

EQUITY READING LISTS 2023-2024

Plan of reading lists

1. Types of trust (1): deliberately created trusts for persons
2. Types of trust (2): non-charitable and charitable purpose trusts
3. Types of trust (3): some difficult trusts
4. Issues in Equity (1)
Holiday reading: The duties and powers of trustees
5. Fiduciaries and fiduciary liabilities
6. Responses to a breach of trust (1): personal liabilities
7. Responses to a breach of trust (2): proprietary claims
8. Issues in Equity (2)

Books

On the reading lists, I will be referring to:

McBride, *Key Ideas in Trusts Law* (Hart Publishing, 2023) ('McBride' on the reading list)

Penner, *The Law of Trusts*, 12th ed (OUP, 2022) ('Penner' on the reading lists).

Davies & Virgo, *Equity and Trusts: Text, Cases and Materials*, 3rd ed (OUP, 2019) ('D&V' on the reading lists).

You will also need an up-to-date copy of *Blackstone's Statutes on Property Law* (last year's version, from Land Law, will be fine).

Cases

The reading lists will refer you to a number of key cases – you will be expected to read them. But having read them, don't stop there. Use them as the basis for deepening your knowledge of the law by going onto Westlaw, looking them up, and then on the menu on the left, click on 'Key cases citing' and 'Journal articles' to see whether there are any recent cases that have anything interesting to say about the key cases to which I have referred you, and to see whether there are any interesting casenotes or articles in legal journals on those cases. Do this in particular for any key cases that were decided in the last five years, as they are the ones most likely to give rise to further litigation/comment in the legal journals/questions in the exam.

Journals

You should start getting into the habit of looking at the specialist law journals on Equity – *The Conveyancer and Property Lawyer* (available on Westlaw), *Trust Law International* (available on Westlaw) and the *Journal of Equity* (available on LexisLibrary – click on 'Journals' and then click on 'International Content' on the far left, and then scroll down the list of Australian publications that should be the first thing to pop up). You will benefit far more from looking through those than ploughing through a textbook.

mcbridesguides

If you go to my website www.mcbridesguides.com you will find a number of essays there under the 'Equity' section. I won't be referring to them in these reading lists as they have been superseded by the material in my *Key Ideas in Trusts Law* book. But they may make useful revision reading at some point.

Aims and objectives

Each week, I will set out the aims and objectives that you should have in mind in going through the reading. Check your progress against these aims and objectives, and if you are failing to achieve these aims and objectives, see if a different approach to your work would help; if not, ask me in the supervision about any areas of the law where you are still not up to speed.

Written work

Every two supervisions, you will be expected to do some written work and hand it in, in the supervision. What written work will be specified on the reading list.

Questions for the supervision

For most of the supervisions, you will be asked to consider a variety of questions, which are intended both to encourage you to deepen your understanding of the law, and to highlight issues that you need to focus on in your reading. We will go through these questions in the supervision.

Past paper questions

At the end of every supervision reading list, you will find some past paper questions relevant to the reading for that supervision. We will be aiming to go through some of these questions in the supervision – so it would be a good idea to have a look at them before the supervision and get some general idea of what the questions are about and how you might try to answer them.

Supervisions

Please note that (other than in 5th week of Lent Term, when I am due to be out of the country):

****I will not be holding any supervisions on Zoom this year****

If you are feeling ill, do not struggle on and attend the supervision and potentially make others sick. Simply get in touch with me (my email address is below) and we can see about slotting you into a later supervision group when you are better. If that isn't possible, you will always be able to get the notes for the supervision from someone else in your year. One person disregarded these rules last year, and as a result I was made very seriously ill – please respect these rules and do not try to circumvent them.

Final warning

Do not underestimate how tough Equity is. It is complicated (though I have tried to help a lot with that, with my essays on www.mcbridesguides.com), and the Equity exams have tended in the past to be very difficult. You really have to give yourself 100% to this subject if you are to achieve a good mark in it.

Nick McBride
njm33@cam.ac.uk

SUPERVISION 1. TYPES OF TRUST (1): DELIBERATELY CREATED
TRUSTS FOR PERSONS

Reading

McBride, ch 1, 31-34, 53-62

Penner, ch 2, 50-64, 79-89, ch 5, 139-40

D&V, ch 2, 491-500, 506, 526-31, 65-111, 144-50

Hunter v Moss [1994] 3 All ER 215

Re Kayford [1975] 1 WLR 279

Re Barlow [1979] 1 WLR 278

McPhail v Doulton [1971] AC 424

Re Baden (No 2) [1973] Ch 9

Re Hay [1981] 3 All ER 786

Harris, 'Trust, power and duty' (1971) 87 LQR 31

Palmer and Rickett, 'The revolution and legacy of the discretionary trust' (2017) 11 Journal of Equity 157

Smith, 'Massively discretionary trusts' (2017) 70 Current Legal Problems 17

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

(1) To understand what a trust is, and how a trust is different from: (i) a contract to use property in a particular way; (ii) a contract of agency; (iii) a bailment; (iv) a charge; (v) the interest of a legatee under a will that has not yet been executed.

(2) To understand the various reasons (good and bad) why someone might want to create a trust.

(3) To understand the basic rules that have to be complied with if a declaration of trust is to be valid. In particular, the rules on: (i) certainty of intention; (ii) certainty of subject matter; (iii) certainty of objects.

(4) To understand what a discretionary trust (sometimes referred to in the cases as a 'trust power') is, and how it is different from a fixed trust. For example: What sort of trust is the following: '£5,000 to be held on trust for whoever, in the opinion of my trustees, gave the best speech at my wedding'?

(5) To understand the difference between a discretionary trust and a power of appointment; and to understand the different kinds of powers of appointment (bare, fiduciary) that are recognised in English law.

(6) To understand the nature and rationale of the rules relating to certainty of objects (and capriciousness and administrative workability) that will apply to determine whether a discretionary trust is valid or not. Also to understand to what extent those rules apply to powers of appointment.

(7) To understand when an 'uncertainty curing' clause (whether applying to a fixed trust, or a discretionary trust) will be valid, and when it will not be.

Questions for the supervision

Are the following provisions in *Bill's* will valid (and how many of these provisions purport to create a trust):

- (a) '100 of my 200 shares in British Gas to *Joanna*.'
- (b) 'Five of the best bottles of wine in my cellar to *Fred*.'
- (c) '£500 to each of my friends.'
- (d) '£100,000 to be distributed equally among everyone who helped me in my career; in case of doubt as to whether someone helped me in my career, my wife is to have the final word.'
- (e) '£10,000 to *Stanley*, in the expectation that he will use the money to ensure that anyone whom I cheated will be recompensed.'
- (f) '£50,000 to be distributed as my trustees see fit among everyone who bullied me at school.'
- (g) '£5,000 to be given each year to the best Scottish sprinter.'
- (h) 'The rest of my estate to my wife, so long as she never marries again or has an intimate relationship with anyone else.'

Past paper questions

2 (a) 'There is no reason why a trust deed should not be able to make the opinion of the trustees or some third party conclusive in resolving any uncertainty as to the identity of beneficiaries of the trust.'

Discuss.

and

(b) Richard has just died. By his will (which contained other gifts as well) he gave £200,000 to his trustees to hold on trust for 'such one or more, as the trustees shall appoint, of Edward, Ruth, Helen and anyone else my old friends Chris and Charlotte think should benefit from my will but has not already done so'. The will also appointed Chris and Charlotte as Richard's trustees.

Advise Chris and Charlotte how they should deal with the £200,000, and give your reasons.

1 Sally is considering making a trust. She wants the trustees to have power to benefit those who have helped her achieve her present success as an author and those who were kind to her when she was struggling at the start of her career. Sally cannot understand the rather convoluted explanation that Lenny, her lawyer, has offered as to why a power in these terms might cause difficulties.

(a) Explain what is problematic about such a power as a matter of equity, and the reasons why such problems exist.

and

(b) Suggest any alternative ways by which Sally may, so far as possible, validly achieve her goal.

1 Jason died recently, leaving a will which provided:

(i) '£250,000 to my wife, Kate, as trustee, to be distributed by her, in her absolute discretion among my best friends and the more famous of my professional associates. In case of doubt as to who are my best friends, Kate shall have the power to settle any difficult questions.'

(ii) 'My trustee shall also be able to distribute up to £100,000 of the aforementioned sum of £250,000 among the people of Scotland, in her absolute and unfettered discretion, trusting that she will take into the people of Glencoe, where I so loved walking.'

The population of Scotland is approximately 5,100,000, and that of the Glencoe region of Scotland approximately 19,250.

2 Daniel has recently died and his home made will provides as follows:

(i) I give enough money to my trustees as is required to ensure that my children and their families can have the good standard of living they deserve.

(ii) I give £200,000 for distribution in my trustees' discretion amongst my ballet-loving friends. Any doubts about who gets what shall be determined by the Director of the Royal Ballet.

(iii) I give the residue of my estate to my niece Rebecca if she shall divorce her feckless husband Henry.

Advise the executors of Daniel's will as to the validity of these provisions.

SUPERVISION 2. TYPES OF TRUST (2): NON-CHARITABLE
AND CHARITABLE PURPOSE TRUSTS

Reading

(1) *The beneficiary principle*

McBride, 27-31, 43-51

Penner, ch 7

D&V, ch 6

Re Endacott [1960] Ch 232

Re Denley [1969] 1 Ch 373

Matthews, 'The new trust: obligations without rights?' in Oakley (ed), *Trends in Contemporary Trust Law* (OUP, 1996)

mcbridesguides → Equity → Equity Casenotes → Re Horley FC

(2) *Charitable trusts*

McBride, 35-43, 79-79

Penner, ch 18

D&V, ch 5

Charities Act 2011, ss 1-5

Re Pinion [1965] Ch 85

Dingle v Turner [1972] AC 601

Re Koepler's Will Trusts [1986] Ch 423

<http://www.charity-commission.gov.uk> (especially their 'Public Benefit Assessments')

mcbridesguides → Equity → Equity Casenotes → ISC v Charity Commission

Hackney, 'The politics of the chancery' (1981) 34 Current Legal Problems 113

Syngé, 'Charitable status: not a negligible matter' (2016) 132 LQR 303

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

(1) To understand why the law is reluctant to recognise that a trust for a non-charitable purpose is valid; and to understand the reason for the exceptions to the rule against non-charitable purpose trusts.

