

# EQUITY AND TRUSTS LAW

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Revision Pack

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- The trust may arise where the property has been transferred to an agent for a particular purpose that has failed.
- Ultimately whether trust or = will depend on the intention of the party creating the relationship
  - *Pearson v Lehman Brothers Finance SA* [2010]
    1. If the agent is absolved by the principal from one or more of the basic duties of trusteeship, it does not necessarily follow that a trust cannot have been intended to be created, but this does suggest that it may not have been.
    2. Ultimately, the finding of a trust should turn on the objective intention of the parties.
    3. Policy considerations = whether the property in the hands of the putative trustee should not be available for distribution to that person's creditors if he/she becomes insolvent.
  - Judicial discretion = critical in determining whether or not a trust should be recognised, with particular regard to the proprietary consequences of such a recognition.

#### Assignment:

- An assignment involves transferring rights from one person, the assignor, to another, the assignee – if B owes money to A, A can assign the debt to C so that B will then owe the money to C = this does not involve creation of any trust, since the essence of assignment is the transfer of existing rights rather than the creation of new rights.
- *Don King Productions Ltd v Warren* [2000]
  - Two boxing promoters entered into a partnership
  - They agreed the benefit of their existing contracts with particular boxers should be brought into the partnership
  - They fell out and the partnership needed to be dissolved.
  - K: whether all of the boxing contracts had been transferred to the partnership despite that many contained anti-assignment clauses.
  - Held: the clauses did not prevent the person who was to receive the benefit of the contracts from holding those benefits on trust for somebody else.
    - Prohibition on assignment was sidestepped by treating the agreement to transfer rights as an agreement to hold the rights on trust.

#### Gifts:

- *Re Endacott* [1960], typical gift = where the donor transfers all rights to property to the donee without any obligation attached.
- Typical trust involves the settlor transferring property to the trustee, who is subject to an obligation to hold that property on trust for the benefit of the beneficiary.
- Property transferred subject to a condition = whether these transfers constitute gifts or trusts will depend on the intention of the transferor, objectively determined by the courts.
  - *Attorney-General v The Cordwainers' Co* (1833)
    - Testator had left an inn to the Cordwainers' Company on condition that it paid annuities to certain relatives of the testator and made some payments for charitable purposes.

- To avoid the embarrassment of having a joint bank account with the C, he had an account in his own name to which the damages were credited.
    - Money he and C had both won from playing bingo was credited to this account, and money was drawn from it to pay for both of them to go on holiday.
    - On his death, C sought a declaration that the money credited to this account was held on trust for her, so that it would not pass to the D.
    - Held: evidence supported the conclusion that the money was intended to be held on trust, particularly because, on a number of occasions, the deceased had confirmed that the money was the C's as much as it was his own.
  - *Rowe v Prance* [1999]
    - D had been having an extramarital affair with the C for 14 years.
    - D told her that he would divorce his W, sell the matrimonial home, and use the proceeds to buy a yacht, which would be their home whilst they sailed around the world.
    - D did not divorce his W neither did he sell the matrimonial home, but he did buy a yacht.
    - Relationship between them ended and C successfully sought a declaration that the yacht was held on trust for them both, there being a crucial finding of fact that the D had often described the boat as 'ours'.
    - Held: yacht on trust for them both in equal shares.
- Commercial Contexts
  - General reluctance to find a trust arising from a commercial relationship (*Henry v Hammond* [1913])
  - But^ where there is clear evidence of the necessary intent, a trust will be found.
  - *R v Clowes (No. 2)* [1984] per Lord Justice Watkins
    - A requirement to keep money separate is normally an indicator that a trust was intended.
    - If mingling of funds is contemplated, then that normally negates the intent to create a trust, unless other factors support a finding of a trust.
  - *Re Lewis's of Leicester Ltd* [1995]
    - A company which traded as a department store, licensed other trades to trade within the shop (concessionaires).
    - Concessionaires paid takings into tills controlled by the company, which takings were then paid into a separate bank account.
    - At the end of the month, the company paid this money to the concessionaires minus a commission.
    - Company entered into administration and Q. for the court = whether the money paid into the bank account was intended to be held on trust for the concessionaires.
    - Held: Trust present = because of the payment into a separate bank account, although the company was also a beneficiary of this trust to the extent of its right to receive a commission.
- Intention to make a gift
  - If there is an intent to make a gift, but legal title to the property is not successfully transferred, this transaction cannot be saved by treating it as a trust (*Jones v Lock* (1865)).
  - An intention to make a gift contradicts any intention to declare a trust.

- (2) made to defraud creditors; or
  - (3) to prejudice creditors' interests in a claim against the settlor.
- Absence of certainty of intent = no valid trust has been declared

### Identifiable Subject Matter

- Trusts can be declared over all kinds of property (e.g. milk quotas, *Swift v Dairywise Farms Ltd* [2000])

### Description of subject matter:

- A declaration of trust can be valid only if the subject matter of the trust has been described with sufficient clarity.
  - *Palmer v Simmonds* (1854) – a testator's declaration that the 'bulk' of her estate should be held for certain people was not sufficiently certain.
  - Other failing descriptions
    - 'the remaining part of what is left' (*Sprange v Barnard* (1789))
    - 'such parts of my...estate as she shall not have sold' (*Re Jones* [1898])
    - 'all my other houses' (*Boyce v Boyce* (1849))
    - 'such minimal part of my estate [to which my wife is] entitled for maintenance purposes' (*Anthony v Donges* [1998])
  - On the other hand
    - *Re Last* [1958] – 'anything that is left' = sufficiently clear
      - When the testator had left her estate to her brother apparently absolutely, but then added in the will that anything left was to be left to other people, this was interpreted as giving the brother a life interest in the estate, with the residue of the estate passing to other people on his death.
    - *Re Gony's Will Trusts* [1965] – 'a reasonable income' was held to be sufficiently certain, because it was considered to be possible to determine what is objectively considered to be 'reasonable'.

### Identity of subject matter:

- *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] = even if the subject matter of the trust is clearly defined, the property must be clearly identifiable.
- If not^, the void for uncertainty (*Re Stapylton Fletcher Ltd* [1994])
- *Hunter v Moss* [1994]
  - D owned 950 out of 1,000 issued shares in a company and declared that he held 5% of the issued share capital, which was construed as meaning 50 shares on trust for the C.
  - Appears to be a trust that would be void for uncertainty of subject matter, since it was not clear which 50 shares were held on trust.
  - Despite this, it was held that there was a valid declaration of trust over 50 shares.
- Types of shares = must be same.
- Chattels in a bulk – *Hunter v Moss* was different because the shares were of a single class and in a single company.

- “On other facts disclosing genuine Unconscionability the imposition of a constructive trust may be justified, but on the facts of *Pennington* and *Re Rose* the search for an explanation continues.”

