

Law 580
Trusts
McInnes

Definitions

- **Trust:** fiduciary obligation imposing obligations on person holding title
- **Settlor:** the person who gives the property to be held in trust
 - Testamentary trust: testator
 - *Inter vivos* trust: trust created during the settlor's life
 - Testamentary trust: created after settlor dies, usually by will
- **Trustee:** person who holds the property in trust
- **Beneficiary / *Cestui(s) que trust*:** person who gains beneficial interest of trust
- **Trust Property / Subject matter of the trust / trust res / trust corpus:** the money, property, other assets to be held in trust
- **Trust Instrument:** written doc that sets out terms of trust (deed / will)
- **Bare Trust:** trustee holds property for the benefit of one or more persons, but trustee has no management obligations – only the obligation to hold the property in trust
- **Fixed Trust:** sets out a specific set of beneficiaries and a specified amount of benefit to be given
- **Discretionary Trust:** trustee granted power to make certain decisions, amount distributed to beneficiaries, etc.
- **A Power:** an authority to deal with someone else's property – can take a variety of forms

I. INTRODUCTION

1) Scope of Study

- **Nature of trusts, species of trusts, choice and formation, administration of trusts, application of trust law**

2) Common Law and Equity

SYSTEMS	Common law	Others (i.e. civil, Islamic)
SOURCES	Common law	Statute
JURISDICTION	Common law	Equity (derived from Chancellor)

A. Nature of Equity

- Equity = rules historically derived from Chancellor's juris (Equity)
- equity = broad rules of fairness and justice (Law)

Rise of Equity

- Equity arose **when it was needed:** Chancellor's conscience was piqued by the Law (inadequacy of Law)
- **"Fusion"** of Law and Equity, procedural reform and *Judicature Act, 1873*
 - Law and Equity *administratively* fused into a single court system (Canadian system)
 -

B. Brief Overview of Trusts

- **Stage 1) Rise of the use** (1200-1400) = "on behalf of", "for benefit of"
 - "to A (feeoffee) for the use of B (*cestui que use*)"
 - "Use" arose largely to facilitate benefits of ownership without burdens (avoidance of creditors/ taxes, forfeiture upon treason/felony, feudal burdens related to inheritance, etc.)
 - "Use" was refused recognition in courts of Law

- Enforcement of "use" restricted to moral suasion

Stage 2) Chancellor's enforcement of uses (1400-1535)

- Court of Chancery compelled fulfilment of conscience
 - Recognition of Equitable estate in land
 - Estates in Equity analogized to estates in Law

Stage 3) Statute of Uses (1535-1634)

- Henry VIII passed legislation aimed at preventing avoidance of feudal burdens
- Statute generally executed use and gave legal title to B
 - "to A to use of B" = transfer of whole title to B

Stage 4) Avoidance of Statute and Rise of Trusts (1634-present)

- *Statute* contained various loopholes
 - **Examples:** chattel, corp trustee, active duty
 - *Statute* dealt with land, humans, and bare use w/o active duties
- Effect of statute eventually avoided use upon a use
 - "to X to the use of A on trust for B"
 - *Statute* executed *only* first use
 - Equity enforced second use and A held for benefit of B
- Relationship created by use upon a use = a trust

C. Introduction to Trusts

C.1) Law and Equity

- Law and Equity: fusion into single judicial system (1873-1875)
 - fusion (primarily) administrative and not substantive
 - distinctions defensibly remain between Law and Equity, e.g. separation of title necessary for existence of trust
 - distinctions indefensibly remain between Law and Equity, e.g. unjust enrichment and knowing receipt

C.2) Basic Elements of a Trust

- **Trusts** (uses) as primary contribution of Equity to the common law
- **Trust:** property administratively held by one party for benefit of another (Legal title and Equitable benefit)
- **Species** of trusts: express, resulting, constructive

C.3) The Nature of Trusts

- **How to determine the type of trust:**
 - What facts do you need to trigger that type of trust?
 - What is the principle that triggers the type of trust?

C.4) Species of Trusts and Triggering Events

<p>1) Express trust = trust created through intention</p> <ul style="list-style-type: none"> • Orthodoxy: triggered by settlor's intention 	
<p>2) Resulting trust = trust that facilitates beneficial interest "jumping back"</p> <ul style="list-style-type: none"> • Primary species of resulting trusts: <ol style="list-style-type: none"> 1. Failure of express trust to exhaust property 2. Gratuitous transfer of property (Equity presumes that when someone gives a gift, benefit comes back to the giver) • Orthodoxy #1: imposed entirely <u>regardless of intention</u> • Orthodoxy #2: triggered by (presumed) <u>positive intention to retain</u> <ul style="list-style-type: none"> ○ Does not work if resulting trust is for a child or person with mental incapacity, as they "cannot" have intention ∴ <u>this cannot be the reason for resulting trust to arise</u> 	<ul style="list-style-type: none"> • Emerging view: triggered by unjust enrichment <ul style="list-style-type: none"> ▪ When A gives B physical prop, but results back b/c A did not have intention for B to take the benefit of prop ▪ "True" explanation of resulting trusts: not intention to get back, but <u>absence of intention to give away benefit</u>
<p>3) Constructive trust = trust imposed by Equity to effect certain ends</p> <ul style="list-style-type: none"> • Types of constructive trusts (examples): <ul style="list-style-type: none"> ▪ Proprietary relief for wrongdoing (breach of confidence) ▪ Fulfilment of expectations (co-habitational property) • Orthodoxy #1: imposed entirely regardless of intention • Orthodoxy #2: triggered by "unjust enrichment" • Orthodoxy #3: triggered by "good conscience" (<i>Soulos v Korkontzilas</i>) 	<ul style="list-style-type: none"> • Emerging view: dissimilar explanations for distinct instances
<p>4) Statutory trust = trust imposed by statute (trust in name only)</p> <ul style="list-style-type: none"> • Orthodoxy: triggered by statutory imperative 	
<p>5) Implied trust = a useless misnomer to be carefully avoided (constructive or resulting trust)</p>	

II. Parties to a Trust and Their Positions

A. Generally

Party	Position
<p>Settlor = party creating trust through provision of property</p> <ul style="list-style-type: none"> • All recognized forms of property subject to trusts <ul style="list-style-type: none"> ▪ Legal or Equitable prop, real or personal, chose in possession or chose in action (things enjoyed by taking action; i.e. enforceable right to a debt) • Settlor's property may consist of legal or equitable interest • No "formal" settlor in resulting or constructive trusts 	<p>Settlor's position:</p> <ul style="list-style-type: none"> • Generally no obligation to establish trust – unless enforceable promise • Generally no rights once trust established – unless revocation created
<p>Trustee = party acquiring property for benefit of another</p> <ul style="list-style-type: none"> • Settlor may be trustee under express trust • Trustee may be one or several <ul style="list-style-type: none"> ▪ Better to have more than one ▪ Trust will never fail for lack of trustee, as someone will always be appointed 	<p>Trustee's obligations: subject to onerous obligations from various sources – no rights</p> <ul style="list-style-type: none"> ▪ Settlor's obligations created by trust instrument ▪ Statutory obligations under <i>Trustees Act</i> ▪ Fiduciary obligations imposed by law • Before becoming a trustee, carefully consider appointment for settlor and trustee
<p>Beneficiary = party beneficially interested in property</p> <ul style="list-style-type: none"> • Settlor may be beneficiary • Trustee may be one of several beneficiaries • Cannot have same person as sole trustee and beneficiary <ul style="list-style-type: none"> ▪ <u>No division of title</u> = trust immediately dissolves, no Equitable title 	<p>Beneficiary = no obligations, only rights</p> <ul style="list-style-type: none"> • Personal rights against trustee • Personal right to compel observance of trust obligations • Right to compensation for loss sustained by breach • Right to disclosure of info pertaining to trust <ul style="list-style-type: none"> ○ <u>No right to direct administration</u> of trust • Proprietary rights against subject of trust <ul style="list-style-type: none"> ▪ right to remove prop from estate of bankrupt tr ▪ right to recover (<u>traceable</u>) prop from Tr in breach ▪ right to recover (<u>traceable</u>) prop from <i>some</i> others in breach (third party); however, if 3rd party is a bone fide purchaser for value (bought property in good faith), 3rd party may keep it***

	<ul style="list-style-type: none"> recoverable if property not acquired for value recoverable if prop not acquired w/o notice of trust
<p><u>Nemo dat vs. BFPV ***</u></p> <ul style="list-style-type: none"> Situation: must have three parties BFPV is a purchaser who: <ol style="list-style-type: none"> paid for property bought in <u>good faith</u> (not knowing anything was wrong) <ul style="list-style-type: none"> Any pre-existing Equitable interest disappears Nemo dat: one cannot give what you don't have (thief cannot give what he doesn't have) Hypo: π-owner has property taken by X (thief or trustee) who sells it to Δ – how to decide between two innocent parties? <ul style="list-style-type: none"> Which rule to apply depends on: <ol style="list-style-type: none"> the <u>nature of the thing</u> (\$ or personalty) and whether it is <u>Legal</u> and/or <u>Equitable</u> prop π will argue as the original owner, while Δ will argue that he is a BFPV <div style="text-align: center; margin-top: 20px;"> <pre> graph TD pi_owner["π-owner"] --> X["X = Thief or trustee"] X --> delta_bpv["Δ-BPV purchaser"] </pre> </div>	
<p><u>Dispute in Law (no trust or other Equitable interest)</u></p> <ul style="list-style-type: none"> Nemo-dat applied = π wins If property is in <u>Law</u>, then <i>nemo dat</i> almost always applies <ul style="list-style-type: none"> Unless dealing with money (\$ is currency, tangible = commerce reasons) <ul style="list-style-type: none"> Δ will have an action against X, but as between π and Δ, original owner wins under the tort of conversion 	<p><u>Dispute in Law/Equity (trust prop)</u></p> <ul style="list-style-type: none"> BFPV applied = Δ wins If X steals from π and sells <u>Legal</u> title to Δ, then Δ always wins because: <ol style="list-style-type: none"> Nature of transaction where Δ paid in good faith Need special circumstance = Equity only arose when Chancellor's interest was piqued Between Law and Equity, the Chancellor defers to Law by saying that a BFPV of a <u>Legal</u> estate <u>extinguishes pre-existing Equitable interests</u>—π can sue X but not Δ <ul style="list-style-type: none"> Exception (Dispute in Equitable interest only) – when X owns <u>Equitable title</u> (trust upon a trust) and sells it to BFPV, first in time prevails – π wins (seldom arises as X always has legal title)
<ul style="list-style-type: none"> π wins if dealing with: <ol style="list-style-type: none"> All <u>Legal prop</u> except \$, or BFPV of <u>Equitable prop</u> 	<ul style="list-style-type: none"> Δ wins if dealing with: <ol style="list-style-type: none"> <u>Legal money</u>, or BFPV of <u>Legal prop</u>
<p>Note: neither Law nor Equity will assist either (1) a <i>volunteer</i>, or (2) a recipient who failed to act <i>bona fide</i>. That means that π will always win against Δ if Δ either (1) paid nothing to X in exchange for the asset, or (2) paid X for the asset, but did so knowing something was amiss</p>	

B. Trusts and Other Legal Relationships

B.1) Trusts and Fiduciary Relationships

Fiduciary obligations:

- Selfless service** to principal (beneficiary): honesty, prudence, diligence, fairness, etc.
- Avoidance of **conflict of interest**
- Avoidance of **personal profit**

a) Fiduciary relationships: traditional approach

• Good faith exercise of discretion affecting principal's well-being

- Parasitic and not independent: *manner of performing existing duty* (not new

substantive duty)

- Proscriptive and not prescriptive: *don't be self-interested* (not *do* act in best interests)
- Prophylactic and not merely reactive: focus on deterrence (not merely sanctioning wrongdoers)
- Economic and not personal: discretion affecting financial matters (not personal health)

• Enumerated categories importing obligations of utmost fidelity

- Examples:** trustee-beneficiary, agent-principal, solicitor-client

b) Fiduciary relationships: modern Canadian approach

- Broader than traditional approach: open-ended and fact-driven recognition of trust and dependence
- **Indicia** of fiduciary relationships (Test from **Frame v Smith, 1987 SCC**)
 1. Discretionary power vested in fiduciary
 2. Discretion exercisable to detriment of beneficiary
 3. Beneficiary vulnerable to fiduciary's exercise of discretion: weaker party is not in a position to protect own interests, but vulnerability is not an essential element (**Hodgkinson v. Simms**)
 4. Reasonable reliance by beneficiary on fiduciary
 - If fiduciary outside of Canada, fiduciary inside of Canada – however, fiduciaries in Canada may not work elsewhere in the world
- **Unorthodox** fiduciary relationships
 - 1) **Norberg v Wynrib** (1992 SCC, concurrence): exploitation of vulnerable person = breach of fiduciary obligation*** (**McInnes says this does not add up – no fiduciary obligation**)
 - 2) **M v K** (1992 SCC): despite expired limitation period in Law, breach of fiduciary obligation in Equity is not caught by limitation period

• **Overlap** between trusts and fiduciary relationships

- Not all fiduciaries are trustees; fiduciary is possible without property *but* trust is not
- Not all trustees are *equally* fiduciaries
 - *all* express trustees are subject to fiduciary duties; fiduciary of the highest order (strict rules apply)
 - *some* resulting Trs *may* be subject to fiduciary duties; some Trs may not be aware of obligation; however, if person does know, there may be fiduciary obligations
 - *some* constructive trustees *may* be subject to fiduciary duties; where one breaches a duty and makes a profit

Q. Why are all trs not equally fiduciaries? Perhaps **level of knowledge corresponds with level of duty**

- **Intersection** of fiduciary and trusts
 - Breach of fiduciary duty may trigger response of constructive trust
 - **Example:** **AG Hong Kong v. Reid**

B.2) Trusts and Bailments

- Bailment: when one holds something that belongs to another
 - **Example:** Rent car, borrow library book, deposit television for repairs

Trusts	Bailments
Similarities: <ul style="list-style-type: none"> ▪ Control: trustee <i>controls</i> B's prop; bailee <i>controls</i> bailor's prop ▪ Title: trustee <i>always</i> has title; bailee <i>may</i> have title (or mere possession) ▪ Reliance: beneficiary <i>relies</i> upon trustee; bailor <i>relies</i> upon bailee 	
Differences: <ul style="list-style-type: none"> ▪ If it is a trust, generally <i>irrevocable</i> ▪ Trustee is a <i>fiduciary</i> ▪ Trust can apply to <i>any kind of prop</i> ▪ Trust occurs in <i>Equity</i> ▪ Trust vulnerable to <u>bona fide purchase for value</u> (BFPV) 	<ul style="list-style-type: none"> ▪ Bailment usually <i>revocable</i> ▪ Bailee is <i>not a fiduciary</i> ▪ Bailment only to <i>personalty</i> ▪ Bailment occurs in <i>Law</i> ▪ Bailment vulnerable only to <u>nemo dat</u> exception

B.3) Trusts and Debts

Trusts	Debts
Similarities: <ul style="list-style-type: none"> ▪ Transfer: trustee must transfer <i>to beneficiary</i>; debtor must transfer <i>to creditor</i> 	
Differences: <ul style="list-style-type: none"> ▪ Trustee is <i>fiduciary</i> ▪ Trustees must <i>manage prop</i> ▪ Trustee <i>not liable for innocent loss</i> – trustee responsible only for subject matter of trust ▪ Beneficiary has <i>proprietary rights</i> 	<ul style="list-style-type: none"> ▪ Debtor is <i>not fiduciary</i> ▪ Debtor need <i>merely pay debt</i> ▪ Debtor <i>liable even if innocent loss</i> – debtor responsible for debt howsoever discharged ▪ Creditor generally has <i>personal rights</i> (relationship desired depends on circumstances)
Framing preference: <ul style="list-style-type: none"> • Insolvency: <u>beneficiary preferred</u> to creditor – can point to prop and claim it in Equity; other creditors cannot claim B's assets • Destruction of property: <u>creditor preferred</u> to beneficiary if prop is innocently destroyed • Order of ownership strength: <ol style="list-style-type: none"> 1) Trust 2) Secured Debt (come up with \$, if not, then can sell X property for \$) 3) Debt (come up with \$) 	

Debt or trust relationship:

- An express trust is created based on the parties' intention – commingling of funds and parties' language is not determinative of an express trust

(Air Canada v M&L Travel)

• **Test:**

- 1) What was **intended**? Debt or trust?
 - Some evidence, but not determinative
- 2) Was there **commingling of funds**?
 - Not determinative
 - **McInnes**: commingling must defeat the trust
- 3) **Parties' language**
 - Not determinative of classification

Air Canada v. M&L Travel (SCC 1993) Test: debt or trust rel'n

- M&L Travel's owners received monies for Air Canada; monies were placed a general account (not a trust one)
- M&L went bankrupt, bank took \$ from general account
- AC sued M&L owners personally for funds owed – required to show trust relationship (= breach), not debt

Issue: How to distinguish debt from a trust relationship?

- 1) **Character** of relationship turns upon intention
 - Trust if so intended; debt if so intended
- 2) **Commingling of funds** is not determinative of classification (dubious argument)
 - Iacobucci: permissibility does not preclude trust
 - **McInnes**: this reasoning is wrong, as **commingling must defeat the trust** (prohibition on commingling would suggest trust)
- 3) **Parties' language** is not determinative of classification
 - Use of "trust" strongly suggests trust
 - But absence of "trust" language does not deny trust

Analysis of Relationship:

- **Trust** = express
- **Settlor** = not customers; may argue Air Canada (started with contractual right, chose in action, and M&L sold seats and received money) or M&L because they took legal title of \$ from customers and declared themselves to be trustees
- **Trustee** = M&L
- **Beneficiary** = Air Canada
 - **Why was the existence of a trust relevant?** If trust = Air Canada had right to money held by bank; if not a trust = debt that M&L owners could not repay

Ratio: An express trust is created based on the parties' intention – commingling of funds and parties' language is not determinative of an express trust

B.4) Trusts and Contract

Trusts	Contract
Similarities:	
<ul style="list-style-type: none"> ▪ Positive intent: express trust arises by <i>positive intent</i>; contract arises by <i>positive intent</i> - settlor intends to create express trust - contractual parties intend to create binding 	
Differences:	
<ul style="list-style-type: none"> ▪ Trust <i>requires property</i> ▪ Express trusts created <i>unilaterally</i> ▪ Trust obligations are <i>unilateral</i> 	<ul style="list-style-type: none"> ▪ Contract <i>does not require property</i> ▪ Contracts created <i>bilaterally</i> ▪ Contractual obligations usually are <i>bilateral</i>

<ul style="list-style-type: none"> ▪ Trust generally <i>irrevocable</i>; ▪ Trust enforced by <i>volunteer</i> (beneficiary) ▪ Trust may be enforced by <i>non-party beneficiary</i>; 	<ul style="list-style-type: none"> ▪ Contract <i>bilaterally variable</i> ▪ Contract enforcement requires <i>consideration</i> ▪ Contract requires <i>privity</i> (party to negotiation)
Intersection of trusts and contract:	
<ul style="list-style-type: none"> ▪ When will a trust arise in context of a contract? 	

Contract or trust relationship (Re Schebsman):

• **Dividing line between:**

- 1) Case of a trust
- 2) Case of a contract made for a third party beneficiary

• **Test:**

- 1) **Consider intention:** trust or contract made for the benefit of a third person?
- 2) **Legal argument:** was there unjust enrichment?
 - Must show (1) Enrichment, (2) π's deprivation, (3) no explanation in law for transfer (unjust)
- 3) **Equity argument:** was it a gratuitous transfer (resulting trust argument)
 - Consider direct and indirect transfer
 - Resulting trust: if Settlor gives something and does not get anything in return, assume not gift = benefit bounces back to settlor
- 4) If it is a **contract made for the benefit of a third**, then trustee has no claim

Re Schebsman (Eng CA 1943) Distinct: contract and trust

- Co. agreed to pay S some money for rest of his life, then to wife after S's death. After S goes bankrupt, trustee in bankruptcy (Tr) steps in place of S and wants \$ to go to creditors
 - When a person becomes bankrupt, legal interest in anything owned is vested in Tr who pays out \$ as it ought to be paid out (even after death of person)
- **By whom was contract created?** (S) For whom was contract created? (S and wife) Did a trust arise on the facts? (No) Was it relevant to the dispute? (Yes)

Issues/arguments:

- 1) Did S hold benefit of contract on trust for wife?
 - "[D]ividing line between (1) the case of a trust and (2) the simple case of a contract made between two persons for the benefit of a third..." – **this case was the latter**
 - Not true that \$ was taken on trust for wife, as parties intended for S to take \$ (even if it was for benefit of a third)
 - If money was held on trust, wife as B had privity
- 2) **Legal argument:** were payments to W "had and received to S's use"?
 - Unjust enrichment: must show (1) enrichment, (2) π suffered deprivation, (3) no explanation in law for transfer (unjust)
 - Argument fails, even if there was (1) an enrichment, (2) \$ did not come from π (but from employer); and

(3) enrichment was just under terms of contract
 3) **Equity argument:** was trust created by voluntary transfer from S to wife? (same argument re: money, but in Equity)
 - Resulting trust argument: if S gives something and does not get anything in return (gratuitous transfer), benefit bounces back to settlor – assume not gift unless can prove otherwise for gift to succeed

- Tr claimed it was a gift to W, but should result back
- Argument fails even if wife received it as a gift – satisfies conscience for wife to receive, as argument that the \$ paid to wife was under contract wins over trust
- No *direct* unintended transfer from S = wife received money from employer rather than S
- No *indirect* unintended transfer from S = S fully intended payment by employer to wife
 - contract indicates desire of S to benefit wife
 - contract precludes S from altering intention

Decision: W is a third party beneficiary; she had no enforceable right to the pension money, but it does not go through Schebsman. It was a gratuitous transfer to her. The common law position is that W, having received the prop by gratuitous transfer, has a right that is good against the world. There is no equitable reason to give it to the trustee in bankruptcy

Ratio: Note the difference between a case of trust versus a contract made for the benefit of a third party – if it is the latter, trustee has no claim against the gratuitous transfer to the B

B.5) Trusts and Agency

Trusts	Agency
Similarities:	
<ul style="list-style-type: none"> ▪ Obligations: Trustee <i>acts for</i> beneficiary; agent <i>acts for</i> principal ▪ Fiduciary duties: Trustee subject to <i>fiduciary duties</i>; agent subject to <i>fiduciary duties</i> – Trustee’s fiduciary duties are more extensive than agent’s 	
Differences:	
<ul style="list-style-type: none"> ▪ Beneficiary <i>does not direct</i> trustee ▪ Beneficiary <i>never liable</i> under trust ▪ Express trust based on <u>unilateral intention</u> ▪ Trust generally <u>irrevocable</u> ▪ Trustee <i>must hold property</i> ▪ Trust is <u>proprietary</u> 	<ul style="list-style-type: none"> ▪ Principal <i>does direct</i> agent ▪ P <i>may be liable</i> under agency ▪ Agency on <u>bilateral agreement</u> ▪ Agency generally <u>unilaterally revocable</u> ▪ Agent <i>need not hold property</i> ▪ Agency (generally) is <u>personal</u>
Propriety v. personal:	
<ul style="list-style-type: none"> • Critical consequence of proprietary aspect of trust <ul style="list-style-type: none"> ▪ Agent generally personally liable to P for debt – Agent liable even if property innocently lost – P enjoys no priority in event of insolvency ▪ Trustee generally liable to beneficiary for property itself – Trustee not liable if property innocently lost – B enjoys priority in event of insolvency 	
Intersection of trusts and agency	
<ul style="list-style-type: none"> ▪ When will an agent become a trustee? 	

Trust relationship may arise through Agency:

• Where a fiduciary duty is owed in an agency-principal relationship, a constructive trust may arise where there has been a breach of fiduciary duties

• **Case of bribe:** when a fiduciary receives a bribe, legal title vests in that person paid but he must account to the person whom the fiduciary duty is owed = constructive trust is deemed for benefit of the principal (windfall gain for principal) (**Reid**)

• **Test:**

- 1) Is a fiduciary duty owed?
- 2) Was the duty breached?
- 3) Can a constructive trust arise out of the facts?

AG Hong Kong v Reid (PC 1994) Agent-fiduciary/Constructive Trust

• Director of public prosecutions in HK breached fiduciary duty by accepting bribes. With bribe money, purchased prop in NZ. Employer (Attorney-General) sued and sought a declaration for beneficial title; claimed prop was held on constructive trust for AG, on the basis of breach of fiduciary duty

Issue: Does agent in breach hold bribes on trust for a principal?

Decision: Yes, in the form of a constructive trust

- 1) Twofold liability of agent in breach:
 - a) Personal liability for amount of bribe received - agent accountable for shortfall from own resources
 - b) Proprietary liability for traceable value of property remaining - agent holds surviving (traceable) property on trust
- 2) Agent cannot be permitted to profit from breach of fiduciary duty = becomes a constructive trust of profit; a fiduciary who acts criminally and accepts a bribe causing loss to his principle becomes a constructive trustee – not allowed to make a profit
 - Poor precedent: **Lister v. Stubbs** stated that if there’s a fiduciary duty and Δ earns a profit, then cannot take prop, only take value – court rejected this
- 3) Maxim applied incorrectly: “Equity deems done that which ought to be done” (propriety relief) – what ought to be done was bring Reid to justice
 - “Bizarre” line of reasoning that R did everything on behalf of HK (accepted bribe, bought prop)
 - To use this maxim in this case means no sense, as applies to protection of parties in a transfer of land
 - Court’s policy: wanted to make strongest remedy possible for this serious breach of fiduciary duty
- 4) R *ought* to have paid bribe to AG instantly
 - R treated *as if* he paid bribe to AG instantly
 - R treated *as if* he invested bribe in NZ for AG
 - R holds NZ land for benefit of AG
 - AG enjoys accretion to value of traceable property
 - **AG enjoys priority over R’s general creditors**

Ratio: When bribe is paid to someone owing fiduciary duty, legal title vests in the person paid, but he must account to the person whom the fiduciary duty is owed – constructive trust is deemed for benefit of the principal

Questions: In what form of trust did AG receive proprietary relief? (Constructive) What facts triggered the creation of that trust? (As soon as cash was received, the false fiduciary held the bribe on constructive trust for the person injured)

Note controversy of decision (dangers): (re: whether HK should have proprietary relief and be able to take prop) unsecured creditors or tort victims cannot get relief if HK takes prop

- Always a windfall = getting money that they would

- not have originally have
- HK would never have had the money and would not have accepted the bribes in the first place

III. TRUSTS AND POWERS

A.1) Express Trusts

- Express trusts arise from S's unilateral intention
- Three roles:
 - settlor** = providing prop and creating trust
 - trustee** = administratively holding prop
 - beneficiary** = beneficially interested in prop

Species of Express Trusts

- Fixed** = beneficiaries' interests fixed
 - no discretion re: distribution of benefits – it is a trust ∴ it must happen as S wants it
 - interests of beneficiaries' fixed *absolutely*, e.g. "\$5000 to each of A and B")
 - interests of beneficiaries fixed *proportionately*, e.g. "1/2 of annual income to each of A and B")
- Discretionary** = beneficiaries' interests not fixed
 - discretion regarding distribution of benefits – it must happen, but Tr can decide how
 - discretion as to *which* beneficiaries will receive, e.g. "\$5000 to either A or B as trustee chooses")
 - discretion as to *how much* each beneficiary will receive, e.g. "\$5000 split between A and B as trustee chooses"

A.2) Powers – An Introduction

- Trust = must happen (if Tr fails to do it, court will)
- Power = authority to deal with property belonging to another
 - not an obligation but authorization ("may")
- Powers may authorize any form of action (subject to public policy)
 - administrative* = power to manage property, e.g. stockbroker's authority to invest funds
 - dispositive* (power of appointment) = power to dispose property, e.g. "X can give my \$5000 to A or B")

Powers of Appointment – Roles

- Donor** = party owning property and granting authority (not settlor)
- Donee/appointor** = party authorized to alienate property (not trustee)
- Appointee/object of appointment** = party receiving property (not beneficiary)

Powers of Appointment – Species

- General power** = authority to select anyone,

- e.g. "X may dispose of my car as she sees fit" to anyone in the world incl. yourself

- Special power** = authority to select from class

- e.g. "X may dispose of car to either A or B"

- Hybrid power** = authority to select anyone except from certain class

- e.g. "May dispose to anyone except A or B"

Powers – Personal Capacity and Fiduciary Duty

Donee receiving authority in *personal capacity*...

