you go to café to buy coke and the shopkeeper gives you $5 extra change and you do not know. Shopkeeper finds out and claims the money. Action: unjust enrichment.
Where someone has made gains as a breach of duty. No loss need be proved. Gain as a result of the breach.

How much of the profits are attributable to the breach?

BOARDMAN V PHIPPS:

Account for profits but **generous equitable allowance** for skills and time.

WARMAN INTERNATIONAL [1995]:

Where as a breach of FD, the F has acquired a business. How much profit should be disgorged? The court cannot have him account for profits over an indefinite period of time.

Profit sharing between F and plaintiff. Usually more advantageous to F. Unless, before the breach, they were intending to share profits anyway, the courts would prefer the other method as outlined below.

Prefer defendant to **disgorge all profits** with **allowance to efforts and skill** in the absence of a profit-sharing agreement.

In the case where the fiduciary has not acquired a specific asset but a business, attributable profits need to be calculated. Balancing extent of attributable profits. Rough approximation.

Burden to establish that it is inequitable to order an account of the entire profits is on the defendants.

KAO LEE & YIP: Profit accounting as if breach was not made. 1-year profits go to plaintiff, after that F would have gotten them.

GUINNESS V SAUNDERS [1990]:

General rule on claiming allowance: If you are a defaulting trustee, you should not get any remuneration for your default. Also no remuneration where the **article of association** has expressly authorized it as being a power of the board of directors. Distinguish from BOARDMAN V PHIPPS in that court has discretion to authorize allowance but **no exceptional circumstance in the present case**.

Compensation & Restoration of Loss

Family trust, breach → loss.

Breach of Trust | Taking of accounts

Common law {archaic}

Procedural remedy: to show actual ledger. If there is an offending item (misapplication of trust assets), that expenditure is struck out as if the money was not paid out.

'Surcharging' the account. Surcharge on basis of wilful default (negligence, breach of duty of reasonable prudence).

Remoteness and causation, do not matter. Nature of remedy is procedural.

Remedy at discretion of beneficiary.

Loss to be assessed at time of trial with full benefit of hindsight.

All loss flowing from the breach is compensable however unexpected the result.

Contributory negligence generally not relevant unless it is so manifest that it seems that the beneficiary was the cause of the loss.

In cases of wilful default/omissions, trustees are charged with actual losses and what might have become had they not wilfully defaulted – ARMITAGE V NURSE.

RE DAWSON [1966] old measure:

Misapplication of trust money (NZ$). At time of judgment, the NZ$ had increased in value against the AU$. Taking of accounts means the trustee might need to pay more.

What value does the trustee need to pay?

HELD: Mandate to restore the trust estate to position had there been no breach – i.e. pay more money. **Novus actus interveniens is irrelevant**, see: CAFFREY V DARBY. But-for test will be used to ascertain cause of loss. Once there is a breach, there is a continuing liability to restore and losses are to be assessed at **date of judgment**.

*TARGET HOLDINGS V REDFERNS:

Bare commercial trust – purchaser of property borrowing 1.7M from mortgagee for property worth 2M. The price had been rolled up by middlemen controlled by the purchaser. R was the solicitor for both parties having set up some middlemen for the purchaser. This is mortgage fraud and the action was brought upon breach of trust.

T transferred cash to R to be held on bare trust – who should have waited for procedure (conveyance and charge) before distributing the cash. They immediately forwarded the money (paying to strangers without instruction was a breach of trust). The charge was, however, executed a month later. Purchaser defaulted and mortgagee took possession, selling the property at 0.5M.

T now suing to make good the trust fund 1.7M – 0.5M.

ARGUED by R: No but/for causation. "Even if I waited for procedure, you would still have suffered the loss".

HELD [CA]: trustee must reconstitute full amount. Once trust money is misapplied, you commit a breach and you owe an immediate, continuing duty to restore it. Subsequent things are irrelevant.

*HELD [HoL]: remedial principles:

In the case of a trust arising out of a commercial transaction, the basis of compensation is similar to that applied in the case of common law damages, i.e. that the **beneficiary is put into the position he would be in if the breach had not occurred** and the wrongdoer should only be required to compensate **loss caused by him**. Common law rules of causation and remoteness apply.

Where a trustee commits a breach of trust by investing in an unauthorised investment which proves to be very profitable. An opposing beneficiary could insist that the unauthorised investment be sold and the proceeds invested in authorised investments: but the trustee would be under no liability to pay compensation either to the trust fund or to the beneficiary because the breach has caused no loss to the trust fund.

The beneficiaries' rights in traditional trusts can be protected by restoring to the trust fund what ought to be there. There, trustees in breach of trust must restore the trust estate the assets which have been lost by breach – NOCTON V LORD

ASHBURTON. If specific restitution of the trust property is not possible, then the trustee must compensate the trust estate to put it back to what it would have been had the breach not been committed – CAFFREY V DARBY.

Where the cause of the loss is the **dishonesty** or failure of a third party, the trustee is liable to make good that loss to the trust estate if but for the breach, such loss would not have occurred – RE DAWSON.

In traditional family trusts where there are *several* beneficiaries, the trustee's duty is to reconstitute the trust fund and not beneficiaries to avoid unequal benefit. However, where there is ***sole*** **beneficiary**, the trust estate is owned by him and the right exists for immediate, **direct compensation**. Courts would normally order direct compensation.

The loss to the trust is to be valued at the **time of judgment** taking into account any **subsequent circumstances** to put the trust fund into a position had there been no breach – CANSON ENTERPRISES V BOUGHTON minority judgment.

YOUYANG V MINTER ELLISON:

Plaintiff is trustee – going to invest AU$500k for trust. Half for bearer deposit certificates and half for investing in ECCCL. Law firm brought defective certificates and ECCCL went bankrupt.

HELD: Affirmed TARGET HOLDINGS V REDFERN. Defendant not liable for lost investment money in ECCCL. However, loss of deposit certificates would not have occurred but for the law firm's defects in purchase. **Common sense causation at time of judgment applied**.

Unauthorised investments:

Trustees liable for loss incurred on sale even if it was ordered by the court and even if the investments would have made a profit later – KNOTT V COTTEE.

Improper retention of investments

Trustees liable for difference between present value of investments and value had they been sold at the proper time – FRY V FRY.

Failure to invest

Trustee liable for interest which would have been produced. Type of interest depends on whether the type of investment was specified earlier, otherwise it is at the court's discretion – RE EMMET'S ESTATE.

Compound Interest:

The equitable jurisdiction to award compound interest cannot be used in a common law action – WESTDEUTSCHE LANDESBANK V IBC.

Setting Profit against Loss

Gains can only be set against loss where the breaches are connected – BARTLETT V BARCLAYS BANK.

Breach of Fiduciary Duty | Equitable compensation

NOCTON V LORD ASHBURTON:

Breach of FD, D obtained advice from solicitor to purchase property – solicitor did not disclose that he would benefit from the sale.

HELD: equitable compensation would be **available based on 'inherent' jurisdiction** of the court – same measure as in action of deceit.

