FE1 EQUITY & TRUSTS
NIGHT BEFORE NOTES

Nine Topics for Careful Revision

- Injunctions, particularly *Mareva* injunctions
- Specific Performance
- Rectification
- Undue Influence
- Secret Trusts
- Charitable Trusts
- Quistclose Trusts
- Trusteeship
- Tracing

INJUNCTIONS

Notes on *Mareva* Injunction

Mareva injunctions are usually interlocutory in nature and are typically awarded on a pre-trial basis following an ex parte application. Their function is to prevent the dissipation or removal of assets before trial (or exceptionally, afterwards), so that if the plaintiff succeeds in the action there will be property of the defendant available to satisfy the judgment.

Lord Denning called the *Mareva* injunction "the greatest piece of judicial law in my time" Lord Donaldson, in *Bank Mellat v Nikpour* (1985), described it as "one of the law's two "nuclear" weapons (the other being the Anton Piller order). The *Mareva* injunction contravenes the general principle that an injunction cannot be used to restrain a man who is alleged to be a debtor from parting with his property (*Lister v Stubbs*) (1890). It is interlocutory (and quia timet) in nature and was first granted in the 1975 decision *Nippon Yusen Kaisha v Karageorgis* (1975). It was adopted by the Court of Appeal in the same year in *Mareva Compania Naviera SA v International Bulkcarriers SA* (1975). In the latter case, the owners of the *Mareva* chartered the ship to the defendants and were to receive half- monthly payments in advance. The defendants, who were based in India, then failed to make the payments due. The defendant had a large sum of money standing to its credit in a London bank which represented payments for carrying goods for third parties on the vessel. The plaintiff had not yet obtained judgment against the defendant for the sums due but nonetheless was awarded an interlocutory injunction which restrained the defendant from dissipating the monies in the account.

The Nippon and *Mareva* cases imposed two important limitations on the granting of *Mareva* injunctions:

(1) the *Mareva* would only be granted against foreign defendants.
(2) the *Mareva* would only be granted if the plaintiff could show he had a "very strong case" against the defendant.

However, these limitations were gradually eroded, and in *Fleming and Others v Ranks (Ireland) Ltd* (1983), McWilliam J, while refusing to grant a *Mareva* injunction on the facts, nonetheless accepted that the types of cases in which *Mareva* injunctions may be granted are not confined to those against defendants resident outside the jurisdiction. The possibility of granting a *Mareva* injunction against an Irish resident was restated the next year (once again by McWilliam J) in *Powerscourt Estates v Gallagher* (1984). Since Fleming, *Mareva* injunctions have been granted at the interim and interlocutory stages in a vast number of cases in which the defendants were Irish citizens and resident within the jurisdiction. The Fleming case arose out of an agreement between a trade union and the defendants concerning redundancies in the work force. On being informed of the defendants' intention to close their Limerick plant, and being unhappy with the redundancy package negotiated by their union, the plaintiffs (a number of individuals working in the plant) served strike notice on the defendants and applied for a *Mareva* injunction to restrain the defendants from reducing their assets below £84,000. In refusing the relief sought, the trial judge stated that the conduct of the plaintiffs had played an important role. They had operated a number of sit-ins at the Dublin premises of Ranks, which had caused a large amount of stock on the premises to rot.

Section 13(1) of the Jurisdiction of Courts and Enforcement of Judgments Act 1998 "provides that the courts in this jurisdiction have power to grant provisional, including protective measures-which may include a *Mareva* injunction-where proceedings have been commenced or are about to be commenced in another contracting state, even where a plaintiff has no independent cause of action within this jurisdiction." *Delany* states that "the introduction of this provision in s 13(1) effectively reverses the finding of the Supreme Court in *Caudron v Air Zaire* [1985] that a *Mareva* injunction could not be claimed as primary relief in an action but only as an ancillary order."

The applicant's "good arguable case" must reveal a subsisting cause of action in Ireland or in one of those states which are signatories of the Brussels Convention, which is adopted into Irish law by the Jurisdiction of Courts and Enforcement of Judgments Act 1998 (*Tavoulareas v Tsavliris, Court of Appeal*).

In *Michael Bambrick v Johanna Cobley* (2006), Clarke J held that while the removal of assets from this jurisdiction to another can of itself give rise to an inference of reasonable risk of evasion of obligation, that judgment will weigh less strongly where the second country was a judgment convention country and where the judgment of the Irish court would be enforceable.