- may – but need not – exercise power
- may – but need not – consider exercise of power
- may release power at will
- power lapses with death of donee

Donee receiving authority in *fiduciary capacity* (e.g. trustee)

- may – but need not – exercise power
- must diligently consider exercise of power
- may not release power unless authorized by donor
- power granted *ex officio* – power survives death of holder

- One usually receives power in fiduciary capacity because person is a fiduciary for some other reason (i.e. already a trustee or already representative of an estate)
- If setting up an express trust, usually includes trust obligations and powers

A.3) Powers and Trusts

- Continuum of freedom:** on one end, much power/freedom; on the other end, express trust

Power in personal donee

- Authority** (rather than obligation) to dispose
 - property need not be disposed
- Disposition need not be considered
 - consideration must be honest *if* it occurs
 - disposition must conform to power terms *if* it occurs
- Any exercise in favour of non-objects is void
- Power dies when donee dies

Power in fiduciary (e.g. trustee)

- Authority to dispose**
 - property need not be disposed
- Duty to consider**—duty arises from fiduciary status
 - disposition must be considered in good faith
 - Must refrain from acting capriciously
- Donee must consider range of objects—duty arises from fiduciary status
- Disposition must conform to power terms *if* it occurs
- Any exercise in favour of non-objects is void
- Power does not die with fiduciary
- Looks like a discretionary trust, but not quite

Discretionary trust in trustee

- Duty to dispose + authority to select
 - property must be disposed
- Disposition must occur – selection in Tr's discretion
 - trustee must consider range of objects:** trustee (fiduciary) must exercise in good faith; presume equal distribution if not exercised by trustee
- Tr must exercise discretionary power—if Tr does not do so, court will

Fixed trust in trustee

- Duty to dispose
 - property must be disposed

- disposition must occur — actual selection determined by settlor

and then a gift over to my children = probably a trust, not a gift over

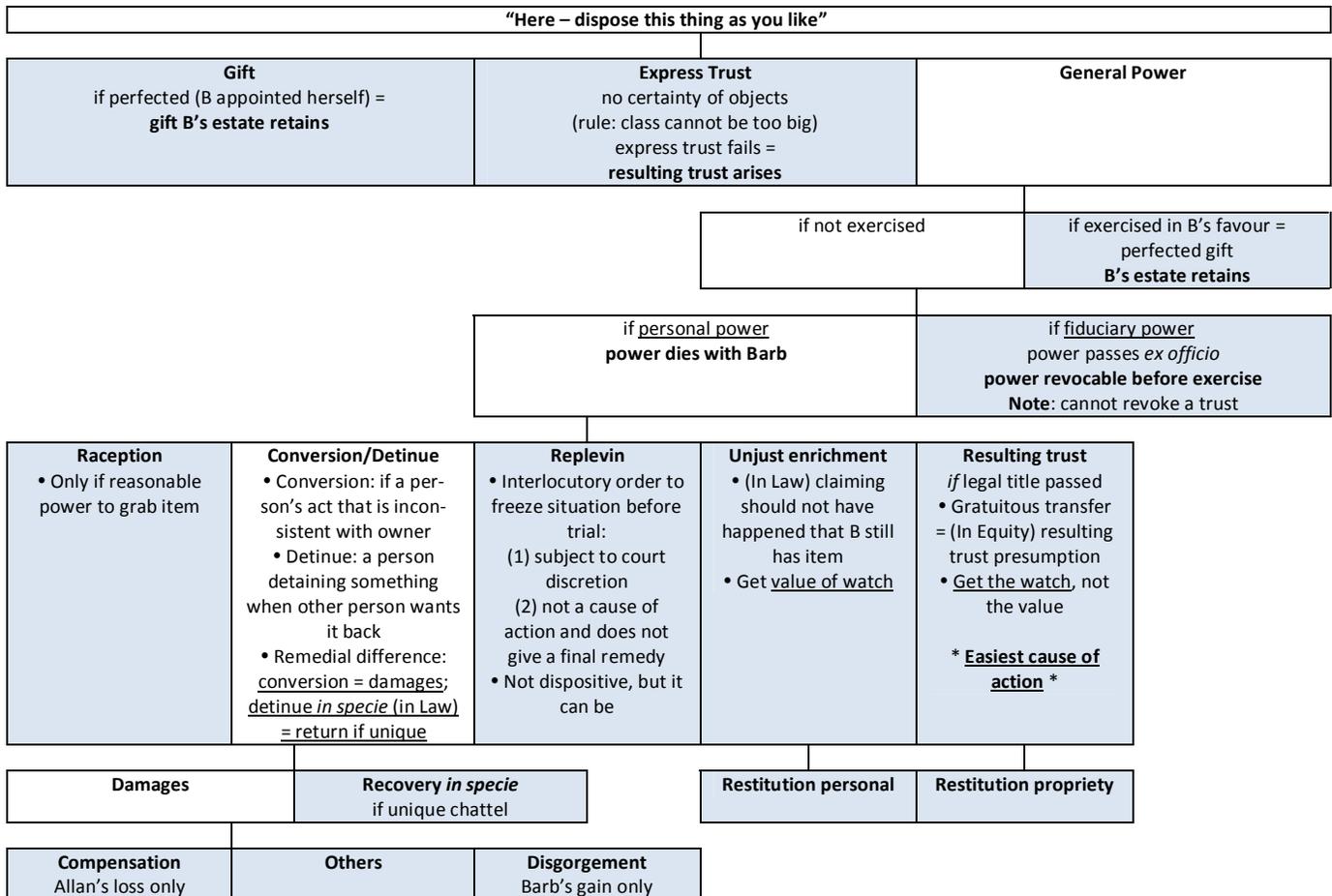
Distinguishing Powers, Gifts and Trusts

- Distinguishing btw. fiduciary power or discretionary trustee:
 - Construe intention from totality of circumstances
 - Example:** “You can give my car to A or B but C gets it if you don’t”
- Gift over** (disposition that must occur if first event does not happen): definitely a power not a trust
 - First disposition is a power, not a trust
 - Gift over cannot be a trust as it works in default—if first thing is a trust, it must happen
- “Gift over” is a term of art
 - Is it a disposition in default of another?
 - Example:** Blackacre in trust to my wife

A.4) Gifts and Powers

- How does a general power of appointment differ from an outright gift?

Hypo: A gives his watch to B and says, “Here – dispose of this thing as you like.” B dies with the watch still in her possession. A wants to recover the watch—or at least the value of the watch—from her estate. Is he entitled to do so? Does it matter whether or not Barb was in a fiduciary position with respect to Allan? If Allan is entitled to the return of the property, what mechanism would effect such a result?



Approach:

- Know **facts**, interpret them, put facts into as many causes of action as possible
- Disposition:** what did A intend?
 - Nature of disposition turns on intention
 - Figure out intention and that will either succeed or fail on its own terms—intended one thing
- In practice, if B’s estate is being difficult, A probably cannot get watch back
 - Equity will almost always return thing back, if you have a story that interests the Chancellor
 - In Law, unless the thing is land, never have the right to get it back

A.5) Distinguishing Trusts and Powers

• Power and discretionary trust is distinguished by intention (**Re Lloyd**)

- **Intention of donor**; if trust, **cannot be any contrary intention** to trust
- **Totality of circumstances** may be used to construe intention
- **Power if gift over**; but not necessarily trust if no gift over (contrary purported rule rejected in favour of flexibility)
- Greater specificity of objects *may* suggest trust (**McInnes** does not agree)

Re Lloyd (1943 Ont HCl) **Non-exercise of power**

• Testatrix (T) left life estate to husband with a discretionary power to distribute prop (after his death) to one named niece; no mention of gift over or disposition of residue
• H died before T, who did not revise will before her own death. The only appointee alive at her death was the niece—application to determine where the remainder was to go

Issue: Was there was an intestacy or an implied gift to niece as the object of the power of appointment? I.e. Was this a mere power or was it a discretionary trust?

Possible outcomes:

1. **Special power in personal capacity (gift over)** → results in intestacy to nephews and nieces
2. **Discretionary trust to niece** → if trust, does not matter that H died before it was made, as court can make decision to divide prop equally to beneficiaries

Decision: It was a discretionary trust for which the donee was obliged to exercise—no contrary intention expressed; estate went to the niece as sole remaining beneficiary of the trust

1) **Intention:** court looked to words actually used and applied what necessarily and reasonably should be implied
2) **Circumstances:** court influenced by the fact that here T had given thought re to whom the property should be given; the act of selection was a clear indication that she had a clear intention that at least those she mentioned should receive benefit—probably a trust rather than a power if intended Bs are identified with some specificity

Ratio: If there is a power to appoint among certain objects, but no gift to those objects and no gift over in default of appointment, Court may imply a trust for or a gift to those objects equally if the power is not exercised

- But for the rule to apply there must be a clear intention that the donor intended the power to be in the nature of a trust, and any contrary intention defeats an implied trust
- Proper approach is for court to look to words used and apply them necessarily and reasonably

McInnes: outcome was wrong—can have great specificity under a special power

A.6) Donee Obligations

• Duties of consideration on trustees to exercise a discretionary power (**Turner v. Turner**):

- 1) Consider periodically **whether or not he should** exercise the power,
- 2) Consider the **range of objects** of the power

3) Consider the **appropriateness** of individual appointments

4) If appointment made, must **comply with terms** of power

A.7) Appointee Rights

• Before Tr exercises discretion, individual appointee does not have right, but collective group (that is appointed) does—collectively owns benefit

- May complain if prop goes to someone outside of class, no rights under *Saunders*
- **Rule in Saunders:** if get all Bs under a discretionary trust (all at least 18 and not insane), they may collapse the trust immediately—Bs can get benefit now (instead of later) of equal value

Turner v. Turner (1984 Ch.D.) **Duties of fiduciary holding discretionary power of appointment**

• S created a trust for benefit of wife, children, and remoter issue and their spouses; Trs given powers of appointment. Dispositions in 1967, 1971, 1976: Trs basically got instructions from donees—did not appreciate their powers and duties re: discretionary trust and did not “consider” before appointing
Issue: Did the trustees validly exercise their powers?

Decision: Exercise of power set aside—Trs failed to satisfy obligations; effect of appointments reversed to extent possible

- '67 and '71: improper disposition, therefore, resulting trust to donees
- '76: appointment set aside—subject to mortgagee's rights (purported appointee holds property on trust for power - mortgagees of prop maintain rights against prop)

- Trs didn't consider exercise of power and therefore breached their duty. Court can put aside the purported exercise of a fiduciary power, if satisfied that Trs never applied their minds to exercise of discretion

- Trustee donee of power subject to obligations:

- Although Tr need not appoint at all...
 1. Must periodically consider whether or not they should exercise the power
 2. Must consider the range of objects of the power (possible appointees)
 3. Must assess individual appointments
 4. *If* appointment made – must comply with terms of power

Ratio: Duties of consideration on trustees to exercise a discretionary power (see above)

McInnes: If donees exercise discretion, must be own choice—cannot refer to donor

Problem re: 1976 disposition: prop was mortgaged, need to protect mortgagee = BFPV

- Donees transferred prop to J, mortgages prop to X-third party
- Actually beneficial interest resulted back to donees in 1976, but BFPV-mortgagee (X) is protected as he purchased interest from John—**must balance interests**

- What if it was not mortgaged, J sold it to X? X would get prop
- Under mortgage situation, title was not extinguished
- Final outcome: result back to donees, subject to the mortgage—if J does not pay the loan, then X can take land from donees

Fixed trust	Discretionary trust	Power
<ul style="list-style-type: none"> • Bs have vested rights (in possession or in interest) in prop • Individual beneficiaries have proprietary rights <ul style="list-style-type: none"> ▪ Example: House to A and my car to B 	<ul style="list-style-type: none"> • Individual class members have no proprietary rights until discretion is exercised <ul style="list-style-type: none"> ▪ Example: House and car to A and B as trustee sees fit • Collective class members have limited proprietary rights <ul style="list-style-type: none"> ▪ may complain if power exercised improperly ▪ may demand prop if <i>sui juris</i> and absolutely entitled ▪ presumptively equal distribution if discretion not exercised 	<ul style="list-style-type: none"> • Individual class members have no proprietary rights until appointment <ul style="list-style-type: none"> ▪ Example: House and car to A and B if donee wishes • Collective class members have no proprietary rights <ul style="list-style-type: none"> ▪ may complain if power exercised improperly (<i>Turner</i>) ▪ no ability to demand property if <i>sui juris</i> ▪ no obligation on donee to ever appoint ▪ property returns to donor if power not exercised

A.8) Certainty of Objects of Powers

- **Object** = person to whom property is disposed
 - **Certainty of object** = certainty of person (potentially) receiving property (need sufficient certainty)
 - **Certainty of objects and powers**
- 1) **General power:** do not need certainty of objects
 - e.g. "X may dispose of my \$5000 to anyone she chooses"
 - 2) **Special power:** requires certainty of objects
 - e.g. "X may dispose of my \$5000 to A or B"
 - 3) **Hybrid power:** requires certainty of objects
 - e.g. "X may dispose of my \$5000 to anyone except A or B"
- To find a trust versus power, must find an indication that S intended the class or some of the class to take (***In Re Weekes' Settlement***)

In Re Weekes' Settlement (1897 Ch. D.) Power in personal capacity versus discretionary trust

- T willed a life interest in certain property to H; also gave him "power to dispose of all such property by will amongst our children in way [he saw] fit". H died w/o having exercised the power of appointment
- Issue:** Was a trust created, or was it a mere power? Does the property go to the children or beneficiaries of intestacy?
- Decision:** Based on will, T intended to give a life interest and power to H—power died with H, prop goes to intestacy
- Not a gift but a mere power conferred on H; even if husband has a choice to make, not a fiduciary; he died w/o making a choice
 - "To the children" = not specific, then a **general power** (not a real rule—it's just the judge taking a guess)
 - No words in will to justify that T intended that children should take if H didn't execute the power; not the case of a gift to the children with power to H to select, or to such of the children as H should select by exercising the power. If T truly intended mere power, she shouldn't have to say more

Ratio: A gift to H for life and a power to H to appoint among a class, with no gift over in default, does not result in the members of the class taking in default of the power being exercised. In order to find a trust, the court must find an indication that T intended the class or some of the class to take

- intended in fact that the power should be regarded in the nature of a trust (construe the will and arrive at T's meaning by examining the words expressly used, and implying only those things that are necessarily and reasonably to be implied)
- Note:** What rights do appointees under power possess?
- Object under power has no property rights until appointment
 - no immediate and indefeasible right (*cf Lloyd*)
 - Question as to disposition of property
 - to children if discretionary trust intended - equally among children if discretion not exercised
 - to other parties if power intended - to parties entitled to residue of testatrix's estate
 - T's intention construed to support power rather than trust
 - How is *Weekes* distinguishable from *Lloyd*? *Lloyd*: specific about B

Test of individual ascertainability

- **Test for certainty of objects for power of app (*Gulbenkian*):** class of possible appointees must be sufficiently clear so that donee can properly perform power (if she so chooses) – "no conceptual uncertainty whether... individual is or it not a member of the class"
 - Either in the class or not in the class, do not have to come up with everyone in class

Gulbenkian's Settlement Trusts (1970 H.L.)

Certainty of objects for power

- S created a settlement for benefit of son during son's lifetime; Trs may pay any amount they want to anyone who employs, lives with, or has care/control of S. "Gift over" = it is a power
- Issue:** As settlement provided alternative trusts, should power not be exercised by Trs? Settlement was void for uncertainty?
- Decision:** Power not a trust
- Ascertain S's intention, without regard to the consequences, and, then, having construed the document, apply the test:
 - 1) Date of effective disposition
 - *Inter vivos* = date of disposition
 - 2) **Test of individual ascertain ability:** ascertainable that any given person is or is not within class (must be specific on this)
 - Do not have to find everyone, just need to be sure that person who steps forward is or isn't in class
 - Do not have to exercise power, but if you do, must come up with a big enough class to exercise discretion
 - **Test of certainty of objects under powers:**

- *Personal donee*: no need to undertake any ascertainment
 - *Fiduciary power*: must reasonably undertake ascertainment
 - No need to ascertain every member of class
 - Must ascertain reasonable number *if* power exercised
 - insufficient that at least one member of class is identifiable
 - power must involve sensible choice (personal or fiduciary)
 - Test requires conceptual rather than evidentiary certainty
 - no need to locate every member of class
 - Court will resolve evidentiary difficulties
- Court: clause was a mere power, phrases sufficiently certain
- Words given ordinary meaning and read in context
 - Donee may apply to court in difficult case

Ratio: When dealing with a mere power, it is not necessary for validity to have to ascertain every member of the class, but it must be possible to be able to say with certainty whether any given individual is or is not a member of the class. Re: trusts, donor must make his intention sufficiently plain as to the objects of his trust and the court cannot give effect to it by misinterpreting his intentions by dividing the fund merely among those present. The question of certainty must be determined as of the date of the document declaring the donor's intention

Obiter dicta re: trusts:

- If it is a test of powers, test of individual ascertainability
- If it is a fixed trust, then test is class ascertainability = if it is a trust, all members of class must be identified (but not located)
- Test for DT (trust power) overruled in **McPhail v. Douulton**

Powers and Certainty of Objects—Review Questions

- Must have clear criteria, as long as it is conceptually certain, not fatal if cannot find some people or it is a difficult decision to decide
- Are the objects sufficiently certain in the following cases?
 1. “You may dispose of my cars to any law graduate” — Conceptual certainty, some criteria exists
 2. “You may dispose of my cars to my friend, Rob” — May have more than one friend named Rob, any way to save? If there is ambiguity, call on outside evidence; if it is on its face hopelessly uncertain, can bring external evidence (probably cannot be a DT)
 3. “You may dispose of my cars to anyone of great morals” — Hopeless, “great morals” is not a clear standard

IV. CREATION OF EXPRESS TRUSTS

A. Essential Elements to Creation of Express Trusts

- 1) Capacitated parties: legal ability to act
- 2) Sufficient certainty
 - certainty of intention
 - certainty of subject matter

- certainty of objects
- 3) Constitution: unless prop handed over, no trust at all
- 4) Formalities

Capacity

- **Settlor:** must have capacity to give away prop
 - minority (under 18): generally unable to create testamentary trust
 - *inter vivos* trust voidable at minor's option
 - mental incapacity: generally unable to create testamentary or *inter vivos* trust
 - bankruptcy: generally unable to create testamentary or *inter vivos* trust
- **Trustee:** must have capacity of dealing with prop
 - minority and mental incapacity
 - cannot effect valid transfers
 - incapacitated trustee can be judicially replaced
 - unincorporated associations (not a corp = not a “person”)
 - not a legal entity—incapable of holding property as trustee
- **Beneficiary**
 - minority and incapacity
 - typically represented by representative
 - unincorporated associations
 - not a legal entity—incapable of holding equitable title
 - trustee may hold for individual members of association

B. Introduction to Three Certainties

- Three certainties of:
 - **intention to create trust**
 - subject matter re: **prop contained in trust**
 - objects regarding **recipients of trust prop**
- Reflexive relationship
 - distinct elements tends to be mutually (non)-reinforcing, e.g. “hold this house for the good people of the world”—uncertain objects questions certainty of intention

B.1) Certainty of Intention

• **Test:** On BOP, must satisfy that trust was intended as opposed to something else

- **Rule:** one can either succeed or fail on the basis attempted
 - if A tries to give money as an express trust and fails, then transfer is completely invalid—cannot turn it into a gift or power

Indicators of trust:

1) Purported Tr must be obliged to hold and ultimately distribute

2) Certainty of intention inferred from nature and manner of disposition as a whole

3) Technical language not required

- intention may be gleaned from statements and acts
- “on trust” or “as trustee” are indicative but not conclusive

• **Wish or imposition of moral obligation insufficient**

- **Example:** “I hope that...” “I wish that...” “I am confident that...”
- discredited historical tendency to interpret as obligation
- onus of proof on party proposing trust

• **Consequences of failure of certainty of intention**

- intention to benefit “trustee” absolutely = gift
- intention for power = appointment, gift over or resulting trust
- absence of intention to benefit “trustee” = resulting trust

B.2) Certainty of Subject Matter

- Any form of prop may constitute trust property
- Subject matter of trust must be sufficiently certain
 1. sufficient certainty in ID of trust prop
 2. sufficient certainty in quantum of beneficiaries’ interests

Uncertainty in Subject Matter

• ID of property must be ascertained or ascertainable

- **ascertained** = specified prop or fixed sum
 - e.g. “Blackacre on *inter vivos* trust,” “\$5000 on testamentary trust...”
- **ascertainable** = mechanism to generate answer on effective date
 - e.g. “residue of my estate on testamentary trust...”

Subject Matter – Identification of Property

- Time of assessment
 - Property must be IDable at creation of trust

CERTAINTY OF SUBJECT MATTER: QUESTION #1

T creates a trust under his will. The relevant provision states: “my house located at 123 Blackacre Rd shall be sold and 60% of the proceeds shall be held on trust for my daughter.” Is the subject matter of the trust sufficiently certain? What if the housing market fluctuates between the time that the will is written and the time that the testator dies? What if the relevant provision read: “the bulk of the proceeds shall be held on trust for my daughter”?

- Subject matter of 60% of proceeds is certain if we know whether will comes into effect upon death or upon writing will (*inter vivos* = effective immediately, testamentary = effective upon death)
- Ascertainable answer = price of house at death
- If testamentary trust and market fluctuates, proceeds will be 60% of price at time of death
- “Bulk of the proceeds”: court will have to determine if this is sufficiently certain

CERTAINTY OF SUBJECT MATTER: QUESTION #2

A and B enter into a separation agreement that is intended to create a trust under which A settles property on trust for the benefit of B. The trust property is said to consist of 60% of the value of A’s estate upon his death. Upon A’s death, B attempts to enforce the purported trust against A’s estate. Will she succeed? Is the subject matter of the trust described with sufficient certainty?

- Question of intention, need to know what the prop is when A created trust
- A appeared to have created an *inter vivos* trust that pays out when he dies
- TRUST FAILS: need certainty of subject-matter, impossible to figure out based on the facts

CERTAINTY OF SUBJECT MATTER: QUESTION #3

T drafted a will that directed that his four houses should be held on trust upon his death. His son was permitted to choose one and his daughter was permitted to take the remaining three. The son predeceased T. Does a valid trust exist for the benefit of daughter upon the T’s death?

- Need formula and must be effective
- If son doesn’t make choice, daughter gets nothing at all (outcome of *Boyce v. Boyce*)

Note: If same case happened today, courts would likely come to a more favourable decision to the daughter

Subject Matter – Intangible Property

- Sometimes trusts can take form of intangible prop: choses in action (i.e. debts, shares, etc.)
- Must accept that if we are going to call it ownership, must be able to identify the property
 - Point was missed by in *Hunter v. Moss*

***Hunter v Moss (Eng. CA 1994)* Intangible prop – chose in action**

• Co. had 1000 equal shares, Δ owned 950 of shares and self-declared Δ to be Tr of 50 of shares for π (ought to have told co. to take back 50 and reissue, but this didn’t happen). Δ refused to give 50 shares beneficially to π after Δ sold entire share capital of 950 shares

Issue: Does the trust fail due to uncertainty of subject matter?
Decision: Trust succeeds, as CA held that in general a trust is certain if, immediately after its declaration, a court could make an order to enforce it. In this case, it was irrelevant which 50 shares were subject of trust, which was therefore upheld

- 1) As a matter of ownership, must be able to identify the prop
 - However, in this case, Eng. CA is saying that it does not matter that you can’t identify—this is WRONG
- 2) Analogy to testamentary bequest of portion of identical shares (if Δ dies with 950 shares in co, and will gives 50 shares go to H, then it is a good gift)

- *cf* executor receives full beneficial title to all assets – S here retained beneficial interest in rest of shares
- *cf* testamentary gift involves immediate disposition – trust often involves ongoing administration
- **Criticism:** this analogy does not work, as (1) there is no beneficial interest in prop, (2) only executor has an (fiduciary) obligation to distribute, and (3) there is no division of title unlike usual express trust which is an ongoing relationship

3) Distinguish cases involving tangible property (e.g. wine, gold)

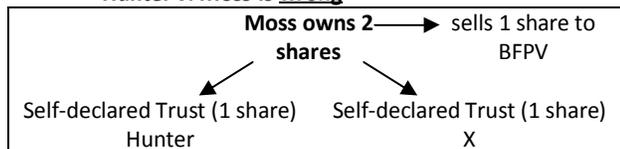
- *cf* identification also crucial for intangible property – intangible prop may be subject to competing claims
- **Criticism:** must be able to ID any prop—however, court believed intangible prop could be distinguished from choses in possession

4) Distinguish case of unascertained part of fund creating mere charge (lien)

- *cf* beneficial ownership (trust) requires more than security interest (lien) – ownership must pertain to *specific* asset
- **Criticism:** in some situations (charge, debt, or lien = security), do not have to identify the exact value and debt subsists until paid back—but this is not a creditor-debtor relationship, as it involves trust prop ownership = if prop is innocently destroyed, then too bad

Questions

1. Could M change mind before registration of share transfer?
 - **Re Rose:** Δ cannot change mind = **constructive trust** imposed today to perfect the gift in Equity
2. What if H had paid M to declare trust? Not a trust:
 - Unjust enrichment from Δ to π (restitution, return \$)
 - Expectation damages for \$ paid to π (breach of contract)—expect to get (increased) value; if want specific performance must show no amount of money for specific shares would allow one to get same benefit from the market (i.e. land, family heirlooms)
3. What if M sold 50 shares to BFPV and profitably invested proceeds? Who's money is that? H or M?
 - is M liable for breach of trust?
 - can H trace “his” shares into proceeds and profit?
 - **McInnes:** must know which shares in this scenario – **Hunter v. Moss is wrong**



4. What if M gave 475 shares to X and 475 shares to Y?

- X and Y are not BFPV ∴ they are potential Δs
- As between the 3 parties, Ct will try to be fair
- Situation can be avoided by requiring subject matter be IDed regardless of tangible or intangible prop

5. What if M declared self trustee for *all* shares in 900:50 ratio? Sufficient certainty as subject matter = all 950 shares

Subject Matter—Quantum of Beneficiaries’

Interests

- Beneficiaries’ interests must be ascertained or ascertainable (*inter vivos* or *testamentary*)
- Seemingly uncertain provision may be saved by

ameliorating doctrines

- e.g. “\$5000 to be split between A and B”
 - settlor may grant discretion to trustees (generally express)
 - court may hold “Equity is equality”
 - settlor may provide formula

• Where T specifically gives Tr discretion to quantify an amount, the gift is not void for uncertainty; the court can apply an objective test to find that what was intended is the same as what the court would have regarded as reasonable (**Re Golay’s Will Trusts**)

Re Golay’s Will Trusts (Ch D 1965) Courts may discern “reasonability” (want trust to succeed)

• T directed that his friend enjoy one of his flats and some other prop during her lifetime, and to receive a “reasonable income” from his other prop. Executor applied to determine whether “reasonable income” was void for uncertainty
Issue: “Reasonable income” = certain enough to create a trust?
Decision: Not void for uncertainty; court discerned that an amount could be objectively identified. Since the Court can make objective assessments of what was reasonable, it would not be deterred from doing so merely because subjective influences can never be wholly excluded

1) T **intended** an objectively determined “reasonable income” (ascertainable through mechanism) = objective standard

2) **Objective assessment** may be performed by trustee or court

- possibility of divergent assessments is immaterial
- focus on *conceptual* certainty—not *evidentiary* certainty

3) Intent of T was not what he/some specific person would subjectively deem to be reasonable; it was what the courts objectively presumed to be a reasonable income

Ratio: Where T specifically gives Tr discretion to quantify an amount, gift is not void for uncertainty; the court can apply an objective test to find that what was intended is the same as what the court would have regarded as reasonable

Questions:

- What if trust said “an income that I believe is reasonable”? Insufficient, T is dead
- What if trust said “an income that my trustee believes is reasonable”? Discretionary trust; if done in good faith then it is sufficiently certain
- “Reasonable income” = fixed trust

B.3) Certainty of Objects of Trust—Introduction

- Significance of requirement of certainty of objects
 - settlor: assurance that intention will be satisfied
 - beneficiary: receipt of property + early termination of trust
 - trustee: proper performance of obligation
 - court: control of trust + execution if default by trustee

3.1) Test for Certainty of Objects—Power

- **Power** = test of individual ascertainability (**Gulbenkian**)

- must be possible to determine if any person “is or is not” class member
- no need to compile complete list of members
- Rationale: power = not a trust, disposition unnecessary, donee in personal capacity need not consider at all, donee in fiduciary capacity must consider but not every member, objects have no proprietary right individually or collectively before disposition

3.2) Certainty of Objects of Trust—Fixed Trust

- **Test of class ascertainability (*Gulbenkian*, *obiter*)**
 - e.g. “\$500 000 equally between UA students”
 - must compile list of *all* Bs and *no* others
 - difficulty in actual location of Bs irrelevant
 - payment into court possible regarding lost students
- Rationale for test of class ascertainability
 - fulfilment of S’s intentions regarding Bs
 - trustee must distribute to *all* members and *no* others

3.3) Certainty of Objects of Trust—Discretionary Trust

- Although *Gulbenkian* says DT uses the test of class ascertainability, *McPhail* overturns this and applies **test of individual ascertainability**
 - Test for certainty of objects in power and DT are “assimilated” but not identical
 - DT which pass individual ascertainability test may fail if “definition of B is hopelessly wide as not to form “anything like a class” so that trust is administratively unworkable
- Rationale for assimilated tests:
 - DT and powers of appointment held by Trs are similar in nature
 - Tr need not distribute subject matter of DT in equal shares
- Overruled *Gulbenkian*: former rationale for test of class ascertainability
 - fulfilment of settlor’s intentions regarding class of beneficiaries
 - trustee must exercise discretion amongst *all* members and *no* others
 - court must distribute to *all* beneficiaries equally if trustee defaults

3.4) Certainty of objects--Summary

- **General power:** anyone
- **Special power:** must know who A and B are; does

not have to be done

- **Fixed express trust**

- Must be done as intended
- Must have class ascertainability

- **Discretionary trust**

- No need to equal distribution, do not have to consider every person in the class, lower threshold for discretionary trust
- **Old test (*McPhail*):** individual ascertainability that if someone steps forward, they are either in “yes” or “no” box (problem: can easily show “yes”, but cannot be certain with “no”)
- **Refined test (*Re Baden’s*):** individual ascertainability only requires one box: with sufficient certainty to know that anyone in the “yes” box definitely belongs there—don’t care if there are other “yes” people out there
- **Note:** “relatives” does not mean anyone related by blood or marriage—the usual people one considers to be family

McPhail v Doulton (1971 HL) Discretionary trust = test of individual ascertainability

• S transferred to Trs shares in a co. to form trust fund for benefit of employees and ex-employees of co., their relatives and dependents. Deed provided that the “Trs shall apply the net income of the fund in making at their absolute discretion grants... in such amounts and at such times and on such conditions (if any) as they think fit...”

Issue: Power or discretionary trust?