(2) To understand the rules that currently apply to determine whether or not a given purpose trust is charitable in nature.

(3) To understand what will happen to a charity's assets if, at some point in the future, that charity's purposes are held no longer to be for the 'public benefit'.

(4) Given (3), to understand why the Charity Commission's role in determining whether a given charitable organisation (such as a school, or a religious organisation) is operating for the 'public benefit' is so controversial; and to understand what legal recourse a charitable organisation has if the Charity Commission declares that the existence of that organisation is not for the 'public benefit'.

(5) To understand the rationale of the rule that a political purpose will not be charitable in nature; and to understand what effect that rule has on a charitable organisation's ability to pursue political projects.

(6) To understand when, and how, the rules on *cy-prés* will apply to allow money that has been donated for a particular charitable purpose or organisation to be applied for a different purpose or organisation.

(7) To form some views as to whether or not the law in this area needs reforming (on either side of the charitable/non-charitable divide).

Written work

Answer the following question:

1 Daniel has recently died, and his home-made will provided as follows.

(i) I give enough money to my trustees as is required to ensure that my children and their families can have the good standard of living they deserve.

(ii) I give £100,000 to my trustees for the purpose of supporting the campaigns of candidates from the Monster Raving Loony Party standing for election to Parliament.

(iii) I give £200,000 for distribution in my trustees' discretion amongst my ballet-loving friends. Any doubts about who gets what shall be determined by the Director of the Royal Ballet.

(iv) I give £300,000 to my trustees for the benefit of the Camberwick Green Cricket Club (an incorporated association), to commemorate my long membership of the club and to be used to construct a new pavilion and scoreboard for the club. Any surplus monies are to form part of my residuary estate.

(v) I allow my trustees to use money from the residue of my estate as they see fit to advance the cause of homeopathic medicine, and subject to that I give the residue of my estate to my niece Rebecca if she shall divorce her feckless husband Henry.

Advise Daniel's executors as to the validity of these provisions.

Questions for the supervision

1. Are the following provisions in *Candy's* will valid:
 - (a) '£10,000 to be used to pay for an annual fireworks display in memory of me.'
 - (b) '£5,000 to be used to pay off *Ernest's* debts.'
 - (c) '£7,500 to look after my neighbour's tortoise after my neighbour dies.'
 - (d) '£50,000 to my husband, subject to my trustees having a power to use the money to help my children learn some useful lifeskills.'
 - (e) '£100,000 to be distributed as my trustees see fit among anyone other than the members of my family.'

2. Are the following provisions in *Dermot's* will valid:
 - (a) '£50,000 to provide music lessons for poor people.'
 - (b) '£100,000 to endow a prize, to be awarded every ten years to the most outstanding legal academic under 25.'
 - (c) '£6m to purchase and destroy as much pornography as possible.'
 - (d) '£100,000 for the promotion of the Roman Catholic religion.'
 - (e) '£60,000 to subsidise the cost of meals at my old college.'
 - (f) '£4m for the creation of an indoor swimming pool at my old school.'
 - (g) '£800,000 to encourage cat owners to have their pets neutered; we need to reduce the number of cats – there are too few birds as it is.'

(h) '£3m to create a swimming pool, jacuzzi and massage centre for sex workers; they have a hard life and need some fun.'

(i) '£8m to tell unemployed people in other countries how miserable life in Britain is so that they won't try to come here illegally.'

Past paper questions

NOTE that the law on unincorporated associations is no longer on the syllabus and so any questions in the past papers that seem to require knowledge of it should either be disregarded or handled with caution.

3 'The beneficiary principle does not require that every trust should at all times have *cestuis que trust* who are vested with beneficial ownership of the trust property. All that is required is that there must be a person or persons with *locus standi* to compel the trustees to carry out their duties.'
Do you agree?

7 **Either** (a) 'Once an otherwise English trust is valid as a non-charitable purpose trust because, say, Jersey law has been made the governing law and an enforcer has been appointed, one wonders why such a trust should not be allowed to develop as a valid English trust if limited to a valid perpetuity period and the purposes are certain and workable: the old cases rejecting non-charitable purpose trusts can be explained as really void for perpetuity or for unworkability.' (HAYTON, 2003)
Do you agree?

2 Answer **both** (a) and (b):

(a) 'An express trust may exist even though there is no corresponding equitable interest held individually or collectively for a group of beneficiaries ... [and] it is possible to have [an express] trust without being able to locate an equitable interest in the property held on trust.' (PARKINSON) Discuss.
and

(b) Consider the effects of the following provisions contained in the will of Akworth, recently deceased.

(i) '50 of the most valuable books in my library to the Master, Fellows and Scholars of Belkin College Cambridge for the furtherance of research within the College';

(ii) 'sufficient from my shareholding in the Clarke company to ensure that my nephew, Donners, will have a comfortable life';

(iii) 'pictures to be selected by my trustees from my collection, one to be given to each of my friends';

(iv) 'my residue to my trustees as to half for distribution amongst such of my cricket-loving cronies as they shall select, for the purpose of enabling them to continue to enjoy visits to Lord's Cricket Ground in memory of the happy times we have all spent together there and as to half for the purpose of improving the catering facilities at that Cricket Ground.'

2 Answer **both** (a) **and** (b):

(a) 'There is, usually, no good reason for regarding a non-charitable purpose trust as being void and there is good reason, ordinarily, for regarding it as valid.' Discuss.
and

(b) Advise the executors and trustees of Easyman's will as to the validity of the following bequests which were contained in his will.

(i) '£100,000 to my trustees for the purpose of ensuring that my two cats continue to live in luxury and what is left at the death of the survivor of them for the purpose of providing good seats at the opera for such of my opera loving friends as my trustees shall select';

(ii) '£100,000 to the Fanfaron golf club for the purpose of improving its catering facilities.'

1 Consider the effect of each of the following dispositions contained in the will of Nelson, who died recently:

(i) '£10,000 to Julia as trustee, the money to be applied in building a bus shelter by the village green as a lasting memorial to my father Walter, who hated waiting for the bus in the rain';

(ii) '£10,000 to the Felpersham Antiquarian Society (a non-charitable unincorporated association), to be used in the first instance for the refurbishment of their meeting-rooms; any sums not needed for the refurbishment may be put to the Society's purposes generally';

(iii) '£10,000 to Elizabeth as trustee, for the purpose of paying for the upbringing of her children Freddy and Lily';

(iv) 'my residual estate to Shula as trustee, to be distributed between the regular customers at Nelson's Wine Bar, so that each of the regulars shall receive at least £500, or a larger sum at the trustee's discretion. Shula shall also have power to make an individual gift of £1,000 from the residual estate to any person I have left out of my will whom she feels ought to receive something from me'.

How would your answer be affected, if at all, if the Felpersham Antiquarian Society had been wound up last week by a vote of its members?

3 Answer both (a) and (b):

(a) 'Whether a group of persons is a section of the public is a question of fact and degree.' Discuss.

and

(b) Whether the following trusts are charitable

(i) 'For the display of paintings by chimpanzees;'

(ii) 'For the encouragement of plain speaking by politicians and the encouragement of the use of private monies for the improvement of public services the National Health Service in particular;'

(iii) 'For the provision of a chapel in the maximum security wing of Dartmoor Prison;'

(iv) 'For the relief of stress suffered by practising solicitors.'

Or (b) Consider the nature and validity of the following trusts set up under the will of a recently deceased testator.

(i) 'for the promotion of the welfare of parrots generally and for the extension of their vocabulary and improvement of their enunciation in particular';

(ii) 'for the provision of free donkey rides on Brighton beach for the children of single mothers';

(iii) 'for the provision of a sports and recreation centre in Beigravia';

(iv) 'for the provision of a snooker table to provide relaxation for the members of a strictly cloistered order of nuns';

(v) 'to educate the public about the disadvantages for the United Kingdom of its adopting the Euro as its currency and for the publication of arguments for and against the holding of a referendum on the matter.'

8 (a) Discuss the validity and effect of the following gifts on trust:

(i) 'to restore plant biodiversity on a private country estate';

(ii) 'to encourage young people in Cambridge to play the card game of bridge';

(iii) 'to fund research studentships in peace studies at a university'.

and

(b) 'The first aspect is that the nature of the purpose itself must be such as to be a benefit to the community: this is public benefit in the first sense ... The second aspect is that those who may benefit from the carrying out of the purpose must be sufficiently numerous, and identified in such manner as, to constitute what is described in the authorities as 'a section of the public': this is public benefit in the second sense.' (UPPER TRIBUNAL, TAX AND CHANCERY CHAMBER, 2011)

Does this statement assist our understanding of the case law on the public benefit in charity law?

3 Marcus's will provided as follows:

'(i) £250,000 to my trustees to provide daily religious services for the prisoners in maximum security at HM Prison at Full Sutton for the next 20 years.'

'(ii) £200,000 to my trustees for the education of children living in Cornville.'

'(iii) £150,000 to my trustees for the purpose of promoting a better understanding in English secondary schools of the history of the Conservative Party.'

'(iv) £200,000 to the Metropolis Housing Trust for the purpose of furthering its work.'

Cornville is a town of some 150,000 inhabitants. Almost all of its adult population works for Cornstar, a popcorn factory. Marcus had no formal connection with either, other than buying Cornstar popcorn.

The Metropolis Housing Trust had provided affordable housing for the poor. Before Marcus's death, but unknown to him, the Metropolis Housing Trust had been dissolved. Its remaining funds had been added to the trust fund of the comparable Urbane Housing Trust, which still exists.

Advise the residuary legatee of Marcus's estate as to the validity of the gifts.