#### **Goode (2003) – are intangible assets fungible?**

- “even if one assumed that shares were somehow segregable, the trust did not purport to relate to individual shares but rather 5% interest in the entire fund of shares. So even if the subject-matter had been bottles of wine in a cellar rather than shares in a company, the requirement of identification would have been satisfied, the subject-matter of the trust being a co-ownership interest in the contents of the cellar, not a purely personal right to a given number of bottles.”
- “concept of fungibility is...imperfectly understood.”
- “Because^ of an unfortunate tendency to define fungibility in terms of the physical characteristics of the subject-matter. In this conception, fungibility is confined to goods and denotes a collection of units which any one unit, or a single mass or volume of which any portion, is physically indistinguishable from, and interchangeable with, any other. But this focus on physical features as a means of determining legal characterisation is fundamentally flawed.” → “assumes that items possessing different physical characteristics are not interchangeable, whereas the obligee may well be prepared to accept any kind of asset in performance so long as it falls within a given description or has not less than a specified value”
- Quoting Professors Lawson and Rudden = “goods are fungible if they are treated as such”.
- “Accordingly the physical test must be rejected”
- “the obligation is to deliver or transfer not an identified asset but anything which corresponds to the contract description.
- “an order for a case of wine may be very precise or the buyer may leave it to the wine merchant to send a case of any kind of wine so long as it is red and does not cost more than £50.”
- “the distinction between an assignment of £100 part of a £500 deposit and an assignment of a 20% interest in the deposit is a distinction without a difference.”

## Discretionary Trusts

The essential test of certainty:

- In order for the power to be exercised, it is essential that the trustees know from the outset who the potential beneficiaries might be = if unclear the trust will be void for uncertainty (*Sprange v Barnard* (1789)).
- *McPhail v Doulton* [1971], HoL rejected the fixed list test of certainty of objects for discretionary trusts.
- *Burrough v Philcox* (1840) – the complete list test, however, is not totally irrelevant to discretionary trusts, but will only apply where it appears that the settlor's intent is that if the trustee does not make a selection from the objects, there will be division among them all, whether equally or in different proportions.
- Such a construction^ is only available where the list of potential objects is small.
- *McPhail v Doulton* [1971], per Lord Wilberforce
  - It was sufficient that it could be said with certainty that any given individual was or was not a member of the relevant class, and it was **not** necessary to ascertain everybody who was in the class.
  - *Re Gestetner Settlement* [1953], per Mr Justice Harman – also known as^ the 'given postulant test'.
- Although known as *Re Baden's Deed Trusts (No.2)*, it is the same as *McPhail v Doulton*
  - Trial J and CoA (all 3 LJs) = discretionary trust was valid applying Lord Wilberforce's test.
  - However CoA judges had divergent approaches ('is or is not')
    - Lord Justice Stamp – *Hartog v Glynn* (1739) discussed, which defined 'relations' as 'next of kin' = narrow definition of conceptually certain.
    - Lord Justice Sachs – provided that the concept is clear, it doesn't matter if there are evidential concerns. Objects must show if they 'is', or 'is not' within the class.
    - Lord Justice Megaw – enough to show that a 'substantial number' of people who are in the 'is' class.
- Subsequently^ = *Re Barlow's Will Trusts* [1979] – normal meaning of 'family' was considered to be those related by blood.
- *R v District Auditor, ex parte West Yorkshire Metropolitan County Council* [1986]
  - 'An inhabitant of West Yorkshire' = conceptually certain
- *Re Tuck's Settlement Trust* [1978]
  - 'as being of Jewish blood' = as being of 'some Jewish blood'.

### Evidential Certainty:

- *Re Baden (No.2)* [1973] ('is or is not')
  - Lord Justice Sachs – given postulant test was concerned only with conceptual certainty, once the meaning of the class was clear, it was simply a Q. of fact on the evidence whether a person fell within that class.
  - Lord Justice Megaw – not necessary to show that a particular person either was or was not a member of the class, because it was necessary to ascertain every member of the class for a discretionary trust to be valid.
    - Trust would therefore be valid even though a significant number of potential objects would not be able to prove whether they 'is' or 'is not' within the class.
  - Lord Justice Stamp – not enough that to be able to show that one person fell within or outside the class; rather the test of evidential certainty required it to be shown of any given person that he/she either was or was not within the class.
    - It would be enough to show of anybody who might potentially be an object that he/she was or was not an object, but if there were uncertainty about any one person as to whether or not he/she was within the class, the trust would fail.
  - Analysis
    - Lord Justice Stamp's approach is most consistent within the test put forward by Lord Justice Wilberforce.
    - Also puts the evidential burden on the potential object as he/she is best placed to bear it.
    - Lord Justice Megaw = wrong → Lord Wilberforce's dictum makes it clear that it is not necessary to ascertain the whole class.

### Ascertainability of objects:

- *McPhail v Doulton* [1971] – the fact that it cannot be established where a particular object is, or even whether he/she is still alive.

### Size of the class:

- *R v District Auditor ex parte West Yorkshire Metropolitan County Council* [1986]
  1. A local authority purported to create a discretionary trust for the benefit of any, some, or all of the inhabitants of the county of West Yorkshire, which amounted to £2.5m objects.
  2. Held: conceptually certain, but the size of the class = **administratively unworkable**
- *Re Baden (No.2)* [1973] – a class of hundreds of thousands is not inherently defective.



## Summary Chart for Certainty of Objects

4.4.5 SUMMARY OF THE LAW

The various tests relating to certainty of objects apply as shown in Figure 4.1, in which a tick (✓) indicates that it is relevant and a cross (X) indicates that it is not relevant.

	Essential test	Conceptual certainty	Evidential certainty	Ascertainability	Size of the class	Capriciousness
Fixed trust	Complete list	✓	✓	X	X	X
Fixed trust: subject to condition precedent	One person satisfies condition	X	X	X	X	?
Discretionary trust	Any given individual	✓	X (?)	X	✓	✓ (?)
Fiduciary Power	Any given individual	✓	X (?)	X	X	✓

## Resolving Uncertainty

Trustees as arbiters:

- Conflicting principles
  - Principle against excessive delegation to the trustee by the settlor and especially the testator + not acceptable to exclude the jurisdiction of the court
  - Against<sup>^</sup> - the settlor/testator's intention should be respected.
- Resolution<sup>^</sup> = trustees are able to arbiters about Qs. of evidential certainty, but not conceptual certainty.
  - *Re Coxen* [1948]
    - Trustees held a house on trust to permit the testator's W to live in it, but the house was to be transferred to those entitled to the residuary estate if the trustees considered that she had ceased to live there permanently.
    - Held: legitimate for the testator to allow the trustees to determine whether a condition for revoking a gift had been satisfied so long as the terms of the condition were defined with sufficient certainty.
      - Condition was not void for uncertainty, because the meaning of 'ceasing to live somewhere permanently' = conceptually certain.