Decision: Discretionary trust found—test of individual ascertainability applied

- Test: individual ascertainability, not class ascertainability

- Why bring the threshold up? DT looks in practice and in theory more like a power than a fixed trust

- Conceptual rather than evidentiary certainty
- Either individual is or isn’t in group
- Fiduciary power and DT is similar, but it is not the same—if DT, a little more work; also, need another test, because if it is a power, there can be a large class because it may never be done
- If trust and not a power, the class cannot be so big b/c court may be the one to select

- Wilberforce (majority):

- class test said to presume equal distribution by court in default
 - but no actual rule invariably dictating equal distribution
 - and no reason for equality here—not settlor’s wish
- class test said to presume need to consider *all* members of class
 - but settlor could not sensibly have obliged trustees to do so
 - sufficient if reasonable fiduciary effort at ascertainment; fiduciary selection between ascertained members and no obligation to select

- from among *all* members
 - fine line between discretionary trusts and powers in trustee
 - both subject to fiduciary duty to consider class
 - test: assimilated to individual test under power
 - possible to say *any* person “is or is not” a member
 - test of *conceptual*—not *evidentiary*—certainty
 - difficulty in actually locating members irrelevant
 - imperfect assimilation to test applicable to powers
 - more comprehensive consideration required under trust
 - added prohibition of *administrative unworkability*; excessive width may negate “anything like a class” and negate sensible exercise of discretion (why is general power not invalid for unworkability?)
- Lord Hodson (dissent—not reproduced)
- *Gulbenkian* revisited: Tr must consider *all* members intended by settlor; court generally must distribute *equally* in trustee’s default
 - draconian consequences insufficient reason to ignore principle

Re Baden’s Deed Trusts (No 2) (1972 Eng CA)
Individual ascertainability only requires person fits in “yes” box

- *McPhail v Doulton* facts
- Issue:** How is individual ascertainability test to be applied?
Decision: “Relatives” and “dependents” as trust objects are not so uncertain as to invalidate discretionary trust
- 1) Relevant phrases interpreted in light of all the circumstances
 - *Relative* is contextually limited to close relations
 - *Dependent* “conjures up a sufficiently distinct picture”
 - 2) Test pertains to *conceptual*—not *evidentiary*—certainty
 - Evidentiary applications can be guided by court if doubt
 - Mere factual resolution of actual person’s status required
 - 3) No requirement of proving exclusion from class
 - *Not* necessary to say whether any person “is or is not” in class
 - Purported test reverts to class ascertainability (complete list)
 - not necessary that every member is ascertainable
 - *Not* necessary to prove a negative
 - no requirement of saying “X clearly is out” (“relation” possible to prove but impossible to disprove)
 - test pertains merely to presence or absence of proof of inclusion in class (merely requirement of saying or not saying “X clearly is in”)
- Ratio:** Test is satisfied if, as regards to at least a substantial number of objects, there is sufficient certainty that the person falls within trust, even if there are a substantial number of persons for whom it cannot be proven that they are in or out

C. Constitution of Express Trusts

• **Constitution:** when there has been a declaration of trust plus conveyance of prop to Tr

C.1) Significance of Constitution

- 1) T created only upon element of **constitution**
 - no trust merely because certainty of

- intention, subject and object
- analogy to delivering a gift – prop must be placed in hands of trustee (***Carson v Wilson***)
- S must do everything in power to transfer (***Re Rose***)

2) Generally **no revocation after constitution**

- settlor cannot retrieve property settled upon trust

3) Generally **no enforcement by B before constitution**

- beneficiary cannot compel settlor’s mere promise to constitute

C.2) Modes of Constitution

1) Settlor’s transfer to trustee

- Delayed express trust may suggest constructive trust in the meantime (***Re Rose***)

2) Third party’s transfer to trustee (***Re Ralli’s Will***)

3) Settlor’s declaration of self as trustee (***Paul v Constance***)

Carson v Wilson (1961 Ont. SC) Constitution: settlor must transfer prop

- W had lands he wanted to give to certain people. During his life, filled out necessary paper work, but did not hand over immediately as he did not want them to get prop until his death. W died before he could hand it over
- Issue:** Effective disposition?
Decision: No, failed gift cannot be a cure by finding a trust
- 1) If *inter vivos* gift, must hand over papers—this didn’t happen
 - 2) If testamentary, did not comply with *Wills Act*
 - 3) Bs argued it was an express self-declared trust, but court rejected this
 - Act is effective—if at all—only as intended (*Milroy v Lord*: court will not perfect an imperfect gift or recharacterize the method of transfer in order to see the intention carried out)
 - Failed intention to create gift cannot be cured by finding trust; intention to create gift necessarily precludes intention for trust
 - 4) Bs had to identify the intended disposition and succeed or fail on that basis
- Ratio:** Settlor must transfer property to Tr in order for the trust to be constituted
Comment: S should have given himself a life estate with remainder going to Bs
Question: Why did claimants not argue S’s lawyer was trustee? Lawyer was not a Tr b/c S reserved power to recall deeds

C.3) Transfer of Property to Trustee by Settlor
Re Rose (Eng. CA 1952) Delayed express trust → may have constructive trust imposed in meantime

- Rose wanted to create an express trust, but complications arose when there was a delay in the transfer and estate duties were imposed on the shares
- **March 30:** Rose → Trs (secretary & wife) → Bs (wife and son)
 - Co. had discretion as to accepting Tr as legal owners
 - Rose did everything he could

- **April 4:** Crown claims estate duties on the shares stating that the transfer was not effectuated by April 1943
 - If beneficial interest belonged to Rose, then huge tax, if trustees, no tax
- **June 30:** Express trust created, when it was constituted
 - Title from Rose to trustees
 - Rose died soon after—need to know who was beneficially entitled to shares on April 4th due to taxing rule

Issue: Who held beneficial title to the shares on April 4th?
When did S constitute the trust?

Decision: March 30

1) Although Equity will not perfect an imperfect transfer (*Milroy v Lord*), Rose did everything in his power—Equity will treat transfer as perfected once donor does all possible

- subsequent registration by co. beyond R's power
- registration essential to W's rights against co.
- donee (trustees) held on trust for W after registration
- registration not essential to W's rights against R
- donor (Rose) held on trust for wife pending registration

2) As Rose did everything he could in March, a trust was immediately imposed

- Express trust arose in June, so a constructive trust was imposed prior to its creation—trustee as Rose, beneficiaries are the same as original express trust

Ratio: As Equity will treat transfer as perfected once donor does all possible, even if an express trust has not been constituted, a constructive trust may be imposed in the meantime

Questions:

- What if co. would not register new owners?
 - No express trust = constructive trust is retroactively wiped out as if it never existed
- What if co. declared a dividend on April 10?
 - Money legally would go to R for benefit of B
- What if Rose changed his mind?
 - Cannot get shares back according to Equity

C.4) Transfer of Property to Trustee by a Third Party (*Re Ralli's*)

• A trust may be constituted by a transfer of title to T from someone other than the settlor. If title to the prop is vested in the Tr through a third party, the trust may still be held to be constituted beyond revocation

- In case of imperfect gift, if coincidentally the donee is also the administrator/executor, the gift is treated as perfected

***Re Ralli's Will Trusts (1964 Ch D)* Equity can act upon a coincidence**

• **1899:** T creates a testamentary trust for wife for life – when wife died, supposed to go to π -Tr – then to daughter, Helen (H)

- Wife's interest: beneficial interest upon creation
- What is H's interest when W had prop? Vested remainder interest, what is left over after life estate

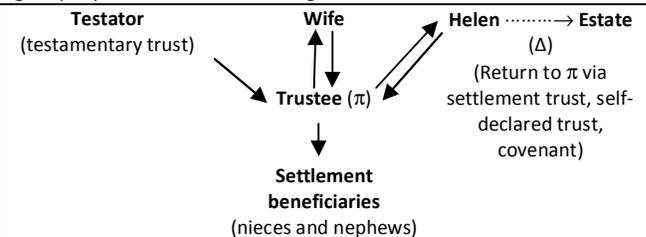
- It belonged to H, but she can't put her hands on it

- **1924:** H created a settlement of own prop
 - Settlement trust through same π -Tr, out to nephews and nieces
 - H declared herself to be trustee of everything she owns (Tr became beneficiary) = trust upon trust upon trusts
 - Covenant also given to π -Tr: everything H gets in future, H will give to π

- At this point, π has multiple roles:

- Trustee of testamentary trust
- Covenantor of H's covenant
- Trustee of settlement trust
- Beneficiary of self-declared trust

• **1956:** H dies before W, Tr- π unsure what to do with prop—if give prop to H's estate, won't get back



Issue: Is the residual estate on trust for Bs under covenant or is it being held for H's personal representatives (her estate)?

Decision: Held on trust for beneficiaries under covenant

1) No dispute arose in 1961 as back in 1924, through self-declared trust, benefit was to go back to Tr = trust enforceable against Helen and her estate

2) Equity generally will not assist a trustee in *acquiring* administrative title = trustee can retain title against Helen's estate for settlement trust

- Sufficient in Equity if trustee acquires administrative title in *any* capacity
 - legal title vested in trustee by virtue of testamentary trust
 - covenant allows trustee to retain title in conscience
 - covenant bars her estate in conscience from claiming title
- Constitution of the trust: Tr expected to take possession from H, but instead took it from W's estate—didn't get it from settlor or H, is the coincidence sufficient? Maybe, but coincidence itself is not enough; **need (1) possession and (2) H's promise** (covenant: could not be positively enforced, but it is still good enough for conscience as it binds the parties—prop is supposed to go back to settlement beneficiaries)
- Unconscionable for estate to get prop

Ratio: If A declares a trust for the benefit of B and that prop finds its way into the hands of the trustee by way of a third party, then the trust is completely constituted. It is of no importance that the trust creator himself was not the one to transfer the property. The trust becomes effective and irrevocable once in the hands of the trustee

Note: Sometimes Equity will act upon a coincidence—acting on the substance, rather than form

C.5) Declaration of Self as Trustee (Paul v Constance)

Paul v Constance (1977 Eng. CA) Self-declared trustee

• C was married, but lived with P (another woman). C and P deposited \$ into an account in his name, with C saying to P “this money is as much yours as it is mine”. C died intestate and his wife wanted \$; P claimed it was an express trust

- Possibility 1: if it were just C’s \$, all passes to true wife
- Possibility 2: Legal title to account, but declared himself to be a trustee for himself and cohabitee

Issue: Was there an express declaration of the trust?

Decision: Express trust found

1) **Intention:** question of sufficient evidence of clear intention to create trust

- Intended a trust for himself and co-habitee

2) **Language:** deceased’s failure to use technical language irrelevant—may declare a trust w/o using those words

3) **Totality of circumstances:** sufficient evidence of intention

- deceased effectively declared self to be Tr of \$

Ratio: Settlor need not use legalistic language, as long as he expresses idea that he is holding property for benefit of another

Note: If shared beneficial interest, crucial to determine co-tenancy (half-half) or joint-tenancy (survivor gets the benefit)

Questions:

- Must settlor intend to create a trust?
- Must settlor be aware that a trust is being created?
- Who exactly was entitled to the money in the account?

D. Covenants in Favour of Volunteers

• **Covenant:** promise that S will transfer prop into trust in future

- Is it enough that would-be S made a promise?
- “Would-be” = unconstituted trust

D.1) Enforceability of Promises—An Overview

• Promises generally not enforceable at Law or Equity

- **Enforcement** generally premised upon satisfaction of two conditions:
 1. person is **non-gratuitous** in sense of having given *consideration*
 2. person enjoys **privity** in sense of being party to contract (negotiation, *consensus ad idem*)
- Can be one of the parties even w/o consideration (as long as connected to another with it)

Situation in Law: promise enforceable if supported by consideration and privity

- **Consideration** = something of value in eyes of Law
 - love and affection are not sufficient
 - seal is sufficient substitute for consideration
 - sealed contract = covenant or deed

- nominal consideration (e.g. peppercorn) is sufficient in Law
 - volunteer = B not providing consideration
 - B whom promise is directed may have privity (depends) (**Cannon**)

• **Remedy for breach = damages only** (nominal or compensatory)

Situation in Equity: promise enforceable if supported by consideration and privity

• **Consideration** = something of value in eyes of Eq

- **marriage settlement** is deemed sufficient consideration
 - extends to husband, wife and children of marriage (grandchildren, perhaps illegitimate / step / *in loco parentis*, not parties’ next-of-kin (volunteers)
 - settlement must precede marriage; marriage otherwise is past consideration
 - settlement and marriage must exhibit mutuality; marriage otherwise is not part of bargain
- **seal is not sufficient** proxy for consideration
- **nominal consideration** not sufficient
 - volunteer = person not providing consideration

• **Remedy for breach = specific enforcement or damages in lieu** – must be something special

- **Examples:** shares in privately held co, land, family heirloom, etc.

D.2) Mechanisms to Circumvent Constitution Req 2.1) Beneficiary is Party to Covenant (Cannon)

Cannon v. Hartley (1949 Ch D) Covenantee status may = privity

• Deed of separation: Δ promised under seal that if he inherits \$ exceeding £1000 during his wife’s or π-daughter’s lifetime, he would settle half of that to his wife for her life and remainder to π. When he inherited some money, he refused to execute the covenant and put \$ into trust. π claimed for breach of covenant (claimed damages and not specific performance)

Issue: Was there a breach of contract (covenant) even though the daughter was a volunteer?

Decision: Yes, damages awarded

1) No Equitable consideration as promise made under seal = Equity does not care (although Law recognizes the seal)

- No action in Equity because daughter was volunteer (not entitled to specific performance)
- Equity will not assist a volunteer
- Eq does not recognize seal as proxy for consideration

2) Damages allowed in Law even though daughter technically was volunteer

- Law generally will not assist volunteer; exception if

“consideration” satisfied by seal

- Ask: to whom promise was directed? Test for privity: direct persons can enforce promise
- Privity requirement satisfied by daughter’s covenantee status
- Entitled to expectation damages for breach: if she gets damages, she can get prop now, not when he dies—therefore, she sues in Law = receives monetary value as if Δ had constituted the trust

- Trust was never constituted in this case, but good for daughter to get value of trust by suing in Law

3) Damages were properly quantifiable—court must use best guess and discount it to present value

2.2) Trustee is Party to Covenant (*Re Kay’s*)

Re Kay’s Settlement (1939 Ch D) Covenant cannot be enforced by Equity (usually)

• S, an unmarried woman, executed a voluntary settlement (not a marriage settlement) that contained a covenant that if and when she gets future prop, promised to constitute into the settlement trust (voluntary = no consideration)

• S later married and had several children (beneficiaries). Later, she became entitled to prop by will that came within the terms of covenant, but she refused to transfer the property to the trustees, who applied for directions from the Court

Issue: Can trustee covenantee enforce promise to settle property? Do the beneficiaries of settlement trust have an action against her?

Decision: No, covenant not enforced

1) Covenant unenforceable by volunteer non-party Bs

- Equity: Bs are non-parties/volunteers and have no privity = no action in Equity
- Law: No action as they are non-party volunteers

2) Tr cannot compel specific performance in Equity (seal not sufficient)

3) Trustee enjoys *theoretical* right to damages at Law

- party and consideration/seal = action at Law

4) Tr enjoys no *actual* right to substantive damages at Law

- contractual damages fulfil expectation
- tr suffered no loss from covenantor’s breach
- tr cannot recover damages on behalf of B; volunteer non-party refused indirect enforcement
- Law: cannot get specific performance; can only get value of the thing = nothing, as Tr would never take the prop beneficially as he can only take it legally, and therefore could not have a positive expectation
- Equity: cannot sue in Equity (specific performance), as not a party under seal and Equity does not recognize seal

5) Trustee suffers no loss, according to Court

- Problem with this analysis: in law should only see legal interest and not the equitable interest – should see him as legal holder of promise
 - Even if court was correct back then, things have moved on in law and contract – today should get nominal damages for breach
 - Possible to view Δ’s gain as a result of the breach (unjust gain) rather than expectation loss
 - Disgorgement: pre-2001, breach of contract is only sue for loss, could not sue because Δ did wrong and should not receive gain. **Attorney General v. Blake (2000 HL)**: in exceptional circumstances, if π suffers from breach of contract, can argue π’s loss or Δ’s gain (disgorgement = give up the prop)

Note: Case is generally thought to be correct, but there are

cases that go the other way

2.3) Recharacterization of Subject Matter of Trust

• Getting around *Re Kay’s* (*Fletcher v. Fletcher*)

1) No trust exists prior to constitution

2) Mere promise to settle property on trust generally unenforceable

3) But *any* recognized form of property may be subject matter of trust

- trust property may consist of contractual rights (covenanted promise)
- e.g. “I covenant with trustee to settle my house on trust for my children”
 - no relief in Law or Equity under orthodox analysis
 - non-party volunteers; promise unenforceable by beneficiaries
 - no loss suffered; promise unenforceable by trustee
- relief available to beneficiaries under unorthodox analysis
 - covenant = property capable of supporting trust
 - immediately constituted trust of covenant
 - trustee holds promise on trust for children (take a promise legally for oneself and beneficially for oneself and child)
 - children: may demand performance of promise (although no privity in law, would have privity in equity)

Notes

- Unorthodox analysis presumes intention to settle promise
- Unorthodox analysis; seldom effective in practice

• Through **recharacterization of issue**, may take promise on trust for third party (**Cook’s Settlement**)

- Therefore, in *Re Kay’s*, when trustee took promise, it was for Tr to own legally for beneficiaries to own beneficially

Re Cook’s Settlement Trusts (1965 Ch D)

Recharacterization

• **Settlement trust** was created where Father (F) gave Son (S) a life interest in most of prop, power to appoint prop to his children from first marriage and in default of that appointment, children to share prop; one of the assets was a Rembrandt

• **Side contract:** F gave consideration to S in exchange son gives promise to settle certain property (including Rembrandt painting); won’t sell the painting unless tell Trs first, if sold, proceeds go into settlement trust

- This is an interest in future prop, which may or may not actually exist (b/c the pictures may not be sold)

• S, 30 years later, gave painting to his wife who wanted to sell

it – children from first marriage argued against sale
Issue: Is promise enforceable? If so, by whom? When can trust of covenant be recognized?

Decision: Two analyses

- 1) Disposition by gift not within covenant terms; covenant is irrelevant, as triggering event (sale of painting) does not occur
- 2) Covenant did not form subject matter of trust
 - No enforceable rights in children as volunteer non-parties
 - cannot rely upon consideration of third party (Father); if F received promise legally for himself, but beneficially for children, court said could work, but this didn't happen in fact (bizarre thing to do)
 - privity is prerequisite to enforcement of covenant
 - marriage settlement exception inapplicable to facts
 - No intention by S to settle promise on trust
 - mere promise to settle sale proceeds *if* paintings sold
 - Promise incapable of forming subject matter of trust
 - subject of promise was not existing property
 - dubious as promise itself *is* existing form of property
 - **McInnes:** this is wrong, as it is a contractual promise which is a chose in action

Ratio: Sometimes the subject matter of the trust can be recharacterized so that the covenant itself is immediately held on trust. If that happens, Bs of trust can enforce it

Question: What if F had sued in Law or Equity?

Similar to *Re Kay's*? May say F did not suffer any loss, but this case is different as there is consideration (not seal), which is good in Law and Equity (specific performance), therefore, F may have gotten specific performance as remedy in law was inadequate (nominal damages at best)

REVIEW QUESTION

Sam entered into a contract with Tess. S promised T that if he inherited a house from his father, he would transfer it to her to hold on trust for Ben. That agreement was not supported by valuable consideration, nor was it part of a marriage settlement. Sam did, however, place his promise under seal. S has now inherited a house from his father, but he refuses to transfer it to Tess to hold on trust for B.

ORTHODOX ANALYSIS

If Tess received Sam's promise for her own benefit only:

1. Can Tess successfully sue Sam in Law or Equity?

- In Law, not Equity, but may get damages—but no actual loss, so damages will be nominal or none at all
 - Counter argument: although Law cannot see Equity in a strict sense, *Re Kay's* says Law can take a look at Equity—hard to argue
 - Take from Sam what he ought not to take (disgorgement of gain) (*Blake*), but even if she can get disgorgement, can she keep it? Tess receives the value—as disgorgement is not there to compensate or make people whole, works like punitive damages or windfall gain (*Reid*) = no good reason to give π , but want to take from Δ to hurt Δ

2. Can Ben successfully sue Sam in Law or Equity?

- Ben does not have privity and nor is this a marriage settlement or an arrangement with consideration, so no, cannot sue in law or equity

RECHARACTERIZATION ANALYSIS

If Tess received Sam's promise on trust for herself and Ben:

3. Can Tess successfully sue Sam in Law or Equity?

- Promise in Law, suffer from breach of promise = nominal damages
- Equity: no specific performance as no enforceability

4. Can Ben successfully sue Sam in Law or Equity?

- Standing to sue in law (substantive damages) and equity (specific performance), although Ben only has an equitable interest
 - Held legally by Tess or equitably by Ben, still a Legal promise

under seal

- Problem with specific performance: regardless of who holds the promise, it is still a promise under seal (Law) which would suggest equitable remedy should not be available
- Note difference if Tess sues in Law (nominal damages), Ben sues in Law (full value of house)
 - Anomaly: if satisfy everything in *Fletcher*, court will give you what you want

E. Constitution and Future Property

• **Constitution and *existing* property:** three options

1. Existing property (e.g. house) itself settled on trust

- immediate creation of trust but not contract
 - trustee holds property for beneficiary
 - settlor ceases to play any role

2. Promise to constitute trust

- immediate creation of contract but not trust
 - would-be trustee holds promise against would-be settlor *or*
 - would-be beneficiary holds promise against would-be settler
- trust created *only if* promise is fulfilled

3. Promise to constitute trust held on trust by trustee for beneficiary

- immediate creation of contract *and* trust of contractual promise
 - settlor and trustee create new property (enforceable promise)
 - trustee holds contractual promise for benefit of beneficiary
- potential creation of second trust
 - another trust created if promise is fulfilled
 - house is actually transferred to trustee for beneficiary

• **Constitution and *future* property:** two options

1. Equity does not recognize an expectancy as prop (*Ellenborough*)

- mere expectancy cannot form subject matter of immediate trust, e.g. “a house I hope to inherit from father on trust for X”

2. Assignment of expectancy however may form subject matter of contract

- assignment of future interest *is* a contract
 - contractual right *is* form of existing property
1. contractual right: may be held by would-be trustee personally
 2. contractual right: may be held by trustee for beneficiary
 - e.g. “a house I hope to inherit from my father on trust for X”

- house (mere expectancy) cannot be subject of trust
- promise (contractual right) can be subject of trust

Re Ellenborough (1903 Ch D) Expectation of future prop

• S expected that when brother and sister died, she would receive certain prop. Before S died, she established a settlement (1) putting into trust what she expected to get from sibling and (2) promising under seal to Tr that when she receives prop, will give to brother. After sister died, S placed prop into trust, when brother died, S decided she wanted to keep prop. Tr sought action against S

Issue: Can future property form the subject matter of a trust?

Decision: Cannot settle future property on trust

- 1) S could not immediately constitute trust of future property
 - S held no interest in property at time of settlement
 - trustee: did not receive property under settlement
- 2) Sister's prop: S can subsequently achieve constitution of initially future property
 - S did transfer prop eventually acquired from sister
 - transfer reiterates declaration of trust
 - trust: properly constituted and prop irretrievable
- 3) Bro's prop: S can enter enforceable contract to assign future property to trust
 - S *could* bind herself to specifically enforceable promise
 - but contract enforceable only by party giving consideration
 - Equity: operative promise was entirely voluntary in Equity = trustee has no action in Equity
 - Law: promise was received under seal only = trustee has remedially empty action in Law; Bs have no privity to sue

Ratio: Expectation of future prop is not capable of forming a subject matter of a trust

- In *Ralli's*, D had vested interest of remainder of F's estate = this prop is capable of forming the subject matter of a trust. In *Ellenborough*, S did not have vested rights in her sibling's prop – only a hope of getting something

Question

- Court did *not* address issue of recharacterization
 - Issue: whether Tr could force S to settle prop in future
- What if promise to settle on trust was itself received on trust?
 - If promise to settle was on trust, both Tr and Bs could enforce promise; Tr can join the action as π or else B could sue S for breach of contract and sue Tr for breach of fid. obligations (Tr has a duty under the "small" trust) for not bringing action against S
 - B would have a remedy in law and could get damages
 - B could also get specific performance; S would be forced to set up trust of damages (if specific performance not awarded)—Bs would not get money immediately, as damages are held on trust (placing Bs in same position as if promise were carried out)

F. Formal Requirements of Express Trusts

F.1) Requirements of Express Trusts

1. Capacitated parties

2. Three certainties

3. Constitution

4. Formalities

Creation of Testamentary Trusts (Land or Personalty)

• Testamentary dispositions must comply w. **Wills Act**

- Exception regarding secret trusts
 - *Wills Act* cannot be used as inst. of fraud
- e.g. "Blackacre to X to hold on trust" (failed express trust as beneficiaries not named) = X cannot be permitted to hold property for

himself; X \therefore holds on some trust for

someone

- Three possibilities: (1) failed express trust so put prop into residue, (2) resulting trust, (3) constructive trust = can place prop anywhere (Equity wants to perfect intentions)

F.2) Statute of Frauds (UK 1677)

- Legis intended to prevent perpetration of fraud
 - Allegations of trusts and contracts easily fabricated
 - Certain acts must be evidenced in writing to be *enforceable*
 - non-compliance does not result in *invalidity (contra s. 7)*
 - non-compliance merely results in *unenforceability*
 - resulting and constructive trusts exempted from statute (s. 8) (rationale: one may not know if it is constructive or resulting)
- Writing requirement
 1. **Agreement must be evidenced in writing and signed** by defendant (agreement need not be written—merely evidenced in writing)
 2. Evidence document must contain **essential elements of agreement** (evidence does not have to come from same place)
 3. Evidence document **need not be contemporaneous** with agreement
 - Non compliance or no evidence = unenforceable (not a case of invalidity)
- Creation of *Inter Vivos* Trusts (s. 7): *inter vivos* trust of *land* must be evidenced in writing
 - applicable to interests in land only

- applicable to constitution by any of three modes

• **Assignment of Trusts (s. 9):** disposition of interests already held in trust must be evidenced in writing

- e.g. re-settlement of trust benefit into a new trust
- section applicable to interests in land and personal prop

• **Contracts to Create Trusts of Land (s. 4):** contracts for sale of interest in land must be evidenced in writing

- provision extends to contracts for creation of trusts of land

F.3) Preventing a Statute for Frauds

• Legislation potentially serves as instrument of fraud

- trustee may claim beneficial title for himself if no writing

• Non-compliance remedied through recognition of some type of trust, e.g. S makes *inter vivos* oral grant of land to Tr on trust for B

- Remedial trust created to send prop to intended B through constructive trust; equitable title already belongs to B and prop will not be returned to S
- **Invalid testimonial trust:** do not want resulting trust; want constructive trust
- **Inter vivos trust:** may want resulting trust to S, so S can do it again properly—but usually take matters out of hand and send ahead via constructive trust

V. Limitations On The Creation Of Trusts

• Eq covers criminal & things contrary to public policy

- If trust fails for illegality, S tainted and so is trustee
 - Don't want resulting trust
 - Don't want it to stay with trustee
 - Don't want constructive T to complete trust

A.1) Trusts for Illegal Objects

• Trust is void if it entails an illegal, fraudulent or immoral act, e.g. "\$5000 to any of my students who commit murder"

- Effect of trust struck down for illegality
 - failed express trust occasionally achieved by other means
 - could property be available to beneficiary on constructive trust?
 - subject of failed express trust generally results to settlor
 - should settlor be entitled to recover

despite illegal intention?

- what if settlor repents of illegality?

A.2) The Role of Conditions

• ***Cujus est dare ejus est disponere*** (whose it is to give, his it is to dispose): a recurring tension (and a highly complex body of rules)

- donor *prima facie* entitled to impose conditions on gift
- courts generally prefer immediate and absolute vesting (rationale: economy will be stronger if people receive absolutely)

• **Motive v. condition:** motive generally irrelevant *but* valid condition is binding

- e.g. "gift to Bob in expectation that he will care for Mary" What does that mean?
- conditional gift: *only if* Bob cares for Mary? Problem arises
- absolute gift: (motive) *hope* that Bob will care for Mary?

• When will the condition be enforced? **Condition precedent or subsequent?**

- **Condition precedent** = no vesting unless and until event occurs (**BRIDGE**)
 - if invalid, void condition prevents gift from ever taking effect
 - lenient test: condition must be satisfied on actual facts—wait and see
 - e.g. "marriage to a Jewish person"
- **Condition subsequent** = vesting unless and until event occurs (**CLOUD**)
 - if invalid, void condition is struck down and gift remains
 - strict test: condition must be satisfied in abstract—at outset
 - e.g. "marriage to a Jewish person"

• **Presumption:** law prefers immediately indefeasible gifts and will presume condition subsequent

A.3) Trusts Contrary to Public Policy (Illustrations)

• **Conditions in restraint of marriage:** general restraint on marriage is *prima facie* void

- "income to M while she remains a widow"
- impermissible if intended to ensure celibacy
- allowed if intended to support while single
- Exception: partial restraint on marriage is valid if reasonable
 - e.g. "income to M unless she marries Bob"

• **Discriminatory conditions:** reqs based on race, sex, religion, ethnicity are void

- e.g. “income to M unless she marries an Albertan”
- **Restraints on alienation and enjoyment**—cannot give absolutely and add condition subsequent
 - beneficial owner generally entitled to alienation and enjoyment
 - cannot fetter absolute gift *but* can give less than absolutely
 - condition subsequent vs determinable interest
 - condition subsequent = immediate gift possibly cut short
 - e.g. “income to M *unless* becomes bankrupt”
 - e.g. “Blackacre to M *but not if* she tries to sell it” – contrary to policy = gift absolute
 - determinable interest = immediate gift of possibly limited duration, e.g. “income to Mary *as long as* she is not bankrupt” – acceptable, but disposition might come to an end in the future (contemplates something less than complete)
- **Perpetuities**
 - uncertainty of ownership tolerable only for short periods
 - remoteness of vesting: life in being + 21 years
 - generally: when donor’s grandchildren become adults
 - indefinite duration: relevant to non-charitable purpose trust (non-charitable purpose trusts limited to 21 years or life in being + 21 years)

VI. Termination and Alteration of Trusts

- General rules, subject to exceptions:
 - settlor unable to retrieve property settled upon trust
 - can have power of revocation – must be done expressly from the outset (*inter vivos*)
 - trust terminates upon disposition of all prop
 - terms of constituted trust cannot be varied
 - potential problems: (1) no intention to give over in first place, (2) hard to know if someone has an *inter vivos* trust subject to revocation before death, or contemplating a testamentary trust but change mind

A.1) Revocation by Settlor

- S generally unable to retrieve prop settled upon trust
 - settlor divested of interest after constitution
 - settlor retains no interest capable of being recalled
- However, S may reserve power of revocation
 - power must be reserved expressly—not inferred
 - power must be reserved at time of creation
 - power arises only under *inter vivos* trust (not via testamentary trust)
- **Problems arising from powers of revocation**
 1. **Intention to create trust**
 - “power of revocation” may suggest no trust truly exists = interpreted as retention
 2. **Intention to create *inter vivos* trust or testamentary trust**
 - e.g. “power of revocation exercisable before my death”
 - actual *inter vivos* trust subject to revocation? Trust immediately created, reduced formalities (*Wills Act* inapplicable)
 - potential testamentary trust subject to destruction? Trust created only upon death, increased formalities (*Wills Act* applicable)
 - test: does trust depend on death for vigor and effect? Useful indicia: S’s intention, time of vesting of title in Tr
 3. **Tax problems**
 - power of revocation may expose settlor to tax liability
 - power entails beneficial interest in income

A.2) Termination by Beneficiary

- **Rule in *Saunders v Vautier***: Bs may unanimously terminate immediately *if*
 - e.g. “distributed as my trustee chooses among A and B in 2025”
 - Rationale: owners of beneficial title able to direct property
- 1. **Uniformly *sui juris*** (e.g. 18 years old and sane); child cannot consent to it until they reach majority
- 2. **Absolutely entitled collectively**
 - beneficiaries ascertained and fully entitled to property
 - only if interests vested and indefeasible
 - not if interests are contingent or defeasible
- 3. **Rule applicable even if discretionary trust or successive interests**

- presumptively equal division if discretionary trust
- Early termination possible even if contrary to S's desire
 - "Immediately on trust for Prof Chambers to enjoy when he turns 50"
 - intention to prevent wasteful spending during 40s
 - intention may be frustrated immediately
 - an anomalous departure from settlor's intention
 - is the rule justifiable? (abolished in AB, Man)

• **Avoiding the rule in *Saunders v Vautier***

1. Draft trust so that interest is subject to condition precedent
 - "On trust for Prof Chambers *only if* he turns 50 years of age"
2. Put it on trust for B who won't satisfy for a while
 - "On trust for Prof Chambers and my son Sam in 2025"
3. Termination not possible until *both* are *sui juris*

A.3) Setting Aside a Trust

- Trust voidable if induced by fraud, misrepresentation, duress or mistake
 - valid trust premised upon certainty of settlor's intention (free will) = get restitution
 - intention may be vitiated by circumstance (once trust is constituted, cannot be changed)

Variation of a Trust: trust generally unalterable once established—subject to exceptions...