9 (a) 'The Charity Commission's Public Benefit Guidance goes beyond promoting awareness and understanding of the public benefit requirement in charity law. It actually modifies the existing case and statute law.'

Do you agree?

and

(b) Are the following purposes charitable?

(i) To provide art classes for young people in economically deprived areas of London;

(ii) To preserve the rural hinterland of Cambridge from urban development;

(iii) To provide educational scholarships for the children of Church of England ministers.

4 'Recent statutory reforms of English charity law supply an utterly modern basis for altruism and the law of giving. No more will charitable status depend on the idiosyncratic opinions of judges, or on obscure and contradictory principles that are unjustifiable in today's society.'

Do you agree?

SUPERVISION 3. TYPES OF TRUST (3): SOME DIFFICULT TRUSTS

(1) Preliminary: when trusts or dispositions under a trust fail (or do they?) for lack of formality

McBride, 62-65, 71-72

Penner, 199-217

D&V, 118-24, 508-25

Law of Property Act, s 53

(2) Resulting trusts

McBride, 53-54, 76-78

Penner, ch 10, 415-17

D&V, 361-412

Re Andrew [1905] 2 Ch 48

Re Osoba [1979] 1 WLR 247

Swadling, 'Explaining resulting trusts' (2008) 124 LQR 78

(3) The Quistclose trust

McBride, 47-48, 49-50

Penner, 271-82

D&V, 412-28

Barclays Bank v Quistclose Investments [1970] AC 567

Twinsectra Ltd v Yardley [2002] 2 WLR 802, paras [68]-[103]

Swadling, 'Orthodoxy' in Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2014)

(4) The trusts in *Re Rose and Pennington v Waine*

McBride, 68-71

Penner, 143-47

D&V, 150-60

Re Rose [1952] Ch 499

Pennington v Waine [2002] 4 All ER 215

Luxton, 'In search of perfection: the *Re Rose* rule rationale' [2012] Conv 70

Evans, 'Unconscionability: *Pennington* resurrected but confusion remains: *Khan v Mahmood*' [2022] Conv 238

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

- (1) To understand what a resulting trust is, and the basic situations that will normally give rise to a resulting trust.
- (2) To understand why it is probably a mistake to refer to resulting trusts that arise out of the failure of a trust as 'automatic' (and why the decision of the House of Lords in *Vandervell v IRC* led to them being so-called in *Re Vandervell (No 2)*).
- (3) To understand the various theories as to why resulting trusts arise in the situations where they arise, and not in any others.
- (4) To understand why the rule against non-charitable purpose trusts creates difficulties in the *Quistclose* situation where A lends (or gives) money to B to be used only for a particular purpose; and to understand what the legal position will be in that kind of situation.

(5) To form a view as to why the trusts in *Re Rose* and *Pennington v Waine* were recognised (and that can include the view that they were recognised for bad reasons), and to understand when those trusts are likely to be recognised in future.

Questions for the supervision

What is the position in the following situations:

(a) Relatives of six university friends gave them £2,000 to fund a cycling trip in France. The night before the trip, all six fell ill with food poisoning and could not go.

(b) F told G that he was going to give him £100,000. F asked G for his bank details so he could make the payment electronically. F made the payment and received confirmation that the transfer would go through in a couple of hours' time. However, a suspicious bank officer held up the transfer and rang F to confirm that he was authorising the transfer. By then, the enormity of the sum that F thought he had paid out of his account made him have second thoughts, and he told the officer he did not want to make the transfer.

Past paper questions

(a) 'There is no single or convincing explanation as to why a resulting trust arises or as to when it does.' Discuss.

3 'Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.' (LORD BROWNE-WILKINSON in *Westdeutsche Landesbank v. Islington London Borough Council* (1996))

Discuss.

4 (a) What theories have been offered to explain when and why a resulting trust arises? Which do you find most convincing, and why?

Or (b) 'As Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth. I would reject all the alternative analyses ... and hold the *Quistclose* trust to be an entirely orthodox example of the kind of default trust known as a resulting trust.' (LORD MILLETT in *Twinsectra Ltd. v. Yardley*, 2002)

Evaluate Lord Millett's analysis of *Quistclose* trusts.

6 Tim and Tricia were the joint registered proprietors of Stonyfield farm, which they held on trust absolutely for Bernard. For many years, Bernard had been wondering whether he should let his son, Stephen, take over the farm or whether it should instead pass to his daughter, Davina.

Bernard finally made up his mind. He called in Tim, Tricia, Stephen and Davina, and solemnly announced that he was renouncing all his interest in the farm and that it should pass with immediate effect to Stephen. Stephen soon afterwards gave notice to quit the rented farm property where he worked, and prepared to move to Stonyfield. Bernard gave unsigned written instructions to Tim and Tricia that they should transfer Stonyfield to Stephen. The trustees executed the Land Registry transfer form naming Stephen as transferee, and lodged it with Bernard to hold until the agreed completion date. Stephen expected that Bernard would have last-minute doubts so he secretly stole the transfer form from Bernard's house one night and lodged it with the Land Registry. Unaware of this, Bernard telephoned Tim and Tricia some days later to say that he had indeed changed his mind about the transfer, and that he instead wanted them to hold Stonyfield on trust for Davina. He gave them signed written instructions to his effect.

Advise Bernard, on the assumption that the transfer to Stephen is still unregistered.

2 Alan executed a transfer of a registered freehold estate in land to Belinda and Charles, and simultaneously declared that they were to hold the land as trustees for David absolutely. The transfer to Belinda and Charles was duly registered but Alan's declaration of trust was never reduced to writing.

Belinda and Charles later took the view that Alan's oral declaration of trust was probably ineffective so they told Alan that they had no intention of carrying out the trust. This suited Alan since he had changed his mind in the meanwhile and now preferred to see the land go to Edward instead. He orally directed Belinda and Charles to transfer the registered estate to Edward as beneficial proprietor. Belinda and Charles duly executed the memorandum of transfer and passed it to their own solicitor to hold until the date arranged for completion with Edward. Alan died suddenly before completion.

Belinda and Charles are unsure whether they should still proceed with the transaction.

Advise them.

2 **Either** (a) 'To say that "Equity will not assist a volunteer" in the constitution of a trust is highly misleading. Equity often assists a volunteer in the constitution of a trust. Indeed, it should do so more widely than it does now.'

Discuss.

SUPERVISION 4. ISSUES IN EQUITY (1)

(1) History and maxims of equity

Penner, ch 1

D&V, ch 1

Smith, 'Equity is not a single thing' in Klimchuk et al (eds), *Philosophical Foundations of the Law of Equity* (OUP, 2020)

McFarlane and Stevens, 'What's special about equity? Rights about rights' in Klimchuk et al (eds), *Philosophical Foundations of the Law of Equity* (OUP, 2020)

Kiefel, 'Judicial advice to trustees: its origins, purpose and nature' (2019) 42 Melbourne University LR 993

(2) The nature of a trust

McBride, 1-7

Penner, 27-33

Parkinson, 'Reconceptualising the express trust' (2002) 61 CLJ 657

Nolan, 'Equitable property' (2006) 122 LQR 232

McFarlane and Stevens, 'The nature of equitable property' (2010) 4 Journal of Equity 1

Penner, 'The (true) nature of a beneficiary's equitable proprietary interest under a trust' (2014) 27 Canadian Journal of Law & Jurisprudence 473

Langbein, 'The contractarian basis of the law of trusts' (1995) 105 Yale LJ 625

(3) Limits on the powers to create a trust, and under a trust

Penner, 69-77, 98-102

Matthews, 'The comparative importance of the rule in *Saunders v Vautier*' (2006) 122 LQR 266

Re Smith [1928] Ch 125

Re Brockbank [1948] Ch 206

Langbein, 'Burn the Rembrandt? Trust law's limits on the settlor's powers to direct investment' (2010) 90 Boston University LR 375

Fee, 'Trust-owned companies and the irreducible core of the trust' (2020) 26 Trusts & Trustees 826

Armitage v Nurse [1998] Ch 241, 253-4

Note: there is a lot to digest in this reading, and digesting anything takes time. So I would suggest that in the two weeks between supervisions 3 and 4 that you read some of the above materials every day rather than trying to squeeze it all into three or four days. And don't take notes – just do the reading, and get a sense of what the reading is trying to say.

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

(1) To understand more about the history of equity, and how that might inform the current state of the law of trusts.

(2) To understand the current state of debates over the nature of a beneficiary's rights under a trust (and where they come from), and the relevance of those debates to cases such as *Shell UK v Total UK* [2011] QB 86 and *Royal Bank of Scotland v JP SPC 4* [2022] 3 WLR 261.

(3) To understand what the rule in *Saunders v Vautier* says, and why the rule exists.

(4) To understand what it means for a trust to have an 'irreducible core', what that core is, and why certain rights, powers and duties fall within the core and others do not.

Written work

Either

'An individual's clearly expressed intention to devote certain assets to achieving particular aims or benefiting particular groups of people is often thwarted because the relevant laws are so restrictive.'

Describe and critically analyse the relevant legal restrictions and their policy objectives and practical effects in order to determine whether this statement is justified.

Or

'There is no "true" form of the *Quistclose* trust. The general law merely provides a default form of trust consistent with what the parties would have intended if they had considered whether to create a trust behind the debtor-creditor relationship. The parties are free to modify that default form to fit the needs of their transaction.'

Discuss.

Or

'Trusts are about conscience, not property.'

Discuss this assertion in the context of the various formality rules and remedies which are associated with (a) the transfer of assets by settlors to trustees, **and** (b) the transfer of interests from beneficiaries under a trust to their intended transferees.

Or

To what extent is the contractarian analysis of trusts undermined by the ability of a settlor to declare a trust over his or her own property?

Questions for the supervision

1. Is the following declaration of trust valid: 'I hold all my assets on trust for my children, subject to a power to use the assets for whatever purpose I like.'
2. What is the position in the following situations:
 - (a) A settles £100,000 on B to be held on trust for C; the instrument creating the trust specifically permits B to bet all and any trust monies on any horse he 'sees fit to bet on', with any winnings to be held on trust for C. C objects to B's betting any trust funds on horses. Would it make a difference if B was well-known for having a great knowledge of racing horses and had made a fortune betting on horses himself?