'In *Permanent TSB v. Murhill*, September 28th 2011, the plaintiff (to whom the defendant was allegedly indebted) secured an injunction restraining the defendant from dissipating a proportion (€669,000) of an insurance award which he received as compensation for damage to his hotel caused by fire. The plaintiff's solicitor stated that 'the bank feared unless Mr Murhill and the company [were] restrained from dispersing the monies paid to them or due to be paid to them, it would suffer substantial losses'. Edwards J. granted the injunction sought by the plaintiff.'

Prerequisites

It is clear from the case law that in order to succeed:

- the applicant must have a subsisting cause of action against the respondent.
- the applicant must have a good arguable case (in the substantive action).
- the defendant must have assets (these assets will usually be, but need not be, within the jurisdiction of the court hearing the application), and
- there must be a real risk that the defendant will dispose of those assets before the applicant can enforce his judgment, in order to avoid judgment.

In relation to establishing a "good arguable case", the standard of proof required to ground an application for a *Mareva* injunction is higher than that required for an "ordinary" interlocutory injunction. In *Ninemia v Trabe Corporation*, a "good arguable case" was defined as:

> "One which is more than barely capable of serious argument but not necessarily one which [the court] considers would have a better than 50% chance of success". In relation to the "good arguable case" criterion, the court will consider the strength of the plaintiff's case (compare this with the orthodox interlocutory injunction application), the adequacy of the plaintiff's undertaking in damages, and the value of the defendant's assets.

World-Wide Marevas

If the court is satisfied that the defendant has no assets or insufficient assets within the jurisdiction, it may grant a *Mareva* injunction affecting assets outside the jurisdiction. This is because the *Mareva* injunction is made in personam, and so affects the respondent's assets wherever they are located.

Jurisdiction to grant world-wide *Mareva* injunctions was established in *Republic of Haiti v Duvalier* (1990) and *Derby v Weldon* (No. 1) (1990). *Haiti v Duvalier* concerned an action brought by the plaintiff, a sovereign nation, to freeze assets held both inside and outside the UK. However, Staughton LJ sounded a word of caution, stating that cases where it would be appropriate to grant such 'world-wide' *Mareva*s would be "rare-if not very rare indeed". When such orders are made, they tend to be granted post-judgment.

In *Johnson v Yuill, Megarry VC* stated that in his view the *Mareva* doctrine had shed "all the possible limitations of its origin". He suggested that it applied to English people as much as foreigners and was not confined to commercial cases. Murphy J, in *Countyglen Plc v Carway* (1995), was of the opinion that the grant of *Mareva*s should be confined to assets within the jurisdiction. The trial judge chose to ignore the Duvalier decision and instead placed emphasis on an earlier English decision, *Allied Arab Bank v Hajjar* (1988). However, this is at direct variance with the decision of *Keane J* in *Deutsche Bank v Murtagh* (1995), and it is suggested that the latter decision, in the light of its compatibility with the Duvalier decision, will be followed.

World-Wide Marevas and Third Parties

Particular difficulty has surrounded the enforcement of world-wide *Mareva* injunctions against third parties. If the third party resides or is located within the jurisdiction of the court, then the order will bind his conscience and be enforceable against him. In *Babanaft International Co. v Bassatne* (1990), Kerr LJ in the Court of Appeal stated that:

> "in appropriate cases, though they may well be rare, there is nothing to preclude our courts from granting *Mareva* type injunctions against defendants which extend to their assets outside the jurisdiction".

However, the Court emphasised the necessity to limit the scope of world-wide *Mareva* orders since they have the capacity to produce unconscionable consequences for third parties. The "Babanaft Clause", which has become commonplace in *Mareva* orders, restricts the injunction so that it binds only the defendant personally. As a result, third parties will only be affected by the order if they are specifically addressed in the order or are subject to the jurisdiction of the court (having received notice of the order and being in a position to comply with same).

In *Dadourian Group International v. Simms* (2006), the Court of Appeal (Arden LJ) laid down the following guidelines for the granting of a worldwide *Mareva* injunction (or worldwide freezing order (WFO), as it is referred to in the judgment):

Guideline 1: The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

Guideline 2: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

In relation to the "real risk of disposal" criterion, Lynch J in *Moloney v Laurib Investments Ltd* (1993) made it clear that the court is more likely to infer a risk of disposal where the defendant resides overseas. Furthermore, he asserted that before either grant or refusal, the trial judge must establish the effect of same on the parties. The Court of Appeal took a very cautious approach when refusing the application for a *Mareva* injunction in *Polly Peck International v Nadir* (No 2) (1992). The decision of the High Court to grant the injunction was reversed. Scott J noted that the court would not grant a *Mareva* injunction prior to the establishment of liability if the effect of the injunction would have a detrimental effect on the defendant's business. He stressed that this principle would be even more stringently applied if, as in the Polly Peck case, the cause of action that was sought to be protected was no more than speculative.