- **Alteration through trust instrument:** trust terms commonly include power of amendment
 - e.g. permissible investments, disposition dates, beneficiaries
 - alterations must comport with S's intention
 - **Alteration at common law** (by court order): no general judicial power of variation
 - no power even if Bs agree or would benefit
1. **Conversion:** personalty to realty (vice versa) for minor's benefit
 - e.g. trust directs shares to be held on trust for child
 - T varied to allow beneficial conversion to land

2. **Compromise:** settlement of true dispute regarding trust terms (contractual compromise of a law suit)

- e.g. son disputes testamentary trust for daughter alone
- trust varied to include son as beneficiary

3. **Emergency:** unforeseen situation threatening trust's existence

- e.g. permissible investments would entail financial ruin
- trust varied to permit satisfactory investments

4. **Maintenance:** distribution of income for necessities of life

- e.g. T req accumulation of income from prop
- variation to allow distribution to destitute B

• **Alteration under statute** (through *Trustee Act*): (AB) unanimous consent from B, court will sit for B w/o capacity, court may not vary terms of the trust if inconsistent with S's intention (even if in B's interest)

- variation or early termination requires unanimous consent; capacitated beneficiaries must consent in writing; court consents on behalf of other Bs (incapacitated or unascertained Bs); **test for consent:** consent *if* prudent adult would agree to variation

variation or termination must be otherwise "justifiable"; judge has regard to wishes of beneficiaries *and* settler (however, other provinces focus exclusively on beneficiaries)

VII. Charitable Purpose Trusts

A.1) Species of Express Trusts

1. Trusts for **persons**

- beneficiary = person rather than purpose
- species of trusts for persons, either
 - fixed trust (*ie* beneficiaries are stated individuals)
 - discretionary trust (*ie* beneficiaries are class members)

2. Trusts for **purposes**

- beneficiary = purpose rather than person
- species of purpose trusts, either
 - charitable purpose trusts (*ie* purpose beneficial to public) (**Incorp Council**)
 - non-charitable purpose trusts (*ie* purpose not beneficial to public)

• It can be difficult to distinguish b/w persons trust v. purpose trust

- i.e. I set up a trust for education purposes; **purpose** = somebody eventually will get the money (despite that somebody being present)

- i.e. I set up a trust for the education of Mr. X; **persons**: money is given to him personally; quantum they get is defined by its purpose

A.2) Advantages of Charitable Purpose Trusts

1. Certain things need to be done and someone has to pay for it – CPTs take fiscal burden off the taxpayer

2. Relaxed rules against perpetuities

- rule against remoteness of vesting relaxed for charitable trusts
 - statutory “wait and see” provision (not void for mere possibility)
- rule against indefinite duration inapplicable to charitable trusts – can survive indefinitely (i.e. scholarships)

3. Avoidance of rules regarding certainty of objects

- settlor need not identify individuals or class nor even specify charity
 - inherent judicial power to create scheme for charitable intent
- trusts exist for public benefit; therefore, enforceable by Crown as *parens patriae*
 - no need to ascertain specific beneficiary capable of enforcement

4. Cy-près doctrine

- inherent judicial power to substitute one charitable scheme for another
 - “as near as possible” – if one scheme fails, then it can go to another scheme

5. Taxation

- numerous tax concessions available to charitable orgs (pay less tax) and donors (deductions)

A.3) Charitable Trusts - The Meaning and Role of Charity

1. Primary purpose of charitable trust must be for **public benefit** (charity)

2. Must be within scope *Statute of Charitable Uses 1601 (Statute of Elizabeth)*

- statute to prevent abuses of charitable institutions
- non-exhaustive source of charitable heads
 - “charitable” purpose if within scope of preamble
 - “charity” traditionally classified under four headings:

1. relief of poverty
2. advancement of religion
3. advancement of education
4. other purposes beneficial to

community

• Meaning of **public benefit** (*Jones v. T Eaton*):

1. Benefit of trust must accrue to the **public** (charitable)
 - purpose is not charitable if for benefit of private individuals: criteria of personal nexus often traditionally fatal (e.g. trust for education of McInnes clan)
 - modern trend toward greater leniency
 2. Public must **benefit** from the trust
 - court must be able to determine that public clearly would benefit
 - political purposes non-charitable because benefit unclear (e.g. trust for abolition of pornography, trust for reform of vivisection laws)
- Test of public benefit is assessed objectively (*Gilmour v Coats*)
 - Both requirements are increasingly stringent through four heads

a) Heads of Charity - Relief of Poverty

• **Poverty** = financially straitened circumstances

- Relief is considered a pressing need and good for public

• Trust must be for **public benefit**

- benefit aspect presumed under relief from poverty
- public aspect easily satisfied under relatively relaxed requirement (public is defined broadly)
- trust must benefit segment of the community
 - e.g. non-charitable if poor persons to benefit are named
 - e.g. non-charitable if relief of poverty of “next-of-kin”
- community anomalously may be defined by personal relations
 - e.g. “poor relations” trusts valid despite personal nexus
 - e.g. “poor employees” trusts valid despite personal nexus

Jones v T Eaton Co (1973 SCC) Relief of Poverty

- \$50,000 purportedly put on charitable trust for “needy and deserving people of TO in the Quarter-Century Club (anybody who has worked at Eatons for 25 years)”. Not all people were in Toronto or still worked at Eatons

- Arguments: (1) Can be “deserving” w/o being impoverished, so trust is not relief for poverty, (2) not a public benefit b/c people who will benefit are defined by a personal nexus

Issues:

1. Is the purported trust “charitable”?

- Yes, “needy and deserving” in the abstract is not charitable; “needy and deserving” in the context is charitable

2. Does the purported trust sufficiently benefit “the public”?

- Not a problem to define it in a personal nexus
- 7000 members = enough for relief of poverty

- “Needy or deserving” contextually interpreted to pertain to poverty

- “needy” = destitution, “deserving” = inability to meet financial needs in exigency
- irrelevant that beneficial purpose does not extend to whole community
 - lenient test of “public” under charitable trust for poverty relief
- “Toronto members” certain under individual ascertainability test
 - sufficient if employed in Toronto at time of membership

Question: Why did Spence J apply *McPhail v Doulton* certainty of objects test? Correct test as we do not need to apply test of indivd ascertainability in order get trust up and running

- As it is a charitable trust we do not need certainty of objects – courts will get it right
- However, we still need to use test of indivd ascertainability to enforce any validity of money that is distributed (and not to test the validity of the trust itself)

b) Heads of Charity - Advancement of Religion

- Traditionally limited to promotion of monotheistic belief systems. Modern trend toward respect for pluralism. Courts are vigilant against scams and cults
- Public benefit rebuttably presumed if purpose characterized as “religious”
 - religion rebuttably presumed open to entire community
 - promotion of religion rebuttably presumed to entail public benefit

***Gilmour v Coats (1949 HL)* Advancement of Religion, Objective test of benefit**

- Trust for 20 nuns who spend their days in contemplative prayer for benefit of themselves and all of humanity

Issue: Somebody donates money – is the trust set up for a charitable purpose?

Decision: No, it does not get charitable status

- Test of public benefit is assessed objectively:

- law presumes religious belief is beneficial to public
- law will not presume validity of given religion’s beliefs
- Roman Catholic belief in public virtue of prayer; therefore, irrelevant

- Private religious practice is not publicly beneficial as being educational

- Mere facilitation of private practice is not publicly beneficial

- Presumption of advancement of religion is rebutted by showing that the public could not walk in and join in prayer with nuns

c) Heads of Charity - Advancement of Education (Meaning of Education)

- “Education” defined broadly - element of public

advancement of learning (accessible to the public)

- e.g. scholarships, vocational training, disseminated research, aesthetics
- Museums presumed to fulfill advancement of education (***Re Pinion***)

Incorp Council of Law Reporting v AG (CA 1972)

Meaning of Education

• Trust established for publishers of law reports (of decisions) which published statutes and cases. Arguments against donations to be held on trust b/c users are mainly lawyers and judges who are typically wealthy

Issue: Does the purpose of the reports constitute a charity?

Decision: Yes, purpose has charitable status as long as information is available to public (even if some people use it for profit)

- Purpose of law reports constitutes advancement of education

- improvement and dissemination of useful branch of knowledge

- Profit motive of principal audience does not preclude designation

- legal education is lifelong pursuit of professionals
- purpose distinguished from effects of achievement of purpose

- Declaratory theory of judicial activity does not preclude designation

- law reports guide judicial investigation, judges do not really know all of the law; reports are educative

- Charitable designation requires element of public benefit

- requirements more stringent than under advancement of religion

***Re Pinion (CA 1965)* Meaning of Public Benefit**

• Testamentary trust created for a museum to house person’s art, but the “art” is beyond crappy

Decision: Presumption of public benefit rebutted on the facts

- Issue of public benefit must be assessed objectively

- public must receive appreciable educational benefit from trust

- Museums presumed to fulfill advancement of education

- presumption forcefully rebutted on facts by expert evidence

d) Heads of Charity - Other Purposes Beneficial to the Community

- Most stringent requirements of public benefit

- “public” must entail whole of the community or very large segment

• Traditional approach proceeded by analogy to *Statute of Elizabeth* preamble

- mere fact of public benefit insufficient— nature of purpose restricted
- e.g. relief of aged, public works, generalized animal welfare

AYSA v Canada (2007 SCC) Sports generally not charitable

- AYSA operated in Ontario to promote soccer and increase participation
 - AYSA sought charitable status via *Income Tax Act*:
 - 1) charitable organization + RCAA (no tax on income + tax receipts to donors) and
 - 2) non-profit organization (no tax on income)
 - Registered Canadian Amateur Athletic Association (RCAA): created in response to failure of Olympic failures, must operate nationwide, **afforded charitable status**
 - “charity” not defined by ITA, therefore common law definition
 - CRA: did not consider sports to be charitable
 - FCA: RCAA provision in ITA precludes other charities for sport
 - Soccer leagues for children did not fit in preamble
- Issue:** Could AYSA obtain charitable status?

Decision: No

1) *Income Tax Act* does not preclude charitable status for other organizations

- RCAAs exist for specific purposes and do not “occupy the field” → CL test, two branches

2) Charitable status requires satisfaction of common law test

- a. organization’s purpose must be for public benefit
- b. purpose must analogously fall within preamble
 - categories are not *numerus clauses*, but developments must be incremental
- c. weight of precedent against sport *per se* as charitable (*e.g. Nottage*)
 - *cf* sport + other charitable purpose (*e.g. McMullen*) (UK): most English cases say charitable donations to sports are not “charity”
 - *cf Laidlaw* (statutory requirement of public benefit *only*): but case did not look at preamble
- d. significant reform through judiciary highly undesirable (*VSI/MW v MNR*)
 - ITA strikes careful legislated balance between competing interests
 - broad recognition of sports as charitable threatens balance (21% of non-profit organizations are sports-related)
- e. defect not formalistically curable through re-writing purposes
 - organization substantively must be truly charitable

A.4) Imperfect Charitable Trusts

- **Charitable trusts must be entirely charitable** → imperfect charitable trusts generally are void
 - imperfect = charitable purposes mixed with non-charitable purposes
 - *e.g.* “\$50,000 for worthy purposes” **fails**
 - *e.g.* “\$50,000 for charitable *or* benevolent purposes” **fails**
 - *cf* “\$50,000 for charitable and benevolent purposes”

• **Exceptions to requirement of charitable exclusivity**

Exception 1) Severability of non-charitable purpose

- *if* portions of subject matter clearly delineated (*e.g. Re Spence*), *e.g.* “half estate to my church and half to other worthy cause”
- *cf* “between my church and other causes as trustee chooses”

Exception 2) Main and ancillary purpose

- valid if main purpose is charitable B even if ancillary is not, *e.g.* fundraising in support of charitably educational purpose)

Exception 3) Gifts to person in capacity that imports charitable activity (give to an office)

- trust property available *only* for charitable acts of person, *e.g.* “\$50,000 to my parish priest” (charity B not vacations)

• **Severance:** Courts may sever and save in cases where “\$50,000 for charitable *or* benevolent purposes”—what is left can be used as charitable

• When charitable idea cannot take effect as intended b/c either:

- **Intention** is there, but **not specific**, then court can use inherent scheme making power as long as there is intent; or
- **Specific intent** is stated but **cannot take effect**, then **cy-près** doctrine may be applied

a) Cy-Près Doctrine

• **Cy-Près Doctrine:** inherent judicial scheme-making power

- scheme judicially created **if trust objects not defined**, *e.g.* “\$5000 for purpose of educating the public in law”
- *cy-près* doctrine applied if **specified purpose impossible to fulfill**, *e.g.* “\$5000 to Society for Prevention of Cruelty to Squirrels”
 - *cy-près* = as near as possible → court may achieve frustrated intention as near as possible, *e.g.* “\$5000 to Society for Prevention of Cruelty to Animals”

When to use Cy-près?

• Key question: Is the reason why we can’t give effect b/c something fails at outset or subsequently?

Initial Impossibility or Impracticability

1) Impracticability and impossibility assessed at effective date of trust

- impracticability and impossibility arises

before trust created

- key date: creation of trust (testamentary = time of death)

2) Issue: does specification of purpose preclude general charitable intention?

- general charitable intention = *cy-près* doctrine applied
- no general charitable intention = resulting trust to settlor

3) Applicability of *cy-près* doctrine dependent upon general charitable intention

- a question of fact – no conclusive rules
- institution never existed – *cy-près* usually succeeds
- institution ceased to exist before trust effective – *cy-près* usually fails

Re Spence's Will Trusts (Ch D 1978) *Cy-près* requires general intent to benefit

- Testamentary trust split between two institutions:
 - 1) "Blind home on Scott St." – but no blind home on Scott St. but on street over
 - 2) Old folks' home (which had ceased to exist when T died)

Issue: When will general charitable intention be recognized?

1) *Cy-près* can be used if there is a general intent to benefit

- Institution's utter non-existence suggests general charitable intent
 - settlor did not intend to limit gift to particular institution
 - settlor intended to extend gift to general purpose
- Blind Home at Scott Street saved by *cy-près*

2) "The specific displaces the general"

- Institution's prior existence suggests no general charitable intent
 - settlor did intend to limit gift to particular institution
 - settlor did not intend to extend gift to general purpose
- **Doctrine of "kindred objects"** inapplicable
 - although gift to several related charities may suggest general intent, cumulative effect weakens effect of specification
 - difficult burden if relevant institution has *ceased* to exist
 - difficult burden if limited number of charities
- Old Folks Home not saved by *cy-près* (resulting trust for moiety)

Notes:

- Canadian courts often more lenient on "kindred objects"
- imperfect charitable purpose trust
 - valid disposition saved through severability

b) Supervening Impossibility or Impracticability

- Impracticability and impossibility assessed at effective date of trust
 - impracticability and impossibility arises *after* trust created

- *Cy-près* generally applied regardless of general charitable intent – **once charitable, always charitable (Re Fitzpatrick)**

- If given to charity at the outset, always use *Cy-près*, subject to two exceptions:

- unless disposition of remainder designated by settlor
- unless trust limited to income (capital not vested in charity)

Re Fitzpatrick (Man QB 1984) *Once charitable, always charitable*

- Trust set up for musical education for disturbed boys with residual clause in will; school was demolished and different school built for boys with mental disabilities onsite and another school is built for musical education elsewhere

Issue: Is a general intent required for *cy-près* for supervening impossibility?

Decision: General intent is not required as *cy-près* can be used for supervening impossibility

- **Once charitable, always charitable** – give it to the next best thing, which is the new school onsite

1) Property inaccessible to residuary legatee once vested under will

2) No initial vesting if initial impossibility – general intent required

- *cy-près* requires basis for vesting property in charity

3) Initial vesting if supervening impossibility – general intent not required

- *cy-près* does not require basis for vesting property in charity
- *cy-près* merely requires exclusive dedication
 - property disposed exclusively to charity
- supervening impossibility on facts overcome by *cy-près*
 - formulation of alternative charitable scheme ordered

c) Discriminatory Trusts

- *Cy-près* may be used to save charitable trusts that contravene public policy (see below, *Leonard Trust*)
- *Cy-près* works to supervene offensive trust

Canada Trust v Ontario (Human Rights Commission) (Ont CA 1990) *Discriminatory Trust*

- In the recitals of trust, S believed that the white race was best suited to lead the world. Recitals said that a B had to be white, a national, Christian, and only 1/4 at most could go to females

- Impugned terms were not offensive at time of creation

Issue: Can the trust be saved?

Decision: Saved via doctrine of *cy-près*

1) Property vested in trust at outset – initial validity

2) Trust terms now contravene policy – supervening impracticability

- ***cy-près* applied to remove offending trust provisions**
 - "charity once established does not die – though nature changed"
 - scholarships available regardless of personal characteristics
- **once charity is established, does not die if its nature**

is changed

– Scholarship will be available regardless of personal characteristics

- Settlor's intention can be limited by public policy; *cy-près* applied to modify trust

– perpetuity restriction displaced *if* charitable trust
– charity as precondition to exemption from general rule

Note: Gift would be valid if *inter vivos*; however, if want special benefits of trust (tax, perpetuities, etc.), then must play certain game in exchange for benefits

Dicta

• Restrictions to ameliorate effects of discrimination are valid, e.g. "scholarships for female students of Aboriginal heritage"

Questions

- Would the Colonel have approved?

- do the revised terms promote the Colonel's intentions?
- are the revised terms consistent with the Colonel's intentions?
- are the revised terms inconsistent with the Colonel's intentions?

Questions: Is there a practical alternative to *cy-près*? Who might receive the property? Who should receive the property?

VIII. Non-Charitable Purpose Trusts

A. Species of Purpose Trusts

- Charitable purpose trusts
- Non-charitable purpose trusts – **cannot have a trust for:**

- e.g. "\$5000 for the annual faculty golf tournament"
- e.g. "\$5000 on trust for care of my beloved cats Rosie and Gig"

B. Traditional Approach to Non-Charitable Purpose Trusts

- General refusal to recognize non-charitable purpose trusts; problems:

1) Impossibility of execution due to uncertainty

- intention of non-charitable purpose trusts often worded broadly (difficulty in assessing trustee's compliance with settlor's intent)
- solution: permit trust *if* sufficiently defined purpose (i.e. **keep charitable part**)

2) Violation of perpetuities rules

- non-charitable purpose trust may be indefinite or vest remotely
- solution: limit invalidity to violative trusts

3) Main problem: lack of positive enforceability

- enforceability generally presumes beneficiary
 - personal trust involves individual beneficiaries
 - charitable trust involves public as beneficiary; Crown as *parens patriae* enforces trust for public

- non-charitable trust does not involve recognizable beneficiary
 - Crown's *parens patriae* not invoked because no public benefit
 - settlor (if valid) cannot enforce because no remaining interest – **no one to complain if money is not spent**

• Possible solutions

- *anomalous* non-charitable purpose trusts
- *power* rather than trust
- trust for *persons* rather than purpose

C. Anomalous Non-Charitable Purpose Trusts

Re Astor's Settlement Trusts (Ch D 1952) Non-charitable purpose trusts are generally invalid

• Attempt to put money in trust; purpose of purported trust: ensure good relations between nations and preserving integrity of newspapers

Issue: Valid disposition?

Decision: Invalid, potential problems...

- 1) Problem of execution: invalid attempt at a trust as hopelessly uncertain
- 2) Problem of enforcement – orthodox analysis = cannot have a trust w/o power of enforcement

- trust presumes some person enjoys power of enforcement
 - personal trusts involve personal beneficiaries
 - charitable trusts involve Crown as *parens patriae* for public
- no apparent mechanism to enforce non-charitable purpose trusts
 - no person capable of bringing claim for positive enforcement
- limited class of anomalously valid non-charitable purpose trusts, i.e. specified animals, graves, monuments and fox-hunting
 - anomalous trusts negatively enforceable *if* residuary beneficiary; lack of enforcement sufficiently overcome
 - anomalous non-charitable purpose trusts: closed categories = "concessions to human weakness or sentiment"
- present purpose not within closed categories

Ratio: General rule that non-charitable purpose trusts are invalid, except for the closed categories of exceptions

1. Must be within one of these categories
2. Works if and only if there is a residuary beneficiary
 - *Turner* case: at least need someone with power of negative enforcement, even if they don't have power of positive enforcement (ensures some degree of control)

Approach to Irregular Cases:

• Treat it as through it were not a trust at all; it is a power, then anybody can use the money for what they want

- Power = *may* not a must
- Someone will always be in position to receive in default

C.1) Powers #1 – Irregular Cases: A Re-Interpretation

- Special power rather than trust
 - donee (“trustee”) authorized (not obligated) to dispose of assets
 - no person with power of positive enforcement
 - donee cannot be compelled to dispose of assets
 - recipient in default capable of negative enforcement
 - restrain improper disposition of assets
 - no incentive to pursue active dispositions
- Analysis suggests scope far beyond anomalous categories
 - invariably someone entitled in default of power
 - scope limited only externally, *e.g.* illegality, perpetuities

C.2) Powers #2 -- Perpetuities Legislation

- ***Perpetuities Act*** (s. 20): if you have an attempt at specific non-charitable purpose trust that is supposedly invalid, the court may construe it as a power for 21 years – after 21 years, money goes to person who would have taken it had the trust been struck out in the first place
 1. Go through CL approach, if not the case, then...
 2. Court can construe it as a power rather than a trust, but this does not happen automatically – court must exercise discretion – if in effect *cy-pres* (close enough to what settlor had in mind)
- “Specific non-charitable purpose trusts construed as power to appoint”
 - non-obligatory power exercisable for 21 years
 - remainder to person entitled if trust declared invalid at outset
- Courts continue to apply traditional rules first
 - non-charitable purpose *trust* permitted if valid at common law
 - re-characterized as non-obligatory *power* if invalid at common law

Perpetuities Act

(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person

- (a) shall be construed as a power to appoint the income or the capital, as the case may be, and

- (b) is, unless the trust is created for an illegal purpose or a purpose contrary to public policy, valid so long as and to the extent that it is exercised either by the original trustee or the trustee’s successor within a period of 21 years, notwithstanding that the disposition creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period,
but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended

- (a) within a period of 21 years, or
- (b) within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, each person or that person’s successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to the unexpended income or capital.

C.3) Powers #3 – The Quistclose Trust

Barclays Bank v Quistclose Investments (1970 HL)

- Bank agreed to give money to co. in financial difficulty on the condition that:
 - 1) Co. held \$ on trust for bank but
 - 2) Transfer of property (money) must be used for a particular purpose (use money to declare and pay out dividend for purpose of increasing confidence)
 - Transferor recovers assets in default of purpose (attempt for bank protected itself)
 - Not an obligation, but a giving a power

Quistclose Explained

1) Transfer of property to be *used for a purpose*, *e.g.* dividend payment, land purchase)

- recipient must use asset *exclusively* for stated purpose
- recipient does *not* enjoy full beneficial ownership, *e.g.* asset *not* available to creditors upon insolvency
- transferor recovers asset in default of purpose

2) Operation of the arrangement (*Twinsectra v Yardley*)

- B holds legal title on trust for A (A's interest subject to defeasance)
 - majority: *express* trust due to (presumed) intention
 - Millett: *resulting* trust due to absence of intention
 - A does not intend to part with asset absolutely
 - B's interest in asset limited to use for purpose
- B enjoys *power* to use asset for stated purpose
 - A can restrain improper use of power
 - if power not exercised – A re-acquires as trust beneficiary
 - if power exercised – simple debt owed by B to A
- *Quistclose* and anomalous categories (re-interpreted)
 - similarity: purpose as power restrained by default beneficiary
 - dissimilarity: scope of possible purposes
 - *Quistclose*: any valid (non-offensive) purpose
 - anomalies: closed categories of concessions to human weakness
- non-charitable purpose trust? Not a traditional non-charitable purpose trust (does not fall under exceptions)
- power of appointment? No, question of interpretation (“shall”); court will say there is an obligation, which is a trust not a power
- personal trust? Yes, court will hold this as a garden variety personal trust; quantum of the trust is defined by a purpose (go to university)
- Practical problems for personal trust analysis
 - certainty of objects: here there is a large class of persons for broad purpose (*Re Denley's*)— if defined as a personal trust, may have a person as fixed trust rather than discretionary trust – must come up with complete list of Bs
 - class ascertainability of “employees”, e.g. “land for sporting fields for employees of Acme Corp”
 - unincorporated associations (*Re Lipinski*): problem if unincorporated association = not a person
 - beneficiary must be recognized person
 - absolute gift to present members
 - conditional gift to present members of association
 - trust for purposes of association (*prima facie* invalid)
 - *Quistclose* form (trust for donor + power for purposes)
 - trust for present members
 - trust for present *and* future members (subject to perpetuities)
 - perpetuities
 - must vest within perpetuity period (“wait and see” legislation)
 - duration cannot exceed perpetuity period

C.4) Trusts For Persons

- Alternative: say it is a trust for persons where quantum defines the purpose

Purpose Trusts: Question

In 2001, Sara handed \$100 000 to Tom, along with a document that said: “Take this money for the purpose of educating my daughter, Barb, on the following conditions only. If she attends the University of Alberta, you shall use the money for the purpose of annually paying her tuition, fees and a reasonable living allowance. If there is any money left over, you shall pay it to me.” In the summer of 2004, Barb and Sara became estranged. Sara therefore wanted Tom to return the money to her. Barb, however, registered to attend classes at U of A and therefore wants Tom to use the money for the purpose of her education. What should Tom do with the money?

Purposes for Persons vs Persons for Purposes

- How should Sara's transfer be interpreted?
 - absolute gift? Not an absolute gift due to precatory words
 - charitable purpose trust? No, personal nexus, not for the benefit of the community in general

For exam purposes: focus on fact that there is a traditional rule that no longer makes much sense, but there are ways to get around it

IX. Remedial Trusts

Species of Trusts

- 1) Express trusts (personal or purpose)
- 2) Resulting trusts
- 3) Constructive trusts

A) Introduction: Resulting Trusts

a) Resulting Trusts – Essential Elements

- Cast of characters
 - settlor = not formally applicable
 - trustee = party administratively holding title for another's benefit
 - beneficiary = party beneficially entitled to property
- Capacity
 - roles under resulting trust not dependent upon capacity

b) Why Traditional (Non-Exhaustive) Species of Resulting Trusts Arise

- 1) Failure of express trust
- 2) Gratuitous transfer; types:
 - beneficiary gratuitously transfers property to trustee
 - beneficiary pays third party to transfer property to trustee

c) The Basic Mechanism of Resulting Trusts

- 1) Beneficial interest "results" (*resalire* = "jumps back") to beneficiary
- 2) Resulting trust - a slight misnomer
 - Equitable interest *created* through occurrence of resulting trust – **Cannot have prop going to someone who has not owned property**—no Equitable interest pre-existing creation of resulting trust / **before transfer occurs**
 - resulting trust → "jumps up" in favour of beneficiary

B. Failed Express Trust – Resulting Trust

B.1) Failure of Express Trusts

- Express trust may fail for various reasons (*e.g.* uncertainty, illegality, disclaimer, unconstituted, unenforceable, etc.)
 - If express fails b/c it cannot take effect or it is invalid, no way to send it ahead, no may only bounce back
 - If it fails b/c it is unenforceable, two legitimate options: result back or send property ahead by way of constructive trust
- Express trust may fail in whole or in part
 - settlor intentionally or unintentionally may

fail to dispose of all property, *e.g.* "to A until 2010 and then to B if B is still alive"
- temporary resulting trust if A dies before 2010
- permanent resulting trust if B dies before 2010

- Failure of express trust *generally* raises resulting trust
 - 1) no resulting trust if alternative disposition - *e.g.* "\$50 000 to T for A; otherwise for B" - *e.g.* "\$50,000 to T for B; otherwise for T personally"
 - 2) no resulting trust if failed trust was self-declared
 - 3) no resulting trust if express trust failed for lack of constitution
 - 4) no resulting trust if cy-près under charitable trust
 - 5) no resulting trust if property abandoned (*bona vacantia* to Crown) b/c
 - a) impossible to determine who contributed; and
 - b) expense of administering the return would be impractical - *e.g.* \$100,000 in small coins; care of person who subsequently dies
 - 6) no resulting trust if illegality in some circumstances

Hodgson v Marks (CA 1971) Failed express trust (an example)

- Mrs. H owned a house; tenant had her to sign legal prop to him; he flips prop to BFPV, BFPV has mortgage
- Attempt at an express trust; legal scheme where Mrs. H signs legal title to T, T holds benefit for H
- Issue:** Is property held on trust? What kind of trust? What triggered the trust?
 - 1) Oral trust of land unenforceable for want of writing
 - *Statute of Frauds* precludes proof of express trust
 - 2) Resulting trust arises from failed express trust
 - Precise cause of failure irrelevant
- Note:** If there was a BFPV and mortgage, then H should not have won
 - However, provision in 1925 English statute: purchaser's rights are subject to the equitable interest of "every person in actual occupation"
 - Better view: resulting trust
- Questions**
 - Who was entitled to the beneficial ownership of the property? Mrs. H
 - What if there was no *Registration Act 1925*?
 - Statute preserved rights "of every person in actual occupation"
 - Marks BFPV would have extinguished Hodgson's equitable interest
 - What if Mrs H had intended to create a trust for her son?
 - If intention was for benefit to go to son, then cannot have a resulting trust; resulting trust could not take

benefit forward to son

- *Constructive trust could do so (Bannister v Bannister):* if the parties intended prop to go forward, use constructive trust

B.2) Instances of Failed Express Trusts; Real and Apparent

i. Trust or absolute gift

- Personal trust for purpose vs absolute gift with motive, e.g. “\$50,000 to M; confident that she will care for mother” – trust that fails or absolute gift with motive?
- Generally find absolute gift expressed in precatory language

ii. Rule in Hancock v Watson

- Testator: “Blackacre on trust to B; B can decide who takes after her death”; B fails to validly name successor; who enjoys property after B? Two possibilities:

- 1) *if* absolute gift subject to failed interest - interest carved out of larger gift to B - B interposed between failure and settlor, therefore failed portion accrues to B’s estate
- 2) *if* limited gift to B with true remainder - successive interests - B not interposed between failure and settlor, therefore failed portion results to settlor

Note: idea that court can retroactively identify what someone intended gives rise to a lot of result-oriented reasoning

iii. Unincorporated associations

- Contribution to unincorporated association; association fails
- Charitable purpose: *cy-près* for other charitable purpose
- Non-charitable purpose
 1. traditional approach: **trust analysis** - assets result to members personally
 2. modern approach: **contract analysis**
 - a) look at association’s rules = terms of contract → terms may dictate distribution of surplus
 - b) contributions to fund benefits for members → no claim to fund if benefit fully received, surplus may be *bona vacantia* (Crown) (*gotten everything expected, not entitled to anything more*)
 - c) contributions for general operation of association → generally resulting trust for members; presumptively equal shares

among existing members; disregard contribution size or membership length

iv. Pension plan surplus (overview, won’t be on exam)

- Pension trust vs pension contract:
 1. **Pension trust** (employees’ argument): employee contributions presumptively result, plan may otherwise entitle employer
 2. **Pension contract** (employers’ argument): surplus distributed according to contractual terms

C. Failed Express Trust; Trustee Entitled

- If a trust fails, presumptively trust results, but sometimes the trust can advance

Moffit v Moffit (1954 BC SC) Sometimes failed trust can advance

- Deal between mother and son: both put in own prop to be jointly owned; son owns all as trustee, each year pay income to mother; if son died before mother, then wife steps in as trustee
- What happens when mother dies? Does son take all or does prop result back to mother?