- Drew analogy with contract law, under which parties who agree to refer a matter of doubt or difficulty to a third party for decision are bound by that decision.
- Conceptual uncertainty could also be resolved by a 3<sup>rd</sup> party (dubious).
- Settlor/Testator could leave a decision to a 3<sup>rd</sup> party that this would not oust the jurisdiction of the court, to which the trustee could always apply for directions.
- Lord Justice Eveleigh
  - 3<sup>rd</sup> party is not being used to resolve uncertainty in the definition of the class, but forms part of the definition of the class.
    - The definition of the class = those people whom the chief rabbi considers to be of Jewish faith
    - So not^ objects are those of the Jewish faith and that, if it is uncertain who satisfies this definition, that can be resolved by the chief rabbi.
  - Third party can be required to give explanation to the court as to the basis for reaching his/her decision.
    - *Re Coates* [1955] – if found^ to be an unreasonable decision, the court will be able to intervene and set the interpretation of the concept aside.

Severance:

- *Re Wright's Will Trusts* (1999)
  - Class consisted of identifiable named charities and other bodies that could not be identified.
  - Held, CoA: refused to give effect to the gift in favour of the named charities only since no severance of the objects was allowed (named charities and unidentified charities).
- *Re Clarke* [1923] – severance has been recognised regarding charitable trusts

Wide definition of beneficiaries:

- Intermediate power = whereby the trustees have power to appoint property to anybody in the world other than a small class of excluded people.
  - *Blausten v IRC* [1972] – recognised as valid^
    - Only because^ it was possible for the trustees to specify particular objects within this class with the settlor's written consent.
    - If this qualification^ had not been added, the intermediate power would have been held to be void.
      - Reasons
        1. Because the class would have been so wide as not to form a trust class

- *Re Harding* [2008] – a trust for the black community of 4 London boroughs would have been treated as void for being administratively unworkable had it not been a charitable trust.
- *Re Hay's Settlement Trust* [1982], per Sir Robert Megarry V-C = a discretionary trust for anyone other than a few specified people would be administratively unworkable.
- Commentary on size of class
  1. Lord Justice Sachs in *Re Balden (No.2)* = size of the class can be infinitely variable, the trustees need only be aware of the width of the field so that they can adapt their method of selecting objects.
  2. If the trustees fail to exercise their discretion, the court would not be able to execute a trust with a very large class of objects (*Morice v Bishop of Durham* (1805); *Re Manistry's Settlement* [1974]).
  3. Grbich – no criteria for the exercise of the discretion where the class is large, so it is not possible to ascertain what the settlor's intention is. But many discretionary trusts lack such a reference point.
    - Example: a trust for the settlor's children to be distributed in accordance with the trustee's absolute discretion will be valid, even though no guidance is given as to how the discretion is to be exercised.
  4. Harpum (1986) – Principle of administrative workability = reflects a policy against excessive delegation to the trustees by the settlor or testator, the trustees being expected to describe the objects with sufficient clarity.

Capriciousness:

- *R v District Auditor, ex parte West Yorkshire Metropolitan County Council* [1986]
  - Held: the council did not have a sensible reason for wishing to benefit the inhabitants of West Yorkshire = Not capricious.
- However, in *Re Manistry's Settlement* [1974], per Mr Justice Templeman (as he then was) (context of fiduciary powers not discretionary trust)
  - A power given to trustees to benefit the 'residents of Greater London' would be capricious because the terms of the power negatives any sensible intention on the part of the settlor.
  - Mr Justice Templeman:
    - 'If the settlor had any...sensible intention or expectation, he would not have required the trustees to consider only an accidental conglomeration of persons who have no discernible link with the settlor'.

### Fiduciary Powers

Essential test of certainty

- *Re Gulbenkian's Settlements* [1970] (rich bearded guy who stayed in Hotels)

- *Re Endacott* [1960]
  - Gift of the testator's residuary estate to a parish council to provide some useful memorial to him, was not charitable due to the absence of any public benefit, even though it purported to be a 'public trust'.
  - Held: trust void → non-charitable purpose.

Critique of the General Invalidity of non-charitable purpose trusts:

- If the purpose is defined clearly, the only obstacle to validity is the absence of ascertainable beneficiaries to enforce the trust.
- However, if the trustees are willing to perform the trust, there is no issue of enforceability.
- Those who are entitled to the trust property if the trust were to fail could seek to enforce the trust if they wish to do so.
  - *Re Shaw's Will Trust* [1957], Mr Justice Harman (obiter)
    - "in so far as it is not devoted to those purposes, the money being spent is the money of the residuary legatees...and they can come to court and sue...the trustee for breach of trust, and thus, though not themselves interested in the purposes, enable the court indirectly to control them".
- Alternatively, the settlor should be able to appointment a third party to enforce the trust if necessary.
  - Hayton (2001)
    - "Take the case of a trust to further the interests of the UK Conservative Party expressed to be enforceable by the Leader from time to time of the Conservative Party."
      - "The trust deed clearly supplies a mechanism for the positive enforcement of the trust so that the trustees are under an obligation to account to someone in whose favour the court can decree performance"
    - Tracing available = "If trustees of a non-charitable purpose trust are regarded as legal and beneficial owners of the trust property, subject to fiduciary and equitable obligations enforceable by the enforcer designated as such in the trust instrument".
    - "It should make no difference whether the burdens are enforceable by the beneficiaries or by the Attorney-General or the Charity Commissioners or by the designated enforcer."
  - Matthews (1996) - opposite view^
    - The beneficiary principle is not simply dependent on the beneficiaries being in a position to enforce the trust.
    - Rather, it is the fact that the beneficiary has a proprietary right and the trustee owes him or her duties that is significant.