(b) A settles £100,000 on B to be held on trust for C and D. B wants to bet the entire £100,000 on *Constant Nag* in the 4.30 pm race at Kempton Park. C agrees with this plan, but D does not.

(c) A settles £100,000 on B to be held on trust for C. C wants B to bet the entire £100,000 on *Constant Nag* in the 4.30 pm race at Kempton Park. B does not want to do this.

HOLIDAY READING: THE DUTIES AND POWERS OF TRUSTEES

I don't recommend that you do essays or problem questions that are specifically on this issue (some examples are below), as they tend to be the most un-doable on the exam paper – but you should have an outline understanding of this topic as for some of the reading in Lent Term you will need to be able to recognise a breach of trust when you see it.

McBride, 81-85

Penner, 176-90, 89-95

D&V, ch 12

9 (a) Rhonda and William are the trustees of a £5m trust fund which they hold on trust to further the education of the children of employees of Huge College, Oxford. In a recent poll, 85% of the employees of Huge College indicated a strongly held belief that the arms industry is inherently evil. Those employees have signed a petition to Rhonda and William, asking that they ensure the trust fund does not contain any investment in the arms industry.

Rhonda and William have sought your advice.

and

(b) 'The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own.' (LORD WRENBURY in *O'Rourke v. Darbishire*, 1920)

Discuss, in the light of modern authority, the accuracy of Lord Wrenbury's view, with particular reference to the beneficiary's right to obtain information about the trustees' reasons for action.

8 (a) Roger transferred property to Mary on trust for such of Roger's children, Anna, Brendan and Chris, as Mary, in her absolute discretion, should think fit.

Roger wrote separately to Mary indicating that he thought Brendan deserved nothing and that the assets should be divided equally between Anna and Chris. He asked her to keep this confidential so as not to make him appear a bad father.

Mary has recently appointed the property to Brendan as to 75% and to Anna as to 25%. Mary has refused to give any reasons for her decision.

Anna and Chris are unhappy at the decision, as they consider it does not reflect their good relationship with their father, nor Brendan's poor one with him. They consider, however, that the decision is unsurprising given that Brendan is living with Mary's daughter.

Advise Anna and Chris whether Mary's decision can be challenged.

Or (b) 'Modern trustees have so many administrative powers that it is almost impossible for beneficiaries to exercise any effective control of their trustees' administration of the trust fund.'

Discuss.

3 'The possibility of rationalising trusts as specialised types of contract is obstructed by doctrines that maintain that many trust documents and decisions of trustees must remain confidential. Those doctrines reflect a time when most trustees were faithful family friends; they are not relevant now that most trustees are commercial actors.'

To what extent do you agree with this statement?

6 'Modern trustees typically have broad administrative powers, often backed by equally broad exclusion clauses. These powers, including powers of investment and delegation, have been further enlarged by the Trustee Act 2000. This expansive approach, taken together with the generous attitude of the courts in determining whether a breach has been committed or an error should be undone, has the result that trustees are held liable to their beneficiaries much less often than is desirable. The situation is further compounded by unnecessary restrictions on beneficiaries' access to information concerning the trust administration. None of this is justified.'

Discuss.

3 Sarah wanted to put her personal assets beyond the reach of her creditors. In 2000, she settled £200,000 on her old friend, Teresa, 'to hold on trust subject to a power to appoint capital or income to such of my children as my trustee may in her absolute discretion select'. Sarah had three children.

Sarah and Teresa agreed that the beneficiaries should know nothing about the trust. 'They'll only turn into wastrels if they hear about it,' Sarah told Teresa. The trust instrument purported to exclude the beneficiaries' right to see the trust instrument and accounts. It also purported to exempt the trustee from liability for any loss resulting from any breach of trust 'howsoever caused', and to bar the beneficiaries from asserting 'any claim to any property or its proceeds which may be applied by the trustee in breach of trust'. In the following years, Teresa never did anything in the administration of the trust without first consulting Sarah. Nor did she ever exercise the power of appointment in favour of the children.

Last year, Sarah asked Teresa to pay money from the trust fund to provide the start-up capital for her new business venture, Growth Enterprises Ltd. Teresa consulted the trust solicitor, Ron, about Sarah's request. Ron told Teresa that she should 'wise up to whose money it really is' under the trust. 'Anyway,' he said, 'there's an exemption clause so you needn't worry'. Teresa paid £100,000 from the trust to Growth Enterprises Ltd. The business was highly successful and is now worth £500,000.

Sarah died recently leaving enormous personal debts. The assets of the 2000 settlement are worth £1 million.

Advise Sarah's executors and the children about their claims (if any) arising out of the settlement.

5 In December 2018 Sam inherited £100,000 under the will of his late grandmother, Wendy. While Sam was considering what to do with the money, his friend Ivy suggested that he might like to lend it to her on a short-term basis. Ivy's business was having cash-flow problems and she needed money to repay one of her creditors, Parker, who had threatened legal action over an unpaid debt.

Sam agreed to lend £100,000 to Ivy for 90 days. Sam and Ivy executed an agreement on 10 January 2019 that included the following terms:

(i) the money is to be placed in a separate bank account at Cambridge Bank;

(ii) once received, the money is to be used forthwith to repay Ivy's existing creditors;

(iii) the loan is repayable 90 days from the date of the advance, with interest payable at ten per cent above the Cambridge Bank base rate.

Sam also receives quarterly distributions made to him under a family trust settled by Wendy some years ago. The trust assets include bank deposits and shares, with the trustees being Sam's mother, Janis, and an accountant, Teresa. The beneficiaries of the trust are Sam and his brothers Matthew and Norman. The three brothers are entitled in equal shares to the capital of the fund. The trustees have the power to distribute the income of the fund among the three brothers according to the trustees' discretion. The trustees also have the power to accumulate the income and add it to the capital.

Sam is disappointed at the amount of money he has been receiving from Janis and Teresa. He is upset because Matthew and Norman have been receiving more money than him in the quarterly distributions, and he is also upset because the total amount of money being distributed to the three brothers is rather small. Sam has asked the trustees for information on both of these points, but Janis and Teresa have refused to provide any. Sam suspects that the trust fund has been performing poorly because Janis refuses on principle to invest in anything other than bank deposits and UK-listed oil and gas shares. Sam suspects that Teresa just goes along with whatever decisions Janis makes.

It is now more than three months since Sam lent the money to Ivy. The loan money remains in a separate account in Ivy's name at Cambridge Bank, accruing interest at the Cambridge Bank base rate. Neither Sam nor Parker has been paid.

Advise Sam and advise Parker.

4 The Adventurous Investment Trust held £800,000 in shares in Innovations Ltd, £100,000 in gold bullion and £100,000 in cash as of January 2017, when Anna and Benjamin were appointed as the trustees. As Anna and Benjamin were unsure how best to administer the trust, they sought advice from their solicitor, Soliloquy, who in June 2017 advised that Anna and Benjamin:

(i) may invest the trust funds in risky assets and indeed any assets whatsoever, including shares in companies which have paid no dividends in recent years;

(ii) should use the dividend recently received from Innovations Ltd to buy more shares in that company, because of its 'strong performance potential';

(iii) should give custody of the trust's bullion to a banker, Waggery;

(iv) should vest the trust's cash and shares in him, Soliloquy, despite a term of the trust that 'the trustees shall not put cash sums out of their personal control'; and

(v) should delegate authority to make all future decisions about the trust to Waggery, since Anna and Benjamin both travel abroad often.

When Anna doubted these suggestions, Benjamin reassured her that 'Soliloquy is obviously a shrewd and knowledgeable man'. Benjamin knew that Waggery is Soliloquy's daughter; Anna did not.

The trustees accordingly invested £50,000 in shares in Reproductions Ltd, which had never paid a dividend. Carelessly forgetting Soliloquy's advice regarding Innovations Ltd, the trustees distributed the total dividend to the trust's investors. They vested the cash and shares in Soliloquy, then gave custody of the bullion to Waggery under a written 'custodianship and management agreement', and then went abroad travelling.

Soliloquy has profited by using trust moneys to make short-term trades in precious metals, replacing the trust money after each trade. To give the directors of Reproductions Ltd the impression that she could find wealthy new investors, Waggery invested a further £50,000 of trust moneys in Reproductions Ltd. Shares in Innovations Ltd have doubled in value since January 2018.

Advise the beneficiaries of the Adventurous Investment Trust.

SUPERVISION 5. FIDUCIARIES AND FIDUCIARY LIABILITIES

Reading**(1) Fiduciaries and gain-based liabilities**

McBride, 85-89

Penner, 349-79

D&V, 668-712, 720-21

Boardman v Phipps [1967] 2 AC 46

Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134

Bhullar v Bhullar [2003] EWCA Civ 424

Murad v Al-Saraj [2005] EWCA Civ 959

Conaglen, 'The nature and function of fiduciary loyalty' (2005) 121 LQR 452

Samet, 'Guarding the fiduciary's conscience: a justification of a stringent profit-stripping rule' (2008) 28 OJLS 763

Smith, 'Fiduciary relationships: ensuring the loyal exercise of judgment on behalf of another' (2014) 130 LQR 608

Langbein, 'The secret life of the trust: the trust as an instrument of commerce' (1997) 107 Yale LJ 165

(2) Is there a proprietary claim over the gain made by a fiduciary?