Issue: When will trustee be entitled to personally retain trust assets?

Decision: Mother gets income from deal, son gets something after her life is over

- 1) Alternative possibilities; dependent upon settlor’s intention
 - trustee chosen to administer trust only = resulting trust
 - trustee chosen to administer trust and benefit = no resulting trust
- 2) Likelihood of gift to trustee; dependent on reason for failure of trust
 - failure due to invalidity: donative intent less probable
 - failure due to surplus: donative intent more probable
- 3) “Slight expressions and indications of intention” to benefit trustee
- 4) Facts disclosed bargain between settlor and trustee
 - settlor receives income from cumulative properties during life
 - trustee receives gift on settlor’s death

D. Gratuitous Transfer Resulting Trusts

D.1) Traditional Species of Resulting Trusts

- 1) Failed express trust resulting trust
- 2) Apparent gift (gratuitous transfer) resulting trust
 - (a) purchase money resulting trust, e.g. Pam pays Xavier to transfer land to Dave
 - (b) voluntary transfer resulting trust, e.g. Pam transfers land to Dave

Presumptions

- 1) **Equity presumes bargains** rather than gifts
- 2) **Presumption of resulting trust**
 - presumption: transferor lacked intention to

confer benefit

3) Presumption of advancement (below)

- presumption: transferor had intention to keep benefit for oneself (cannot explain transfer to an infant or something with a mental disability) → real reason, not positive intent to keep benefit, but presume that when handed over, lack of intention to benefit the person
- scope of application
 - traditional: transfer by father to child *or* man to wife
 - modern: transfer by *parent* to child (but not between spouses)

4) Role of presumption

- presumptions are rebuttable by evidence to contrary
 - nature and strength of evidence determined by circumstances
- presumptions are rarely determinative
 - generally merely allocate initial burden of proof
 - practically significant *only if* evidence unavailable or inadmissible; *e.g.* transferor and transferee unable to testify; *e.g.* court refuses to rely on evidence (illegality - below)

What we need to know:

- 1) General presumption of **resulting trust**
- 2) Sometimes presumption of **advancement**
- 3) **Not determinative**: (1) sometimes no evidence or (2) do not want to act on evidence (illegal scheme)

Traditional Species of Resulting Trusts

- Failure of express trusts
- Gratuitous transfers
 1. Purchase money resulting trusts
 2. Voluntary transfer resulting trusts

D.2) Voluntary Transfer Resulting Trusts (**Neazor v Hoyle**)

- Resulting trust generally raised if property gratuitously transferred, *e.g.* Pam transfers a car into Dave's name in absence of obligation
 - resulting trust clearly available regardless of nature of property
- Slight debate regarding applicability of *presumption of resulting trust*
 - presumption *does* apply with respect to personal property
 - presumption *may* apply with respect to land

- Canada (presumption very likely)
- *cf* England (probably no presumption)
- USA (no presumption)

Neazor v Hoyle (1962 ABCA) Rebuttable presumption of gratuitous transfer

- H and W entered a loveless marriage in 1923, never cohabitated
 - 1949: H transferred land to sister, so that W cannot get prop; told parents he would take care of sister; will gave everything to sister—after 1949, sister paid all the taxes and also received compensatory money
 - 1954: formal separation
 - When H died, W claimed resulting trust back to his estate, as under *Family Relief Act* W could get prop
 - Sister: on facts, intended to give prop to sister
- Decision:** Presumption of resulting trust rebutted by contrary evidence
- 1) *Dicta* presumption of resulting trust raised by gratuitous transfer
 - 2) Resulting trust rebutted by evidence of contrary intent – facts rebut W's argument

D.3) Presumption of Advancement

a) Transfer to Child

- Traditional scope: father to child *or* any person to *in loco parentis* (man and woman if they were acting as parent to someone)
- Traditional rationale: reflected historical socio-economic reality
 1. Father alone owed duty to support and “advance” children (infant and adult children)
 2. Father generally exclusively held property
 3. Father more likely to intend gift: want child to take benefit
- Contemporary approach considers (1) whether there's a presumption of advancement applied to mother to children and (2) whether presumption applies to adults as well as infants (**Pecore v Pecore**)

Pecore v Pecore (SCC 2007) Presumption of resulting trust if parent gives to independent adult child

- F was old/frail, had many assets which he signed out of his name and placed in his name and daughter's name
- Joint ownership usually means:
 - 1) Right of survivorship (parties were aligned with this idea)
 - 2) All mine and yours, you and I can spend it all (evidence indicated that F was not “giving” this to daughter, 100% ownership was still F's, moreover as between the parties, F retained control over whole thing and D could only withdraw money under his consent)
 - Daughter: claimed she would get everything from survivorship
 - D's husband: resulting trust, divided among both D and husband

Decision: Evidence was sufficient to rebut presumption of resulting trust

1) No longer distinction between mothers and fathers; presumption of advancement applies equally to both

- Traditional presumption based primarily on father's duty to "advance" – now equally applicable to *all* parents
 - *but* for minor children only
 - *cf* duty on adult children to maintain parents

2) No presumption of gift if parent gives to incapacitated adult child

- Presumption based on duty to care for the person if infant or disabled
- No presumption for incapacitated adult child
 - issue of *dependence* too fact specific and difficult
 - same rule for *all* adult children

3) On the facts, this is a deal between F and D for his convenience, so (1) D can act on his behalf and (2) right of survivorship can be intended

- Often no immediate intention to benefit child immediately
- Implicit effect of *Charter 15* requiring equality of sexes
- Location of title throughout the case: how to explain title during time they owned the prop jointly? Both have legal title (F and D as trustees), father seems to have equitable title (beneficiary)
- Joint ownership: *inter vivos* means of securing a quasi-testamentary goal

b) Transfer to Spouse

- Traditional scope: husband to wife; man to woman in contemplation of marriage
 - *Not if* wife to husband; between *de facto* spouses; separated couples
- Traditional rationale: reflected historical socio-economic reality
 - all property vested in husband upon marriage
 - husband alone owed duty to support wife
 - husband more likely to intend gift
- Distinction based on sex no longer tenable
- Consistent choice of presumption: gift or trust?

Arguments in favour of presumption of resulting trust:

1. **Consistency and convenience of application**
 - consistency with same sex couples (trust presumed)
 - convenience of avoiding issue of permanence of relationship (*living together, marriage or not*)
2. **Protective device** (place burden on π to show gift was intended)
 - require donee to prove intention to confer gift
3. **Consistency with statutory cohabitational property regimes**

- consistently presume trust unless joint tenancy or joint account
- a realistic presumption? Note: regime applies *only* on **relationship breakdown**

D.4) Rebutting Presumptions – Illegality

- Property commonly is transferred pursuant to an illegal purpose
 - *e.g.* insolvent debtor transfers property to wife to evade actual creditors; *Fraudulent Conveyances Act* reverses transfer
 - *e.g.* woman transfers property to husband on eve of risky venture; a matter for judicial resolution
 - Either court will (1) not let money go back, (2) only punish if goal was achieved, or (3) not act on illegal act (if transfer to child who is not minor, get it back;
- Illegality may preclude operation of resulting trust
 - When *will* illegality preclude resulting trust?
 - When *should* illegality preclude resulting trust?
 - 1) Whenever court learns of illegal purpose?
 - 2) Whenever illegal purpose is achieved? (no timely repentance)
 - 3) Whenever plaintiff must rely on evidence of illegal purpose? Reliance upon evidence dependent upon presumption
 - evidence unnecessary if presumption of resulting trust
 - evidence necessary if presumption of advancement

Maysels v Maysels (Ont CA 1974) Illegality = presumption of advancement not rebuttable

- H and W equally contribute to purchase of prop; since H was worried about creditor problems, legal title was in W's name alone even though it is for the benefit of both
- 1974: transfer from H to W, presumption of advancement
- When marriage broke down, W wanted to keep whole prop for herself

Issue: Can H get prop back?

Decision: Claim for resulting trust fails and wife retains clear title

1) Presumption of advancement not rebuttable with evidence of illegality

- Illegality *per se* is no bar to recovery, but illegality cannot form basis of rebuttal evidence
- Although court was not put off by illegal scheme, it **cannot act on basis of illegal evidence**

2) Presumption could be rebutted by evidence (if any) of legality, *e.g.* evidence that wife was to hold on express trust for husband

- Only evidence in rebuttal required reliance on illegality
- Gratuitous transfer between H/W presumed to be an

advancement in ON at the time: H could not say it was not a gift, but would have to claim that it was a scheme to avoid creditors (fatal to H's claim)

Ratio: Presumption of advancement cannot be rebutted with illegal purpose

Question: Assume the same facts of Maysels with the exception that the husband purchased in the name of his brother, rather than his wife. Could the husband receive resulting trust over the property held by his brother? Could the brother resist the husband's claim by adducing evidence of the fraudulent purpose underlying the disputed transfer? If H purchased house in bro's name, presumption of RT; bro cannot resist claim by adducing Equity of fraudulent purpose

Tinsley v Milligan (HL 1993) Rebutting illegality

- Similar as above, lesbian couple pooled money to buy house but gave legal title to one name so other could get social assistance

- Relationship fell apart, non-title partner claimed 1/2 of prop

Decision: Gratuitous transfer argument won – equity presumed it was not a gift

Dissent: If it is illegal, tough luck, let the estate lie where it falls (McInnes likes this rule)

- Traditional maxim - court (generally) will not assist wrongdoer - "let the estate lie, where it falls"
- Resulting trust precluded by mere *revelation* of illegal purpose
 - maxim applicable even if illegality not relied upon to assert title
 - maxim applicable whenever court learns of illegal purpose
- principle based on policy - not justice (can result in disproportionate result)
 - principle intended to protect integrity of Equity
 - principle disregards gravity of wrong or quantum of property
 - principle disregards equal culpability of defendant recipient
- General rule subject to exception for timely repentance

Majority: Not put off by mention of illegality, will only be put off if try to show illegality

- Illegality irrelevant if superfluous to claim - relevant if essential
 - mere revelation of illegal purpose insignificant
 - illegality cannot be relied upon to establish title
- illegality irrelevant if presumption of resulting trust
 - claimant need not rely upon evidence to establish title to property
- illegality may be relevant if presumption of advancement
 - claimant may need to rely on evidence to establish title to property

Question: Should property turn on the peculiar modifications of evidentiary presumptions?

Note: Australia governed by perceived purpose of statute (**Nelson HCA 1995**)

- π was a widow of a war veteran, who was eligible for a subsidy upon purchase of first house. First house purchased in name of children and π wants to buy 2nd house (more expensive). Dispute with children arose and π wanted to get first house back

Court: Purpose of scheme was to provide for widows of war veterans; π could get first house as long as she pays back

subsidy received on the 2nd house

- Claim prohibited *only if* relief would violate legislative purpose

- Browne-Wilkinson view: ask why is this illegal in the first place; if return prop, would it fly in the face of the purpose of the statute? No, so widow got RT if she paid back benefit she received on first prop
- Difficulty to say what purpose of statute is

(Possible Exam) Questions: Which approach will SCC adopt?

Which approach should SCC adopt? Does not matter what result you get to, just come up with a coherent approach

E. RESULTING TRUSTS

Traditional Categories of Resulting Trust

1) Failed express trust ("automatic resulting trust")

2) Gratuitous transfer ("presumed intention resulting trust")

- direct transfer resulting trust
- purchase money resulting trust

- Categories may reflect Canadian law, but it

accords with positive intention to keep benefit:

- However, problems arise if trust works in favour of child or person lacking capacity; presumption is a short-cut to the facts
- Bigger problem: takes cases as you find them in the categories;

Westdeutsche Landesbank v Islington LBC [1996]

AC 669 per Lord Browne-Wilkinson (HL): "Under existing law a resulting trust arises in two sets of circumstances:

1. **Gratuitous transfer:** where A makes a *voluntary payment* to B or *pays (wholly or in part) for the purchase of property* which is vested either in B alone or in the joint names of A and B, there is a *presumption that A did not intend to make a gift* to B. The money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions
2. **Failed express trust:** where A transfers property to B on *express trusts*, but the trusts declared do not exhaust the whole beneficial interest
 - 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*"
 - Problem: if A transfers money to B and express trust is not created, money returned b/c purpose failed—if money given for purpose and purpose failed, don't

get money back if purpose is not a trust → not imaginative, takes cases as you find them but does not draw on principles

E.1) Resulting Trusts -- The Orthodox View

- 1) Trust triggered by intention
 - resulting trust ... gives effect to [the plaintiff's] presumed intention"
 - presumed intention ... positive intent to create trust (cf express trust)
 - presumed intention = positive intent to retain beneficial interest
 - critique: impossibility of explaining resulting trust absent valid intention, e.g. gratuitous transfer from person lacking mental capacity
- 2) **“Bottom up” approach** – resulting trust generally confined to historical categories
 - traditional species of resulting trust
 1. resulting trust following failed express trust
 2. resulting trust following gratuitous transfer
 - critique: inconsistent pattern of personal and proprietary relief, e.g. payments made for a purpose subject to qualified intention
 - resulting trust if purpose was express trust that failed
 - no resulting trust if purpose was social project that failed

E.2) A Primer on Unjust Enrichment and Restitution

- 1) **Unjust enrichment** = triggering event (cause of action)
- 2) **Restitution** = invariable legal response to event of unjust enrichment
 - True restitution = defendant “gives back” (value of) benefit to plaintiff
 - restitutionary measure in either personal or proprietary form

a) Law and Equity – Dissonant Responses to

Gratuitous Transfers

- Law and Equity: similar situations historically addressed differently in Law and Equity
 1. Dissonant responses occasionally justifiable (e.g. express trusts)
 2. Dissonant responses occasionally unjustifiable

b) Gratuitous Transfers in Law and Equity

- Pam mistakenly paid \$50,000 to David. D invested the money in shares which are now worth \$75,000. D nevertheless becomes bankrupt -- his debts exceed his assets by a 10:1 ratio. You have been retained to represent Pam
 - What cause of action will you use?
 - What measure of relief will you seek?
 - What form of relief will you seek?
 - How much money can you win for her?

Law (Unjust enrichment)	Equity (Gratuitous Transfer RT)
1. Measure of relief capped by Δ’s gain and π’s loss 2. Measure capped at time of receipt: max \$50 K 3. Form of relief: personal restitution, P claims with D’s other creditors and may not get full amount	1. Gratuitous transfer, D not infant or dependant, then presumption of RT, no need to prove absence of juristic reason 2. Form of relief: proprietary restitution, P can trace value into shares: <ul style="list-style-type: none"> ▪ Point to the “thing” and say it is mine ▪ Get “thing” proprietarily = \$75 K

Comment: RT and UE are the same thing with different labels: (1) you got it, (2) it came from me, (3) it shouldn’t happen; difference in relief: dissonance shouldn’t occur

Unjust enrichment in Law	Resulting trust in Equity
<ul style="list-style-type: none"> • Claim in unjust enrichment: <ol style="list-style-type: none"> 1. Enrichment to defendant 2. Corresponding deprivation to plaintiff 3. Caused by unjust factor (absence of juristic reason for enrichment) <ul style="list-style-type: none"> – miscellaneous policy factors (e.g. promotion of rescue) – unconscientious receipt (e.g. free acceptance) – Impaired intention (i.e. vitiated or qualified intention) • Burden on <i>plaintiff</i> to prove lack of donative intent • Restitution (almost invariably) ordered in <i>personal</i> form <ul style="list-style-type: none"> ▪ plaintiff ∴ not entitled to priority if defendant is insolvent ▪ plaintiff ∴ limited to value of benefit conferred 	<ul style="list-style-type: none"> • Claim in “resulting trust” (not a true cause of action) • Gratuitous transfer (direct or indirect) • Burden generally on <i>defendant</i> to prove donative intent • Equity generally presumes bargains rather than gifts • Resulting trust ordered in <i>proprietary</i> form <ul style="list-style-type: none"> ▪ plaintiff ∴ entitled to priority if defendant is insolvent ▪ plaintiff ∴ entitled to value of benefit surviving

Air Jamaica Ltd v Joy Charlton [1999] 1 WLR 1399 per Lord Millett (PC): “Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest -- he almost always does not -- since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient. It may even arise where the transferor positively wished to part with the beneficial interest.” See also *Twinsectra Ltd v Yardley [2002] 2 AC 164 per Lord Millett*

- In other words, reason you get RT is b/c lack of intention to benefit upon another at transfer
 - Incapacitated transferors can have RT as they (1) do not have intention to keep benefit but (2) lacked intention to confer benefit
 - Significance of cases: accepting a thesis where RT is **restitution for unjust enrichment**, but is a **proprietary** instead of personal form

c) Unjust Enrichment and Resulting Trusts -- A Restatement of Established Case Law

- Birks “Restitution & Resulting Trusts” – Chambers *Resulting Trusts*
- Resulting trust as species of restitution for unjust enrichment
 - triggering event invariably is unjust enrichment; unjust factor pertains to intention of party effecting transfer; unjust factor consists of non-donative (impaired) intention
 - resulting trust does not arise from *positive intention to create trust*

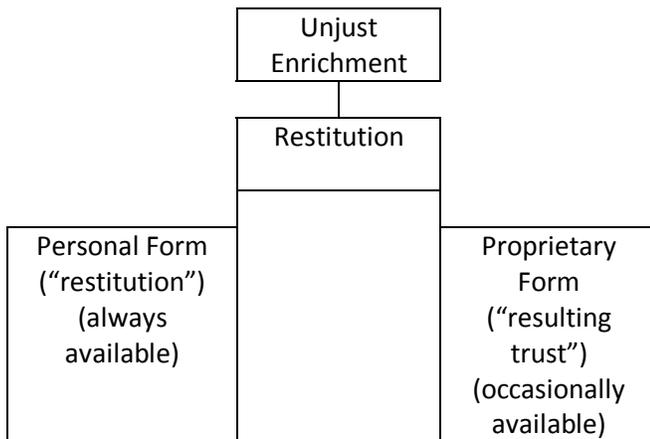
- resulting trust does not arise from *positive intention to retain benefit*
- resulting trust does arise from *absence of intention to confer benefit*
- e.g. no intent to benefit trustee if express trust fails
- e.g. no intent to benefit transferee if gratuitous transfer
 - legal response invariably is restitutionary measure in proprietary form
 - defendant compelled to “give back” benefit to plaintiff

d) Unjust Enrichment and Resulting Trusts -- Extending Proprietary Restitution

- UE always works when there is no good reason for the transfer, if Birks and Chambers just stopped there, would have provided a coherent explanation—however, problem is that it explains old RTs, but also show that one should get a RT every time the facts arise
 - When exactly will you get proprietary restitution?
 - If take Birks/Chambers thesis seriously about what happened in the past and future, then will get more RT than historically been the case—πs would trump in all bankruptcy and insolvency cases (constructive trusts would do the same)
- Cause of action in unjust enrichment invariably supports restitutionary relief
 - All resulting trusts effect restitution for unjust enrichment
 - Not all unjust enrichments support restitution in proprietary form

- But restitutionary resulting trusts *should* be available more often
- “Top down” approach -- resulting trusts available on principled basis

- π should get proprietary relief as long as traceable asset survives (rationale: take personal autonomy seriously – S must have intention)



e) Limitations on resulting trusts for unjust enrichment

1) **Nature of enrichment:** if enrichment takes the form of services, can never be a RT (as it is not property) – must have **traceable property**

- all trusts presume existence of identifiable trust property
 - trust impossible if plaintiff provides services to defendant
 - trust impossible if property ceases to be identifiable; difficult issues of tracing (discussed under constructive trusts)

2) **Nature of injustice:**

- Canada: if there is no good reason, reverse transfer unless there is a policy reason not to return prop or S acted badly

Limitation on resulting trust for unjust enrichment:

Impaired intention #1-- vitiated intention (“I didn’t mean to do it”)

• If take Birks seriously, 1) can get restitution in proprietary form, 2) transfer occurred only b/c there was a vitiated intention

- class not exhausted by gratuitous transfer and failed express trust
- class includes any transfer not intended to benefit recipient, e.g. transfers under ignorance, mistake and compulsion

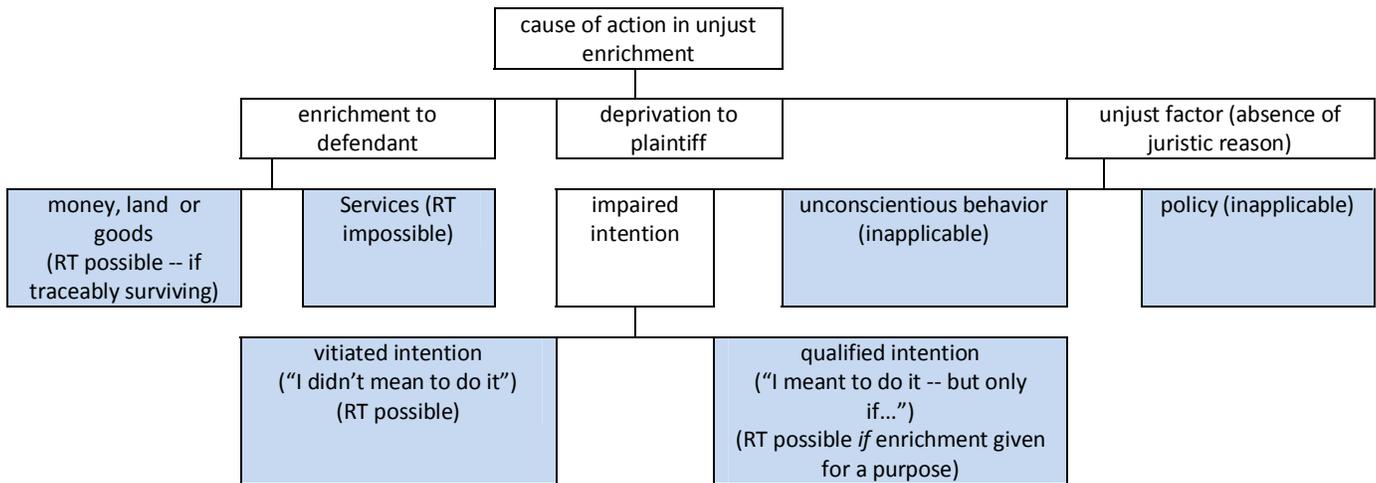
Impaired intention #2 -- qualified intention (“I meant to do it -- but...”)

1) **Intention is qualified:** A transfers prop to B, but intended B to retain benefit only if some event happens; if it doesn’t then, then reason for transfer falls away and there is no reason for B to keep it
 2) **May or may not fully intend to let go of prop;** at crucial point, A takes a chance that they may end up an unsecured creditor – get restitution, not propriety

- recipient fully intended by transferor to receive benefit at outset
- but intended to *retain* benefit only if specified event occurs
 - e.g. “\$5000 is yours to keep if you write a book for me”
 - e.g. “\$5000 is yours to buy shares in XYZ Corp” If express trust fails, then qualification of basis fails = restitution; as was told can only use for one purpose, fettered interest in property

• (1) Not enough to be qualified, (2) must also be **fettered to get proprietary interest**

- trust not possible if unfettered interest in property acquired, e.g. “\$5000 is yours to keep if you write a book for me”
 - trust presumes existence of identifiable property
 - recipient entitled to expend or destroy asset if wholly entitled
 - trust should not depend upon fortuity of existing property
- trust possible only if recipient’s interest is fettered, e.g. “\$5000 is yours to buy shares in XYZ Corp”
 - interest fettered if property received for exclusive use
 - benefit must be received for a purpose
 - cf *Quistclose* trust (*Twinsectra Ltd v Yardley*)



f) Strict liability

- Strict liability (SL) acts: trespass, breach of contract, breach of fiduciary duty
 - **Rylands v. Fletcher (1866)**: strict liability act
 - Breach of an obligation, even if it was not breached intentionally

- for transfer disappears, to get restitution proprietary, must show that the prop was given with a fettered interest
 - This is half true in Canada, all of this is true in UK
 - Difficult question whether to accept principle (formula then get RT)

Is UE a strict liability claim?

- Ambiguous, as SL can mean:
 - (1) it was breached w/o intention
 - (2) UE is unique as in it is SL in a more profound way → it is liability even if person did not do anything at all
 - UE = receipt of money and absence of juristic reason
 - Since it is true SL, then liability can never hurt the person – Δ can never be worse off before judgment than after
 - However, if Δ spent money thinking it was proper and would not have spent it otherwise, person can be off the hook

Specific Performance

- For specific performance (equity): show cause of action and need for equity
- In UE: only get to equity when π wants something proprietary; must want the “thing” in return
- RT is the confusing label that equity historically put of **restitution in proprietary form**

How to decide if restitution is owed personally or proprietary?

1. If proprietary, must have **property** (services can never form RT)
2. Reason for reversing transfer
 - a) Did not exercise autonomy, to the extent that prop is still there, can get it back
 - b) If certain event does not happen, then basis

FAILED EXPRESS TRUST—RESULTING TRUST

- **Exam approach:** new rule extrapolated from old rules
 $A \rightarrow \text{trust} \rightarrow B \text{ (shares)} \rightarrow \text{benefit} \rightarrow C$
- **UE:** intended to give shares, basis fails, no reason for it to remain with B
- A’s intention was qualified and fettered B’s interest in shares

INSTRUCTIONS

Under a resulting trust, the property beneficially belongs to the person from whom it *effectively* came. For the next three exercises (1) assume that the attempted express trust failed immediately, (2) identify the person who effectively provided the property, and (3) identify the trustee and the beneficiary of the resulting trust (if there is one).

EXERCISE #1

Alan transferred shares to Barb to hold on express trust for Claire. The express trust failed.

- Barb unjustly enriched at Alan’s expense = proprietary restitution

EXERCISE #2

As part of an estate planning exercise, Xavier paid \$10,000 to Alan under the terms of a contract and, in exchange, Alan transferred certain shares to Barb for her to hold on express trust for Claire. The express trust failed.

$X \rightarrow \$10K \text{ contract} \rightarrow A \text{ (money)} \rightarrow \text{trust} \rightarrow B \text{ (shares)} \rightarrow \text{benefit} \rightarrow C$

- a) Assume X is client and shares have increased in value
 - If shares increased: fettered interest, X would argue RT (X went to A, A as agent transferred shares to B to hold on trust)—cannot always look physically where property came from; legal source of the property = X
- b) If shares decreased: unfettered interest, X would have to

argue for \$10K, X wanted B to hold shares on trust for C, A gets RT; X bought services from A, creation of the trust; as RT occurred, then X would claim UE against A for \$10K personally

• How to know which situation: comes down to intention and it succeeds and fails on the basis

- 1) Who had legal title to the shares immediately before it went to B? That is the person who is entitled to RT
- 2) Always watch for situations where someone gets prop back from RT and retains money – the money may have to be returned elsewhere

PURCHASE MONEY RESULTING TRUST LOANS—CONTRIBUTIONS TO PRICE—MORTGAGES

GENERAL RULES

A resulting trust is generally presumed if the purchaser paid the price *as* the purchaser. A resulting trust generally will not arise if the purchaser paid *on behalf of* the person receiving title.

EXERCISE #3

Dave wanted to buy Blackacre, but he did not have sufficient funds. He therefore borrowed \$300,000 from Pam. She paid that amount to Xavier out of her own bank account, but directed him to transfer title into her own name. Who has the beneficial interest in the property? Approaches:

a) Dave wants to argue beneficial title:

- 1) D borrowed \$ from P, which became D's money which is paid to X (P paid price as D's agent + title to Pam)
- 2) Title of \$ before given to X was under D's name
- 3) Any time one person's money is used to buy prop in another person's name is a classic RT situation

b) Unjust enrichment: Pam enriched by title + Dave deprived of price + unjust factor as Dave did not intend to benefit Pam

c) Pam holds title on resulting trust for Dave but Dave must repay loan to Pam

EXERCISE #4

Dave wanted to buy Blackacre from Xavier, but he did not have sufficient funds. The price was \$300,000. Dave paid \$200,000 from his pre-existing resources. Pam provided the remaining \$100,000 toward the price. Legal title was held by Dave alone. Explain the location of the beneficial interest if (a) Pam provided \$100,000 by way of *loan*, and (b) Pam provided \$100,000 *in her own right*.

a) No UE as it was a loan: Dave gets full legal title, personally indebted to Pam

b) UE as co-tenants in law: Pam gets 1/3, if provided in her own right

EXERCISE #5

Dave purchased Blackacre from Xavier for \$300,000. Because Dave did not have sufficient funds, Xavier agreed to immediately transfer title in exchange for later payment. Pam subsequently satisfied Dave's debt to Xavier. Is Pam entitled to a resulting trust over Blackacre?