In the Matter of John Horgan (Livestock) Ltd (1995), the Supreme Court directed that the *Mareva* will only be granted where the plaintiff shows he has an arguable case and that the anticipated disposal of assets by the defendant is for the purpose of preventing the plaintiff from enforcing judgment and not merely for the purpose of carrying on his business. In the *Powerscourt Estates* case, McWilliam J came to a similar conclusion when he stated that a *Mareva* injunction may be granted where "it appears to the court that dispositions are likely to be made for the purpose of preventing a plaintiff from recovering the amount of his award, as distinct from conducting the normal business or personal affairs of the defendant". However, both Capper and *Delany* note that "it may be unrealistic to expect a plaintiff to be in a position to adduce evidence of a defendant's intentions in this regard in making an exparte application".

In *Production Association Minsk Tractor Works v Saenko* (1998), McCracken J cited Horgan and stated that he did not believe that there was any evidence before him to establish an intention on the part of the defendants to dispose of assets with a view to evading their obligations to the plaintiff or frustrating the anticipated order of the court. Emphasising that the *Mareva* is "an extremely drastic remedy", the learned trial judge concluded that the plaintiffs had failed to satisfy the criterion necessary to succeed in their application (see also *OBA Enterprises Ltd v TMC Trading International Ltd, Laffoy J*).

The importance placed on the intention of the defendant's actions by the Irish judiciary is at variance with the approach taken by the English courts, which have preferred to focus on the effect of the defendant's actions. All that must be established is that there is real risk that assets will be dissipated and a judgment in favour of the plaintiff would thus be unsatisfied. Capper approves of the English approach and argues that it is unrealistic to expect a plaintiff to be able to adduce evidence of the state of mind of the defendant, particularly when he is making an ex parte application and advocates taking a more flexible approach when a *Mareva* is sought on this basis.

There is a heavy onus on the plaintiff in a *Mareva* injunction application to make "full and frank disclosure of all matters in his knowledge which are material for the judge to know'. This requirement was laid down by Lord Denning in *Third Chandris Shipping Corporation v Unimarine SA* (1979) and reasserted by Balcombe LJ in *Brink's Mat Ltd. v Elcombe* (1988). Lord Donaldson described the rule requiring full disclosure as "one of the utmost importance" in *Bank Mellat v. Nikpour* (1985). Failure by the plaintiff to make adequate disclosure can result in the subsequent discharge of the injunction.

The requirement to disclose all material facts to the court was considered in the recent High Court case of *Michael Bambrick v Johanna Cobley*. Here it was held that where inadequate disclosure has been alleged, the court should consider the materiality of the facts not disclosed, the extent to which it might be said the plaintiff was culpable in respect of a failure to disclose and the overall circumstances of the case. Full and frank disclosure had not been made on the facts of the case, and Clarke J discharged the interim order and declined to consider the merits of the interlocutory application.

Since it would defeat the purpose of the *Mareva* injunction if the defendant had prior notice of it, the application is made ex parte. The application may be made at any stage in the proceedings or even after judgment (to aid execution of a judgment already awarded). Once the *Mareva* is granted, the plaintiff must immediately notify the bank or other party holding the assets in question. Should such party act in breach of the terms of the court order, they will be guilty of a contempt of court.

Proofs

In *the Third Chandris Shipping case* (1979), the court particularised the proofs to be included in the plaintiff's grounding affidavit. It is in this document that the plaintiff sets out his (unanswered) case.

(1) The plaintiff has to make full and frank disclosure of all facts within his knowledge.
(2) He must give full particulars of his claim against the defendant, including the grounds for making the claim, the amount, and he should exhibit those documents which evidence this claim.
(3) He should refer to any counter-claim or grounds of defence the defendant may, will, or has raised.
(4) He should advise the court of any argument he expects will be advanced by the defendant.
(5) He must set out his grounds for believing the assets exist, along with the location of those assets.
(6) He should set out his grounds for believing that those assets will be either dissipated or removed from the jurisdiction.

Guidelines

In the *Rasu Maritime* case (1978), guidelines were laid down for the granting of *Mareva* injunctions.