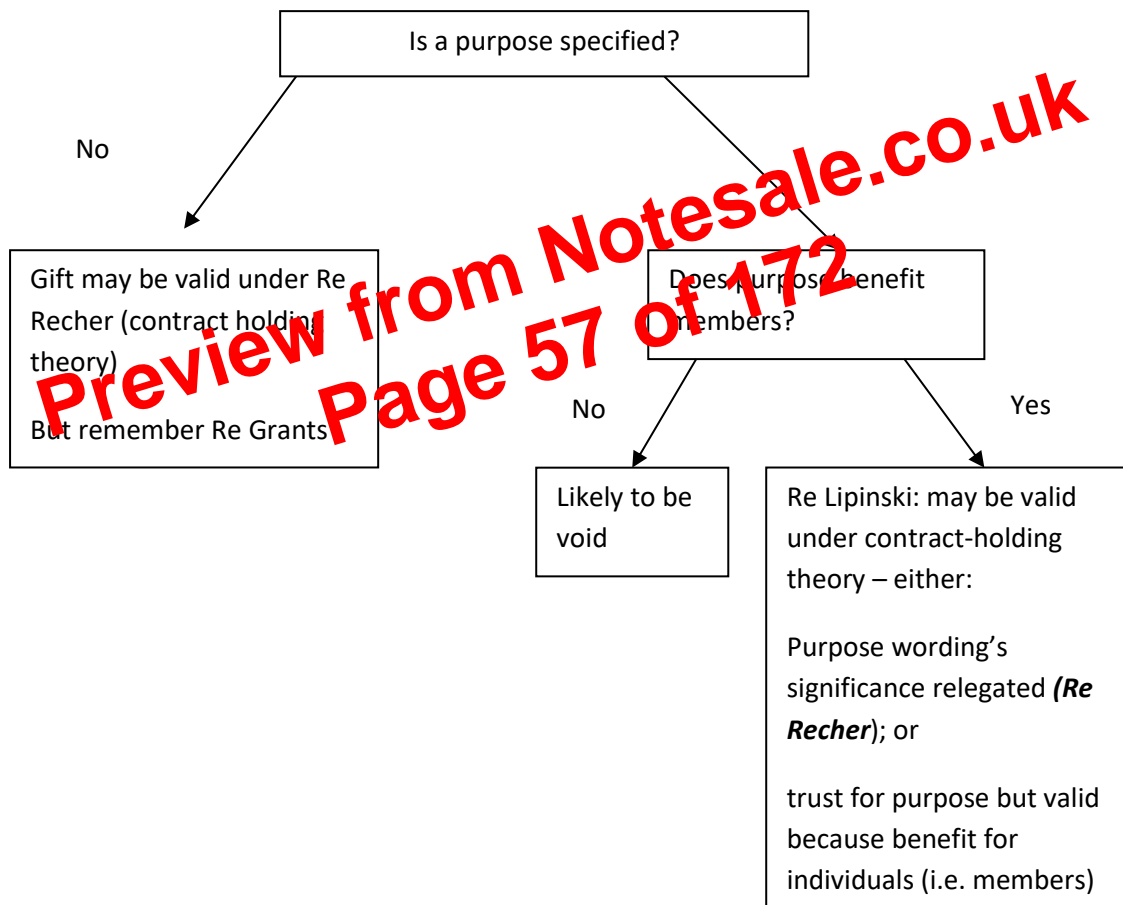
Exceptional Circumstances in which non-charitable purpose trusts are valid

Direct or indirect benefit to individuals:

- These individuals will not have a proprietary interest in the trust property, the benefit that they obtain from the purpose means that they, in practice, are interested in what happens to the trust property, so that they have *locus standi* to enforce the trust property.
  - *Re Denley's Trust Deed* [1969]

vote, if the rules so prescribe), vary or terminate their multi-partite contract”.

- NB: **Rule against inalienability** = association rules must allow the club to be dissolved and for the funds to be disposed of by its members, otherwise the gift will be void.
  - *Re Grants Will Trusts* [1979]
    - Labour party local association could not alienate the assets = trust/gift void
  - *St Andrews (Cheam) Lawn Tennis Club Trust* [2012]
    - Association could not alienate assets, so trust invalid.
  - *News Group Newspapers v SOGAT* [1996]
    - Rules allowed the local branch to secede from national organisation and dissolve itself = trust/gift valid.
  - *Horley Town Football Club* [2006] – existence of external members did not prevent trust gift from being valid.



Where no unincorporated association exists:

- Agency for the transferor (aka “mandate theory”)

- Charitable Purpose
  - *Re Clarke* [1923] – ‘poverty’ is a relative term.
  - *Re Coulthurst* [1961] – encompasses, but not confined to, complete destitution.
    - Fund for the widows and orphans of officers of a bank whose financial circumstances were such that they were most deserving of assistance was held to be charitable.
  - *AITC Foundation’s Application for Registration as a Charity* [2005] – it can extend to people of moderate means and may even include people who suffer only temporary financial hardship arising from a sudden change in their circumstances.
  - *IRC v Oldham Training and Enterprise Council* [1996] – a trust to set up the unemployed in trade or business was held to be charitable as being for the relief of poverty.
  - *Re Sanders’ Will Trusts* [1954]
    - ‘dwellings’ for the ‘working classes’ has been held not to be charitable because there was no requirement of being poor to benefit from it.
  - *Re Niyza’s Will Trusts* [1978]
    - Testamentary gift to construct a working men’s hostel in Cyprus was held to be charitable, because ‘hostel’ suggested modest accommodation for working men of relatively low income who were in temporary need.
  - *Re Gwyon* [1930]
    - Testator left a fund to provide undergraduates for boys in Farnham, subject to various conditions.
    - Motive for gift was unclear, but it was held not to be for the relief of poverty, because the conditions did not sufficiently identify that the eligible boys had to be poor.
- Public benefit
  - Long-standing recognition that this test is interpreted more liberally where the purpose is for the relief of the poor than for other charitable purposes.
    - Reason^ = benefit to the State from poverty being relieved, so that it is easier to justify allowing fiscal privileges to such charities.
  - Notion of the public can encompass (**under this heading**):-
    - *Re Segelman* [1996] – poor relatives of the testator
    - *Re Lucas* [1922] – poor people from a small geographical area (i.e. parish or town).
  - *Re Scarisbrick’s Will Trusts* [1951] – the class must consist of a particular description of poor people rather than a gift to particular poor people, with the relief of poverty simply being the motive for the gift.
  - Examples
    - Charitable Trust – “for the relief of my poor relatives” = valid
    - Charitable Trust – “for the relief of poverty suffered by my son and daughter” = NOT valid.
  - *Dinger v Turner* [1972]

- *Re Slatter's Will Trusts* [1964]
  - Testatrix had left money for the work of a hospital in Australia treating tuberculosis.
  - Hospital was closed down before testatrix's death because tuberculosis had been controlled in the locality.
  - Since the hospital had not left any funds to continue this purpose, it followed that there was an initial failure of the gift.
- *Martin* (1974) – criticises *Re Slatter*
  - K.Q = should be continued existence of charitable purpose NOT continued existence of funds; presumably the purpose of eliminating tuberculosis continued elsewhere.
- *Re Rymer* [1895]; *Re Stimson's Will Trust* [1970]
  - Where a bequest is intended to be for a particular charitable institution, rather than for the institution's charitable purpose, and the institution has ceased to exist before the testator's death, there will be an initial failure of the gift.
- *Re Finger's Will Trusts* [1972]
  - Unincorporated association and incorporated charity = ceased to exist before testatrix's death.
  - Gift to unincorporated association was valid as a charitable purpose trust
  - Gift to incorporated charity = failed.
  - Reason for distinction
    - Unincorporated association = no legal identity, so a gift to such a charity must be a gift for a charitable purpose rather than to the institution
  - If the purpose can still be fulfilled for unincorporated association = no initial failure, unless the continued existence of the institution was essential to the gift.
    - Since the purpose did continue and the gift was found not be conditional on the continued existence of the unincorporated association, it was applied for that purpose.
    - No failure of purpose → cy-pres doctrine not engaged.
  - Even though work of incorporated charity continued, unless the gift was intended to be held on trust for that organisation's purpose rather than being absolute gift, it will fail.
- *Re ARMS (Multiple Sclerosis Research) Ltd* [1997]
  - Testamentary gift had been made to a charitable company that entered into insolvent liquidation before the death of testator.
  - By the time the testator had died, the company had not been dissolved.
  - No initial failure → testamentary gift belonged to the company beneficially and so could be distributed among its creditors.
- *Re Rymer* [1895]