• Simple question is who has legal title to the money that pays from prop? Pam – gets full beneficial interest

• How to avoid this: (1) X gave D on loan, or (2) if person pays the price, then it belongs to that person – problem is whether a third party can step in and pay debt (perhaps intervener can only intervene in debt with person's consent)

a) Xavier accepted late payment of purchase price – price paid by Pam

b) UE: D enriched + P deprived by payment of price + unjust factor because P presumed not to intend gift to Dave (assuming that D is not P's child)

c) Resulting trust: Dave holds legal title for benefit of Pam

EXERCISE 6

Dave purchased Blackacre from Xavier for \$300,000. Dave financed that purchase by borrowing \$300,000 from a bank and by securing that purchase by borrowing \$300,000 from a bank and by securing repayment of that loan by granting a mortgage over Blackacre to the bank. Pam subsequently repaid Dave's debt to the bank and thereby discharged the mortgage. Explain any rights that have arisen in favour of Pam.

• Exercise 5: no one paid purchase price until P intervened

a) Dave paid purchase price to Xavier immediately with money borrowed from bank – Pam subsequently repaid D's loan to bank (but did not pay purchase price)

- Legally not P's money before house was paid for
- P repaid the loan, does not get benefit by way of paying the bank

b) No unjust enrichment of *title*: Dave enriched by title + Dave deprived by payment of price with money borrowed from bank

- Alternative analysis: *backward tracing* (not yet in Canada – some support in England) where...
 - 1) P pays money D = resulting trust over money; or
 - 2) P pays money to D + D buys land = resulting trust over land (money lost to BFPV); or
 - 3) D buys land on simple credit + P pays D + D uses money for price = resulting trust; or
 - 4) D buys land on loan + P pays D + D uses money to repay loan = resulting trust?
- Smith: payment traced *back* into land for which loan was used = resulting trust for Pam who *effectively* purchased land for Dave
- Chambers: only *principal* (and not *interest*) portion of repayment go toward purchase; fractional resulting trust with each mortgage payment (principal only), e.g. 20 year mortgage: one payment = 1/240th interest (subject to interest)

c) Unjust enrichment of *money*: Dave enriched by discharge of debt to bank + Pam deprived by payment of loan + unjust factor because Pam did not intend gift to Dave (assuming Dave is not Pam's child)

- No resulting trust to Pam because *negative* benefit to Dave (discharge of debt)
- Personal restitution as Dave bears obligation to restore value to Pam; obligation may be secured by *equitable lien* over Blackacre
 - common law lien: possessory (no right of sale)
 - equitable lien: right of sale (non-possessory)
 - note: *Foskett v McKeown* option of lien or trust (relative benefits)
 - note: also statutory lien and contractual charge
- Pam may be *subrogated* to revived rights bank held against Dave on loan; reviving subrogation: former creditor's security re-animated for claimant, e.g. land value drops *but* bank held security over valuable shares
 - lien ineffective because Blackacre not worth \$300,000
 - better to enforce security over shares worth more than \$300,000
- simple subrogation: claimant takes over existing right (e.g. insurance indemnity)

UNJUST ENRICHMENT—RESULTING TRUSTS

Unjust enrichment

• Unjust enrichment argument: must show (1) enrichment, (2) π suffered deprivation, (3) no explanation in law for transfer (unjust)

Resulting Trust

• When A gives B physical property, but results back because A did not have the intention for B to take the benefit of the property

• True explanation of resulting trusts: not intention to get it back, but absence of intention to give benefit away

EXERCISE #7

Pam pays Dave \$100,000 to construct a house. As Pam knows, Dave simultaneously has many projects under development. Dave commits a repudiatory breach of contract at the outset and refuses to perform. Is Pam entitled to receive restitution on the basis of unjust enrichment? Is she entitled to receive relief in the form of a resulting trust?

• D is bankrupt:

- 1) **Contractual remedy**: breach of contract, owed a debt, get damages but line up with creditors
- 2) **UE**: get restitution, line up with other creditors
- 3) **No RT**: cannot get proprietarily, likely placed in a general account
 - Probably cannot say when P gave money, fettered interest in \$
 - Money not only used for purpose of building the house, as some of it must be for D's services
 - Usually when hiring someone, not fettering their interest

EXERCISE #8

Pam pays Dave, an environmental activist, \$100,000 to oppose the construction of a dam. That project is Dave's only project. The planned construction of the dam is cancelled the next day—before Dave undertakes any work. Is Pam entitled to receive restitution on the basis of unjust enrichment? Is she entitled to receive relief in the form of a resulting trust?

• Two approaches:

- 1) Unfettered discretion, maybe proprietary restitution in RT; interest fettered, take it back
- 2) Maybe can view it as an express trust—if it cannot be used to form an express trust, then can get RT (however, difficult to determine intention)

Question: How is this different from a Quisclose trust? If it is a RT analysis, it is the same

EXERCISE #9

Pam approached her colleague, Dave, who occasionally dabbled in the stock market, handed \$10,000 to him and said, "Take this money. It's yours to keep once you acquire 200 shares in XYZ Co for me. I don't care what money you use to get those shares and I don't care how much they cost—just get them for me, please."

Later that same day, Dave approached an officer of XYZ Co with a view to arranging the requested purchase. Dave was then informed that XYZ Co had ceased operations several weeks earlier and that its shares no longer were available from any source.

Dave has become insolvent—his debts exceed his assets by a

10:1 ratio. How much, if anything, will Pam recover from him? In what form, if any, is relief available to her?

- Contract and UE will not help P if she gets restitution
- Can she get restitution proprietarily? Appears to be a qualified intention case and D received unfettered interest, but Pam **intention was vitiated** as she did not really intend to give him the money as at the time of the transfer, she **made a mistake**; facts existed that could have been known to her that she could not get shares—autonomy to give away was never given away

If Pam was fully informed, then subjective test of whether P would have done the same

X. CONSTRUCTIVE TRUSTS: INTRODUCTION

A. Species and Sources of Trusts

- 1) Express trusts: created by settlor's intention to create trust
- 2) Resulting trust
 - *Westdeutsche*: created by plaintiff's intention to retain interest in property
 - *Air Jamaica*: created by law to effect restitution for unjust enrichment
- 3) Constructive trust: created by intention? unjust enrichment? other?

B. The Traditional Approach – Institutional Constructive Trusts

- 1) Constructive trusts arose automatically upon occurrence of certain events:
 - **Constructive trust arose as extension to express trust**, e.g. profits acquired in breach of express trust obligations – *Keech v Sandford* (trustee obliged to give up wrongful gain)
 - **Constructive trust extended to miscellaneous circumstances** (anytime you have a breach of equitable obligation it could trigger a constructive trust) – e.g. property acquired in breach of non-trust fiduciary duty; *Hong Kong v Reid* (agent holds bribe for principal) – e.g. property acquired in breach of confidence; *LAC v Corona* (confidtee obliged to give up wrongful gain) – e.g. specifically enforceable sale contract (breach irrelevant); *Lysaght v Edwards* (vendor holds on trust for purchaser) → **perfectionary CT, in Equity, if one clearly indicates he intends to do something in the future, especially in another relies on this, CT makes sure the person lives up to his word**
- 2) Constructive trusts not referable to single coherent theory
 - "There was never a theme behind the use

of the constructive trust by Chancery. It was never more than a convenient and available language medium through which for the Chancery mind the obligations of the parties might be expressed or determined.”
Waters Constructive Trust (1964) at 39

C. A Modern Canadian Approach – Remedial Constructive Trusts

- 1) Canada = remedial constructive trust
 - 2 types: discretionary and non-discretionary
 - Constructive trust exists only if judge says it exist at the end of the day
 - Broad discretion to create prop rights, where there were none to start with
- 2) Inequitable division of cohabitational property as catalyst for reform
 - failure of general trust principles
 - requisite intention absent under express trust
 - identifiable property usually absent under resulting trust (services)
 - constructive trust for distribution of assets upon dissolution of relations
 - constructive trust as proprietary restitution for unjust enrichment
 - *Murdoch* (1973 dissent) + *Rathwell* (1978 concurrence)

Re: Murdoch (1973 SCC) UE can result in constructive trust

• W and H worked on ranch; H took all assets in his own name; relationship fell apart
SCC (majority): W should not get anything as W had not done anything more than what a ranch wife does; H never intended trust (no express trust); W did not contribute to purchase price of property (no resulting trust)
Laskin dissenting: CT existed as a remedy for UE; only remedy is to put a CT on the prop
Rathwell (1978 SCC): Dixon picked up Laskin’s dissent in a concurrent judgment

Pettkus v Becker (SCC 1980) Matrimonial situation – UE

• W and H immigrated to Canada around 1950s, both worked hard to build business; wealth went exclusively into H’s name, whereas W contributed services
 • Relationship subsequently fell apart
Issue: Appropriate case for constructive trust?
Outcome: Cause of action in unjust enrichment established → CT (H was enriched by receipt of services, W provided services, H’ enrichment and W’s expense due to unjust factor)

- Unjust factors: policy, unconscientiousness (in form of free acceptance), impaired intention
- “[W]here one person ... prejudices herself in the reasonable expectation of receiving an interest in property and the other person ... freely accepts

benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation of receiving an interest in property, it would be unjust to allow the recipient of the benefit to retain it.”

Criticism of decision:

- 1) (Wrong) **Cause of action:** did H truly freely accept?
 - At the time, W did not have a “reasonable expectation” of property (based on *Murdoch*); H did not know of that “reasonable expectation” of property?
 - Can get around this today because *Pettkus v. Becker* is now law and it will create a reasonable expectation
- 2) (Wrong) **Measure of relief:** principle of restitution not followed; W should have received value of contribution
 - If dealing with free acceptance, then measure of relief is always *forward looking* (what is expected in the future)
 - If there is a cause of action in unjust enrichment, then only remedy is restitution (look backwards and give it back) → this is not a case for restitution
 - Contrast to *Degelman* (Aunt/nephew case): difference in relationship, claim failed based on Statute of Frauds as it was an oral agreement for land, restitution looks to the past and only awards value of services
 - This approach is unsuited for marriage relationship as parties are looking forward / towards fulfilling expectations
 - Although remedy should have been restitution, court gave expectation damages
- 3) (Wrong) **Form of relief:** CT as proprietary restitution for unjust enrichment
 - W received proprietary relief in the form of expectation damages, when there was no proprietary rights in the first place
- 4) Restitution for unjust enrichment or *sui generis* judicial legislation?
 - Problems associated with cutting through Gordian’s knot: (1) SCC should have made up a new COA to deal with matrimonial situations; (2) SCC achieved good results by butchering UE for the next 1/4 century (see below)

Always ask:

1. What was the cause of action?
2. What is the measure of relief?
3. What is the form of relief?

D. Unjust Enrichment – Exclusive Trigger of Constructive Trusts?

- 1) “Principle of unjust enrichment lies at the heart of the constructive trust;” *Pettkus v Becker* (1980 SCC *per* Dickson)
- 2) Constructive trust depends on “whether...unjust enrichment is established;” (*LAC Minerals v Intl Corona* (1989 SCC *per* LaForest)
- 3) “No unjust enrichment and therefore no possibility of a constructive trust;” *Hunter Engineering v Syncrude Canada* (1989 SCC *per* Dickson)

4) "Requirement of unjust enrichment is fundamental to...the constructive trust;" *Brissette v Westbury* (1993 SCC per Sopinka)

of sale)

***Soulos v Korkontzilas* (SCC 1997) Principle of Good Conscience**

D.1) Unjust Enrichment – An Ambiguous Concept

• UE has two meanings:

1) Autonomous unjust enrichment

- three part cause of action articulated in *Pettkus v Becker*
- invariable response of restitution (personal or proprietary), e.g. Δ compelled to give back enrichment to π

2) Unjust enrichment by wrongdoing (such as breach of confidence); we call it this if instead of asking for other types of damages, asking for the benefit that Δ gained as a breach of that obligation

- cause of action other than autonomous unjust enrichment
- alternative response of "restitution" (personal or proprietary); courts call this restitution, but it's actually disgorgement, e.g. Δ compelled to give up (disgorge) enrichment to π
 - Personal disgorgement = accounting for profits
 - Proprietary disgorgement = CT
- Normally one gets compensation for private breaches of law, but sometimes one can get disgorgement (you did me wrong, may or may not have hurt me, but you received benefit that I want) ∴ disgorgement ≠ restitution, as it is "giving up" rather than "looking back"

• Δ = π's real estate agent, π desperate to buy prop which Δ bought for himself

• Several years later, π finds out what happened; still wanted prop so he could become the landlord to his banker (even though it went down in value ⇒ in the Greek community it was prestigious to be your banker's landlord)

• π wanted CT, but can't have it without unjust enrichment

Trial: CT available only for unjust enrichment

- UE defined in terms of autonomous action; π suffered no corresponding deprivation; CT unavailable on facts

CA: CT available to maintain integrity of fiduciary relationship

- Equity must preclude temptation to breach obligation; Equity must preclude profit from wrongdoing; CT available on facts

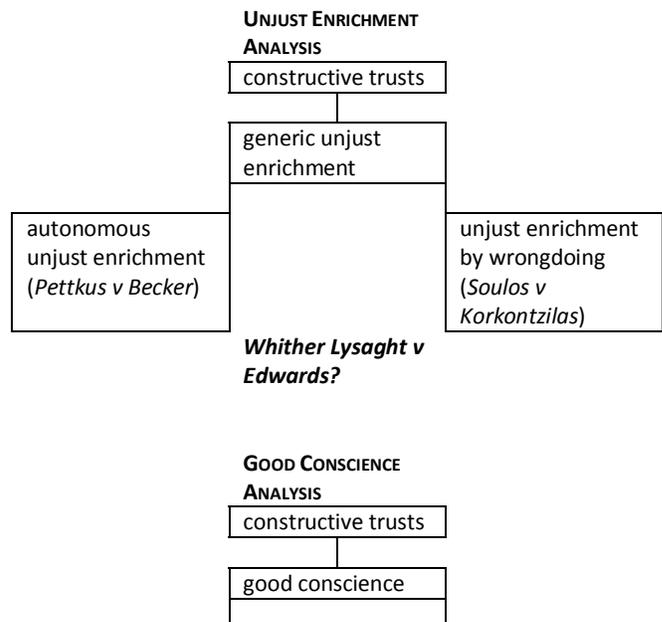
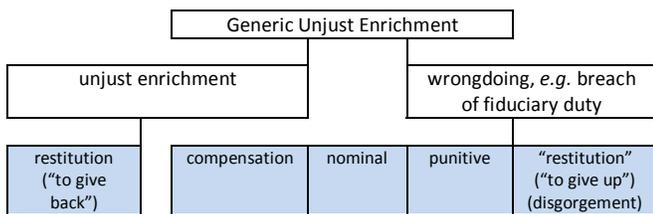
SCC:

- 1) "The constructive trust is an ancient and eclectic institution"
- 2) Modern remedial species do not displace traditional institutional species
- 3) Constructive trust cumulatively based on principle of "good conscience" which consists of:
 - autonomous unjust enrichment (*Pettkus v Becker* criteria)
 - property acquired by wrongful conduct (four criteria – below)

Disposition: Δ compelled to hold prop on CT for π; π required to indemnify Δ for purchase and market loss

Questions: Was the triggering event unjust enrichment – autonomous or generic? Was the relief awarded restitution? was it disgorgement?

Problem 1. Substituting obfuscations, unhelpful wording as CT does not arise from UE (autonomous kind), but from "good conscience." GC means generic UE; still cannot explain *Lysaght*; should have just acknowledged that CT is a grab bag with no unifying rationale like RT (according to *Waters*)



D.2) Unjust Enrichment : Exclusive Trigger of Constructive Trusts – An Untenable View

1) Constructive trusts indisputably arise outside autonomous unjust enrichment

- Triggered by "unjust enrichment" by wrongdoing; e.g. *Keech v Sandford* (breach of fiduciary duty)

2) Constructive trusts indisputably arise outside generic unjust enrichment

- Triggered by something other than unjust enrichment or wrong; e.g. *Lysaght v Edwards* (specifically enforceable contract

autonomous unjust enrichment (*Pettkus v Becker*)

wrongful acquisition (*Soulos v Korkontzilas*)

Whither *Lysaght v Edwards*?

Problem 2. Misinterpreting authority, can have CT for some wrongful acquisition, but not all wrongful acquisitions will trigger CT

- 1) Good conscience – wrongful acquisition of property
 1. Proprietary v. personal disgorgement determined by criteria from Goode’s test
 - a) Δ owed equitable obligation to π regarding asset
 - b) asset acquired by defendant through agency (deemed or actual; deemed = agent didn’t acquire prop on principle’s behalf but should have; what Goode had in mind, is that π should never end up with prop that they didn’t have in the first place or π ’s relief was such that if Δ took part of the prop, he should have done so on π ’s behalf)
 - c) π established legitimate reason for proprietary relief (emotional interest, prestige of having banker as tenant is sufficient)
 - d) No factors render constructive trust unjust (e.g. creditors) (principle willing to pay higher than market value, so good for creditors)
 2. Goode concerned to strictly limit scope of proprietary relief; proprietary relief must not prejudice Δ ’s creditors; proprietary relief if plaintiff enjoyed pre-existing property right – property acquired by defendant from plaintiff – property acquired by defendant on plaintiff’s behalf
- 2) Goode on *Soulos v Korkontzilas* (good conscience – wrongful acquisition)
 1. constructive trust warranted on facts
 - a) real estate agent owed fiduciary duty to purchaser
 - b) agent should have acquired for purchaser (deemed agency)
 - c) purchaser uniquely interested in disputed property
 - d) proprietary relief ordered on terms (indemnification)
 2. Goode’s test can be satisfied in this case but only because it was unusual

Goode on *Hong Kong v Reid* (good conscience + wrongful acquisition)

- CT not warranted on facts
 1. prosecutor required to refrain from receiving bribes
 2. no actual or deemed agency gain as prosecutor did *not* receive bribe through agency

- prosecutor did not actually receive bribe on Crown’s behalf
- prosecutor should not have received bribe on Crown’s behalf

3. CT would prejudice Reid’s creditors

- Will *Soulos* preclude constructive trust in *Hong Kong v Reid* situation? SCC would agree but Goode would say there’s an actual or deemed agency gain

Goode on *Pettkus v Becker* (good conscience + autonomous unjust enrichment)

- CT not warranted; not prejudiced against creditors
 1. CT must not prejudice general creditors
 2. CT → presumes “proprietary base”; Δ must (traceably) hold *hard asset* received from π – π able to remove *her* prop from Δ ’s assets – Δ cannot discharge his debt with π ’s prop
 3. services = *soft asset* → cohabitational services insufficient to give rise to proprietary rights
- Left with the grand irony that the test was used for the opposite purpose that the author intended ⇒ SCC used it to find many CTs

XI. Constructive Trust Applied

A. Introduction

- 1) Constructive trusts – an overview
 - “unjust enrichment” and “good conscience” as unifying principles; the impossibility of squaring the circle
 - bases of stranger’s liability as “constructive trustee”; recurring problems of mis-diagnosis and mis-prescription
- 2) Two types of liability: wrongdoing and without wrongdoing
 - Other types of liability: breach of contract, trespass or battery
 - Liable regardless of lack of intention or due diligence
- 3) Accessory liability of someone who is not in trust relationship, but participated in breach of trust

B. Bases of Stranger’s Liability to a Trust

Problem: stranger to the trust fiddling with asset of a true trust; B can potentially sue a (1) trustee and (2) stranger, but when is a stranger liable?

- 1) **Trustee *de son tort*:** liability for improperly assuming position of trustee (someone who is not a trustee acts as one)
 - a) Liabilities of trustee, including strict liability
 - b) Usually comes up innocently
- 2) **Knowing assistance:** liability for assisting in

breach of trust

3) **Knowing receipt:** liability for receiving trust property

Note on Constructive Trustees:

• The only parties to a trust are B and trustee; as a result if something goes wrong, B can only sue Tr; yet sometimes want to go outside of relationship; historically, done by making accessory as constructive trustee – deem that person as a trustee, then B can sue that person

- **Constructive:** pretend/construe that someone is a trustee or something is a trust
- **Constructive trustee:** someone outside of trust relationship who is personally liable to beneficiary = person is not a trustee, but personally liable for breach of trust
- There is no trust where there is a “constructive trustee”

B.1) Action #1: Trustee De Son Tort

- Scenario: stranger assumes position of trustee without authority
 - stranger treated as “trustee of his own wrong”
 - stranger subject to same extensive liabilities as true trustee
 - If see this on exam or in practice, not usually case of trustee *de son tort* – usually arises innocently (i.e. executor thinks they are also the trustee)

B.2) Action #2: Knowing Assistance

- Scenario: stranger assists trustee in breaching trust and thereby causes loss (stranger is an accessory to a wrong)
 - Parasitic wrong: wrong of helping someone breach their fiduciary obligation
- a) First cause of action against trustee: trustee uncontroversially is liable for loss caused by breach
 - trustee’s liability (generally) is strict
 - trustee’s honesty and knowledge (generally) is irrelevant
- b) Stranger may also be liable for loss caused by breach
 - **M&L Travel:** must have (1) underlying fraudulent breach and (2) stranger’s actual knowledge of breach – *McInnes*: this test is **wrong**

Air Canada v M&L Travel (SCC 1993) Stranger to a trust

- See facts at p. 5; Air C sued M&L for breach of trust
 - AC could not successfully sue the bank as they are a BFPV b/c they bought legal title to the money (against chose in action for debt), extinguishes previous equitable interest
 - AC could sue directors of co. personally not as trustees but as strangers to the trust (technically, trust existed between AC and M&L) for knowing assistance
 - Co = trustee, Δs = strangers to trust
- To what extent were Δs aware of the breach of trust?
Issue: When are directors (strangers to the trust) liable?
Decision: Cause of action in knowing assistance assumes stranger fiddled with prop but did not receive prop; involvement premised on wrongdoing; measure of relief = compensation (not restitution)
- 1) Liability not premised upon wrongful profit; fault-based liability
 - high threshold required to justify imposition of liability
 - anomalous strict liability of fiduciary (relation justifies)
- 2) Liability premiered upon fraudulent and dishonest breach of trust
 - no liability on stranger unless trustee acted fraudulently
 - stranger not expected to guard against innocent breach
- 3) Liability premiered upon stranger’s subjective knowledge of breach
 - stranger must know of both trust and fraudulent breach
 - “knowledge” includes recklessness, wilful blindness, but not constructive knowledge
 - carelessness cannot justify liability
- Ratio:** Must give court sufficient reason for getting court involved by showing:
 1. Trustee acted fraudulently (stranger not expected to guard against innocent breach)
 2. Stranger (1) knowingly participated in (2) fraudulent breach of trust
- Disposition:**
 - 1) Fraudulent breach by M&L, funds knowingly exposed to risk
 - Stranger knew of both agreement and mis-use of funds - Valiant at least culpable of wilful blindness
 - Valiant “personally liable...as constructive trustee” for compensation
 - 2) “Personally liable... as constructive trustee” – a contradiction in terms?
 - B’s rights generally limited by terms of trust – beneficiary *prima facie* entitled to sue *only* trustee – “constructive trustee” = stranger treated *as if* he was a trustee (= construed/deemed/pretend trustee); beneficiary exceptionally can sue stranger to trust
 - the danger of legal fictions – misunderstanding and mistake
- Criticism:** M&L is a disaster; consider example: Tr innocently follows advice from solicitor who fraudulently gives wrong advice – under M&L, B do not have a cause of action for knowing assistance b/c trustee did not fraudulently breach trust (it was an innocent breach)
 - Theoretically Tr could sue solicitor for breach of

fiduciary duty in performing contractual duties and hold judgment amount in trust for B

- Alternatively, if Tr refuses to sue, B could sue solicitor and name Tr as co-Δ
- Bottom line: (1) Stranger's liability should turn on his culpability; does not make sense to look to Tr's state of mind; (2) unlike criminal law which requires a guilty mind, civil law requires guilty action – knowledge should be objectively determined, rather than subjectively determined

Royal Brunei Airlines v Tan (PC 1995) Look to stranger's state of mind

What precise state of mind must the stranger have?

- **SCC:** fraudulent breach and subjective knowledge that stranger is doing something wrong (*McInnes* disagrees)
- **HL:** stranger must know they are participating in breach of trust and reasonable person would realize that is a bad thing; must have actual knowledge but objective standard on issue of dishonesty
- ***Twinsectra*:** adds that the person subjectively feels that act is dishonest
- ***Barclay Cloves*:** stranger must have enough info such that a reasonable person would realize that what they are doing is wrong
- For exam purposes: pick one and show reasons

- 1) **M&L** approach: "That would make no sense," as there are principled requirements for liability
 - **trustee's liability must turn on trustee's culpability;** trustee's special position negates requirement of dishonesty
 - trustee is strictly liable for breach
 - **stranger's liability must turn on stranger's culpability;** stranger's culpability turns on stranger's state of mind
 - trustee's state of mind irrelevant to stranger's culpability
- 2) **Nicholls'** response to Sullivan *via* Iacobucci
 - liability justified only if trustee knowingly breached (**M&L**); stranger need not refrain from assisting in innocent breach
 - intolerable burden on agent stranger to disobey trustee
 - stranger agent need not investigate every suspicion
 - liability potentially justified even if honest breach (*Brunei*); stranger sufficiently protected by requirement of dishonesty
 - mere carelessness insufficient basis for liability
- 3) Liability based on stranger's dishonesty
Nicholls in *Royal Brunei* (Millett dissent in *Twinsectra*)
 - objective dishonesty: impropriety + reasonable person would realize
 - criminal law requires guilty mind (*mens rea*)
 - civil law requires guilty action
 - cf tort of inducing breach of contract**Hutton in *Twinsectra***
 - subjective dishonesty: impropriety + defendant actually realized
 - reserve "dishonesty" label for most serious situations

Possible causes of action:

- 1) Express trust imposing fiduciary obligation (with single Tr and B)
 - Sometimes fiduciary obligation imposed on resulting or constructive trust and person holding legal title has obligations
 - 2) If there is a breach of trust, 3 possibilities:
 - a) **Pure loss to B:** action B against Tr for breach of trust; measure of relief must be compensation; strict liability (does not care if it was done so carelessly or unintentionally)
 - b) **Improper substitute:** Tr has taken the trust prop and instead of holding on trust, does something else (buys a painting); B can either (a) sue for loss = compensation; or (b) trace new prop = trace prop to find it is on trust (don't know if it is express or constructive, but it really does not matter)
 - c) **New gain/benefit:** Tr as a result of breach of trust takes in a new gain (*Gordon*); arises b/c trustee has secret info to buy prop (new prop is not traceable to trust – it was acquired from a wrongful gain); remedy = disgorgement
 - If prop must be given up, can be personal (value of prop = account of profits); or
 - Proprietary; constructive trust
 - 3) **Remedies for wrong-doing:**
 - **Compensation:** B suffered a loss, S committed a wrong against B
 - **Disgorgement:** S participated in wrong and imposed loss on B and S may have gotten some gain for himself – can be personal or proprietary
- **Threshold for Liability**
 - **Compensation:** high threshold; shifting π 's loss to Δ , so Δ must dip into prior resources
 - **Disgorgement:** high threshold, giving π anomalous windfall gain; π would not otherwise get prop (***Reid***)
 - **Restitution:** low threshold, bringing parties back to *status quo ante*, thus should never hurt Δ or give π windfall
- #### **B.3) Action #3 – Knowing Receipt**
- **Knowing receipt:** breach of trust, but accessory participated in act and in doing so, took a benefit out of the trust
 - Scenario: stranger to trust receives trust property in personal capacity
 - trustee uncontroversially is liable for loss caused by breach

- trustee’s liability (generally) is strict
- trustee’s honesty and knowledge (generally) are irrelevant
- stranger may be liable for receipt of trust property
- must stranger “know” of breach of trust?

Citadel General Assurance v Lloyds Bank (SCC 1997) Beneficial Receipt + Knowing Receipt

- π sold insurance to motorists in AB; hired a co. called “Drive On” to act as agent in collecting premiums
- Like M&L, money held on trust for insurance co. at Lloyd’s Bank
- Parent co IWC’s manager was also the manager of account for “Dive On”; both co. had financial difficulties
- IWC told bank to take resources from Drive On and place it in IWC, and bank agrees (as bank would be repaid loan)
- Drive On and IWC go under, π tries to claim \$, but any action would be useless as companies don’t have \$ (taken by the bank)
- π sued the bank as a stranger that participated in the breach of trust
- Bank did not knowingly assist, but knowingly received

LaForest’s reasons:

- 1) **Knowing receipt** = claim for restitution in unjust enrichment
 - beneficiary recovers value of property that stranger received
 - enrichment + deprivation + unjust factor
 - stranger compelled to “give back” to beneficiary
 - Knowing receipt is a useless label; just indicates it is a equitable species of UE
 - **Knowing receipt test:** (1) π must show bank received money in personal capacity (bank had possession of money and took benefit of the money as it took money to repay itself on loan), (2) no need for actual knowledge; just need proof of constructive knowledge (lower threshold of moral culpability)

- 2) Liability premised upon **beneficial receipt** of trust property
 - no liability on bank for mere paying or collecting trust funds
 - liability on bank for beneficial reduction of overdraft

- 3) Liability premised upon **knowing receipt** of trust property
 - liability involves receipt of property – low threshold
 - lower standard than liability for knowing assistance
 - stranger’s *actual* knowledge of breach unnecessary
 - stranger’s *constructive* knowledge of breach sufficient
 - unjust factor = bad conduct (constructive knowledge of breach)

Disposition: Bank received funds beneficially and had constructive knowledge; “liability as constructive trustee... is a restitutionary remedy”

- Citadel did not seek a (proprietary) “tracing” order

Criticism: La Forest is saying that if stranger (with constructive knowledge) takes prop from B, then B can either sue for (a) **personal liability for knowing receipt** (restitution for UE) – enough that at some point S received \$; or (b) **proprietary liability** as S received and retained prop

- Prop beneficially belongs to B, so unless BFPV, still belongs to B which B can take back
- LaForest is saying that innocent recipient should not be disadvantaged by liability (*Citadel*); proposal is strict, not absolute; cause of action in UE establishes

prima face liability, which may be reduced or eliminated by defence (three levels of culpability: actual knowledge, constructive knowledge, strict liability). Strict liability ≠ absolute liability and is subject to defences, notably the change of position

- However, as seen in example below, Law and Equity would result in different outcomes...