BRICKENDEN V LLSC (obsolete):

Measure: not necessary for plaintiff to establish but/for causation. The court would not entertain any evidence by the fiduciary that the loss would have occurred despite the breach. (old)

SWINDLE V HARRISON [1997]:

Old lady buying hotel – engaged solicitor who offered loan without disclosing his profit. Lady suffered loss on hotel.

ARGUED: Had the solicitor not loaned, I would not have lost.

HELD: one needs to identify the breach (non-disclosure). Had he disclosed, would she have taken the loan? Lady was desperate – even if disclosed, she would have accepted the loan. Adopted REDFERNS, CANSONS – common sense, hindsight and causation.
Liability was limited to loss flowing from the breach. Zero.

UNCERTAIN: whose burden of proof?

NATIONWIDE BUILDING SOCIETY V BALMER RADMORE:

Solicitor who acted for a property transaction failed to disclose information leading to a breach of fiduciary duty.

HELD: Court is not precluded from looking at **but/for causation**. The **defendant can show evidence**.
Measure for damages in **honest breaches** (consciously breaching terms for good of beneficiary) is that **all loss caused through common sense** view of causation must be restored. **Remoteness and foreseeability is not relevant**.

PILMER V DUKE GROUP:

Buyer bought a company relying on a false valuation report from an accounting firm. The results were disastrous.

HELD: Suppose the F owed a FD, could contributory negligence mitigate the liability? The High Court of Australia **refused contributory negligence**: because in contractual or tortuous relations, people look after their own interests and their negligence should reduce recovery. In a fiduciary relationship, the F is supposed to look after the best interests of P. One cannot expect the P to act as carefully and have his recovery reduced through negligence.

CRITICISM: Agreed that if you are a beneficiary, you will not have to look after your own interests but that should be changed at the time you learn of a breach of trust. Contributory negligence should be relevant once the P has acquired knowledge of the breach.

Punitive Damages

In breaches of fiduciary duty, should punitive damages be available?

HARRIS V DIGITAL PULSE:

HELD: No punitive measure. Rationale in case: to be read.

CRITICISM: A. Burrows argued that history should be ignored in treatment of remedies. If the facts are strong enough for meeting the test (deliberate and outrageous), exemplary damages should be awarded. Question mark here.

Breach of Duty of Care | Equitable Compensation

MOTHEW:

A breach is not necessarily a breach of FD – could be a breach of duty of care. Incompetence.

Breach of Duty of Nondisclosure:

GWEMBE VALLEY DEVELOPMENTS V KOSHBY:

But/for causation needs to be proved. Apply SWINDLE V HARRISON.

Trustees and Co-Trustees are Jointly Liable.

BARTLETT V BARCLAY'S BANK:

Paid/professional trustees owe a higher duty of care. Where there is a breach – one profitable and one flop, the trustee is liable only for net loss.

Equitable compensation vs. damages. Traditionally, common law courts had monopoly to give damages. Equitable 'damages' were awarded where common law damages would be insufficient. Injunctions and specific performances are subject to equitable bars yet there are situations when these should have been available in principle but have been barred. In such situations, there are statutes (Lord Cairns Act s17 High Court Ordinance) which allows damages in lieu of injunction, specific performance etc. the principles (causation, remoteness, etc.) for equitable damages are the same as those in common law damages – JOHNSON V AGNEW [1970]. After new developments about equitable compensation, the statute is now redundant.

Implied Trusts

Constructive Trusts

Imposed by courts through legal principles.

Could be imposed on legal titleholders (against their will).

Crude Theory: Justification is that the **conscience** of the legal titleholder was affected (breach of some equity) so that he should not enjoy his legal title in full.

E.g. accepting a bribe, breaching Boardman v Phipps etc.

Resulting Trusts

RE VANDERVELL'S TRUSTS NO. 2 [1974]:

> Megarry J: Automatic and presumed resulting trusts:
>
> (A **Presumed resulting trusts**) Where the transfer to B is not made on any trust. There is a rebuttable presumption that B holds on resulting trust for A. The question one of presumption: that the property has been carried to B, and from the absence of consideration and any presumption of advancement, B is presumed to hold the entire interest on trust and also to hold the beneficial interest for A absolutely..
>
> (B **Automatic resulting trusts**) Where the transfer from A to B is made on trust which leaves some of the beneficial interest undisposed of, B automatically holds on resulting trust for A to the extent that the beneficial interest has not been carried to him or others. The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to dispose of what is vested in him. Since the transfer is on trust, the resulting trust does not establish the trust but merely carries back to A the beneficial interest that has not been disposed of..

Lord Browne-Wilkinson in WESTDEUTSCHE V ISLINGTON [1996] *OBITER*:

> Only voluntary transfers of money come within category (A). This makes it impossible to explain HODGSON V MARKS [1971] as a category (A) case. It must be a category (B) case, but this explanation is more difficult.
>
> Any reasoning, such as that of Harman J in RE GILLINGHAM BUS DISASTER FUND, which depends on resulting trusts operating independently of intention, must be rejected. So must "automatic" resulting trust terminology.
>
> The decision in WESTDEUTSCHE suggests that there is an overriding conscience requirement (since otherwise the bank could (possibly) have argued category (A)). This does not affect category (B), since express trusts must have been declared, but it suggests an additional requirement for category (A), that the conscience of the recipient is affected.

Automatic Resulting Trusts

These occur when the settlor makes an ineffective declaration of a trust and the equitable interest in the trust property results back to the settlor.

Transfer, declaration – effective?

> Yes, then equitable interest → beneficiary.

No, then equitable interest → settlor.

Where there is a valid trust but with a surplus, that surplus must be distributed but there is no beneficiary… **equitable interest → settlor**.

ART's can be imposed contrary to the intentions of the settlor

RE VANDERVELL'S TRUSTS [1974]:

Settlor wanted to transfer property to avoid tax. Declaration ineffective.

HELD: Equitable interests result back to the settlor so he would have to pay tax.

RE GILLINGHAM DISASTER FUND [1985]:

Fund for some purpose had a surplus. The Crown could not show that the donors parted with all their money absolutely (no absolute gift) and so the surplus would be held on a resulting trust for the donors. Resulting trusts do not depend on the settlor's state of mind. Coherent with RE VANDERVELL'S TRUSTS NO.2.

WESTDEUTSCHE V ISLINGTON [1996]:

Doubted VANDERVELL'S TRUSTS that resulting trusts can operate against the trustee's presumed intention. The House thought (obiter) that if the settlor had abandoned the beneficial interest in the trust property (showing contrary intention), there can be no resulting trust and the undisposed equitable interest rests in the crown bona vacantia.

This obiter dictum goes head to head against VANDERVELL'S TRUSTS and would confine resulting trusts to a limited category.

What does this mean? Will the courts inquire into whether the settlor intended that a resulting trust should arise; or despite the idea that ART's are 'intention independent', there are cases where:

1) The facts show that the settlor actually intended to abandon any interest in the trust property if the trust failed ; or
2) This intention was not expressed in the trust which he created; and
3) Because of these issues, the court treats undisposed of property as bona vacantia.