- even if provision does not apply, court can use inherent jurisdiction at common law to amend the terms of the charitable trust to give effect to the purposes of the charitable trust.
- *Oldham BC v A-G* [1993]
  - Court could not authorise sale under provision → none of the identified circumstances under the statute applied.
  - Court had inherent jurisdiction to authorise a scheme to sell charitable property and to reinvest the proceeds on the same charitable trusts.
    - Jurisdiction however = NOT available where the identity of the property (land) was essential to the charitable purpose.

#### Charity Collections:

- Where donor cannot be identified or found or has formally disclaimed his or her right to have the property returned, the property is treated as if it were given for charitable purposes generally and can be applied cy-pres.
  - Charities Act 2011, s 63(1).
- Only possible<sup>^</sup> where donor cannot be identified or found after:-
  - prescribed adverts have been published;
  - inquiries have been made; and
  - prescribed period of time has elapsed.
- Provision is made for a donor who had not been identified or found to make a claim to the property within 6 months of the scheme to apply the property cy-pres having been made.

#### Charity Solicitations:

- Cy-pres<sup>^</sup> if = accompanied by a statement that, if the purpose fails, the property will be applied cy-pres as though the property had been given for general charitable purposes.
- Also cy-pres if solicited purpose fails.
- EXCEPTION<sup>^</sup>
  - Donor = at the time of making the gift, wanted to be given the opportunity for the property or its value to be returned if the purpose failed.



- After a family row, he revoked this power, and transferred his money to a new bank account for himself & nephew.
- F died and his children claimed that the money credited to the bank account was held on resulting trust by the nephew for their father's estate, to which they were entitled as next of kin.
- Held:
  - presumed resulting trust → nephew had given no consideration for the transfer of assets into the joint names of himself and his uncle
  - BUT **rebutted** → nephew relied on mandate form, which clearly expressed an intention that the beneficial interest should be held by them both jointly and that the survivor was to take beneficially.
- *Re Vinogradoff* [1935]
  - Grandmother transferred £800 stock into her own name and her granddaughter's, who was 4 years old.
  - Held: Presumption of resulting trust applied
    - granddaughter held the stock on trust for the grandmother and it was irrelevant that the granddaughter was a child, who could not have held the property as an express trustee.
  - Analysis – wrongly decided
    - granddaughter should have been able to rebut it by virtue of her youth, meaning that her grandmother could not have intended her granddaughter to hold the property on trust for herself.

#### Purchase in the name of another

- Where the C buys property in the name of the D, it is presumed that the property will be held on resulting trust for C.
- Where the C has contributed to the purchase price of property that is in the name of the D, that property will be presumed to be held on resulting trust for the C in shares proportionate to his/her contribution.
  - *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996]
  - Applies whether land or personal property
- Presumption rebutted if:-
  1. Presumption of advancement applies
  2. Evidence shows C intended to provide D with outright gift.
- Evidence required to rebut presumption = depends on facts of the case (*Fowkes v Pascoe* (1875))
- May be strong a difficult to rebut (i.e. solicitor)
- In other cases where presumption of advancement does not apply, the relationship between the parties may suggest a gift
  - *Fowkes v Pascoe* (1875)
    - M had purchased annuities in the joint names of herself and her daughter-in-law's son
    - Presumption of resulting trust applied, but rebutted on facts
      - C was wealthy
      - He was living in her house
      - she was already providing for him financially.
- *Abrahams v Trustee in Bankruptcy of Abrahams* [2000]

- Relationship ended.
- Arguments
  - Tinsley brought action for possession of the house, asserting her sole ownership.
  - Milligan counterclaimed that she had a beneficial interest in the property because the nature of their relationship meant that a resulting trust could be presumed.
  - Tinsley argued that Milligan could not ask the court to enforce the trust in her favour because of her illegal conduct in perpetrating benefit fraud.
- Held (majority)
  - Milligan counterclaim should succeed → she did not need to rely on her illegal conduct to assert her beneficial interest by triggering the presumption of resulting trust.
  - She only needed to show that she had contributed to the purchase price.
- *Lowson v Coombes* [1999] – applied same principle
  - C had transferred property into the name of his mistress to hide it from his W if she should seek financial relief.
  - C was able to rely on the presumption of resulting trust because he did not need to rely on his illegal purpose to do so.
- There seems to be a **crucial difference** between referring to a transaction that happens to be tainted by illegality and referring explicitly to an illegal purpose.
- *Silverwood v Silverwood* (1997)
  - Money was given by a grandmother to 2 of her grandchildren.
  - Presumed that this was held on resulting trust for the grandmother.
  - Grandmother sought to rebut the presumption by pleading that the grandmother had intended the transfer of the money to be a gift.
  - Held (per Lord Justice Gibson)
    - Executor of grandmother's will could plead that the purpose behind the transfer of the money was actually to perpetrate a fraud on the Dept. of Social Security = enabled grandmother to obtain income support.
  - Illegal purpose was being pleaded to defeat the grandchildren's **attempt** to rebut the presumption of resulting trust rather than to rebut a presumption of resulting trust itself
- Distinction between *Tinsley* and *Silverwood*
  - Tinsley = Milligan did not need to use illegal purpose for presumption of resulting trust to operate.
  - Silverwood = grandchildren were trying to rebut the presumption of resulting trust, so executor could use illegal purpose to rebut the attempt.
- *Tinker v Tinker* [1970] – with regard to presumption of advancement = NOT possible to rely on an illegal purpose to rebut the presumption of an intention to make a gift.
- HOWEVER → EXCEPTIONS TO TINKER V TINKER
  - *Tribe v Tribe* [1996]
    - C is entitled to plead an illegal purpose to rebut the presumption of advancement where he/she has withdrawn from the illegal transaction before any part of the illegal purpose has been fulfilled.
    - F had illegally transferred shares to his son to conceal them from his creditors.