QUESTION: Pam keeps \$5000 in her cookie jar. That money is not subject to a trust. While Pam is on vacation, a thief enters her home and steals the money. The thief then gives it to his friend, Dave, as a gift. Dave is unaware of the circumstances underlying the gift.

When Pam returns from vacation, she discovers what has happened. As the thief has disappeared, she brings an action in unjust enrichment for personal restitution against Dave, who has not spent the money. Analyse Pam’s claim against Dave. Is there any reason why it should not succeed?

Answer: Cause of action depends if money is in law or out of a trust

1) No hint of equity, then P’s cause of action in law is simply UE, then D’s liability is strict

- **Air Canada v Ontario:** airlines paid a lot of money to gov’t to serve alcohol; one airline said it was unconstitutional, Ont. CA agreed and said gov’t only on the hook for \$ they received after they were aware; SCC: gov’t on the hook for all the money -- Δ’s knowledge is totally irrelevant

2) **Citadel:** if situation is in equity (\$ from trust), even if cause of action in UE, element of proof changes: UE in law, strict liability, but UE in equity, then π must show: (1) didn’t mean for Δ to have \$, (2) Δ knew or ought to have known Δ was not entitled to \$ -- harder to prove

- Does not make sense

B.4) Knowing Receipt – A Missed Opportunity

• Liability for misdirected funds in Law and Equity

1) **Law:** strict based on plaintiff’s state of mind (*Air Canada v Ontario*)

- claim for personal restitution in unjust enrichment
- gist of claim: plaintiff’s impaired intent (“I didn’t really mean to do it”)

2) **Equity:** fault based on defendant’s state of mind (*Citadel v Lloyds*)

- claim for personal restitution in unjust enrichment
- gist: defendant’s knowledge of plaintiff’s impaired intent (“I knew that P didn’t really mean to do it”)

A modest proposal

- Emerging English view (Lord Nicholls extra-curricularly)
 - **Nicholls got it right:** same social problem, test should be the same – correct test is the test in law (true strict liability)
 - **Law and Equity reconciled:** strict liability in unjust enrichment:
 - relief for Legal interest if plaintiff’s intention was impaired
 - relief for Equitable interest if plaintiff’s intention was impaired
- Argument was raised in *Citadel*, but La Forest got it wrong as he focused on policy of protecting innocent recipients
 - innocent recipient should not be disadvantaged by liability (*Citadel*), but unjust enrichment proposal is strict – not absolute

- cause of action merely establishes *prima facie* liability; liability may be reduced or eliminated by defence
 - detrimental change of position in reliance on receipt; even if person is strictly liable for receiving money, person escapes liability to extent that person honestly spent it away in a way they normally would not have (*e.g.* Dave spent \$5000 on exceptional holiday in Fiji)
 - BFPV: complete defence to any UE action
 - Restitution should never hurt the Δ -- restitution says give it back (preferable all back), but if honestly spent, Δ is off the hook – otherwise it would hurt Δ; recipient need merely give back surviving value
- Note:** change of position in UE works in law or equity – only La Forest got it wrong in *Citadel*

QUESTION #1: Theo held a gold coin worth \$50 K on trust for Pam. In breach of trust, he gave that coin to his friend, Dave, in an effort to prevent Dave from becoming bankrupt. The effort failed – Dave later declared bankruptcy. Theo has disappeared, but Dave remains and he still has the coin in his possession. Pam has discovered the facts and seeks relief from Dave. Should she seek relief on the basis that Dave: (i) was a trustee *de son tort* (nothing in facts to show this), (ii) was guilty of knowing assistance, or (iii) was guilty of knowing receipt? Is there any other basis upon which she should seek relief? (no option for action against Trustee for breach of trust for compensation – as, T is missing)

Cause of Action	Knowing Assistance (encompasses any breach of underlying equitable obligation)	Knowing Receipt (basically UE action)	Knowing Receipt (UK approach)
Must demonstrate...	1) Fraudulent breach by Tr; and 2) Actual knowledge by S • Need more facts re: whether there was actual knowledge; still would not do much good, as would result in	1) D received benefit of money which belonged to P 2) If follow <i>Citadel</i> , must also show D knew or ought to have known something was wrong (constructive knowledge)	1) UE (strict liability) 2) Show P’s equitable title (<i>vindicatio</i> : right to pull back prop) 3) No sale of legal int. to BFPV • Possible to argue proprietary rights as P beneficially owned trust property (<u>as long as legal interest was not sold to BFPV</u> , then P can claim interest) • Problem with <i>Citadel</i> : requires proof of D’s fault
Measure of Relief	Compensation	<i>Citadel</i> : Restitution in personal form for UE	Restitution in proprietary form
Form of relief	Personal remedy (but D is bankrupt)	Personal remedy for knowing receipt	• Proprietary liability → give back the coin • Appears to be a CT, but should be a <u>resulting trust</u> by showing (1) no intention and (2) UE in order to get coin back in <i>species</i> (encompasses both the coin and its traceable proceeds)

QUESTION #2: Paul hired Donna, a lawyer, to represent his interests in the context of a large business deal. As part of that relationship, Paul disclosed information which, if made public, would allow his competitors to harm him. Unbeknownst to Paul, Donna was intimately involved with his chief competitor, David. Using information that she had received from her client, Donna and David acted in a way that

caused Paul to suffer a financial loss of \$500 K. Do the causes of action studied in this part of the course (analogously) support an appropriate cause of action?

Answer: No trust (as there is no property)

Cause of Action against Donna: breach of fiduciary obligation (although there is no trust relationship), breach of confidence, maybe negligence

Cause of Action against David: equitable action of knowing assistance in breach of an equitable obligation (confidence)

- S as accessory to breach, guilty of knowing assistance
- In law, can sue for tort of breach of inducing breach of contract
- In equity, any time there is a primary breach of any obligation, can get accessory on the hook (case of knowing assistance)

Remedies: Not disgorgement of gain as there was no gain, but compensation for loss

QUESTION #3: Tom, who had fallen on hard times, held \$500 K on trust for Pam. The terms of the trust permitted only safe investments that yielded guaranteed, but minimal, returns. Because Pam paid relatively little attention to the operation of the trust, Tom believed that he could obtain an improper benefit for himself without being detected.

Tom entered into an agreement with Xavier, a friend of his who worked as a financial adviser. Tom transferred the trust money to Xavier. Xavier promised that he would place the \$500 K in high risk investments that potentially offered large returns. According to the terms of that agreement, after one year, Xavier would return to Tom all of the money representing the original trust funds (i.e. \$500 K plus the income received on the investments). Tom would then place an appropriate amount back into Pam's trust account and retain the additional profits for himself. For his part in the scheme, Xavier was paid \$50 K by Tom at the outset.

In breach of his promises, Xavier squandered the entire \$550 K on unsuccessful gambling junkets to unidentifiable casinos in Europe. The money is untraceable.

The scheme eventually was uncovered. Tom was devastated by the adverse publicity and committed suicide. His estate contains virtually no assets. Xavier, in contrast, has assets in excess of \$1 million. Advise Pam. What cause of action should she use? What measure and form of relief should she seek?

• **P's action against X:**

- **Possible causes of action:** *Tt de son tort* (will not work), knowing assistance, or knowing receipt
- **Knowing receipt remedy** (equitable): UE remedy = restitution of \$500 K
- **Knowing assistance remedy** (equitable form of wrongdoing): personal remedy in form of compensation (\$500 K), or (as all equitable forms of wrongdoing supports compensation for loss or disgorgement of Δ 's gain) **disgorgement** = everything Δ gained in scheme = \$550 K (does not matter that it can't be given back in *specie*, can be disgorgement of personal form from X's \$1 million; i.e. *Reid*, where government never had the property) → show that X does not deserve it
- Possible to get the interest that could have been gained from \$500 K

Approach:

- Cause of action: only a few causes of action
- Measure of relief: disgorgement or restitution
- Form of relief: proprietary or personal

C. Tracing

C.1) Claiming and Tracing

1) The nature of tracing

- "Tracing properly so-called is neither a claim nor a remedy but a process. It is the process by which the plaintiff traces what has happened to his property, identifies the people who have handled or received it, and justifies his claim that the money which they have handled or received (and if necessary which they still retain) can properly be regarded as representing his property" (*Boscawen v Bajwa* (1996 CA per Millett LJ))

2) Tracing is *not* a cause of action *nor* a measure of relief *nor* a form of relief

- plaintiff does *not* pursue a "tracing claim"
- plaintiff does *not* ultimately seek a "tracing order"

3) Tracing is *possible* anytime value transfers from one property to another

- exercise of tracing is entirely neutral regarding rights and liabilities (e.g. employer=s money is traceable into employee=s home)
- but exercise is useless if money was validly received as salary

4) Tracing is *relevant* if an action or remedy requires identification of property

- e.g. claim may require proof that defendant received plaintiff=s property
– e.g. knowing receipt: defendant must receive plaintiff=s property
– note: form of relief is personal notwithstanding tracing

- *e.g.* remedy may require proof that defendant holds plaintiff=s property
 - *e.g.* resulting trust: plaintiff=s property must survive
 - note: cause of action is neutral as to form of relief

Summary: Tracing is an evidentiary exercise; it is not a cause of action nor a measure of relief nor a form of relief – successfully, it might lead to a personal remedy

- Facilitates other actions
- Tracing is completely value neutral; merely says value has moved from one asset to another
- Needed when action or remedy requires identification of property (knowing receipt, resulting trust, etc.)

C.2) Tracing and Following

- 1) Following = process of determining location of same property (tracing must be distinguished from tracing)
 - claim or remedy may turn on location of specific asset *itself*
 - following = physical exercise

EXAMPLE: Xavier stole Pam=s bike and gave it to Donna, who was unaware of the theft. Donna then sold the bike to David, who also was unaware of the theft. **ANSWER:** Pam is entitled in Law to bring an action in the tort of conversion (for compensation or disgorgement) against anyone who acted in a manner that was inconsistent with her right of possession. She therefore can sue everyone who dealt with her bike as if it was their own—*i.e.* Xavier, Donna and David. **Note:** it is possible to commit the tort of conversion “innocently.”

- On basis of following, P can commence action against all parties – even against David, as in law we prefer *nemo dat* over BFPV; can sue for conversion on basis of following, not tracing, as conversion is already a harsh action (David is on the hook (unless it was money), even though he had no idea it was stolen)

- 2) Tracing = process of determining location of value through substitutions
 - claim or remedy may turn on location of *value* of specific asset

EXAMPLE: Dave held \$100 K on trust for Pam. In breach of trust, he appropriated that money to his own use and bought a parcel of land from Xavier, who was unaware of Dave=s wrongdoing. **ANSWER:** Pam is entitled in Equity to recover misappropriated trust property from Dave. However, because he no longer holds the original trust property (*i.e.* because he sold it to a *bona fide* purchaser for value), she may be entitled to recover from him the land that represents the traceable proceeds of misappropriated money

Can Pam succeed in an action in conversion against Xavier based on his dealings with her money?

Note: a *bona fide* purchaser of a legal interest for value and without notice generally extinguishes prior equitable interests B but it extinguishes prior legal interests (which usually are protected by the *nemo dat* rule) only in limited circumstances, most notably where the property consists of money

- Cannot go after X who is a BFPV, legal title is extinguished
- May go after D through tracing
- If P, have choice to trace into new asset and assert proprietary ownership, or may pursue personal claims against trustee for breach of trust (disgorgement)

Tracing in Law and Equity—a dubious distinction

C.3) The Rules of Tracing—Law

- 1) No principled basis for separate systems for locating value
 - tracing invariably is mere evidentiary exercise for locating value
 - tracing is a meta-physical exercise
- 2) Growing movement toward rationalization
 - “Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough.” (*Foskett v McKeown* (2000 HL *per* Lord Millett))
- 3) Law generally allows only “clean substitutions”
 - value must move entirely and directly from old asset to new asset (*e.g.* a car is traded straight-up for a painting)
- 4) Law generally does not allow tracing through a “mixed fund”
 - exercise frustrated once value is mixed with other value (*e.g.* money placed into a bank account holding other money)
- 5) Tracing in Law may be pre-requisite to a claim at Law

Summary: before, believed to have two sets of rule of tracing in Law and Equity (true in Canada), but U.K. courts started recognizing that this doesn’t make sense; started to recognize Equitable tracing rules

- At law, cannot trace through a mixed substitute (supposedly, tracing in law required showing substitute was direct and entire); in law, must be all or nothing (*i.e.* from an account)

QUESTION: Xavier stole \$50,K (which was not subject to a trust) from Pam and deposited it into his bank account. Several weeks later, he withdrew the money and gave it to his friend Dave,

who placed it into his own bank account. Xavier has disappeared.

- 1) Is Pam entitled to personal restitution under a common law action in unjust enrichment against Dave? Did he receive an enrichment? Did Pam suffer a corresponding deprivation (*i.e.* did Dave traceably receive Pam=s money)?
- 2) Will Pam succeed if Xavier=s account contained credits other than those representing the stolen money? Will Pam succeed if Dave=s account contained credits other than those representing Xavier=s transfer?

Note: money generally cannot be identified or followed once it is deposited into a bank account—the depositor does not retain an interest in the money, but rather trades the money to the bank in exchange for a chose in action (*i.e.* the bank owes a debt)

- If X's account held anything at all, then in Law, P cannot trace through that account, then cannot assert anything against D
- If X's account didn't have anything, then just have to show that everything that went to D was P's at Law for P's action to succeed
- If D's account had money in there before, P can still sue as she is suing for UE – D received P's \$50K

C.4) The Rules of Tracing B Equity

- 1) Purported requirement of a fiduciary relationship
 - Equitable tracing often said to require fiduciary relationship; requirement thought necessary to invoke Equitable jurisdiction
 - traditional willingness to impose fiduciary relationship instrumentally; *e.g.* fiduciary obligations incongruously imposed on thief
 - emerging view that fiduciary relationship is not necessary; no logical reason to premise tracing on fiduciary relationship – fiduciary relationship relevant at most to a claim
 - “There is certainly no logical justification for allowing ... capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship as a precondition for applying equity=s tracing rules. The existence of such a relationship may be relevant to the nature of the claim which the plaintiff can maintain, whether personal or proprietary, but that is a different matter.” (*Foskett v McKeown* (2000 HL *per* Lord Millett))
- 2) Equity allows tracing through “mixtures”
 - value need not move entirely and directly from old asset to new asset (*e.g.* trust money is deposited into an account holding other credits)
 - beneficiary may assert ownership in *part* of the account
- 3) Tracing in Equity may be pre-requisite to a claim in Equity

Summary: Equity can trace into and through substitution; but before could not invoke Eq tracing rules unless could show action involves a fiduciary obligation; need something to pique Chancellor's interest

- Fiduciary should not be relevant to tracing as an evidentiary exercise
- U.K. seems to believe this, but Canadian courts are not there yet – still need to show fiduciary obligation

EXAMPLE: Dave held \$50 K on trust for Pam. In breach of trust, he deposited that money into his own account, which also contained credits from other sources amounting to \$10 K.
ANSWER: Pam is entitled to bring a proprietary action to recover her trust money. Although Dave no longer holds any of that money *in specie*, Pam can trace its value into Dave=s bank account and assert a proprietary claim to \$50 K. Her equitable claim will not be frustrated by the mere fact that the value inherent in the trust money has become mixed with other value

C.5) Equitable Tracing and Mixtures of Trust Property

- Situation #1: competing claims between innocent and guilty parties
 - innocent party can generally assert most favorable analysis possible
 - **Innocent (Pam) and guilty (Dave): P can assert any version of the story she wants as long as it is not inconsistent with the facts (bank account: chose in action – do not know who's money was drawn out)**

QUESTION #1: Dave held \$50 K on trust for Pam. In breach of trust, he deposited that money into his own account, which also contained credits from other sources amounting to \$50 K. He spent \$50 K on a painting. The painting subsequently declined in value to \$25 K. What is Pam=s best argument?
ANSWER: \$50K in account still belongs to P, painting purchased with D's money

QUESTION #2: Dave held \$50 K on trust for Pam. In breach of trust, he deposited that money into his own account, which also contained credits from other sources amounting to \$50 K. He then spent \$50 K on a painting. The artist died and the value of the painting increased to \$75 K. What is Pam=s best argument? **ANSWER:** P would treat purchase money for painting as her money

QUESTION #3: Dave held \$50 K on trust for Pam. In breach of trust, he deposited that money into a bank account of his own. He also held another account that contained \$50 K of his own. He then spent \$50 K from the latter account on a painting. The artist died and the value of the painting increased to \$75 K. What is Pam=s best argument? **ANSWER:** just a matter of fact that painting was purchased with money from one account rather than the other; P can only come up with a plausible version of the story and go after \$ 50 K in first account

QUESTION #4: Dave held \$50 K on trust for Pam. In breach of trust, he deposited that money into his own account, which also contained credits from other sources amounting to \$50 K. He then spent \$75 K on a painting and \$25 K on a trip around the world. The painting has retained its original value. What is Pam=s best argument? **ANSWER:** P would argue co-ownership of painting; 2/3 share of painting, 2/3 beneficial interest belongs to P as one of the tenants in common

QUESTION #5: Dave held \$50 K on trust for Pam. In breach of trust, he deposited that money into his own account, which also contained credits from other sources amounting to \$50 K. He then bought a painting for \$100 K. The value of the painting has dropped to \$25 K. The art market remains highly volatile.

ANSWER: Do you have to trace? If P wants, she can trace from her \$50 K into painting, still owns 1/2 of painting (\$12,500) (under constructive trust?) or sue D for breach of fiduciary obligation and go after D personally (no proprietary interest, but D has to come up with \$ somehow); also, could go into tracing for security where D is liable for \$50 K and security interest by lien is placed on painting so that force D must sell or P can sell painting – if value goes up to \$75 K, P can only get \$ 50 K (security interest via lien can only guarantee that payment is satisfied)

- Situation #2: competing claims between innocent parties
 - **Old rule:** *Clayton=s Case* previously held “first in—first out”
 - money first paid into active account presumed to be first spent (if dealing with a mixed fund, look to who’s money went in first, then sort that out before looking at second claim)
 - *Clayton’s Case* generally rejected in Canada
 - **Today’s rule:** innocent parties generally share proportionately if shortfall

QUESTION #1: Dave was trustee under two trusts: (i) he held \$40 K for Pam=s benefit, and (ii) \$60 K for Paul=s benefit. On May 1, he opened an account in his own name and deposited \$10 K of his own money. On June 1, he paid Pam=s money into that bank account. On July 1, he did the same with Paul=s money. Dave then spent \$40 K on a trip around the world in August 1. To what extent can Pam and Paul assert proprietary claims over the account? How would that question be answered under the rule in *Clayton=s Case*? Pam would get \$40 K, and Paul could get what is left; Canadian rule: loss is shared proportionately – Paul gets \$ 40 K, Pam gets \$ 20 K

2. Should Pam and Paul seek any other form of relief? Pam and Paul can look to Dave personally for the rest (breach of fiduciary duty)

QUESTION #2: On June 1, Dave had \$10 K in his own bank account. On July 1, he paid into the same account \$40 K that he held on trust for Pam. On August 1, he withdrew \$45 K and spent it on a trip around the world. When he returned on November 1, he received, by direct deposit, payment of \$20 K for work that he performed on a separate matter. On December 1, Pam brings a proprietary action against Dave in an

effort to recover her trust money. How much should she receive? If she receives less than \$40 K, is there any other basis upon which she can bring an action for the shortfall? **ANSWER:** Pam has a combination of personal and proprietary interest; according to Ont. CA, Pam has proprietary interest in \$25 K and must rely on personal rights for the rest of \$15 K

• However, this is impossible: tracing rules are inconsistent with facts – P can only get \$5 K due to the lowest intermediate balance rule (once innocent party’s money is in there, then proprietary is the minimum balance of the account subsequent to that)

Note: just know rules between innocent and guilty parties (follow U.K. rules for a better result)

C.6) Resolution of Competing Interests

	Recipient of Legal Interest	Recipient of Equitable Interest
Owner of Legal Interest	1. property <i>other</i> than money: <i>nemo dat</i> prevails—strict liability conversion even against BFPV (owner wins personally) 2. money: BFPV prevails—extinguishes pre-existing legal interest (recipient wins)	1. pre-existing legal right generally prevails over subsequent equitable interest (owner wins)
Owner of Equitable Interest	1. BFPV extinguishes pre-existing equitable interest (recipient wins) 2. non-BFPV holds subject to pre-existing equitable interest (owner wins personally and <u>proprietary</u>)	1. BFPV eliminates possibility of <i>personal</i> action (owner wins personally)—but does not prevail over pre-existing equitable interest, which <i>generally</i> takes priority on basis of order of creation (owner wins <u>proprietary</u> —unless owner misled BFPV) 2. non-BFPV holds subject to pre-existing equitable interest (owner wins personally and <u>proprietary</u>)

Notes

1. If BFPV is successful, then protection extends to *bona fide* purchaser for value *and* all subsequent recipients—even if subsequent recipients were not purchasers (*ie* donees) or not *bona fide* (*ie* because they received with notice of the earlier legal interest). Subsequent protection does not extend to original wrongdoer, however
2. Effect of BFPV of *non-trust equitable* interest (*eg* lease, mere equity) depends on *nature* of interest (non-examinable)

C.7) Tracing Review

Following and Tracing

- Following = evidentiary process for locating specific *assets*
 - a natural physical exercise
- Tracing = evidentiary process for locating *value* through substitutes
 - an artificial metaphysical exercise
 - value does *not* move from one asset to another; policy decision to substitute one asset for another

The Role of Tracing

- Tracing is *not* cause of action *nor* measure of relief *nor* form of relief
- Tracing is *not* an end in itself
- Tracing *may* serve some *other* purpose
 - tracing *may* facilitate a cause of action (*e.g.* establish nexus between parties in knowing receipt)
 - tracing *may* facilitate a form of relief (*e.g.* resulting trust over car purchased with stolen money)

Law and Equity: Purported Advantages and Disadvantages

- Tracing at Law
 - advantage: available in absence of fiduciary element
 - disadvantage: unable to trace through mixture
- Tracing in Equity
 - advantage: able to trace through mixture
 - disadvantage: not available in absence of fiduciary element

Recent Developments

- England: tracing as an evidentiary process
 - recognition that tracing is *neutral* as to rights
 - abolition of *division* between Law and Equity
 - abolition of need for *fiduciary* element
- Canada: traditional rules subject to exception
 - persisting errors: Δ tracing claims Δ and Δ tracing orders Δ (*Citadel*)
 - Law and Equity retained but evaded
 - Equitable tracing facilitated through Δ constructive fiduciaries Δ

QUESTION: On June 1, Dave had \$10 000 in his own bank account. On July 1, he paid into the same account \$40 000 that he held on trust for Pam. On August 1, he withdrew \$45 000 and spent it on a trip around the world. When he returned on November 1, he received, by direct deposit, payment of \$20 000 for work that he performed on a separate matter.

On December 1, Pam brings a proprietary action against Dave in an effort to recover her trust money. How much

should she receive? If she receives less than \$40 000, is there any other basis upon which she can bring an action for the shortfall?

Rules for Resolving Competing Claims on Property

- 1) Rule #1: *nemo dat quod non habet*
 - you cannot give what you do not have (*e.g.* conversion at Law against Δ innocent Δ recipient, constructive trust in Equity for donee of misdirected trust asset)
- 2) Rule #2: *bona fide* purchaser for value without notice of *some* existing interest
 - policy of protecting innocent purchasers + facilitating commerce
 - *bona fide*: not available if bad faith or notice of existing interest
 - purchaser: not available to donee (*ie* no consideration)
- 3) Reconciling the rules
 - when to prefer interest of original owner?
 - when to prefer interest of subsequent purchaser?

Competition #1 C Entirely Legal Interests

- Δ strict Δ liability tort of conversion
 - two meanings of Δ strict Δ liability: breach without fault (*eg* conversion) and liability without breach (*eg* unjust enrichment)
 - conversion: Law= Δ s substitute for a *vindicatio* (*cf* Equity)
 - allegation of wrongdoing became non-traversable
- Generally: *nemo dat* over *bona fide* purchase
 - persisting title preferred to efficient transaction (*e.g.* conversion against Δ innocent Δ purchaser)
- Money: *bona fide* purchase over *nemo dat*
 - efficient transaction preferred to persisting title (*e.g.* commercial exchange launders money)

Competition #2 C Legal and Equitable Interests

- *Legal* title administratively held on trust + unauthorized disposition by trustee

T (legal) Trust > B (equitable)

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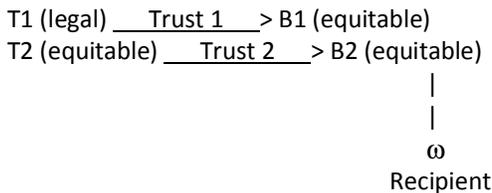
Recipient

- If unauthorized recipient *is not* BFPV (*ie* not purchaser or not *bona fide*):
 - 1) beneficiary: personal claim against trustee
 - action = breach of trust
 - remedy = compensation or disgorgement
 - 2) beneficiary: personal claim against recipient
 - gist of claim: *receipt* of (traceable) trust asset
 - action = unjust enrichment/knowing receipt (*Citadel*)

- remedy = restitution
- 3) beneficiary: proprietary claim against recipient
- gist of claim: *retention* of (traceable) trust asset
 - action: unjust enrichment (strict) *or* direct *vindicatio*(?)
 - remedy: resulting trust *or* constructive trust(?)
- If unauthorized recipient *is* BFPV
 - beneficiary: personal claim against trustee C same as above
 - beneficiary: no claim against recipient – BFPV of *legal* interest *extinguishes* prior *equitable* interest; defence to claim in unjust enrichment/knowing receipt, eliminates possibility of claim to persisting title
 - Exception: equitable title resurrected against wrongdoer

Competition #3 C Entirely Equitable Interests Under Trust

- *Equitable* title administratively held on trust + unauthorized disposition by trustee



- If unauthorized recipient *is not* BFPV (*ie* not purchaser *or not bona fide*)
 - beneficiary: personal claim against trustee C same as above
 - beneficiary: personal claim against recipient – same as above
 - beneficiary: proprietary claim against recipient – same as above
- If unauthorized recipient *is* BFPV
 - beneficiary: personal claim against trustee C same as above
 - beneficiary: personal claim against recipient – gist of claim: *receipt* of (traceable) trust asset – action = knowing receipt/unjust enrichment – impossible to prove fault (*Citadel*); strict liability defeated by defence (COP)
 - beneficiary: proprietary claim against recipient – BFPV of *equitable* interest does *not extinguish* prior *equitable* interest; equitable interests prioritized by time of creation – exception: trust beneficiary misled BFPV
 - note: different rules for *other types* of equitable interests (non-examinable) – non-trust equitable interest (*eg* equitable lease); BFPV wins *if* prior party unreasonably failed to protect interest – mere equity (*eg* right to rescind sale); BFPV wins

D. CONSTRUCTIVE TRUSTS AND UNJUST ENRICHMENT

D.1) Cause of Action in Unjust Enrichment

- Elements of action = enrichment + corresponding deprivation + reason to reverse
- Measure of relief = restitution
- Form of relief = personal or proprietary
 - what is proper *name* for proprietary restitution?
 - what is proper *role* for proprietary restitution?

***Chase Manhattan Bank v Israel-British Bank (QB 1979)* UE may support constructive trust**

- Parties are two banks, π bank indebted to Δ bank – paid \$2 m, paid another \$2, Δ became bankrupt
 - Since Δ is bankrupt, π wants proprietary relief
- Issue:** What kind of trust? Not an express trust, CT or RT?
Decision: Can get constructive trust where personal relief is inadequate; if Δ is bankrupt, this applies
- 1) Judgment doesn't give an answer, says "constructive trust" but relies on resulting trust cases
 - 2) Unjust enrichment *may* support constructive trust
 - equitable relief available where legal relief inadequate
 - legal relief inadequate if D insolvent
 - 3) As matter of principle, should be able to:
 - Treat as a resulting trust based on principle
 - UK would say RT, but Canada might say CT – just say CT, to avoid complications

D.2) Identifying the Trust

- *Chase Manhattan*: proprietary restitution = constructive trust
- Emerging view: proprietary restitution = resulting trust
 - consistent label for *all* proprietary restitution
 - facilitate better understanding of proprietary restitution

D.3) Justifying the Trust

- 1) Consequences of proprietary restitution
 - plaintiff: avoid effect of insolvency
 - plaintiff: enjoy increase in value of asset
 - defendant: loss of freedom of choice
- 2) Affected parties: **matters to many people**
 - plaintiff and defendant
 - defendant's unsecured creditors (loss of eligible assets)
 - legislature (statutory schemes for insolvency)
 - society (efficient rules *and* out-of-court settlements): **rather have a rule that is**

really clear

3) When do you get proprietary relief? Three options:

- 1) A matter of effective relief – inadequacy of a personal debt (*Chase Manhattan*)
 - proprietary relief available to overcome insolvency
 - **McInnes**: cannot be right
 - 2) A matter of principle – enforcing a proprietary base (Chambers) – focus on autonomy
 - nature of enrichment: trust presumes property
 - impossible for services
 - possible for (traceable) receipt
 - personal interest: locked into to value at the time; proprietary interest: value may change
 - nature of injustice: recipient never acquired full beneficial interest
 - always possible for vitiated intention (restitution; autonomy still attached to thing)
 - occasionally possible for qualified intention (if fettered)
 - affects π and Δ 's freedom of choice: better in co-habitation situation to put lien on house to repay for services, not finding a CT
 - 3) A matter of insolvency – avoiding a risk of loss (Burrows)
 - did not fully intend to risk of insolvency of other party (test is almost identical to Chambers)
 - transferor analogous to secured or unsecured creditor
 - risk generally avoided for vitiated intention (vitiating intention in context of unsecured contractual debt)
 - risk occasionally avoided for qualified intention (if fettered)
 - McInnes likes this view most
- **Canadian law** is unclear
 - **Soulos**: proprietary restitution given in certain circumstances
 - Happens when there is UE, sometimes in commercial context, unsure when exactly it happens

E. CONSTRUCTIVE TRUSTS

E.1) An Overview of Constructive Trusts

1) Constructive trusts: a grab bag

- Not invariably referable to “unjust enrichment” (*Pettkus*)
- Not invariably referable to “good conscience” (*Soulos*)

2) Constructive trusts and constructive trustees

- constructive trust = a *constructed* trust (built by law)
- constructive trustee = *construed* as if a trustee (a confusing fiction), i.e. (1) trustee *de son tort*, (2) knowing assistance (*M&L Travel*), (3) knowing receipt (*Citadel*)

3) Constructive trusts and unjust enrichment

- Any time there is an equitable wrong, can get disgorgement (could be CT) or restitution
- Label for proprietary restitution – constructive trust or resulting trust?
- Criteria for proprietary restitution
 - inadequacy of legal relief (*Chase Manhattan*)
 - retention of beneficial interest (Chambers)
 - assumption of risk (Burrows)
- Other instances of constructive trust
 - wrongful gains: breach of confidence, breach of fiduciary duty, death, true fraud, assessor liability
 - perfecting intentions

E.2) BREACH OF CONFIDENCE

1) Breach of confidence

1. confidential information
2. confidential circumstances: imparted to Δ in confidential circumstances
3. unauthorized disclosure; unauthorized use of the infor
 - sometimes must show detriment (but this is usually satisfied by part 3)

2) Remedies for breach

- “Full gamut of available remedies” (*Cadbury Schweppes*)
 1. direct protection (e.g. injunction or destruction or delivery up)
 2. consequential relief (argument of loss): compensation, reparation of positive loss (e.g. cost of new security), restoration of information's value (lost bargain)
 3. disgorgement of gain: personal = account of profits, proprietary = constructive trust (Canada only)
 4. other goals: punishment (Canada only: punitive damages)

LAC Minerals v International Corona (SCC 1989)

Canada: CT needs UE

• π = small mining co, Δ = large mining co; π proposed venture to Δ , revealed info, Δ independently went after purchase of land as part of venture; π sued for breach of fiduciary duty and breach of confidence

Issue: Cause of action, form of relief, measure of relief?