This does not destroy the classification in VANDERVELL'S TRUSTS, but it does modify it. The ART is not wholly intention-independent: it might be displaced by the settlor's intentions to abandon his property.

This case rationalizes the ART by saying that it was the legal presumption of the settlor to get back what was 'ineffectively used'. It is fiction and lends itself to say that the law imputes a trust to fill a gap in beneficial ownership. However, the law does not readily assume abandonment.

AIR JAMAICA V CHARLTON [1999]:

After a pension fund was wound up, a surplus remained and the trust provisions said nothing as to distribution. It was held that the fund did not revert to the crown as bona vacantia but was held on resulting trust for the contributors.

Resulting trusts of this type give effect to the intentions of the settlor.

They may be purchase money resulting trusts. Settlors intend beneficial interests to return to them should their trusts fail.

Presumed (Purchase Money) Resulting Trusts (optional)

These are created by the settlor's exercise of his powers to create a trust. Because the law presumes the settlor's intention he needs to do nothing to prove it in writing; no need for formalities / a declaration of trust. This is a presumption and may be rebutted, i.e. the settlor intended to make a gift. People normally ~~intend~~ to give a gift.

If I provide the consideration to transfer my flat to some *stranger*, there would be a presumption of a resulting trust (I keep the equitable interest or at least part of it). CF where there is a loco parentis, the presumption of advancement applies and the equitable interest goes to that person who is not a stranger. That a gift was intended.

Advancement

If a father transfers his property to his children, the presumption of advancement applies, i.e. that a gift was intended for the children. What about a mother? See international cases. Advancement was criticised in PETTITT V PETTITT, Lord Diplock but there has been a strong lineage of cases using advancement – Malins VC in RE EYKYN'S TRUSTS.

The Modern View | Birks and Chambers

Merges ART's and PRT's.

A resulting trust arises whenever a person transfers property or contributes value to a purchase for **no consideration** and **without the intention** to give the beneficial ownership of it to the recipient. The law gives rise to a trust to **prevent the unjust enrichment** of the recipient.

This thesis broadens the operation of the resulting trust. Consider a mistaken payment to a mechanic. The first payment is made for repair of a vehicle; a second payment is then made in error. Common law entitles him to a personal restitutionary claim.
New theory: the second payment was for *no consideration*. The money was *not intended as a gift*. The mechanic is a recipient of a gratuitous transfer. The money is held by the mechanic on resulting trust. Relevant if the mechanic becomes insolvent: an equitable proprietary remedy.

Refuted by Swadling: A resulting trust is displaced by evidence of any intention contrary to the intention to create a trust. The transferee does not have to prove that the transferor intended to make him a gift. Therefore in the case of mistaken payment, since the initial intention was to transfer the money to the mechanic outright as legal owner, the presumed intention resulting trust does not arise.

Constructive Trusts

"A constructive trust is a trust which is imposed by **equity** to satisfy **justice** and good **conscience**, without reference to any **express or presumed intention** of the parties."

– CARL ZEISS STIFTUNG V HERBERT SMITH NO 2 (1969)

OR

"A constructive trust is the formula through which the **conscience** of equity finds expression. When property has been acquired in such circumstances that the holder of the legal estate **may not in good conscience retain the beneficial interest**, equity converts him into a trustee."

– BEATTY V GUGGENHEIM EXPLORATION (1919)

"A constructive trust is one which arises by operation of the law, and not by intention of the parties, express or implied." – Martin, Modern Equity

A constructive trust arises when a person is compelled by the court to hold it for someone else. Thus, a recipient who is not a bona fide purchaser holds trust property on constructive trust. A constructive trust will arise if the court considers it unconscionable that the legal title holder deny his cohabitee the equitable interest that they agreed the latter should have.

Like resulting trusts the normal certainties do not apply; neither do the rules in relation to formalities. However, unlike resulting trusts, constructive trusts are **not compelled to give effect to the testator's wishes**. Rather, they are trusts that are imposed by the court.

> "As an equitable mechanism to vindicate the equitable interests of beneficiaries under express or resulting trusts, it is a long established principle of equity that, if a person who is a trustee **receives money or property because of, or in respect of, trust property**, he will hold what he receives as a constructive trustee on the trusts of that original trust property. Similarly, **a third party other than a bona fide purchaser for value without notice, who, through breach of trust, receives property subject to an express, resulting or constructive trust** will hold it and its traceable products as a constructive trustee on the trusts affecting such property. Finally, a person not within such two categories, but who has obtained or enhanced his interest in property … will be constructive trustee of the whole or part thereof where it would be unconscionable for him to act inconsistently with the property." Dillon LJ in RE EVTR [1987].

Because the defendant's conscience has been affected, he becomes subject to personal **fiduciary or equitable obligations** at the same time that he becomes **subject to the claimants proprietary interest**. It is possible for a defendant to unknowingly become subject to a proprietary interest; however, for there to be an personal claim, the defendant's conscience must be affected by the plaintiff's interest.

Constructive trusts arise independently of the order of the court. There is also the *remedial constructive trust*:

Remedial constructive trusts

This is a remedy imposed by the court at its discretion to alter existing proprietary rights.

It is imposed at time of judgment and from that time onwards.

Differs from the institutional constructive trust which arises at the time of the wrongful conduct and not at the judges' discretion – LLOYD'S BANK V ROSSETT.

The Court of Appeal in the United Kingdom in RE POLLY PECK INTERNATIONAL [1998] has rejected the remedial constructive trust in the context of the insolvent defendant, because this would mean that the judiciary would have to over-rule certain insolvency statutes. There is the possibility that it could be used against a solvent defendant – WESTDEUTSCHE, but that is unresolved.

In Canada's SOULOS case, an estate agent was supposed to find property for his client. The vendor rejected the initial price wanting more. The agent did not disclose this but had his wife buy it at the higher price. An RCT was imposed and not an account of profits. The market value had dropped so no 'profits' were made and furthermore, the client wanted the building itself.

Supreme Court of Canada: PETTKUS V BECKER: These court-imposed trusts are designed to cure injustices where three conditions are met: Someone has benefited or been 'enriched' at the expense of another (a corresponding deprivation), and the enrichment is 'unjust' or without legal justification. Courts like to talk of an 'absence of any juristic reason' regarding the enrichment of the defendant at the expense of the party claiming constructive trust.

In PETER V BEBLOW, the Court added that the connection between service rendered and the property must be direct and sufficient.

Misuse of Position vs. Infringement

'Pure breach': Misuse of position e.g. bribe, diversion of existing business opportunity but without infringement of the trust estate.

Unlike in misappropriation cases, the beneficiary has no existing proprietary interest. Controversial since the interest arises for the first time, insolvency situations may be upset.

Misappropriation:	Trustee spends trust estate for his own benefit. Tracing applies but stops at Equity's Darling. Institutional constructive trust.
Pure Breach:	Pure breach of trust. Trustee does not touch trust estate but misuses his position. BOARDMAN V PHIPPS | AG V REID.