McBride, 74-75

Penner, 379-84

D&V, 712-18

Attorney General of Hong Kong v Reid [1994] 1 AC 109

FHR European Ventures LLP v Cedar Capital Partners LLC [2015] AC 250 (noted, Gummow, (2015) 131 LQR 21; Conaglen, (2014) 73 CLJ 490)

Millett, 'Bribes and secret commissions' [1993] *Restitution Law Review* 7

Swadling, 'Constructive trusts and breach of fiduciary duty' (2012) 18 *Trusts and Trustees* 985

(3) Liabilities to pay equitable compensation arising out of a breach of fiduciary duty

D&V, 718-19

Swindle v Harrison [1997] 4 All ER 705

Bristol & West Building Society v Mothew [1998] Ch 1

Conaglen, 'Equitable compensation for breach of fiduciary dealing rules' (2003) 119 LQR 246

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

(1) To understand what a fiduciary is, and why certain legal actors are classed as fiduciaries and why others are not (for example, why don't we say that a building contractor is a fiduciary, with the result that if making a gain for himself might tempt him to breach his contract with A to put up a building with reasonable skill and care, he will not be allowed to keep that gain for himself, but will have to hand it over to A).

(2) To understand the nature and rationale of the 'no conflict' and 'no profit' rules that fiduciaries are subject to; and to think about whether these rules are different in any way, or whether there are situations where these rules might work in different ways (one to say that a fiduciary can keep a gain, because making that gain did not involve a conflict with his duty to his principal; and the other to say that the fiduciary has to give up the gain, because he made that gain by reason of his position as a fiduciary).

(3) To understand the remedies that are available when a fiduciary breaches a fiduciary duty. In particular, you should aim to understand: (i) when (and why!) a fiduciary will hold a gain that he has made in breach of his fiduciary duty to his principal on constructive trust for that principal; and (ii) whether a contract entered into by a fiduciary in breach of his fiduciary duty will be void or voidable; and (iii) whether a fiduciary can ever be held liable to compensate his principal for a loss that the principal has suffered as a result of the fiduciary's breach of fiduciary duty.

Questions for the supervision

What is the position in the following situations?

(a) *Developer* employed *Agent* to purchase for it blocks of flats which it could renovate and sell on for a profit. *Slum* persuaded *Agent* to purchase *Slum*'s block of flats on behalf of *Developer* by paying *Agent* a bribe of £100,000. *Agent* paid the going market rate (£2m) for *Slum*'s block of flats, given their condition. Unknown to everyone at the time the block of flats was bought – including the surveyor whom *Agent* employed to survey the flats – the flats are riddled with asbestos and will need to be torn down. The value of the land without the block of flats on it is only £1m.

(b) *Tycoon* fell under the spell of an influential *Guru* and invariably followed *Guru*'s advice on everything. Knowing this, *Innovator* paid *Guru* £50,000 to advise *Tycoon* to invest in *Innovator*'s new business. *Guru* – to whom money means nothing – paid the money to his local *Church* and never mentioned *Innovator*'s business to *Tycoon*.

(c) The *Trustee* of a trust fund met the trust fund's *Solicitor* in *Solicitor*'s offices. While *Solicitor* went out to get some coffee for him and *Trustee*, *Trustee* happened to see some legal papers in the office indicating that a takeover bid for *Doldrums* was about to be launched. *Trustee* bought some shares in *Doldrums* that doubled in value when the takeover bid was announced.

Past paper questions

2 'The underlying purpose of the [fiduciary] duty of loyalty, ..., is to advance the best interest of the beneficiaries. ... [A] transaction prudently undertaken to advance the best interest of the beneficiaries best serves the purpose of the duty of loyalty, even if the trustee also does or might derive some benefit. A transaction in which there has been a conflict or overlap of interest should be sustained if the trustee can prove that the transaction was prudently undertaken in the best interest of the beneficiaries.' (LANGBEIN, 2005)

Do you agree? Give your reasons.

5 'It does not appear to me that this rule [prohibiting conflicts of interest and duty is ...] founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he is bound to protect.' (LORD HERSCHELL, 1896)

Is there a general explanation for the rules of fiduciary liability?

7 'The requirement of loyalty is not imposed to control mere power over another person; it is imposed to control decision-making power held for, or on behalf of, another person...The use of brute power, as distinct from decision-making authority held on behalf of another person, is not regulated by fiduciary obligations.' (SMITH)

Discuss.

3 Roberta and Suzanna are wealthy heiresses. Trevor is a property developer with considerable experience in the London market over the last 20 years. Trevor convinced Roberta and Suzanna to enter into a joint venture arrangement with him, to purchase a run-down warehouse block, known as 'Block A', in East London with a view to developing it into apartments. The arrangement between the three parties was such that Roberta and Suzanna provided funding to purchase Block A and for its re-development, while the management of the project was left entirely in Trevor's hands given his expertise in that area. Trevor applied for planning consent for the re-development of Block A. However, the Local Council refused to grant planning consent for the re-development unless a neighbouring warehouse, known as 'Block B', was also purchased and developed into a leisure centre, to encourage people to live in the apartments. Trevor did not reveal this to Roberta and Suzanna and instead proceeded to purchase Block B for himself. The purchase and re-development of Block A have cost Roberta and Suzanna £1.5m. In contrast, Trevor managed to buy and re-develop Block B at the relatively low cost of only £500,000. Contrary to expectations, the local population has flocked to the leisure centre, with the consequence that Trevor was able to sell it recently for £2m. He has used his profits to repay a mortgage loan over another re-development project in West London. Also contrary to expectations, the apartments in Block A have not been popular.

Roberta and Suzanna have sought your advice, telling you that they believe Block A would only sell for £1m on the open market today.

4 Geoffrey purchased a warehouse for £1,000,000. The purchase was funded partly with a £750,000 loan from the Wayward Bank, secured by a first mortgage over the warehouse. Geoffrey suggested to the Bank that his solicitor, Harry, should act for both parties in the mortgage transaction, and the Bank agreed.

In addition to the Wayward Bank loan, Geoffrey needed further finance for the warehouse purchase. He contacted Harry, who approached a financier friend of his, Ian. Ian provided Geoffrey with a further loan secured by a mortgage over Geoffrey's flat. Harry received a finder's fee of £2,500 from Ian for arranging the second loan, though he, Harry, did not mention this to Geoffrey. Geoffrey thanked Harry for arranging the loan but added that even without it, he could have proceeded with the purchase by borrowing the necessary money from his father.

When Harry completed Geoffrey's application form for the loan from the Wayward Bank, he did not reveal the existence of the loan from Ian, despite a question on the form asking about secondary borrowing. Harry did this because he thought the Bank would be more likely to make the loan to Geoffrey if it did not know about the loan from Ian. Indeed, the Bank's policy was to lend no more than 50% of the value of a property where the mortgagor was borrowing from secondary sources to fund the purchase.

Geoffrey has defaulted on both the loans due to Wayward Bank and Ian. The Wayward Bank has exercised its power of sale and sold the warehouse for £650,000. Ian has also sold Geoffrey's flat under his power of sale, covering the debt due to Ian. Geoffrey is now bankrupt and has nowhere to live.

Advise Geoffrey and the Wayward Bank.

3 Servalan and Travis are trustees of the Blake family settlement. The beneficiaries are Avon, Blake, their respective spouses and children. Avon and Blake are both married, and each has three children who are all minors. Servalan and Travis employ Federation Financial Futures as the settlement's investment advisors, and the investment policy document states that its main goal is long term capital growth.

Three years ago, Servalan and Travis received a letter from Federation Financial Futures which stated that shares in a new start up company, Liberator Ltd, were the investment opportunity of a lifetime for sophisticated investors, with huge prospects for capital growth even though not currently paying dividends. Servalan and Travis invested £100,000 of the settlement's money in Liberator shares. Travis wanted to invest £200,000, which the settlement could just afford, but Servalan persuaded Travis that this would mean too high a proportion of the settlement's monies would be invested in one stock. Instead, Servalan bought £80,000 of Liberator shares for herself, and Travis bought another £50,000 of them for himself.

Two years later, Orac Inc made an offer to buy Liberator. The offer price was four times the price of the shares at the time of the three purchases made by Servalan and Travis. Orac required vendors who were beneficial owners of their shares to give onerous guarantees that Liberator's most recent annual report and accounts were entirely accurate, though it was willing to accept significantly less onerous guarantees from vendors who were trustees. So Servalan and Travis sold their shareholdings to the settlement for slightly less than the offer price, and then the settlement sold them on to Orac.

Advise Avon and Blake.

SUPERVISION 6. RESPONSES TO A BREACH OF TRUST (1):
PERSONAL LIABILITIES

Reading

(1) Liability of trustee

McBride, 89-97

Penner, 312-35

D&V, chs 16-17

Target Holdings Ltd v Redferns (a firm) [1996] AC 421

AIB Group (UK) plc v Mark Redler & Co Solicitors [2015] AC 1503 (noted, Turner, (2015) 74 CLJ 188; Ho, (2015) 131 LQR 213; see also (at much greater length) Davies, (2015) 78 MLR 681, and Watts, [2016] LMCLQ 118)

Various Claimants v Giambrone [2017] EWCA Civ 1193 (noted, mcbridesguides → Equity → Equity Casenotes → Various Claimants v Giambrone; Davies, (2018) 134 LQR 165)

Auden McKenzie v Patel [2019] EWCA Civ 2291, [31]-[49], [60] (noted, Worthington, (2020) 79 CLJ 220)

Millett, 'Equity's place in the law of commerce' (1998) 114 LQR 214, 223-227

Chambers, 'Liability' in Birks and Pretto (eds), *Breach of Trust* (2002)

Georgiou, 'Taking trusts seriously' (2021) 137 LQR 305

Elliott, 'Remoteness criteria in equity' (2002) 65 MLR 588

Trustee Act 1925, s 61

(2) Liability of third parties to the trust

McBride, 97-103

Penner, ch 15

Notes on *Williams v Central Bank of Nigeria* [2014] AC 1189 by Lee, (2015) 131 LQR 39, and Watterson, (2014) 73 CLJ 253

(a) For assisting a trustee to commit breach of trust (note that there is also liability for inducing a trustee to commit a breach of trust)

D&V, 929-52

Novoship (UK) Ltd v Mikhaylyuk [2015] QB 499 (completely demented; noted, Devonshire, (2015) 74 CLJ 222; Gummow, (2015) 74 CLJ 405; Davies, (2015) 131 LQR 173)

Ridge, 'Justifying the remedies for dishonest assistance' (2008) 124 LQR 445

(b) For receiving trust assets disposed of in breach of trust

Penner, 419-27

D&V, 952-72

Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347, [92]-[128]

Byers v Saudi National Bank [2022] 4 WLR 22 (appeal now heard in the UKSC:

<https://www.supremecourt.uk/cases/uksc-2022-0048.html>)

Salmons, 'Claims against third-party recipients of trust property' (2017) 76 CLJ 399

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

(1) To understand in outline the rules governing a trustee's liability to compensate the beneficiaries of the trust fund for losses resulting to the fund from his breach of trust.