- that the money was applied for the purpose of paying those creditors.
- If primary purpose were carried out → Quistclose would only have a simple claim for repayment of the debt.
  - If however, the primary purpose failed = necessary to consider whether a secondary trust for the money arose.
- Mutual intention of the parties and the essence of the bargain between them = money lent should not become part of Rolls Razor's assets, but was to be used **exclusively** to pay those creditors who were entitled to the dividend.
  - If the dividend could not be paid = money returned to Quistclose (via resulting /express trust: controversial whether resulting or express)
  - Barclays bound by this secondary^ trust if it had notice of the primary trust or the circumstances that gave rise to it when the money was credited to the borrower's bank account.
    - Barclays did have such notice = aware money had been paid for **specific** purpose to benefit 3<sup>rd</sup> parties rather than the borrower.
  - Lord Wilberforce – policy grounds
    - Money that had been paid for a particular purpose should not be available for the borrower's general creditors whom the lender had not intended to benefit.
- *Twinsectra v Ltd v Yardley* [2002]
    - Solicitor, Sims = received money from a lender (Twinsectra) on behalf of Yardley, who made arrangements to borrow the money.
    - Sims = undertook to Twinsectra to put in the money until it was used to acquire property.
    - In breach → money paid to another solicitor, Leach, who paid it out on Yardley's instructions for other purposes.
    - Twinsectra sued Leach for dishonestly assisting a breach of trust committed by Sims – liability hinged on whether Sims had held the money on trust.
    - Held, HoL
      - Lord Hoffman (agreed by Lords Slynn, Steyn and Hutton)
        - Money = held on express trust
      - Lord Millett (Lord Hutton agreed)
        - Money = held on a Quistclose trust, which was characterised as a resulting trust.
        - Trust did not arise because money is paid for a particular purpose, since many loans are made for particular purposes.
        - Requirement for Quistclose trust → money was intended to be at the free disposal of the borrower, but was to be used exclusively for the **specific** purpose and no other.

### Requirements of Quistclose Trust

#### 1. Particular purpose

- Pay his/her creditors
  - *Barclays Bank Ltd v Quistclose Investments Ltd* [1970]
  - *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd* [1985]

- Resulting trust → cannot reflect other contributions, whether they are indirect financial contributions or non-financial contributions relating to the running of the family home.
- **Cohabiting couples context**, who purchase property in their joint names for their joint occupation = resulting trust will have NO role to play in determining their beneficial interests in the family home.
  - REGARDLESS of whether they have made a financial contribution to the purchase.
    - *Jones v Kernott* [2011] UKSC, para 53 (Lady Hale and Lord Walker).
    - Policy reasons = dramatic inflation in property prices = division of property with reference to initial financial contributions is now artificial and produces a result that is unjust (Lord Collins, para 56).
- Remedial constructive trust = justice and good conscience (*Heseltine v Heseltine* [1974]) – **no longer relevant** = rejected.
  - *Burns v Burns* [1984]
  - *Stack v Dowden* [2007]
- Institutional constructive trust = where the D can be considered to have acted unconscionably.
  - *Stack v Dowden* [2007]
- Common intention constructive trust = an agreement or understanding of the parties as to whether they have a beneficial interest in the property and, if so, what the extent of that interest might be.
  - Common intentions = basis of the trust, rather than unconscionability (hallmark of institutional) → common intention constructive trust = distinct form of trust.
- Proprietary estoppel = where the C has relied to his/her detriment on an assurance that he/she will acquire an interest in property belonging to the D → the court may recognise that the C has a beneficial interest in that property.

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## Common Intention Constructive Trusts

- Origins
  - *Pettit v Pettit* [1970]
  - *Gissing v Gissing* [1971]
- Old approach → *Lloyds Bank v Rosset* [1991], per Lord Bridge
  - Ways common intention constructive trust can arise:
    1. Common intention to share the beneficial interest + detrimental reliance by the C that is referable to that common intention → unconscionable for D to deny the C's beneficial interest in the property = constructive trust/proprietary estoppel.
    2. Common intention to share the beneficial interest = inferred by C's **financial contribution** to the purchase price/payment of mortgage instalments.
- Criticisms of old approach

- *Pettit v Pettit* [1970]
- *Gissing v Gissing* [1971]
- *Tackaberry v Hollis* [2007] HC –
  - Suggested that HoL in *Stack v Dowden* [2007] did not intend to find common intention by imputation
  - Even though^ Lady Hale expressly referred to imputation being sufficient)
- *Jones v Kernott* [2011] (Majority = Lady Hale; Lord Walker; Lord Collins)
  - Courts should be primarily concerned with searching for the parties' actual shared intentions, subject to **two exceptions** where an intention will be imputed:
    1. the result of a presumption of resulting trust (but NOT applicable to cohabiting couples)
    2. Where it was clear that the parties intended to share the beneficial interest, but it was not possible to determine a common intention as to the proportions in which the interest was to be shared (para 31, Lady Hale and Lord Walker)
      - Court then considers what is fair having regard to the whole course of dealing in respect of the property (para 51, Lady Hale and Lord Walker)
        - financial contributions + factors under holistic approach
      - => imputation possible to size of beneficial interest, but not its existence (however holistic approach applied to both stages in *Abbott v Abbott* [2007] UKPC)
        - Majority – no conceptual difference between inference and imputation of a common intention → difference in practice might not be great.
        - Para 47 (Lady Hale and Lord Walker)
          - '[The court] cannot impose a solution upon them which is contrary to what the evidence shows that they actually intended. But if it cannot deduce exactly what shares were intended, it may have no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time' → 'fallback position'
- Minority (Lord Wilson and Lord Kerr)
  - The parties share of the value of the property should reflect only what the court considers to be fair having regard to the whole course of dealing between the parties.
  - Unlike the majority, minority considered that the imputation of an intention had nothing to do with what the parties did intend, or could be considered to have intended had they thought about it.

- proprietary estoppel = NOT established just because D's conduct is unattractive.
- Effect of Estoppel → enables the court to create property rights in land, chattels and chose in action
  - *Cobbe v Yeoman's Row Management Ltd* [2008], per Lord Scott
- Forms of Relief
  - No relief/benefits received sufficient to satisfy the estoppel (*Sledmore v Dalby* (1996))
  - C should only receive some of the assets promised by the D (*Jennings v Rice* [2002])
  - C = should acquire a beneficial interest in the property → held on constructive trust
- There must be **proportionality** between the C's expectation and the detriment suffered → if expectation is extravagant/out of proportion to the detriment suffered = should be reflected in the relief awarded
  - *Re Basham* [1986]
  - *Thorner v Majors* [2009]
- Uses of Proprietary Estoppel
  - To perfect an imperfect gift (i.e. a gift that lacks the relevant formalities)
    - *Dillwyn v Llewelyn* (1862)
    - *Pascoe v Turner* [1979]
  - C mistakenly believed that he/she already obtained a proprietary interest, which was encouraged by D
    - *Crabb v Arun DC* [1976]
  - C is led to expect an interest in property arising in the will (i.e. via will)
    - *Re Basham* [1986]
    - *Gillett v Holt* [2001]
    - *Ottery v Grundy* [2005]
    - *Jennings v Rice* [2002]
  - By a cohabitating party → obtain proprietary interest in the family home where common intention is absent for the purpose of establishing common intention constructive trust.
    - *Pascoe v Turner* [1979]
    - *Holman v Howes* [2007]
- Limitations on proprietary estoppel
  - *Cobbe v Yeoman's Row Management Ltd* [2008]
    - Lord Scott → key test is to determine what fact the D was estopped from asserting
      - Criticism^: his Lordship assumed that the C needed to rely on a proprietary claim that the D was seeking to answer by asserting a fact that he could be estopped from asserting → NOT what proprietary estoppel is concerned with = Lord Scott confused it with promissory estoppel
    - Lord Walker → C was running a commercial risk as to whether a written contract would be made.
  - Context of the claims = decisive (commercial/domestic distinction)
    - *Cobbe v Yeoman's Row Management Ltd* [2008]