Fiduciaries and Constructive Trusts

E.g. between a beneficiary and trustee. The trustee is legally obliged to act in the best interest of the trust. It is as if the onerous obligation balances the huge power of the trustees.

Some become subject to fiduciary duties because of a particular factual situation where the imposition of such duties is considered appropriate in the interests of justice because of the plaintiff's particular vulnerability to being taken advantage of by the defendant upon whose loyalty he is relying.

READING V AG (1951) [HL]:

> The appellant was a sergeant. On several occasions whilst in uniform, he boarded a private lorry and escorted it through Cairo enabling it to pass the civilian police without being inspected. On each occasion the sergeant received from a civilian a large sum of money of which the authorities later took possession.
>
> HELD: Any position which enabled a servant to earn money by its use gave the master a right to receive the money so earned even though it was earned through a criminal act;
>
> This right was derived from an **implied promise** by the servant, made at the time that the contract of employment was entered into, **that he would account to his master for any moneys he might receive by reason of his employment**, and it was not open to the servant to set up his own wrong as a defence to the masters claim;

AG V REID:

> Before this case, the CA in LISTER V STUBBS said that where an agent receives a bribe, he has a duty to account for the bribe by an in-personam equitable debt. If the fiduciary

goes bankrupt, the beneficiary has to share with general creditors. The FY could thus easily escape his duty by giving the money to someone else!

In this case, the FY bought properties in New Zealand in the name of his wife using bribe money. If the court had applied LISTER V STUBBS, the government claimant would not have been able enforce any proprietary interest…

HELD [PC]: government had proprietary interest in the bribe. LISTER V STUBBS overruled.

> Compared REID to BOARDMAN: If an innocent, bona-fide fiduciary is subjected to a constructive trust for breach of a pure duty, it must be equally so where the FY was committing a deliberate wrong.

> BUT in Boardman, the FY was not bankrupt. It was also imposed against original wrongdoer. 3rd party interests were not affected. The justification is that why should creditors benefit from a bribe that would not have occurred but for the breach of fiduciary duty? Also, proprietary interest is established at the time of the bribe, it is the property of the fiduciary and creditors should not encroach upon hard-nosed property rights.

When a FY has obtained a secret bribe, he should account for the bribe. Equity treats as done what ought to be done therefore equity deems that at the time the bribe is received, it is already returned and so the principle would already have an equitable interest in that amount.

CRITICISM: If the doctrine was broadly used, there would be no in-personam rights…

Where there is a bankruptcy, SOLLAND INTERNATIONAL V DARAYDAN HOLDINGS [2004]:

This was different from REID since the creditors were innocent and the wife and solicitor in REID were not.

Dicta: no problem in applying Reid even in an insolvency situation.

Defending Reid {read DM}

Quistclose Trusts

BARCLAYS BANK V QUISTCLOSE TRUSTS [1970]:

RR had declared dividends but did not have enough money. It approached Quistclose, who granted a loan on the condition that the load could only be used to pay dividends. The loan was deposited at Barclays Bank.

RR went into liquidation.

ARGUED: Condition of loan forbade Barclays from taking the money. The money was held on trust for Quistclose

ARGUED: A loan and a trust are mutually exclusive. Why? Lending money is a contract where money and promise to repay is exchanged.

PRINCIPLE: An equitable proprietary interest was desired. When a company is liquidated, its property will be distributed first to the secured creditors and then to unsecured creditors. However when you can establish that the property was held on trust for you, it does not fall into the liquidated estate. No formalities and highest priority.

HELD: Barclays had notice of all these arrangements. In such arrangements where the money is loaned for **exclusive purposes**, the effect of which is that the borrower is not free to dispose of the money as he wishes, then there would be a **primary trust imposed** on the borrower to use that money for that purpose.

When the purpose is fulfilled, the parties' relationship will turn contractual and non-payment of the debt is actionable in personam.

When the purpose is not fulfilled, there will be a **secondary trust** in favour of the lender.

A loan and a trust *are* mutually exclusive.

Portions fulfilled and unfulfilled are probably split into a contractual and a trust relationship at the same time.

RE KAYFORD [1975]:

Company was in financial difficulty, it had put all money from cheques in a separate account.

HELD: Customers writing cheques could get the money back on the basis of a Quistclose trust. A loan/contract is not required. A **payment on conditions** for purposes is sufficient.

CARRERAS ROTHMANS V FREEMAN MATTHEWS TREASURES [1985]:

Equitable interest held in suspense.

TWINSECTRA V YARDLEY [2002] See case attachment:

T lent $ → Y for the purpose of a property development project. A condition of the loan was that the money should only be used to buy a specific relevant property.
T transferred the $ to solicitors acting on behalf of Y. The solicitor should only disperse the funds in accordance with the loan agreement. The solicitor breached this and $ was used for other purposes. Y went into liquidation.
T sued the solicitor for dishonestly assisting a breach of trust.

HELD: Quistclose trust.
Lord Hoffmann's less detailed analysis reached the same conclusions as Lord Millett's and is in no way inconsistent with it. A Quistclose trust is a form of resulting trust (para100). The beneficial interest of the loan monies remains with (or is immediately reverted to [WESTDEUTSCHE]) the lender; the borrower merely has a power to use the lender's money for the stipulated purpose. If the power is not used or becomes void, one is simply left with the resulting trust. There is therefore no need to distinguish between a primary trust to carry out the purpose and a secondary trust by which the lender receives the beneficial interest of the loan money; the beneficial interest in the loan money at no stage leaves the lender (conflict possibly reconcilable with WESTDEUTSCHE).

Lord Millett, perhaps misidentified the Quistclose as a resulting trust since the resulting trust is, on this definition, a form of equitable boomerang by virtue of WESTDEUTSCHE. Rather than identifying the Quistclose trust as a resulting trust it might be better to

acknowledge it as an express trust created by the terms of the loan (see e.g. Hudson 2001, p310) {and if the express trust fails, a resulting trust forms and the property still belongs beneficially to the settlor/lender.

Crown Forestry Rental Trust

TYPHOON 8 RESEARCH V SEAPOWER RESOURCES [2002] (wrongly decided):

A tenant gave a deposit to a landlord. The landlord went bankrupt. Could the tenant get the deposit back ahead of other creditors? Normally, he should not as it was a contractual relationship.

HELD: **Quistclose trust**, relying on terms of agreement: that the landlord is to hold the money during the term of the tenancy. (CA inferred a trust). The deposit is held to ensure the due observance of the tenancy agreement terms. (CA again **inferred a trust – a specific purpose**).

CRITICISM: It misunderstands the essence of the Quistclose trust that when the condition is such that the recipient is not free to use the money but for a specified purpose, that money is separate from his general funds. **A deposit is in fact free for use by the landlord**.

Fulfilment of function. It does not fit the traditional parameters of trust law. Trust law was used to give effect to good policy approaches.

Possible trusts arising from void/voidable transactions

Money obtained as a result of a void contract is reclaimed on the total failure of consideration on the basis of restitution.