(2) To understand when a third party will be held personally liable either: (i) for the value of trust assets disposed of in breach of trust on the basis that they passed through his hands

(liability for knowing/unconscientious receipt); (ii) for the loss suffered by the trust fund as a result of a breach of trust that that third party assisted the trustee to commit (liability for dishonest receipt).

(3) To form some views as to what should be the standard of liability in cases where a third party receives trust assets, or does something that assists a trustee to commit a breach of trust.

Written work

Either

3 Jermaine and Kenneth entered into a joint venture, intending to purchase land for commercial development, with all profits to be shared equally between them. They agreed that Jermaine, a former professional footballer, would seek out potential investors to fund their plans and Kenneth, a professional land agent, would use his expertise to identify suitable properties for development. Liz, a friend and business associate of Kenneth's, approached him with the offer of an ex-industrial site which she said was 'ripe for development' and which she could let him have for the 'rock bottom price' of £750,000. Kenneth took the suggestion to Jermaine, falsely representing the asking price as being £800,000. Jermaine approached a former team-mate, Mario, who agreed to provide £800,000 in loan finance. Nerys acted as solicitor both for Jermaine and Kenneth and for Mario, with the agreement of all three parties. She drew up all the necessary legal and financial documents for the acquisition of the site, doing so under the direction of Kenneth since Jermaine told her he had no grasp of business matters. Freehold title was conveyed from Liz to Jermaine and Kenneth jointly for the sum of £750,000. A loan of £800,000 was provided by Mario and secured over the site by a mortgage in his favour. Nerys asked Kenneth why the loan was larger than the purchase price, but was satisfied by his explanation that the additional £50,000 was required for outlays that were necessary in preparing planning applications. Oswald, an independent valuer engaged by Kenneth, had in any event valued the site at £1 million.

It has now emerged that the site is contaminated by large deposits of industrial waste, making development impossible without an expensive clean-up operation. The land is consequently now valued at only £250,000. It is also apparent that had Nerys conducted the usual environmental searches before the site was purchased, the evidence of the contamination would have been revealed. Kenneth used the additional £50,000 of the loan from Mario to purchase a fixed-term bond, due to deliver a 10% return in one year's time. Kenneth has now been declared bankrupt.

Advise Jermaine and Mario.

Or

5 '[W]e can only understand when fiduciary duties arise if we conceive of them as obligations based upon manifestations of a voluntary undertaking to another ... Fiduciary duties thus arise in the same manner as any other express or implied term: by construction of the scope of voluntary undertakings. They are not duties which are imposed by law nor are they necessarily referable to a relationship or status.' (EDELMAN)

Discuss.

Questions for the supervision

1. A holds a very valuable painting on trust for B. A arranged for the painting to be cleaned by C, a reputable cleaner. Unfortunately, D, an art thief, learned of A's plans and A handed the painting over to D when D turned up to A's house, impersonating an employee of C's. The painting has now disappeared and it was far too valuable for it to be practical to insure it against

being damaged or stolen. Is A liable to B? If so, can A escape being held liable to B if A can establish the following:

(a) B had planned to demand that A hand over the painting to her, so that she could burn it because she hates the subject matter of the painting.

(b) Had D not stolen the painting, it would certainly have been stolen by another group of very determined art thieves and A would have been powerless to prevent the theft.

(c) Even though C was a reputable cleaner of fine art pieces, C had been concealing from everyone that he had a serious drinking problem, and had the painting been handed over to C, C would in all likelihood have done such a terrible job that the painting would have been irreparably ruined.

2. A held a painting on trust for B. A sold the painting for £1m to C in a private sale. A could probably have obtained more for it had he put the painting up for auction, but he was in a hurry to sell as he planned to leave the country with the proceeds of the sale. A asked D, a friend, to give him a lift to the airport. D agreed to do so, thinking that A was leaving the country to escape his creditors. When they got to the airport, A reached inside his suitcase and gave D a stack of banknotes worth £10,000. D has now spent this money. How much is D liable for? Nothing? £10,000? £1m?

Past paper questions

1 'According to the decision of the UK Supreme Court in *AIB Group (UK) plc v Mark Redler & Co Solicitors* (2014), the principles of relief by equitable accounting are irrelevant where trust beneficiaries sue for breach of trust. Courts must focus instead on compensation for loss.'

Discuss.

10 'The purpose of the law on fiduciaries and express trustees has been said to be to keep fiduciaries and express trustees "accountable" for their actions. Such explanations are mere rhetoric. The ideas of accounting and accountability do not describe the duties of fiduciaries or express trustees, nor what a successful claimant achieves by suing a fiduciary or an express trustee. Those ideas also fail to explain such phenomena as the availability of proprietary relief and relief against third parties.'

Do you agree?

8 Answer **both (a) and (b)**:

(a) 'Liability for "knowing receipt" is receipt based. It does not depend on fault. Constructive notice is sufficient and may not even be necessary. There is powerful academic support for the proposition that the liability of the recipient is... strict but subject to... defence[s].' (LORD MILLETT)

Discuss.

and

(b) Goring, by his will, left certain properties to Horabin and Jenkins to sell them and to pay the proceeds of their sale to Liddament, Goring's grandson, when he became 21. Goring died when Liddament was only 3. The will had been drafted by Mallock, a solicitor, who, over time, had completely forgotten the terms of the trust though he has always had a copy of the will in his safe. 15 years after Goring had died, Horabin and Jenkins, who had taken an intense dislike to Liddament, instructed Mallock to arrange for the sale of the properties and to pay the proceeds to Pardoe, Goring's nephew. Mallock did so.

Pardoe, a credulous young man who had taken a first in the Law Tripos, expressed surprise at receiving the monies but was assured by Jenkins that all was in order. He met his father who said to him that he had thought that Goring had intended Liddament to have the money but he did not take his father's remarks seriously and has since dissipated the monies. Liddament, who is now 23, has just discovered the facts. Advise him.

7 Teresa and Ursula held £5 million on trust for Diana for life, remainder to Eleanor. Teresa and Ursula felt that they were out of their depth making investments in the current turbulent financial markets, and they wished to appoint an investment manager. Teresa was an old friend of Imogen, who is owner and managing director of Imogen Investments Ltd, a very successful boutique fund management company. Teresa persuaded Ursula that the quickest solution to their problem was simply to appoint Imogen Investments Ltd as their investment manager and hand over the trust fund to the company for management. Imogen wanted to help Teresa, and so Imogen procured her company to take the trust fund under management immediately in its own name, without waiting for formal instructions from the trustees. She also gave Teresa some hot investment tips, and Teresa made £30,000 on her personal investments as a result.

All went well, with the trust fund invested in a portfolio constructed by Imogen to provide balanced income and capital growth, until the great market crash of 2008. Most of the investments from the trust fund were then wiped out, though an investment in Gold Diggers Ltd (a gold mining company) is still showing a healthy profit of £30,000. Teresa, Ursula and Imogen now realised that they should put the management of the trust fund on a firmer footing, and they executed documents confirming the appointment of Imogen Investments Ltd and setting out the strategy it should now follow. They also provided that Imogen Investments Ltd shall change its past practice and henceforth account to the trust fund for any commissions it receives when it makes investments on behalf of the trust.

Advise Diana, who has now discovered these facts. Would it make a difference to your answer if the trust had provided that 'no trustee shall be liable for losses beyond an aggregate sum of £50,000'?

5 Belinda and Camilla were the trustees of their mother's will trust. The trust assets were divided into the 'Education Fund' and the 'General Fund', each of which was worth £500,000. The terms of the Education Fund provided: 'The trustees shall apply, in their absolute discretion, the income of this Fund for the sole purpose of supporting the education of the testatrix's grandchildren at school.' Under the General Fund, Belinda and Camilla had a joint life interest, with the remainder vested absolutely in the grandchildren in equal shares.

In 2005, the trustees wanted to improve the investment return on the trust assets. Simple, a solicitor with no expertise in trust or tax matters, advised them that it would be more tax-efficient to transfer the assets of the Education Fund to an educational charitable trust. He said the trustees could then apply the charitable income to support the grandchildren's education. Despite some misgivings, the trustees followed his advice and duly transferred the assets of the Education Fund to a separate charity of which they were the trustees. It was registered with the Charity Commission.

Belinda also persuaded Camilla to agree to invest all the £500,000 of assets of the General Fund in a 50% shareholding in a chocolate retail business called Cocoa-to-Go Ltd, which Belinda was setting up and in which she, Belinda, held the remaining shares. Belinda could not have started the business without the investment of trust money.

Cocoa-to-Go Ltd yielded big income returns for the trust and Belinda in the first few years. But in 2011 it hit hard times, and the value of the company plummeted to £100,000. That same year the Charity Commission launched an investigation into the trustees' decision to apply all the income of the charitable trust to pay the grandchildren's school fees. The grandchildren's legal advisers questioned whether the establishment of the charitable trust had ever been a valid exercise of the trustees' powers under the Education Fund.

Advise the grandchildren.

2 'In *Royal Brunei Airlines Sdn. Bhd. v. Tan*, Lord Nicholls most helpfully clarified the law as to the liability of a third party who has assisted in a breach of trust on the part of the trustee. But as to the liability *in personam* of one who has received trust property transferred to him in breach of trust, the authorities are inconsistent and confused. *Bank of Credit and Commerce International v. Akindele* does not help much; the decision there is really a lost opportunity.' Discuss.