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- Director who had tried unsuccessfully to exploit a corporate opportunity for himself, was under a **positive** fiduciary duty to disclose to the company his intention to compete with it and was liable for the failure to disclose the attempted exploitation.
- The non-disclosure of misconduct by the fiduciary that constituted a distinct breach of fiduciary duty and this was a prescriptive, rather than a proscriptive, duty because the director was required to act in a particular way.
- Analysis of *Item Software UK*
  - Although CoA described failure to disclose misconduct as a breach of fiduciary duty, the preferable view is that this is actually a distinct non-fiduciary duty, since the duty to disclose misconduct was related to the director's duty to act in the best interests of the principal.
  - Since^ this is a duty that is not peculiar to fiduciaries = better view is that it is not a fiduciary duty, and so the decision does not undermine the fundamental principle that fiduciary duties are proscriptive.

### The Core Case of Reporting

- *Keech v Sandford* (1726) → no-profit principle
  - The trustee's liability was founded on his breach of duty since he obtained the opportunity to profit from the renewal of the lease in his capacity as trustee.
  - 'the trustee is the only person of all mankind who might not have the lease'.
- *Re Biss* [1903]
  - A partner who obtains a renewal of a lease of the partnership premises in his own name holds the lease on constructive trust for the partnership.
- *Chan v Zacharia* (1983), Mr Justice Deane
  - Where the lease was renewed for the benefit of a trustee, there is an irrebuttable presumption that the lease was obtained from the trustee's position of advantage, so that it is held on trust for the beneficiary.
- *Re Biss* [1903]
  - Where however, the lease has been obtained by a partner, the presumption of exploitation of fiduciary position is **rebuttable**, so it will be presumed that the lease is held for the benefit of the partnership, save where the fiduciary can rebut this presumption.
- Where the trustee has renewed the lease for himself → NOT constitute a breach of fiduciary duty if the no-profit rule has been excluded (i.e. a will)
  - *Re Knowles' Will Trusts* [1948], per Lord Justice Cohen
- *Keech v Sandford* → extended to cover all kinds of benefit obtained by a fiduciary as a result of being a fiduciary.
  - *Re Edward's Will Trusts* [1982]
- If a fiduciary holds a leasehold interest for the principal and then acquires the freehold reversion in a personal capacity, the fiduciary must hold the reversion for the principal.
  - *Thompson's Trustee in Bankruptcy v Heaton* [1974]
  - *Popat v Schonchhatra* [1997], per Lord Justice Nourse
- If a trustee receives a payment in consideration of his/her retiring and appointing the payer as a new trustee, the former trustee will be liable to account for the payment.
  - *Sugden v Crossland* (1856)



- s.1(1) → Trustees = NOT liable for any acts/omissions of agents, nominees, or custodians except if the trustee has failed to comply with the statutory duty of care.
- If the trustees have exercised such skill and care as is reasonable in the circumstances, they will not be vicariously liable if the agent has caused loss by acting negligently.
- If trustee exceeds the statutory powers in authorising a person to exercise functions as an agent or in appointing a nominee/custodian → authorisation = still valid.
  - Any action of the agent, nominee or custodian that is within the scope of his/her own authority will be effective and binding on the trust.

### Specific Powers of Delegation

- Trustee Act 1925 (TA 1925)
  - Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996)
- Relevant statutes for specific powers of delegation
- TA 1925, s 25(1) → possible for an individual trustee to delegate by deed the execution or exercise of any of the trusts, powers, or discretions that are vested in him/her as a trustee
    - for up to a year by PoA (2).
  - Differences between TA 2000 & 1925.
    1. TA 2000 = delegation of functions by the trustees collectively; whereas TA 1925 = enable an individual trustee to delegate for a limited period of time.
    2. TA 1925 = possible to delegate to a trustee or a beneficiary, whereas TA 2000 = does not permit delegation to a beneficiary.
    3. TA 1925 = trustee remains liable for acts/omissions of the agent as if they were the acts/omissions of the trustee; whereas TA 2000 = trustees who delegate are not vicariously liable, but are personally liable only for failing to comply with the statutory duty of skill and care.
  - Trustees of Land
    - Trustees of land can collectively delegate to one or more beneficiary of full age, who is beneficially entitled to an interest in possession in land that is subject to the trust - → any of the trustees' functions relating to that land for any period or indefinitely.
      - s. 9(1) and (5).

### **Personal liability of trustees for breach**

- Formula for breach of trust liability
  1. Does the D owe an equitable duty to the C?
  2. Has that duty been breached?
  3. Has the breach infringed any rights of the C?
  4. Are there any defences, excuses, or bars to defeat the claim or to reduce the extent of liability?

5. If the D is liable, what remedies might be available to vindicate the C's rights?

### Nature of Liability

- Breach of Trust = 'the violation of any duty which the trustee owes as trustee to the beneficiaries'.
  - *Tito v Wadell (No.2)* [1977]
- Unauthorised action = do what they should not do → ultra vires.
  - Strict liability
  - Examples
    - misapplication of the trust property
    - unauthorised investment
    - acting where there is a conflict between their personal interest and duty to the beneficiaries.
- Inadequate action = liable for acting badly, or failing to act, when, if the act were done properly, it would be an authorised action → intra vires.
  - Proof of fault in the form of negligence.
  - Example
    - Mismanaging trust investments by unreasonably investing in unauthorised investments, but with a low yield, or by failing to invest at all.
  - The loss must arise from an equitable breach of duty.