These are remedies in persona.

What if the thief of my money goes bankrupt? Remedy? Constructive trust imposed? Rationalization: resulting trust. A resulting trust arises when:

Property **(legal title) is transferred** to a transferee;

There was no **intention to benefit** the transferee

The transferee was **not free** to dispose of the property as he wished.

The property remains **identifiable**.

Payments under a void arrangement

E.g. mistake in common law, illegality, ultra vires and capacity.

The equitable interests in the void payment will not be created for the settlor unless the payee's conscience was affected. The trust could be constructive or resulting where the transfer could not be presumed as a gift or where the express trust had failed.

CHASE MANHATTAN (reasoning doubted by WESTDEUTSCHE):

One bank paid another bank twice due to some computer error. A few days later, the recipient bank went into liquidation.

Did the payor have any proprietary interest in that mistaken payment?

HELD [FI]: "New York and English law is the same on this point." If A makes a mistaken payment to B, A retains an equitable proprietary interest in the money. B's conscience would be affected such that he would be a trustee/fiduciary of that money. There is no clear authority.

CRITICISM: Relied on SINCLAIR V BROUGHAM BUT that was overruled by WESTDEUTSCHE. Presumes the other jurisdiction, which has comprehensive trust laws to be the same as UK law.

RATIONALIZED: by WESTDEUTSCHE to say that the defendant **bank's conscience was affected** since it had notice of the mistaken payment 2 days later and before liquidation. Probably a constructive trust since there was no intention to transfer the beneficial interest to the second bank.

WESTDEUTSCHE V ISLINGTON LBC:

The bank had to make net payments to Islington. These agreements were later held to be ultra vires by the HoL since they were gaming contracts.

Since payments were made for void transactions. They were recoverable through the law of restitution which would allow simple interest. W wanted compound interest. To do that, they had to establish a trust.

ARGUED: Since it was a void payment, the payor retained equitable interest although legal title passes.

ANS: You cannot retain parts of the interest. When a trust arises, the settlor transfers full ownership to the trustee, but because of the trust declaration, a new equitable interest arises in favour of the beneficiary. This new equitable interest cannot be said to have related to the settlor.

ARGUED: The split of interests forms a trust.

ANS: Split of interest ≠ trust. Many counterexamples given, e.g. one can be a mortgagee yet not your trustee.

ARGUED: A resulting trust forms.

ANS: ~~Resulting trust~~. Generally, if a person is to be made a trustee, his **conscience** must have been affected, i.e. he knows that he holds the property for the benefit of others. Not the case here since no one could have known the transactions were void. However, once he is aware, his conscience is affected and he holds the **identifiable trust property** on resulting trust. In this case, there was no identifiable trust property at the time of knowledge since before that, the bank account had been over-drafted.

Once a trust is established, it is held on that date and proprietary interest is enforceable in equity against any subsequent holder of the property except equity's darlings.

If a transferee of property was **not to benefit** from the property, the property remains **identifiable** and the transferee was **not free to dispose** of the money as he wished then

a **resulting trust** should arise. Such a trust **gives effect to the presumed intention of the parties**. {It seems that a resulting trust can only arise from the failure of an express trust or from voluntary purchase money agreements…} If the settlor has (impliedly) abandoned any interest in the property, there is no resulting trust and the equitable interest rests in the Crown as bona vacantia. Such a trust with its tracing and priority implications was inappropriate in relation to a commercial contract that all parties believed was valid and in a context where no-one was aware of the existence of the trust; "a new unmanageable risk would be introduced into commercial dealings" (Swalding); Constructive trusts may be applied despite the intentions of the parties.

Type A: Presumed purchase money resulting trusts. No trust because the intention was that the money should be paid in absolutely. A presumption of resulting trust is rebutted by contrary intention.

Type B: Failed express trust. There was no express trust in this case.

ARGUED: SINCLAIR V BROUGHAM (overruled):

Claimants deposited money in Building Society which subsequently went into liquidation. It was held that there could be an implied contract to repay the money.

HELD: Overruled: Any implied contract is also ultra vires and void. There was total failure of consideration and under contract law, money could be claimed as an in-personam right. There is no trust.

ARGUED: CHASE MANHATTAN (see above):

HELD: Reasoning of this case was wrong although verdict was correct – that proprietary interest stays with the bank. On the facts, the recipient bank knew about the mistaken payment *within a reasonable timeframe* therefore the recipient bank became aware that it should not take whole benefit of the money so its **conscience was affected** and a **constructive trust** arises forming an equitable interest.

"Where property is **obtained by fraud**, equity imposes a **constructive trust** on the fraudulent recipient if the property is recoverable and traceable in equity". Imposing a resulting trust would allow the plaintiff to recover property at the expense of those who have not been unjustly enriched.

The court might impose a **remedial constructive trust** on one who knowingly retains property which has been unjustly acquired in cases not involving insolvency.

Payments under a voidable transaction

Rescission is an in personam equitable remedy.

EL AJOU V DOLLAR LAND HOLDINGS [1993]:

"if a person is induced into a contract by fraudulent misrepresentation, he is entitled to rescind the transaction and revest the equitable title of the purchase money to himself. He can do it to the extent necessary to support an equitable tracing claim."

This would be an old resulting trust.

Rescission → tracing → resulting trust.

RE GOLDCORP EXCHANGE [1995]:

Certificates granted instead of actual gold. Insufficient gold and company liquidated. It had also executed a floating charge with a bank. (Borrowed with executed security – all assets frozen for the bank upon liquidation).

Customers want company to hold coins on trust for them.

HELD: no trust.

Bulk purchase – title does not pass unless the coins are earmarked for you. Objects are **indistinguishable**. There was no separate and sufficient stock on which to attach any proprietary interest.

"The gold dealer was a fiduciary of the customers. There was trust involved" – REJECTED. **Fiduciary relationship ≠ contractual relationship**. Duties resemble contractual obligations. **Mere high expectations are insufficient**.

"Remedial constructive trust: severe hardship" – REJECTED. It would **upset insolvency priorities**, differentiation between a big bank and small customers should not be assumed to have any bias effect.

"Quistclose"

When the purchase money was given, the money was used for the purpose of buying gold coins therefore the money was held on Quistclose trust and the gold coins would fall within the trust fund.

REJECTED as there was no condition of use, the recipient was actually **free to dispose of the funds** as he wished.

"Contract was vitiated as there was never sufficient stock". Fraudulent misrepresentation. Should that be the case, **rescission is the proper remedy** and rescission establishes a personal right.

This judgment conflicts with the dictum in the previous case. In reconciling this case with EL AJOU…

Trusts puts your claim in a completely different class when creditors come to get your debtor's money you are above secured creditors. Only property held beneficially by him will not fall within his beneficial estate (separate accounts).

Case Summaries

EL AJOU V DOLLAR LAND HOLDINGS [1993]:

Tracing → resulting trust. This is a proprietary interest for a voidable transaction. Institutional trust (obiter?).