6 **Either** (a) 'It is impossible to discern at present any coherent principle that explains and justifies receipt based liabilities in equity.'

Discuss.

Or (b) Should 'dishonesty' be the touchstone of accessory liability in equity? Does the answer to that question depend on what 'dishonesty' means? Give your reasons.

8 'To classify collectively as "accessorial liability" claims against third parties, following receipt of misapplied trust assets on the one hand and dishonest involvement in a breach of trust on the other, is misguided in principle and unhelpful in practice.'

Discuss.

7. RESPONSES TO A BREACH OF TRUST (2): PROPRIETARY CLAIMS

Reading

(1) Rescinding a wrongful disposition of trust assets

(a) For breach of fair dealing rule/rule against self-dealing

Penner, 360-63

D&V, 679-87

Re Thompson's Settlement [1986] Ch 99

(b) Under the rule in Re Hastings' Bass/Pitt v Holt

Penner, 64-69

D&V, 579-92

mcbridesguides → Equity → Equity Casenotes → Pitt v Holt (UKSC)

(2) Tracing trust assets

Penner, ch 12, 417-19

D&V, ch 18

Brazil v Durant International Corp [2016] AC 297 (noted, Turner, (2016) 75 CLJ 462)

Stevens, 'Vindicating the proprietary nature of tracing' [2001] Conv 94

Conaglen, 'Contests between rival trust beneficiaries' (2005) 64 CLJ 45

Conaglen, 'Difficulties with tracing backwards' (2011) 127 LQR 432

Cutts, 'Tracing, value and transactions' (2016) 79 MLR 381

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

- (1) To understand the current scope of the rule in *Re Hastings-Bass/Pitt v Holt*, and have a view on whether this area of law is now in a satisfactory state.
- (2) To understand the principal differences between tracing at law and tracing in equity, and to understand the historical reasons why if someone wanted to find out where money had gone, he could only take advantage of the equitable tracing rules under certain circumstances; and to understand what those circumstances were/are.
- (3) To understand the equitable tracing rules in detail. In particular:
 - (a) what rules will be applied when money is paid into a mixed fund and then money is withdrawn from that fund; and
 - (b) what remedies will be available when it is shown that: (i) an item of property in the defendant's hands was acquired by the defendant with the traced money; and (ii) an item of property in the defendant's hands was improved with the traced money.
- (4) To understand the concept of 'backwards tracing' and when, and when it will not, be allowed.

Questions for the supervision

1. A holds money on a discretionary trust for three sisters, B, C and D. A is having an affair with B and allocates all of the money in the trust fund (£10,000) to B. B puts the money into a bank account which already has £30,000 in it. She then withdraws £4,000 from the account and buys a painting with the money. The painting turns out to have been a bad investment: it is now valued as being worth £100. What is the position?

2. *Trustee* takes £10,000 that he holds on trust for *Beneficiary* and uses the money to throw a party for businesspeople where *Trustee* presents his idea for making a new kind of car. *Dragon* invests £3m in *Trustee's* idea, and they become co-owners of a car production company which is now valued as being worth £14bn. What claims can *Beneficiary* make against *Trustee*?

3. *Trustee* takes £100,000 that he holds on trust for *Beneficiary* and gives it to *Trustee's Son* as a 21st birthday present. *Son* is very surprised by the size of the present, but *Trustee* tells him, 'It's been a great year, and you are only 21 once.' *Son* uses £30,000 of the money to pay off his student loans, £20,000 on a much better holiday with his girlfriend than the one he had been saving up for, £10,000 to pay off the remaining payments due on his car to the hire-purchase company from whom he was buying it, and a further £10,000 for various improvements to be made to the car which increased its value from £15,000 to £50,000. *Son* used the remaining £30,000 to buy a timeshare on an apartment in Spain, which gave him the right to use it for six weeks every year. What claims can *Beneficiary* bring here?

4. *Angry* pays *Killer* £50,000 to kill his wife. *Killer* does no such thing, but uses the £50,000 to purchase some shares that are now worth £1m.

Past paper questions

6 'The law of tracing, and the remedies consequent on it, already result in the supremely unjust favouring of beneficiaries over the holders of unsecured personal claims, and all the present suggestions for development of the law in this area would simply make that injustice worse. The law should instead be much more restricted in its effect than it now is.'

Discuss.

6 Courts simply accept or reject claims asserting the existence of a fiduciary duty in order to allow or deny the procedural and remedial advantages that flow from recognition of a fiduciary obligation.'

Discuss.

1 Terry and Ulric are trustees of the Blackadder family settlement. That settlement provides that the trust fund shall be held for such of the descendants of Edmund as the trustees may within the perpetuity period appoint, with various remainders over. Terry is married to Olivia, who is Edmund's daughter. Terry is also terminally short of cash. Terry and Olivia persuaded Ulric that he and Terry should appoint £1 million of the trust fund to Olivia absolutely. That has now been done.

Life has since been good to Terry. Olivia spent £400,000 paying off Terry's debts. The other £600,000 was used to found E-Buy-Gum Ltd, an internet retailer based in Yorkshire. E-Buy-Gum has been very successful, and the shares in the company are now worth £3 million. Terry used some of the money he earned as an employee of the company to bet on Maggie May, a horse that won the 3.15 pm race at Market Forces, netting Terry a profit of £50,000.

Nerys, who is Olivia's estranged sister, has just discovered these facts. Advise Nerys.

5 Under Alice's will, Bridget was holding £1,000,000 on trust to pay £200,000 to any of Alice's five grandchildren who both obtained a university degree and attained the age of 25; subject thereto, the fund was to be paid to the Red Cross.

Shortly after the twenty-fifth birthday of Charles, one of the grandchildren, Charles's father, David, produced to Bridget a certificate from the University of the North Circular, which Charles had given to him, showing that some years before Charles had obtained an ordinary degree in New Age Studies. As Charles was out of the country at the time, David asked Bridget to pay £200,000 to him on behalf of Charles. Bridget did this.

David only paid £150,000 to Charles and spent the remaining £50,000 on a round-the-world cruise for himself and Charles's mother. Charles put £100,000 of the money paid to him towards the purchase of a house, the balance of the total £400,000 purchase price being provided by a building society mortgage. The house has since fallen dramatically in value. Charles gave £20,000 to his girlfriend Elizabeth, spent £20,000 on a boat and spent the remaining £10,000 on food and drink and good living.

Bridget has just been informed that the degree certificate is a forgery and that Charles has no degree.

Advise Bridget.

9 The trustees of the Gorky Discretionary Trust hold paintings on trust with a power to sell up to half the paintings and appoint the proceeds equally as between twins Alexei and Dina, who are twenty years old. The remaining paintings are to be divided equally between Alexei and Dina in the following year when they turn twenty-one.

Bob, an art advisor, tells the trustees to sell the paintings urgently because the art market is about to plunge. When he says this, Bob is hallucinating and does not realise he is saying the opposite of what he means. Nevertheless the trustees decide to sell half the paintings on the basis of Bob's advice. Bob's assistant, Joe, hears of Bob's mistake and phones the trustees offering to buy any or all of the paintings at a low price. The trustees sell half the paintings to Joe who then declares that he holds 'all my paintings and the bulk of my vinyl record collection' for a new charity, Leg Up, which he founds to benefit under-educated children of his poverty-stricken friends.

Dina induces the trustees to sell the remaining paintings to Moira. Moira knows some would find the trustees' sale to her odd, but is comfortable with it herself. She knows Dina would have induced the trustees to sell the remaining paintings to someone else in any event. The trustees say they would have kept the remaining paintings had Dina not induced them to sell.

Advise the parties.

4 Richard wished to make provision for his family out of the shares in his very profitable company, QuickBuck Ltd, without losing voting control of the company. Consequently, he declared that he held 20,000 of his 30,000 shares in QuickBuck Ltd on trust absolutely for his nieces. As it happens, 15,000 of Richard's shares in QuickBuck Ltd are already subject to an equitable charge in favour of Southern Shock Bank as security for Richard's sizeable overdraft.

Subsequently, Richard fell on hard times and had to sell 10,000 of the shares in QuickBuck for £400,000. With that money he did the following.

(i) He paid the last hire-purchase instalment of £10,000 on his car that cost £40,000 in total.

(ii) He discharged the remaining £200,000 of the first mortgage he had raised to buy his house. The house cost £500,000 ten years ago; the mortgage debt had originally amounted to £300,000, and the house is worth £1,000,000 even in the present market.

(iii) He discharged a second mortgage of £180,000 on the house that he had raised to buy a yacht, which he still owns.

Richard has now been declared bankrupt.
Advise his nieces.

4 Sir Basil and Lady Rosemary are the trustees of the Herb Trust. The beneficiaries are Sage and Thyme. Sir Basil is perennially short of cash.

Sir Basil told the trust's solicitor, Araminta, that the trustees would be mortgaging one of the trust assets, Herb Hall. Araminta said this seemed rather risky, as there appeared to be no clear plan for repayment. Sir Basil first blustered, but then said he would bring her a memorandum, signed by both trustees, stating that they had properly considered taking out the mortgage, and that in the mean time Araminta should prepare the mortgage documents. Araminta did so, and the mortgage was later granted. She never saw the memorandum, but assumed it would arrive when Sir Basil was less busy, as he had never failed in the past to keep his promises.

Sir Basil had the mortgage monies paid into the personal account belonging to him and Lady Rosemary jointly. He paid off his debts, though some of his creditors, including the local betting shop, were surprised at his sudden wealth. Lady Rosemary, who was sometimes a little vague, had signed the mortgage thinking it was simply a matter of routine trust administration. But afterwards she noticed how much money was in the joint personal account, and used some of it to pay off the mortgage on the cottage belonging to her boyfriend, Bayleaf the gardener. A year later, when the cottage had doubled in value, Bayleaf sold it and spent the proceeds. Sir Basil also invested in a time-share business run by his old friend Dill, hoping to make enough money to repay the trust. The investment allowed Dill to expand the business hugely and then sell it at a large profit for both himself and Sir Basil. Sir Basil and Lady Rosemary then went on a spending spree with the money and are now bankrupt.