Decision: LAC held property for Corona (Corona must indemnify LAC)

1) Basic principle: equitable wrong of breach of confidence allows compensation of loss or disgorgement for gain, personal or proprietary (RT or CT)

2) LaForest added that if one wants to find CT, matter becomes a UE action – fusion of breach of confidence and unjust enrichment (McInnes disagrees with this approach)

- Substantive cause of action lies in breach of confidence; remedial trust supposedly requires proof of “unjust enrichment” – UE means π is required to show corresponding deprivation (in an economic sense)
- To counter this, LaForest stated that π must prove (interceptive) deprivation/subtraction = instead of reaching into π 's pocket, Δ obstructed it – test is that third party had a legal obligation to give to π , then really is π 's loss (concerned with probability not certainty); cannot satisfy this on the facts
- Can only get proprietary if can show special reason for proprietary:
 - personal relief *prima facie* sufficient
 - constructive trust dependent upon special circumstances (policy of discouraging Δ 's wrongdoing (does not make sense to McInnes), incalculable value inherent in disputed property, LAC's acquisition prevented Corona's acquisition)

Note: This case is now relevant to breach of confidence, but understand where LaForest went wrong

Sopinka: If one wants proprietary disgorgement, need proprietary base; π started with info (prop)

- 1) Cause of action in breach of confidence alone
- 2) Breach of confidence generally supports compensation or account
 - constructive trust generally presumes property rights (cf Goode)
 - confidential information = property
 - no support for trust of property acquired with information
 - breach adequately sanctioned by compensation
 - 50% of property value *minus* indemnification for expenses

Question: Would *Soulos v Korkontzilas* support proprietary relief?

– historically (in U.K.), exercise discretion to make decision on other's behalf

– danger of self-interest over altruism ∴ fiduciary duty

b) Parasitic (not independent)

- non-fiduciary power or duty: focus on decision *per se*
- fiduciary duty: focus on *manner* of decision

c) Proscriptive (not prescriptive)

- non-fiduciary power or duty: *do* something on other's behalf
- fiduciary duty: *don't* be influenced by self-interest

d) Prophylactic (not merely reactive): deal with parties outside suit

- non-fiduciary power or duty: focus on sanctioning wrongdoer
- fiduciary duty: focus on sanctioning wrongdoer *and* deterring others

e) Economic (not personal): relating to financial decisions

- fiduciary duty: discretion affecting decisions regarding *economic* interests

• When making the decision, don't be motivated by self-interest

The Traditional Scope of Fiduciary Relationships

- Paradigm: trustee and beneficiary, trustee administers prop on B's behalf
- Other fiduciary relationships (non-exhaustive): agent and principal, director and company, partners, solicitor and client

2) A Uniquely Canadian Approach

- Categories of fiduciary relationship
 - traditional categories retained
 - new categories flexibly recognized – a touchstone of vulnerability?
 - *Frame v Smith* (1987 *per* Wilson): fiduciary has scope for exercise of discretion, B relies upon trust and confidence of fiduciary, B is specially vulnerable to fiduciary's actions
 - *LAC Minerals v Intl Corona* (1989 *per* Sopinka): special vulnerability invariably required (no fiduciary relationship between small and large co.)
 - *Hodgkinson v Simms* (1994 *per* LaForest, Sopinka dissent): touchstone of reliance upon trust and confidence, special vulnerability is *not* invariably required
 - difficult to know when it arises
- Scope of fiduciary duty

E.3) BREACH OF FIDUCIARY DUTY

1) The Traditional Nature of Fiduciary Duties

a) Range of legal relationships

- presumption of responsibility and self-reliance (*Allen v Flood*)
- exception of reliance and vulnerability

- substantive expansion of duty: independent, prescriptive: act in the best interest of the other party (cf *B(LK) v British Columbia*: this might not be possible as the scope of relationships is too wide), non-economic (i.e. sexual-interest)
- instrumentalism and unpredictability, e.g. *Norberg v Wynrib*: already was battery; SCC imposed equitable fiduciary obligation (higher level of disapproval), *M(K) v M(H)* (evading limitation periods) – limitation periods don't apply to equity
- Australian assessments: Canadian law of trusts does not make sense

3) Breach of Fiduciary Duty

- **Nature of fiduciary duties**: proscriptive duty of utmost loyalty
 - fiduciary must avoid conflicts of interest or duty
 - cannot place self-interest over B's interest
 - cannot assume conflicting duties
 - fiduciary must avoid profiting from position
- **Degree of fiduciary duties**
 - generally prophylactic and inflexible: strong emphasis on deterrence and prevention
 - stringency varies with circumstances: express trust = highest standard, RT or CT = no standard or lower standard, non-trust fiduciary = generally lower standard
- Occasional exemption from strict attitude: no liability if fully informed beneficiary provided consent
 - Exceptions: (1) if get court order in advance to do something or (2) fully inform B of fiduciary obligation and they unanimously consent (send them to an independent solicitor)
 - full disclosure + independent advice + fair price
- Breach of fiduciary duty or breach of obligation by fiduciary? Note the difference

QUESTION: Paul hired Dave, a lawyer, to advise him regarding the purchase of a business. (1) While driving Paul to a business meeting, Dave carelessly became involved in a car accident. Paul was injured and consequently incurred several expenses. (2) Dave incidentally met Paul's wife, Tara. Dave and Tara entered into a sexual relationship. Dave received "the delights and benefits of the affair." When Paul eventually learned of the affair, he required a costly treatment from a therapist.

Dave owed a fiduciary duty to Paul. Did he breach that duty by: (1) causing the car accident, or (2) having an affair with Tara? (cf *Szarfer v Chodos*)

ANSWER: D is a fiduciary, but this just informs one how D performs his duties (when giving advice, don't be tempted by self-interest) – D did not provide advice when D was careless behind the wheel or have an affair with P's wife

a) Measures and Forms of Relief

- **Measures of relief:**
 - nominal = vindicate rights (responsive to neither gain nor loss)
 - punitive = punish reprehensible breach (responsive to neither gain nor loss)
 - compensation = repair loss (responsive to P loss)
 - restitution = reverse transfer (responsive to P loss and D gain)
 - disgorgement = divest gain (responsive to D gain)
- **Forms of relief:** personal relief or proprietary relief
 - Propriety can apply to restitution and disgorgement, but also with lien, which can apply to any measure of relief—identify asset that can be sold to get money
 - Propriety relief can also come with a lien, does not override Δ's freedom of choice

b) Remedies for Breach of Fiduciary Duty

- Broadest remedial scope
 - breach of fiduciary duty is most serious wrong
 - breach of fiduciary duty is actionable *per se* – already *prima facie* liable b/c does not require proving loss or gain; remedy is open-ended
- **Equitable relief:** equitable compensation vs compensation at Law; different rules on proof + causation + mitigation + time of assessment; rules generally favour π over Δ
 - Nominal damages: symbolically vindicate beneficiary's rights (Equitable declaration)
 - Punitive damages: punish fiduciary's outrageous breach (Canada only)
 - Compensation: monetarily repair beneficiary's loss
 - Disgorgement: divestment of fiduciary's gain (*personal* liability = account of profits, fiduciary must give up *amount* of gain to beneficiary, *proprietary* liability = constructive trust, fiduciary must hold *actual gain* for benefit of beneficiary)
- Question:** Why is restitution not available?
 - Would not ask for it b/c if already entitled

to choice to compensation, likely can get restitution and usually more—in nature of wrong, does not usually come up

c) Proprietary Relief

- Property traditionally considered sacrosanct; diminished distinction between *owned* and *owed* (Canada)
 - courts have always *enforced* property rights
 - courts may now *create* property rights
- The central question: when should a plaintiff be entitled to proprietary relief?
 - when should the plaintiff have priority over unsecured creditors?
 - when should the plaintiff enjoy an increase in property value?
- Possible answers: always *or* never *or* sometimes
 - untenable to *invariably* award relief in proprietary form; intolerable disruption of existing property rights
 - need to know basic entitlement to dispose of property
 - desirability of preserving personal preferences
 - untenable to *never* award relief in proprietary form; pre-existing property rights must occasionally persist
 - concept of property largely illusory if easily defeated
 - desirable to *sometimes* award proprietary relief
 - analytical need to identify suitable criterion
- Arguments in favour of proprietary relief:
 - **strongest case:** vindication of pre-existing prop; plaintiff claims (traceable) property that she *did* own at outset
 - *e.g.* gratuitous (mistaken) transfer of property, creditors cannot be paid from another's property (**Chase Manhattan**)
 - **intermediate case:** protection of notionally acquired property; plaintiff claims (traceable) property that she *should have* owned
 - *e.g.* plausible deemed agency gain of land, creditors cannot be paid from another's property, creditors protected (indemnity or *pro nunc* order) (**Soulos v Korkontzilas**)
 - **weakest case:** remedial creation of property, plaintiff claims (traceable) property that she never should have owned

– *e.g.* implausibly deemed agency gain of bribe, creditors unprotected (plaintiff's windfall assured) (**Hong Kong v Reid**)

d) Breach of Fiduciary Duty – Illustrations: Misuse of Information

- Unauthorized use of information by fiduciary
 - fiduciary may be liable for breach of confidence (previously)
 - fiduciary may be liable for misuse of information: fiduciary must avoid actual or potential conflicts of interest, rules strictly designed to remedy *and* prevent breach of duty

Canadian Aero v O'Malley (SCC 1973) Breach of Fiduciary Duty

- Δ was an officer of co., resigned from CanAero, incorporated new co. Terra, then immediately took over contract that CanAero under direction of Δ had been pursuing for years (Δ = former employee)
- Clear breach of fiduciary obligation; could not act in self-interest
- 1) Irrelevant that D did *not* subtract gain from P; breach even though co. could not prove that they would have received the contract
 - Similar to punitive damages, as it gives π more than they deserve—give possibility of windfall gain in front of potential πs
 - *cf* LAC Minerals (interceptive subtraction)
- 2) Irrelevant that P did *not* lose profit equal to D's gain
 - remedial focus on either gain (disgorgement) or loss (compensation)
 - “damages awarded ... as account of profits or ... unjust enrichment”
 - damages = any monetary award
 - unjust enrichment = wrongful enrichment

Boardman v Phipps (HL 1967)

- There was a trust consisting of shares in co.; co. was ran poorly, did not make profits; Boardman was the solicitor of the trust, discussed with P, told trustees to buy out shares of co. so that it could be run properly – trustees could not do so. B and P buy out co. on their own and acquire majority interest, take control, co. does well, value of shares go up
- Beneficiaries' shares go up; one B decided to sue Δs
- HL: Even though Δ acted at risk, in good faith, created a huge benefit for the trust, could not have been done by trustees, still a breach of fiduciary duty, as they acted on info they acquired from trust – don't know if disgorgement was personal or proprietary (no reason for it to be proprietary)
 - Even though in breach of fiduciary duty, as they acted in good faith, allow them remuneration for services—usually does not happen, but it did here as Δ acted honestly
- 1) Defendants acted as self-appointed agents to trust ∴ were fiduciaries
- 2) Defendants breached fiduciary duty by acting in conflict of interest
 - precluded from profiting by virtue of position and

knowledge

- irrelevant that they acted in good faith, that they benefitted the trust beneficiaries, that the breach caused no loss to trust beneficiaries, that the trust could not have purchased the shares
- exception if court order or unanimous consent of beneficiaries or if information received entirely in personal capacity
- liability to account for profits
 - defendants required disgorge benefits acquired through breach (was the order personal or proprietary? should the order have been personal or proprietary?)
- good faith defendants allowed remuneration and reimbursement

Ratio: In extreme circumstances, trustee can still be liable and disgorge profits

Breach of Fiduciary Duty — Illustrations: Bribes and Secret Commissions

- Basis of liability for receipt of bribe or secret commission
 - receipt is incompatible with selfless service to beneficiary
 - conflict of interest between fiduciary and beneficiary
 - unauthorized profit received by virtue of position
- Primary remedies for receipt of bribe or secret commission
 - compensation for losses sustained
 - disgorgement of property received by fiduciary
 - personal claim for amount of bribe; available against both fiduciary *and* briber; “whatever conceptual difficulties it may raise” – disgorgement without a gain? (*Mahesan*) – does not make sense
 - constructive trust over bribe or traceable proceeds; proprietary relief traditionally restricted to property; liability for monetary bribe traditionally personal – an indefensible distinction (*Lister v Stubbs*) – historically, if took form in money, cannot get CT

Note: Simple employee in receipt of bribe anomalously construed as fiduciary

AG Hong Kong v Reid (PC 1994)

Issue: Based on facts, HK can't get compensation for loss (as there was none), but does R hold prop on CT?
- Nonsense to say R got money on behalf of country
- PC: can get proprietary relief based on maxim (does not make sense)
- Bigger problem: result is hard to justify
- If it is disgorgement, it is a windfall—something they never would have had and not ought to have owned; btw. Reid and HK, value of land ought to go to HK, but issue of unsecured

creditors (i.e. victim of car accident would be an unsecured creditor) – hard to justify between HK and the tort-π and HK and the loan-lender

- 1) Agent cannot be permitted to profit from breach of fiduciary duty
- 2) “Equity deems as done that which ought to have been done” (applies to transfer of title)
 - Reid *ought* to have paid bribe to Crown instantly
 - Reid treated *as if* he paid bribe to Crown instantly
 - Reid treated *as if* he invested bribe in NZ land for Crown

Decision: Reid holds (traceably) surviving property for Crown, personally liable for non-surviving portion of bribe

Questions

- 1) What loss, if any, did the Crown suffer? Was the relief restorative or was it a windfall?
- 2) Did Reid acquire property that properly belonged to the Crown? Was the Equitable maxim plausibly applied? In what sense, if any, are the facts distinguishable from *Soulos*? (Would Goode's test allow a constructive trust in *Reid*? Would SCC impose a constructive trust in *Reid*?)
- 3) Assess the relative positions of the Crown and Reid's general creditors; which party, if either, warrants preferential protection?
- 4) Is proprietary relief necessary to prevent profit from wrongdoing?

E.4) Benefits Wrongfully Acquired Through Death

- Proper Death – Improper Acquisition
 - improperly induced gift, *e.g.* fraud leading to destruction of will, undue influence leading to creation of will, duress leading to non-revocation of *inter vivos* gift
- Constructive trust imposed to prevent injustice: property held for benefit of deceased
 - to specific beneficiary if intended by deceased
 - to general estate if no specific intention

Proper Acquisition – Improper Death

Two possibilities:

- 1) Wrongfully caused death (unless insane or unintentional) – *whether or not there is a will or the person dies intestate*
 - *e.g.* life insurance beneficiary murders policy holder, joint tenant kills other joint tenant, remainder murders life tenant, beneficiary murders testator, heir murders intestate
 - If will involved, scrap the will and give it to whoever would have gotten it
- 2) Property allowed to pass to wrongdoer
 - Does not mean wrongdoer does not get anything, but they hold it on constructive trust—anything they took b/c the person died quickly (non-punitive, but more like a

disgorgement)

- 3) Property impressed with constructive trust; beneficiary determined by circumstances
- e.g. trust over accelerated portion of remainder interest
 - interim interest for benefit of deceased's estate
 - remainder interest unaffected

Rosenfeldt v Olson (BC CA 1986)

• Gary Olson murdered eleven children. The bodies could not be found. Olson entered into a contract with the RCMP. He revealed the burial sites in exchange for \$100 K on trust for his family (much of the money was, however, subsequently used to pay Clifford Olson's personal debts). The parents of seven victims claimed that the money was held on trust

Issue 1: The claim was argued as proprietary restitution for unjust enrichment? Was it successful? Should it have been successful?

Issue 2: Could the claim have been successfully argued on the basis of proprietary disgorgement for wrongdoing?

- Argued UE and proprietary restitution: enrichment was in money and deprivation was in children

- Court said cannot be done

- Lawyer could have argued wrongdoing and disgorgement in proprietary form

F. PERFECTING INTENTIONS

	intention	unjust enrichment	wrongs	other
express	✓			
resulting		✓		
constructive	✓	✓	✓	

- **Canadian cases:** *sui generis* in approach to CT
- Equity sees that one intends to do something, makes sure person lives up to their word—CT perfects intentions

F.1) Organizing the Grab Bag

- 1) Constructive trusts and unjust enrichment – proprietary restitution
 - a question of classification (*cf Chase Manhattan*)
- 2) Constructive trust and wrongdoing – proprietary disgorgement
 - breach of confidence (*Lac Minerals*)
 - breach of fiduciary duty (*Soulos*)
 - acquisition upon death
- 3) Constructive trusts and intention – perfecting intentions
 - trust *always* secures and facilitates stated

- intentions
- trust *usually* protects detrimental reliance

F.2) Perfecting – Inter Vivos #1 – Specifically Enforceable Agreements for Sale

- Seen in land transactions
- 1) Equitable analysis culminates in constructive trust
 1. unique property supports *specific performance* (equity deems done that which ought to be done)
 2. specific performance triggers doctrine of *conversion*
 3. doctrine of conversion views obligation as *performed*
 4. performance of obligation entails beneficial interest *passing*
 5. interest passing creates between vendor and purchaser a *trust*
 - 2) Process contemporaneous with right to specific performance
 - execution of sale unifies interest and exhausts trust (*simply goes away*)
 - 3) Possible triggering events – *why constructive trust?*
 - a) *not* a response to wrongdoing
 - vendor has not (yet) breached any duty owed to purchaser
 - b) *not* a response to unjust enrichment
 - no enrichment + no deprivation + no injustice
 - property moves *forward* to purchaser
 - c) **a response to perfectionary goal**
 - trust facilitates intended transfer of interest; autonomy respected through enforcement
 - purchaser's detrimental reliance (contract formed) supports trust

F.3) Perfecting – Inter Vivos #2 – Oral Trusts of Land

- If not evidenced in writing, unenforceable; what to do then?

Bannister v Bannister (CA 1948) Reason for CT: Perfectionary

- Δ sold 2 houses to π, actual transfer of land was done in writing properly, but parties also orally agreed that Δ could live in one of the houses rent-free for the rest of his life; π wanted order of eviction; Δ argued that π held land on trust (life estate) for Δ
- Problem: cannot give effect to express trust due to statute of frauds
- Held:** However, court would not allow π's use of statute of

frauds in order to perpetrate fraud; court imposed constructive trust as π is guilty of denying something they know is true

- 1) Statute precludes enforcement of express oral trust of land
- 2) Equity precludes use of statute as mechanism of fraud
 - P cannot employ statute to deny D's agreed beneficial interest
 - P \therefore must hold property on trust for D as agreed
- 3) Possibilities:
 - P holds property on constructive trust for D based on wrongdoing (arises b/c of parties intentions and detrimental reliance)
 - analysis #1 – unjust enrichment: resulting trust responds to action in unjust enrichment (however, don't really want a resulting trust)
 - P enriched by receipt of legal title
 - D deprived by surrender of legal title
 - D did not intend for P to enjoy beneficial interest in one cottage
 - P \therefore must "give back" beneficial interest in cottage to D
 - (best) analysis #2 – perfecting intentions, as wrong only happened after the fact when π tried to evict Δ – don't want a resulting trust, wrong-doing didn't happen at outset, constructive trust would have happened at the outset
 - constructive trust responds to parties' shared intentions (Equity respects parties' autonomy through realization of intention)
 - D's detrimental reliance (contract formed) may support enforcement

Question: Wrong (constructive) or perfection (constructive) or unjust enrichment (resulting)? Perfectionary is the best answer
Note: If express trust fails b/c it is invalid (something is missing, cannot plausibly send it forward b/s it is defective, so must send it back to settlor) is different from a case where it is unenforceable (didn't put it into writing; can make perfectly good sense, can send it forward via constructive trust)

QUESTION: For tax reasons, Pam does not wish to hold legal title to certain real property. She therefore transfers title into Dave's name. In exchange, Dave orally agrees that he will hold the property on trust for Pam's sister. Subsequently, however, Dave asserts his legal title and refuses to allow Pam's sister to enjoy the benefit of the house. Will a resulting trust based on unjust enrichment serve Pam's purpose? Will a constructive trust serve Pam's purpose? If so, upon what event is such a trust based?

F.4) Perfecting – Inter Vivos #3 – Incomplete Gifts

- Equitable rules on gift-giving
 - will not perfect imperfect gift (*Milroy v Lord*)
 - will regard as perfected once everything done (*Re Rose*)
 - property held on constructive trust for intended donee
 - donee immediately enjoys benefits of property and donor cannot subsequently revoke gift
 - just relying on intention, no detrimental reliance in this case

- Possible triggering events
 - *not* a response to wrongdoing; no breach of obligation by donor
 - *not* a response to unjust enrichment
 - no enrichment + no deprivation + no injustice
 - property moves *forward* to intended donee
 - a response to perfectionary goal
 - trust facilitates intended transfer of interest (autonomy respected through enforcement)
 - (anomalously) no detrimental reliance by donee

F.5) Perfecting – Inter Vivos #4 – Proprietary Estoppel

- Action = belief in interest + acquiescence or encouragement + detrimental reliance
 - (1) show mistakenly believe that one owns a piece of land, (2) actual owner must know the person is making that mistake, (3) detrimental reliance – cause of action is proprietary estoppel, remedy is a range – minimum court has to do to come up with a result
- Minimum response necessary to remedy situation, e.g. monetary compensation – lease – right of purchase – co-tenancy, constructive trust creating anticipated interest
 - perfection of claimant's intention (known to defendant)
 - protection of claimant's detrimental reliance

F.6) Perfecting – Inter Vivos #5 – Cohabitational Property Disputes

- Canada / *Pettkus v Becker*: constructive trust = proprietary restitution for unjust enrichment
 - initially not unjust enrichment: no free acceptance
 - usually not restitution: fulfilment of expectations – not giving back (not reversing the transfer, looking forward)
- (Heretical) Alternative analysis
 - *sui generis* / unique action = dissolution of intimate partnership
 - remedy = perfection of mutual intention to share benefits and burdens – fulfills parties expectations
 - constructive trust gives effect to underlying expectations

G. Wills and Secret Trusts

• If want to leave prop in will, must set out all details; if not, it cannot take place as testamentary express trust

- Statute prevents secret trusts (as express trust); court can impress a CT

G.1) Perfecting – Death #1 Secret Trusts

1) **Scenario:** recipient agrees with deceased to hold property on trust

- recipient acquires property under will or by intestacy
- trust agreement wholly or partially silent regarding trust (fully secret = neither trust nor beneficiaries stated, semi secret = trust stated but beneficiaries not stated)
- wills legislation precludes enforcement as express trust

2) Equity nevertheless imposes trust for intended beneficiary if...

1. deceased *communicated* desire to recipient (“precatory” language sufficient if accepted by recipient)
2. deceased communicated to recipient in *timely manner* (timing differs for fully and semi secret trusts)
3. recipient *agreed* to hold property for intended beneficiaries (silent acquiescence may be suffice)
 - trust imposed *after* recipient obtains property from decease
 - recipient permitted to acquire property upon settlor’s death
 - recipient required to hold on trust for intended beneficiary (trust ∴ technically does not contravene wills legislation)

3) Possible bases of constructive trust imposed upon recipient

1. **Wrongdoing by recipient:** fraud by recipient to dishonor agreement to hold on trust
 - but trust arises immediately upon recipient’s receipt; trust arises before fraud (if any) actually perpetrated
 - and trust arises even if recipient wants to fulfil agreement; recipient may seek court guidance on direction of benefit – forward to beneficiary *or* back to estate
2. **Unjust enrichment of recipient:** recipient unjustly enriched by receipt of property from deceased
 - but property moves *forward* to beneficiaries

3. **Perfection and reliance:** arises b/c people agree
 - perfection of agreement between deceased and recipient; autonomy respected through enforcement
 - protection of deceased’s detrimental reliance (dying with provision)

a) Secret Trusts – Fully Secret Trusts

- Where prop and beneficiaries are kept secret; rules:
 1. Requires communication and acceptance **before deceased’s death**
 - insufficient if instructions written but not delivered before death
 - sufficient if instructions delivered for reading on death, but recipient must agree to scheme before death
 2. If fully secret trust does not work, then person gets to keep property absolutely
 - absolute gift if no acceptance (active or passive) by recipient
 - deceased presumed to intend gift to recipient personally

Ottaway v Norman (Ch D 1972) Fully secret trust

- T died, had a will giving property to Mrs. H in form of life estate, but she must have a will giving remainder to π
- H agreed, she died – claims between Δ (named in H’s will), or π (T’s intended beneficiary)?

Held: H agreed to it before T’s death, bound by conscience to give to π

- 1) Fully secret trust arose on Ottaway’s death in π ’s favor
 - Ottaway *communicated* wish to Hodges
 - Ottaway communicated wish to Hodges *before his death*
 - Hodges *accepted* Ottaway’s proposed trust
- 2) Fully secret trust did not extend to money received under Ottaway’s will
 - no evidence of Ottaway-Hodges agreement on money
 - money no longer identifiable as potential trust property (non-traceable)

Questions: What is the most satisfactory explanation for the constructive trust?

- when did the constructive trust arise? when did H commit fraud?
- did the constructive trust achieve restitution?
- what did the parties’ agreement contemplate?

b) Secret Trusts – Semi Secret Trusts

- 1) Where will does not state who Bs are; requires communication and acceptance **before deceased’s will:**
 - rationale: testamentary provision must conform to wills legislation
 - documents incorporated by reference *if*

existing and identifiable; criteria applied at time of creation of will

– document evidencing subsequent agreement ∴ invalid under will

- critique: constructive trust not dependent upon validity under statute
- trust arises externally to prevent fraud under statute
- fully secret trust permissible if agreement *after* will created; same analysis should apply to semi secret trusts

2) Differences from secret trusts:

- If semi-secret trust fails, legal owner cannot keep it as on the face of the will, legal owner does not get benefit
- If want semi-secret trust, must get agreement before will is drafted
- If will refers to another document, document must exist at time of will for semi-secret trusts; however, criticism that since it is not a testamentary trust that works outside of the will, should not have to comply with *Wills Act*
- Resulting trust to deceased if no timely communication; revelation of testamentary trust negates intention to benefit recipient

Re Mihalopoulos (Alta 1956) Proving referenced document

• Will drafted up will to X to hold on trust, Bs will be named in another document

• After M died, found another document naming Bs

Issue: Can the Bs take the prop equitably?

Held: Bs cannot take property equitably

1) Incorporation by reference, but does not work as:

- no evidence to show that other document existed at time will was drafted
- not proven that disputed document is referenced document

2) Bs cannot take under secret trust, as it is unsure this was the document M was referring to; no evidence that person with legal title committed fraud (this is wrong, as not required)

- not proven that trust communicated to executors at time of will
- not proven that trust accepted by executors at time of will
- not proven that executors acted fraudulently (sought advice)
- relevance of proof of wrongdoing to existence of trust?

REVIEW EXERCISE: Pam drafted a will that left her house to Dave. She later showed him the document and explained that its terms were misleading. She wanted him to enjoy the property for five years, but to then give it as a gift to her nephew, Xavier. Dave agreed to that arrangement. Pam died six years ago. Dave took immediate possession of the house, but now refuses to give it up to Xavier. Can Xavier enforce a constructive trust?

1. What if the precise wording of the will was “I leave my house to Dave”?
2. What if the precise wording of the will was “I leave my house to Dave. He shall enjoy the use of the property for five years, after which time he shall hold it on trust as agreed”?
3. If a constructive trust arose, when and why did it attach to the property?

G.2) Perfecting – Death #2 – Mutual Wills

1) *Reciprocal wills* for benefit of third on survivor’s death

- e.g. spouses each say: “to spouse for life and then to X”, spouses each say: “to spouse but to X if spouse dies before me”
- no contract created between the parties ∴ each is free to revoke at any time

2) *Mutual wills* for benefit of third on survivor’s death: contract created between mutual testators (agreement that wills will stay that way)

- If property is specified, as soon as person dies, prop held on CT
- Wills may say whatever they have, give to the other, remainder to children – when does CT arise?
- CT applies even if person is honest; UE = prop must come back to person—want to forward to children – explanation – perfectionary

3) Mutual promise to die with will containing stipulated provision

- e.g. “to spouse or to X if spouse predeceases me”
- survivor must honor promise if deceased did so; trust on first death if property specified; survivor may enjoy life interest in property
- trust on second death if property unspecified; survivor may dispose of property during life
- constructive trust enforceable by intended beneficiary; third party anomalously enjoys specific performance

4) Possible bases of constructive trust imposed upon survivor’s estate

- unjust enrichment of survivor’s estate; estate unjustly enriched by retention of property
- but trust moves property *forward* to intended beneficiary
- and trust includes property of *both* parties to agreement; trust not limited to property of first to die

- wrongdoing by survivor
 - but trust may arise before survivor dies in breach (specified property)
 - and wrong may arise innocently (*e.g.* will revoked by remarriage)
- perfection and reliance by deceased
 - trust perfects parties' intention and agreement; autonomy respected through enforcement
 - detrimental reliance of first deceased supports trust

University of Manitoba v Sanderson Estate (BC CA 1998) **(non-examinable)**

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