### Exclusion and Limitation of Liability

- Exemption Clauses
  - Liability of trustees = excluded or limited by clause in the trust instrument.
  - *Hayim v Citibank* [1987]
    - The validity of clauses excluding a trustee's personal liability for breach of fiduciary duties has been recognised by the courts.
  - *Armitage v Nurse* [1998]
    - C beneficiary sued her trustees for breach of trust following a variation of the trust, on the ground that the trustees had failed to protect her interests adequately when the trust was varied.
    - A clause in the trust instrument stated that no trustee should be liable for any loss suffered by in the trust fund save where the loss was caused by the trustee's 'own actual fraud'.
    - Held
      - Clause interpreted → trustees would not be liable for any loss that they had caused to the trust property save where they had acted fraudulently = acting dishonestly.
      - Court specifically recognised that dishonesty did **NOT encompass constructive fraud or negligence**; clause can exclude liability for negligence, even gross negligence → effective
      - Whether a trustee had acted fraudulently or dishonestly will turn on whether or not the trustee is purporting to act in the best interests of the beneficiaries, or is purporting to act selfishly or for the benefit of 3<sup>rd</sup> party.
      - Lord Justice Millett

## 5. Defences

- Purchase in good faith
- D has changed his/her position in reliance on the receipt of the property.

### The Proprietary Base

- Creation of equitable property interests:-
  - Express trust
  - presumed or imputed intention via resulting trust
  - constructive trust
- A principal who has transferred property to a fiduciary will be able to bring an equitable proprietary claim against the fiduciary or a 3<sup>rd</sup> party where that property has been misappropriated.
  - *Re Hallett's Estate* (1880)
    - Client of a solicitor transferred bonds to the solicitor for safe keeping, who then sold the bonds and deposited the money in his personal bank account
    - Held
      - The client had a proprietary claim in Equity to the proceeds of sale.
- Not straightforward to identify an equitable proprietary base
  - The D fiduciary will NOT have legal title to the property, which will remain with the principal, so it would appear that the fiduciary could not be considered to hold the property in trust for the principal.
  - Where the fiduciary has mixed the property, or the proceeds of the property, with his/her own property, the equitable proprietary base will be easily established.
    - Because when the property is mixed, it loses identity at law, so the legal title to the mixture will vest in the fiduciary
  - The preferable explanation of how the principal can establish an equitable proprietary base despite retaining legal title to the property → since fiduciary has a possessory right to the property that is good against the world except the principal → which is held on trust for the principal
  - HOWEVER, no authority explicitly in support of it.
  - BUT explains how victim of theft can bring an equitable proprietary claim in respect of property that has been stolen against the person who is in possession of that property, even though the victim of the theft has retained legal title to the property.
- *Paragon Finance plc v DB Thakerar & Co* [1999], per Lord Justice Millett
  - Q. is not whether an agent is a fiduciary, because all agents owe fiduciary duties, but whether the agent owed fiduciary duties in respect of the property that he/she received so that he/she was trustee of it.

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## Conaglen (2011)

- Cases against backward tracing
  - *Serious Fraud Office v Lexi Holdings Plc* [2009] CoA
    - Para 50: “If all the misappropriated funds in any given case are paid into an account which was and remains overdrawn then the proprietary remedy is lost: for there are no identifiable assets left in existence...to which a constructive trust or an equitable charge could attach”.
  - *Re BA Peters Plc* [2008] CoA, per Lord Neuberger
    - Para 15: “because the money in issue was paid by the company into the current account (which was always in debit), it was effectively used to reduce the company’s liability with the bank and it effectively disappeared so that there was never any fund on which a proprietary claim could operate”.
- “Lionel Smith would dismiss such cases<sup>^</sup> as simply instances where it was not clear what had been acquired with the debts that were discharged, so that it was only evidential difficulties that stopped the tracing process at the overdrawn bank account”.
- “Accepted...that the point about evidence does mean that these cases can’t be treated as a categorical rejection of the possibility of tracing backwards”.
- Question = “not whether the law *could* recognise the possibility of backward tracing, but whether it *should* recognise that possibility”.
- “The acquisition and extinguishment of debt are two very different things...when the debt is paid, the debt is not being acquired from the creditor – it is being destroyed”.
- Policy considerations
  - “The justice of things, of the case is strongest on the side of the trust beneficiaries who seek to trace the trust assets through the payment of debt into the asset that was acquired by incurring the debt”.
  - “One can readily understand the intuitive impulse to say that the trust beneficiaries’ money has been used to “acquire” an asset when it is used to pay off the debt in return for which the asset was first acquired”.
  - “However, that intuitive impulse can provide no more than a very rough guide as to how the law ought to approach the question of attribution”.
  - “When the trustee uses trust funds to pay the debt, the beneficiaries’ money has been used to pay the price of the asset only in the loose sense”.
  - “The alleged “fairness” to the trust beneficiaries of being able to trace backwards is not the complete picture. In particular, it fails to take account of the claims that other creditors of the trustee, especially unsecured creditors, may wish to make over the trustee’s assets”.
    - Policy concern reflected by Mr Justice Briggs in *Re Lehman Brothers International (Europe)* [2009]
      - “There is...good reason for caution before embarking upon an extension of the settled principles of tracing, where the

- Consequently, if she had NOT left the residue of the money to the son in her will, it would still be held on trust for the son by the executor of her estate.
    - On facts
      - NOT possible to establish that the F had intended the housekeeper to be obliged to leave the residue to the son, because there was no evidence that she was intended to keep the money left to her by the testator separate from her own money.
  - *Ottaway* = suspensory trust → can't be express trust made *inter vivos*
  - Suspensory trust because = the TP is still uncertain and might never exist if the legatee dissipates all of it.
  - Better analysed as → constructive trust that attaches to any residue of T's estate at the time of the legatee's death – only at that point that the subject matter of the trust will be certain.
- **Communication to legatee**
    - T must have communicated the trust, its terms, and the identity of the TP and the beneficiaries to the legatee **before T's death**; NOT before execution of the will.
      - *Wallgrave v Tebbs* (1855)
    - *Re Boyes* (1884)
      - T left a legacy to his solicitor, who was told that it was to be held on trust, but who was not told for whom.
      - After T's death, a letter was found amongst T's papers stating that the residuary estate was to be held for the T's mistress.
      - Held
        - NOT sufficient to create a valid secret trust and so the estate was held on resulting trust for T's next of kin.
    - *Re Keen* [1937]
      - Delivery of a sealed letter during T's lifetime will be sufficient communication provided that the legatee knows that the letter contains the terms of the trust and accepts it as such.
  - **Acceptance by legatee**
    - *Moss v Cooper* (1861) – expressly or by acquiescence
      - Unlike half-secret trusts, DOES NOT matter communication and acceptance are satisfied before or after the will is made, so long as before T's death.
    - *Tee v Ferri* (1856) – **Tenancy in Common**
      - Where testamentary gifts are made to 2 or more people as TiCs and secret trusts are communicated to some of them, only those people are bound by the trusts and the others take beneficially.
    - **Joint Tenants**
      - *Re Young* [1951]
        - Where the gift is made 2 or more people as JTs and the secret trusts are communicated only to some of them, they are all bound if the trust was communicated before the will was executed.
      - *Moss v Cooper* (1861)
        - If the communication occurred after execution, it is only those who accepted the trusts who will be bound.
    - Reason for distinction