WESTDEUTSCHE LANDESBANK:

Property stolen by thieves would not be traceable. Property obtained by fraud should be traceable. Probably a constructive trust (comments on rescission obiter).

RE GOLDCORP:

Arguable fraudulent misrepresentation. Rescission is a personal right.

More recently, WESTDEUTSCHE has been preferred – PAPAMICHAEL V NATWEST BANK [2003]:

Husband deposited money as fixed time deposits. He also used these as collateral for margin accounts (not authorized and not disclosed). The bank knew about this. The wife wanted to get the money back.

Wife suffered from fraud – no direct contract between W and B.

Where a person suffers from a fraud from another person without the intervention of a contract, justice requires that there should be a constructive trust in favour of the victim.

Rescission not applicable.

HELD: W had allowed a third party to benefit from that fraud and that third party has notice of the wrongdoing of the husband, then a constructive trust should arise.

CRITICISMS: Wrongly decided.

Summary

Constructive Trusts – Institutional

Pre-existing p-interest infringed – not controversial to impose constructive trust.

Pure breach – REID + Dicta(SOLLAND) allows institutional constructive trust too. BUT maybe not in insolvency affairs.

Remedial Constrictive Trusts

Dictum in WESTDEUTSCHE. Upsets statutory regime.

Resulting/constructive trust differentiation

In orthodox times, RT was limited to purchase money and automatic resulting trusts. Constructive trust is broad. Prevent unconscionable behaviour of a legal titleholder. Modern arguments try to limit usage of constructive trusts.

WESTDEUTSCHE tried to define unconscienability by factoring knowledge of the wrong. But that is probably just as broad as the concept itself.

Proprietary Remedies – Tracing

Trustee misappropriated trust property
H → W → J → X → ?
$ $ @ # | from money to jewellery to shares

Introduction

Tracing allows the beneficiary to assert a claim on X. It is better because:

- The plaintiff's claim is **not dependant on the solvency** of the defendant;
- **Increases in the value** of the property may be capitalized upon;
- Interest accrues from the date the property was acquired.

A discretionary beneficiary has sufficient equitable interest to do tracing.

Tracing is **process**, not a right. Following ≠ Tracing.
Following is through people. Tracing is where the plaintiff traces through the various forms of his property and justifies his claim that the property can be regarded as representing the his money – BOSCAWEN V BAJWA [1995].

Tracing may result from a claim of a constructive trust or an equitable charge/lien.

Suppose trustee stole $100 from the trust fund and bought shares costing $100 for his wife. By now the shares have changed in value.

In establishing a **constructive trust**, the wife would hold the shares on trust for you. Since the shares belong to you in equity, the value would directly affect you. This is good if the value of the shares has increased.

A **charge/lien** means taking possession of a piece of debtor's property to secure a debt. If the debt is not recovered, the property is sold and any surplus is returned to the debtor. If the property < start value, the property is sold and the balance is satisfied with an action in personam against the trustee. At least you can get something. This is good if the value of the shares has decreased – you can get the reduced value of the shares and a personal right for the amount remaining.

Tracing – whether property value(increase/decrease) → appropriate remedy
Charge / proprietary claim

General movement to expand resulting trust to constrain constructive trust.

EL AJOU;
BOSCAWEN V BAJWA;
FOSKETT V MCKEOWN.

Tracing in Common Law

Traditional Equitable rules

Requirements

A **proprietary remedy** traditionally required the existence of a **prior fiduciary relationship** between beneficiary and wrongdoer or **proprietary interest in the thing.** This statement should be correct.

BOSCAWEN V BAJWA [1995]:

> No logical justification for allowing any distinction between common law and equity in this case. This requirement should only affect the type of claim for the property identified in the tracing process. *Millett, LJ.*

FOSKETT V MCKEOWN [2001]:

> DICTA: No logical justification for allowing any distinction between them the produce capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship. *Millett, LJ.*

SHALSON V RUSSO [2003]:

> Perhaps the HoL did not want to make such a substantial change in the law in FOSKETT (above). *Rimer, J.*

Theft and fraud (misrepresentation-rescission) are problems.

Property Remains Identifiable

Property remains identifiable (evidence).

2 trusts. Satisfy 1st requirement (express, resulting, constructive).

If express trust, there is pre-existing equitable interest and against that 3rd party, I am claiming a constructive trust.

Gives priority in insolvency situations and is a mechanism to have transferee to return property.

Unmixed Property

The position here is similar to common law. Where trust property has been transformed into property of a different form and kept separate, the beneficiary may take the proceeds. If the proceeds have been used to buy further property, the beneficiary may choose to:

> Take the property that has been acquired wholly with the trust property; or
>
> To charge the property for the amount belonging to the trust – RE HALLET'S ESTATE.

Atkin LJ followed this rule in BANQUE BELGE. In tracing money into a bank account, the court will investigate an account into which another's money has been wrongfully paid.

Mixed Property

The General Process

FOSKETT V MCKEOWN [2001]:

> Identify the plaintiff's interest in the property representing the original trust assets.

Equitable proprietary interests are not enforceable against bona fide purchasers for value without notice. It is a case of hard-nosed property rights so fairness, justice and reasonableness are irrelevant. This is not a claim of unjust enrichment.

A mixed fund belongs proportionately to the contributors pro rata.

Money expended on improving or maintaining the property of another allows a proprietary lien to recover the money expended. It might not even give a proprietary remedy if to give such an interest would be unfair – RE DIPLOCK.

The particular life insurance policy in this case gave rise to a mixed fund and a pro rata share in the death benefits would give the claimants a windfall but that is due entirely to their property rights.

The 4th and 5th premiums paid did not affect the amount of death benefits but at the time of payment, it was uncertain when the insured would die. Therefore, the rights of the parties were established when the relevant premiums were paid and the future unknown.

One does not trace the asset itself but the value inherent in the asset.

Where trust property is misappropriated to exclusively purchase something or even just in part, the beneficiary may assert his beneficial ownership or bring a personal claim against the trustee to enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund. Both are proprietary remedies maintainable against all but bona fide purchasers for value without notice – overrules dicta of RE HALLETT'S ESTATE. The rationale is that the trustee is not to profit from his breach of trust.

Mixing could be purchasing from mixed funds or purchasing with different funds.

Where there are competing contributors and the fund is deficient, the beneficiary is not entitle to enforce a lien and must share rateably in the fund.

Something mixed with trust money may be regarded as belonging to the trustees unless it is appropriate to divide it pro rata. In JONES V DE MARCHANT, a fur coat made from mixed fur was held to belong to the claimant in full. Pro rata is the best the trustee and donee can hope for.

DISSENT: The children's rights were realized before any money was stolen therefore the claimant's cannot trace into the death benefits.

Beneficiaries' Interests

If beneficiary money is mixed with trustee money, any evidentiary gaps are inferred against the trustee.

Suppose trust fund money and trustee money is mixed in a bank account. There is a withdrawal with some left in the account. To whom is the balance attributable?

At common law, the payment first made is treated as first withdrawn – FIFO. It would be unfair to those who deposited money first as they would usually get nothing.