Advise Sage and Thyme.

8 Sandra settled £20,000 on trustees subject to power in herself, Sandra, 'to appoint the sum to such of her particularly deserving grandchildren as she may in her absolute discretion select'. In default of appointment, the fund was to be held on trust for her three daughters, Delia, Deborah and Donna, in equal shares.

Delia's two children, Gerard and Henry, were young and struggling to support themselves so Sandra exercised the power of appointment equally in their favour. The trustees paid them £10,000 each.

Gerard deposited his £10,000 from the trust in his current bank account which before the deposit had been £5,000 overdrawn. He then deposited a further £5,000 of his own money before making a final withdrawal of £10,000 which he used to pay for an extension to his house. The extension improved the value of the house by £20,000.

Henry used his £10,000 from the trust to pay the first five instalments under a hire purchase agreement for a new car. He then paid the five remaining instalments from his own money and acquired ownership of the car. Encouraged by his new-found wealth, Henry also withdrew £10,000 from his own savings account and invested the money in Whizzo Ltd shares. Whizzo failed and the shares have become worthless.

Deborah and Donna resent the way that Sandra exercised the power in favour of Delia's children. They wish to challenge the validity of Sandra's power and recover the appointments made to Gerard and Henry. Advise them.

4 Eastend Enterprises plc is a venture capital company which makes development loans to small businesses. Their agent Ian is drinking one night in the Queen Victoria, a seedy and seriously under-capitalised public house. Ian gets talking to the pub's proprietor, Grant, who agrees to pay Ian £1,000 if Ian will arrange a loan for him from Eastend Enterprises. A loan of £50,000 is duly arranged, and Grant passes the £1,000 to Ian in cash, telling him to regard it as 'something for yourself, on the house.' Ian puts the entire sum on a horse running that afternoon at Kempton Park. When it wins Ian makes a profit of £10,000.

The loan agreement between Eastend Enterprises and Grant stipulates that the £50,000 is to be used only for the purpose of investment in the Queen Victoria. In fact, the main reason why Grant wants the money is to buy with it his heart's desire, a vintage Jaguar car. As his personal bank account is seriously overdrawn, Grant opens a separate bank account and pays the loan money into it. From this account Grant withdraws £5,000 which he spends re-fitting the interior of the Queen Victoria; this includes the purchase of an antique juke box for £1,000. He then spends £35,000 buying a vintage Jaguar from Roy. Grant has had his eye on the Jaguar for some time, and Roy is surprised to find that Grant suddenly has the money to buy it (as a regular drinker at the Queen Victoria he knows that the bar is not doing well) but he decides not to ask Grant where the money has come from.

Despite its refurbishment, the Queen Victoria is still losing money and finally has to close. Grant is declared bankrupt, with the last £10,000 of the Eastend Enterprises loan still lying in the separate bank account. The Jaguar turns out to have belonged to Dirty Den, a legendary local gangster, and is currently valued at £75,000. The juke box is found to be a highly sought after piece of 1950s memorabilia, value at £3,000.

Advise Eastend Enterprises.

1 Captain Nixon is a soldier in the British Army with authority to procure supplies for his sub-unit in Afghanistan. He accepts a bribe in US dollars from an Afghan vegetable trader to procure a supply of fresh vegetables for the sub-unit's use. When he returns to England he converts the US dollars into £10,000 sterling.

His wife, Mrs Nixon, holds £20,000 cash on trust for her and Capt. Nixon's son Rufus. The terms of the trust give Mrs Nixon as trustee 'absolute, unfettered discretion' to select investments. However the trust terms also say the contents of a 'wish letter' are to be read as terms of the trust. The relevant 'wish letter' says that trust funds are only to be invested in automotive companies.

On Capt. Nixon's return to England, he and Mrs Nixon decide to establish a business importing exotic artefacts. They pool the £10,000 sterling profit with the £20,000 cash which Mrs Nixon holds on trust and buy a consignment of 'miscellaneous Far Eastern instruments' for £4,000. In the consignment is a calligraphy scroll which will be worth £10,000 once repaired at a cost of £1,000. Shipping the consignment costs £1,000. From the remaining combined fund, Mrs Nixon then spends £100 on a haircut; £200 on raffle tickets from Rufus's school; and £700 to pay for an ivory bird cage which she bought on credit. Capt. Nixon spends the rest of the combined fund on advice about establishing a business. Mrs Nixon has now sold the cage for £9,000 and won a motor car in the school raffle. She also refuses to let Rufus see the 'wish letter'.

Advise Capt. Nixon, Mrs Nixon, Rufus and the British Army of their rights and liabilities, if any.

SUPERVISION 8. ISSUES IN EQUITY (2)

Reading**(1) Does Equity adopt a fundamentally distinct approach to legal issues from that adopted by the common law?**

Burrows, 'We do this at common law but that in equity' (2002) 12 OJLS 1

Birks, Review of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (2004) 120 LQR 344

Swadling, Review of *Snell's Equity* (2011) 127 LQR 638

Hayton, 'The development of equity and the "good person" philosophy in common law systems' [2012] Conv 263

Millett, 'The common lawyer and the chancery practitioner' (2014-15) 6 UK Supreme Court Yearbook 175

Mackley, 'A challenge to the utility and distinctiveness of the good man theory of equity' (2021) 27 Trusts & Trustees 376

Harding, 'An argument for limited fission' in Goldberg et al (eds), *Equity and Law* (CUP, 2019)

(2) The nature of constructive trusts and the availability of proprietary relief

Penner, ch 17

Birks, Review of Wright, *The Remedial Constructive Trust* (1999) 115 LQR 681

Birks, Review of Rotherham, *Proprietary Remedies in Context* (2003) 119 LQR 156

Swadling, 'Policy arguments for proprietary restitution' (2008) 28 *Legal Studies* 506

Swadling, 'The fiction of the constructive trust' (2011) 64 *Current Legal Problems* 1

(3) Trusts, tax and secrecy

McBride, ch 5

Garton et al, *Moffat's Trusts Law*, 7th ed (CUP, 2020), ch 17 (available online within Cambridge system)

Runciman, 'Didn't they notice?', *London Review of Books*, 14 April 2011 (available online; review of Shaxson, *Treasure Islands: Tax Havens and the Men Who Stole the World*)

Nikitin, 'Kleptocracy', *London Review of Books*, 21 February 2019 (available online; review of Bullough, *Moneyland*)

Weisbord, 'A catharsis for US trust law: American reflections on the Panama Papers' (2016) 116 *Columbia LR Online* 93

Note: the same advice for the reading for supervision 4 also applies here.

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

(1) To think about what scope there is for fusion between the approaches of law and equity in relation to issues such as (a) claiming the proceeds of unauthorised dispositions of money; (b) the treatment of wrongdoers and those complicit in wrongdoing; (c) placing limits on people's powers to dispose of their property.

(2) To think about what a constructive trust is, and what the difference might be between a 'remedial' constructive trust and an 'institutional' constructive trust.

(3) To develop a good overall understanding of the range of situations that currently give rise to a constructive trust, for the purpose of discussing what rationales might underpin the recognition of such trusts.

(4) To gain an understanding of how trusts can be abused and manipulated, and what might be done to prevent this occurring.

Written work

Either

7 'The leading judgments of the Supreme Court over the past decade reflect a fully justified, consistent and principled approach to the liability for losses caused, and to the stripping of profits made, by trustees and other fiduciaries.'
Discuss.

Or

9 Samantha and Peter are partners in an architectural practice. Samantha also owned 30,000 shares in Fastbuck Ltd, which is a profitable investment company. These shares are worth £30,000. Two years ago, in a fit of generosity, Samantha declared she held 20,000 of these shares on trust for Bernard, her impoverished youngest brother.

Earlier this year, however, Samantha fell on hard times. She thought this was temporary, and tried to make ends meet. First she 'borrowed' £10,000 from the architectural practice and paid it into her bank account with HelpMe Bank. At the time her account was £5,000 overdrawn due to the purchase for £5,000 of a rather stunning pen and ink drawing by an up and coming artist. Next, she agreed to an extension of her overdraft limit with HelpMe Bank, giving the Bank in return a charge over her Fastbuck shares to secure her overdraft. Finally, instead of using her enlarged overdraft facility, she sold all 30,000 Fastbuck shares to a very eager buyer for an above-market price of £50,000. She added this sum of £50,000 to her bank account with HelpMe Bank.

With the £55,000 now in her bank account following these various transactions, Samantha then made two further payments:

(i) £5,000 by way of gift to Nora, her niece. Nora was leasing a small sports car from Autoluxe. The lease contract provided that once Nora had paid £25,000 in lease payments (amounting to £5,000 per annum for five years), she was entitled to purchase the car outright for a 'nominal' sum of £5,000. Nora used the gift from Samantha to do exactly this.

(ii) £40,000 on building materials and £10,000 on labour and architects' plans to undertake a stylish extension to Samantha's house. As a result of the renovation, Samantha's house has increased in value by £100,000.

Advise Peter, Bernard and HelpMe Bank.

Past paper questions

7 'Section 25(11) of the Judicature Act 1873 provided that, where there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail. It should have provided that the rules of law shall prevail, but the rules of law are now prevailing over rules of equity in any event.'
Discuss.

1 Critically consider how, if at all, the fusion of law and equity by the Judicature Act 1875 should affect the development of equity jurisprudence. Illustrate your answer with examples drawn from the Equity course.

6 'Debate as to the fusion of law and equity is an unnecessary distraction. Real cases are decided by applying the more detailed doctrines and principles of common law and equity. To take a position for or against fusion is a purely academic exercise.'
Do you agree?

8 Is the 'fusion debate' of any practical significance and why?

3 In what sense are constructive trusts 'constructive' and in what sense are they 'trusts'? What, if anything, is gained by thinking of them in these terms?

7 To what extent do obligations of 'conscience' provide a unifying explanation for the legal outcomes that are (or should be) described as constructive trusts in English law?