In equity, the trustee is treated as acting lawfully and honestly so the withdrawals will be from his own money first – RE HALLETT [1880]. CLAYTON'S CASE established the FIFO rule but it is only a convenient presumption rebutted by any (presumed) contrary intention.

RE OATWAY [1903]:

Shares bought first and [balance left = 0] so beneficiaries would get nothing.

HELD: order of payment irrelevant – whatever presumption that will work against the trustee will take effect. Beneficiaries were entitled to a charge on the property purchased by the trust money. Until the trust fund is restored, the trustees are not freed from the charge.

BARLOW V VAUGHAN [1992]:

Investment company went into liquidation owing money to many investors. How are the funds to be distributed?

HELD: The FIFO rule is only a convenient method to distribute and will not be used where the results would be impractical or unjust, or contrary to the (implied) intentions of the investors. It was indeed contrary to the intentions of the investors that the money should be distributed in such a way since their money was pooled and their misfortunes should be shared. In choosing an appropriate distribution method, the costs will be taken into account. What happened to the investment could not be affected by the order in which the contributions were made.

What if the withdrawal was used to buy shares which has increased insanely in value and there is some money left in the bank account equal to the beneficiary's loss?

RE TILLEY'S WILL TRUSTS:

Under RE HALLET, the first expenditure is presumed to have been of the trustee's money. RE OATWAY is distinguishable because there was enough money to recharge the trust estate here.

In this case, under circumstantial evidence, the defendant had no intention to use trust money in the purchase of the property. Where there is enough money to satisfy the claim, the beneficiaries must be content with a claim to the balance.

What if the trustee then deposits money into the account with less than the beneficiary's contribution so the [balance > beneficiary contribution]?

The beneficiary can only get the lowest intermediate balance – ROSCOE V WINDER [1915] and applied harshly in BISHOPSGATE V HOMAN [1995]. If the trust fund is totally dissipated at one point, there is nothing to trace into. Things purchased before the money is stolen cannot be traced also. Later deposits are not intended to replenish the trust fund. This protects trustee's creditors.

If beneficiary money is mixed with other innocent party's money:

The property should be shared equally but it could still be subject to the FIFO rule, e.g. if B's $50 was put in after A's $50 then a withdrawal of $75 would leave B $25 and A $0.

First in first out rejected and **equal sharing implemented** –
BARLOW CLOWES V VAUGHAM [1992]:

Collective investment company stole from investors and went bankrupt.

FIFO considered but held unjust.

Rolling charge method: each withdrawal treated as coming from pro rata contributions of all deposits. Balance to be distributed pro rata. After the next deposit and withdrawal, the same applies and the latest depositor gets his share. Held too costly to administrate.

Simple Pro rata method. Pari Passu. CLAYTON'S CASE was for convenience and should not be applied in unjust occasions against presumed/express contrary intentions.

FOUND: contrary intention – intended common pool since people intended to pool the money they intended to share their (mis)fortune equally. Presumed even individual investors do not want FIFO injustice.

RUSSELL-COOKE TRUST V PARENTIS:

Clayton's FIFO is easily rebuttable.

COMMERZBANK V IMB MORGAN [2004]:

The defendant went into liquidation. The applicant wanted to know what it could do with the mixed funds. The question in issue arose as to the method of distribution and in particular, whether the FIFO rule in Clayton's case was applicable.

HELD:

1) IMBM became a constructive trustee for the innocent claimants and thus the claimants had a proprietary right to trace their monies in the accounts.

2) There were payments in and out of the accounts, by or on behalf of the claimants, and accordingly the funds became mixed.

3) The FIFO rule in Clayton's case would not apply where the process was complicated.

4) Where the claimants have an equal right to be paid, the parties are entitled to the mixed fund pari passu i.e. to share rateably amongst the beneficiaries according to their contributions – BARLOW CLOWES V VAUGHAN applied.

NOTES:

The rule in CLAYTON'S CASE is a rule of banking law and one of convenience, which had been adopted in the early part of the nineteenth century to ascertain the respective interests in a bank account of two innocent parties.

The basis of the rule lies in the fact that as between the beneficiaries (or innocent parties) the 'equities are equal', that is, there is no need to give one beneficiary any special treatment over the other. THEREFORE, a more equitable solution would be to allow the two groups of beneficiaries to share the balance in the account, in proportion to the contributions.

Backwards tracing – already bought something on credit and used trust fund to pay for that. Would beneficiary be able trace into that item?

FOSKETT V MCKEOWN [CA]:

Mixed opinion.

Defences

The property has reached the hands of the **bona fide purchaser for value without notice** – RE DIPLOCK. Though the proceeds of the sale may be traceable – LAKE V BAYLISS [1974].

If the plaintiff acquiesced – BLAKE V GALE [1886].

If the property has been dissipated so that tracing is impossible. A world cruise, dinner or the payment of a debt – RE DIPLOCK [1948].

It would be inequitable to allow a plaintiff to trace against an innocent volunteer in the particular circumstances – RE DIPLOCK, or if the defence of **change of position** is available: "Thus if an innocent volunteer spends money on altering or improving his land there can be no declaration of charge and consequently no tracing for the method of enforcing a charge is by sale which would force the volunteer to exchange his land and buildings for money: an inequitable possibility, particularly if it may that the alterations had not enhanced the value of the property."

Contemporary Equitable Rules

Theft

No fiduciary relationship or pre-existing equitable interest. No split interests. All interests transferred. No equitable tracing but common law tracing? Problems: property must be identifiable. Electronic transfers stops common law tracing. Advantage of equitable tracing is that mixing does not stop {?}.

Implied Trusts

1/25/05 10:45 AM

Intermeddler's Liability

Introduction

The normal position is where there is a fiduciary relationship between the trustee and beneficiary.

Trustee ←(fiduciary)→ Beneficiary

However, where there is a third party (X) in between and X is not a trustee but commits conduct that equity imposes liability upon him, X has an equitable duty to account in personam (as a 'constructive trustee') – this label is controversial.

Trustee <> X <> Beneficiary

X may be liable in two ways:

Actual wrongdoing. A fault-based liability.

Receipt of property given through breach of trust. A receipt-based liability.

Primary Liability:

If one, not being a trustee, takes upon himself to meddle with trust matters or through conduct, assumes the trustee's position, he may make himself a trustee de son tort.

Secondary Liability:

Where X assists in the primary breach. This depends on the existence of the primary liability – fault based, including accessory liability / dishonest assistance.

Secondary liability is concerned with getting compensation from those persons. Action is not restitutionary and compensation is for wrongdoing – attributing liability for misdirected funds – TWINSECTRA.

Restitutionary Liability:

Unjust enrichment. To reverse the unjust enrichment of the defendant X who received property misappropriated through breach of trust (primary trust required) – receipt based.

X knowingly receives trust money. Action is restitutionary.

Dishonest assistance (secondary liability)

Helping/participating in breach of trust.

BARNES V ADDY, Lord Selborne:

Knowingly assisting in a **dishonest and fraudulent design** on the part of the trustees.

ROYAL BRUNEI AIRLINES V TAN, Lord Nicholls:

Not dependant upon receipt of trust property. Accessory does not need to touch trust property.

RB appointed BLT as one of its travel agencies. Tan (N) was the managing director of BLT (the trustee). BLT was to hold money for airlines from ticket sales. With N's assistance and knowledge, BLT paid the money into its own bank account instead of to RB. BLT failed to pay RB within the prescribed time and went into liquidation.

RB sued N since BLT was in liquidation.

N had knowledge of the scheme and had actively participated in the transfer of funds in breach of trust.

HELD [FI]: N was liable in knowing assistance.

HELD [CA]: N was not liable.

HELD [PC]: N committed dishonest assistance. A liability in equity to make good resulting loss attaches to a dishonest assistant.

GRUPO TORRAS V AL-SABAH:

3 Requirements:

Breach of trust by some trustee.

Defendant must have **assisted** (looking at factual circumstances).

Dishonestly (most controversial).

Dishonesty

BADEN, DELVAUX:

Five groups of knowledge: actual, ignoring the obvious, not making inquiries as an honest/reasonable man would, knowledge of relevant circumstances which would raise a reasonable man's notice or inquiry.

Before ROYAL BRUNEI V TAN, negligence then fraud was necessary. Which category of knowledge was sufficient? *After ROYAL BRUNEI*, dishonesty is sufficient and 'knowingly' is best avoided. What is dishonesty? {a reasonable honest person does not misappropriate trust assets and } Carelessness is not dishonesty.

There has been a continuing usage of the 'Baden scale' – HEINL V JYSKE BANK.

TWINSECTRA V YARDLEY [1996]:

Undertakings such that in the event Y could not repay, T could go against the solicitor, Mr. Leach. Leach did not approve but went to Mr. Sims to get the undertakings. T gave the £1M to Sims on the condition that it be paid to Y to buy property after some transaction. Sims paid the money to Leach who paid it to Y before the transaction.

T sued Leach in an action for dishonest assistance.

HELD [HoL]: Leach was not dishonest. Lord Hutton said that for a person to be liable as an accessory, he had to have acted dishonestly and he himself should have known so.

Lord Millett said that dishonesty should be decided using the objective approach. Consciousness is mens rea, a requirement of criminal liability. Equitable counterpart of economic torts was strict so and subjective dishonesty is not necessary so equity should follow the law with the objective approach.

Lord Hutton: standard of honesty as a reasonable, competent lawyer.

- T v
  - With resulting loss
- Not merely loss suffered as a result of the dishonest assistance but the whole loss can be recovered.

Knowing Receipt

*EL AJOU V DOLLAR LAND HOLDINGS [1994], Hoffman, LJ:

3 Requirements:

Disposal of trust assets in breach of trust by trustee.

Beneficial receipt by defendant of traceable products of trust property

*The defendant must have had knowledge that the property received is traceable to trust property.

Actual Knowledge or Constructive Knowledge?

Majority of cases say **constructive knowledge is sufficient** to constitute liability – see cases. Minority says that **constructive knowledge is inadequate** – RE MONTAGU'S SETTLEMENT TRUSTS:

Trustee was supposed to transfer some chattels into the trust fund. The residue would then go to the 10th duke. The trustee forgot to make the chattel selection and all the chattels went to the 10th duke who sold some. The 11th duke took an action to court. The 10th duke did not have actual knowledge that the chattels were trust property.

HELD: since the 10th duke did not have actual notice, he could not be held liable for knowing receipt.

In **commercial transactions**, there is no place for constructive notice – EAGLE TRUST AND COWAN DE GROOT.

Baden Scale? Doubted in BCCI.

BCCI V AKINDELE:

Single test for dishonesty now used for knowing assistance should be applied to knowing receipt. State of knowledge is such that to make it unconscionable for the recipient to retain.

Conflicting authorities on requisite degree of knowledge. Uncertainty is undesirable. Unjustified distinction between knowing receipt and its counterpart of money had and received. Its counterpart much simpler – all that needs to be proven is that the plaintiff received his money. Defendant is strictly liable.

CRITICISM: Prof Burrows: vague and malleable.

Also an incorrect emphasis on the proof of fault where reversing unjust enrichment should be the focus. Dishonesty should not be required

Defences

Change of position.

Future of Secondary and Restitutionary Liability

In order to simulate money had-and-received, it is possible that the law will make the liability of the recipient strict, subject to defences.

This view is supported by Birks, Harpum and Lord Nicholls.

End of year examination for Law of Equity and Trusts – 15 April 2005.

Property Refresher 1/25/05 10:45 AM

Property defined as a bundle of rights.
Property personal rights. In rem and in persona

In persona rights e.g. privity of contract
In rem rights are enforceable against the whole world.

Remedies in trust centred on personal/property rights.
Rights, bankruptcy.

Advantages

- contract of purchase of car – car is sold, property transferred. Explosion and car is destroyed. The car is yours so too bad.
- contract to agree to buy car, property not transferred. Explosion and car is destroyed. The car is theirs so you can insist on getting it.
- in personam:
    -
- in rem:
    -

subject matter:

- both tangible and intangible.

Property rights classified into

- Realty and personal property
    - Realty: freehold
    - Personal property: leasehold.
    - Remedies are different.
    - Damages vs. real thing
- Moveable and immoveables
    - Land vs. car
- Tangible and intangible.
    - *Choses* in action (rights to sue)
-

priorities at common law

- relativity of title
    - some titles are better than others.
    - A thing can have several titles

- You cannot give what you do not have. *Nemo dat quod non habet* – land
- If it was a car, however, a bona-fide purchaser without notice can get better title than the first purchaser who did not get actual possession on purchase.
- For cash, a bona fide purchaser gets full title.

Priorities in Equity

- Equitable interest vs. Equitable interest
  - Where equities are equal the first in time prevails.
- Equitable vs. legal
  - First in time generally wins. Except as against bona fide purchaser of legal estate for value without notice.

Mere Equity

- Right to revest title.
- Against legal / equitable interest
  - Bona fide pirchaser for value without notice

different property rights.

Property Refresher 1/25/05 10:45 AM

Law of obligations
Law of property

wrongs

- tort is a breach of duty
  - causation – but-for. Not for fraudulent misrepresentation. Novus actus interveniens – Breaking the chain of causation if other event is natural etc.
  - Remoteness – reasonable foreseeability. Easier than contract
  - Mitigation – Contributory negligence
  - Punitive damages – to punishment, rare. Deliberate, outrageous breaches.
- breach of fiduciary duty + account of profits
- compensation CF below

unjust enrichment

- return unjust gain.

consent

- contract
- compensation CF above
  - position you would have been in had the contract been performed.
  - Limits
    - Causation – easily proven but-for test.
      - Not needed for fraudulent misrepresentation. Just show that and a loss
    - Remoteness – reasonable contemplation of the parties. Time to negotiate, chance to hint at losses that might occur to you.
    - Mitigation – innocent party should take reasonable action to minimize loss.

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