(1) The plaintiff must show a "good arguable case".
(2) The scope of the *Mareva* injunction is not limited to monies in bank accounts. It can be made against goods or chattels.
(3) Care and caution is required to ensure the *Mareva* injunction, when granted, does not bring the defendant's business to a stand-still.
(4) The plaintiff has a very high obligation to make full and frank disclosure in his application of all material particulars including those which are unfavourable to his own case. In particular, counsel for the plaintiff must bring to the attention of the court any denials by the defendant that the monies are due and owing. Furthermore the court should be satisfied that there are grounds for believing the defendant has the monies or assets (as alleged by the plaintiff).
(5) Usually the trial judge should be satisfied of the presence of an imminent danger that the defendant will draw funds/dissipate assets in order to defeat enforcement.
(6) In general, a trial judge will not grant a *Mareva* injunction unless the plaintiff gives an undertaking in damages.

Delany states that “a *Mareva* injunction operates *in personam* to restrain the defendant from dealing with the assets to which the order relates and it gives no proprietary right over these assets nor priority over other creditors”, corresponding with the maxim ‘equity acts *in personam*’.

The Siskina (1977) represents House of Lords recognition of the *Mareva* injunction, but the Law Lords emphasised that it had to be ancillary to substantive relief which the plaintiff is claiming in the proceedings.

In *PMC Construction v Borza* (1999), the learned trial judge refused to grant a *Mareva* injunction against the defendant who, the plaintiff alleged, owed it over £40,000. Mr Borza intended to sell one of his principal assets and, according to Carroll J, he was doing so “as a business decision”. She said there was “no evidence to show the purpose of the sale is to prevent the plaintiff from recovering judgment”.

In *Great Future International v Sealand Housing Corporation* (2004), it was held that where a person is alleged to be in contempt of court through breach of a freezing order restraining dealings with assets below a certain financial limit, the alleged contemnor has to discharge no more than an evidential burden as to the value of his assets. He is entitled to rely on the privilege against self-incrimination if to answer such questions might expose him to committal, and so is not a compellable witness. If he chooses to give evidence, the court may permit cross-examination and will normally exercise its discretion in favour of cross-examination if such examination is to be limited to the alleged contempt. If the alleged contemnor adduces evidence but declines to submit to cross-examination, the court might attach very little weight to that evidence. The alleged contemnor cannot be made to answer questions at an interim stage, the answers to which might expose him to an application for committal for contempt (Law Digest, *The New Law Journal*, March 12, 2004).

RECTIFICATION

Some bonus points…

"There is an increasing move away from a rigid application of the criteria requiring an “outward expression of accord” in respect of applications for rectification. The Court of Appeal, relying upon a number of recent cases favouring a more flexible approach, has suggested that it is wrong to treat the expression “an outward expression of accord” as a strict legal requirement for rectification as it is “more of an evidential factor”: *Munt v Beasley* [2006] EWCA Civ 370. In that case the Court relied upon the sale particulars of a flat as being sufficient to discharge any requirement for “an outward expression of accord” to the effect that the demise of a flat should include a loft space. Unilateral mistake – one party took advantage of a mistake by the other by staying silent when he spotted the mistake. A document may be rectified on the grounds of a unilateral mistake, but only in limited circumstances. The test for rectification on the grounds of unilateral mistake was identified by Buckley LJ in *Thomas Bates & Son v Wyndham’s (Lingerie) Limited* [1981] 1 WLR 505 at 515 (recently approved by the Court of Appeal in *George Wimpey UK Limited v VI Construction Limited* [2005] BLR 135 per Peter Gibson LJ at paragraph 38 and *Littman v Aspen Oil Broking* [2005] EWCA Civ 1579). In Bates Buckley LJ said that for the doctrine to apply it must be shown: ‘first, that one party A erroneously believed that the document contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.’ Therefore in order to obtain rectification for unilateral mistake, the claimant must show: (1) that it believed and intended that the agreement in question should provide otherwise than it in fact does; (2) that the other party was aware that the written agreement did not so provide; (3) that the other party was aware that this was due to a mistake on the part of the claimant; (4) that the other party omitted to draw the mistake to the notice of the claimant; and (5) that the mistake was one that was calculated to benefit the other party ie it was to the detriment of the claimant." *Rectification in Property Law*, Julian Greenhill, 2007

QRS Sciences v BTG International [2005] involved a successful application for rectification for unilateral mistake based on "sharp practice" on the part of a company's in-house solicitor.

SECRET TRUSTS

For a short overview of this topic, please see the Professional Law School page at www.citycolleges.ie (video). The KEY to achieving high marks in Secret Trusts questions is to have a thorough understanding of, as well as an ability to apply, the rule in *Re Stead*. For these purposes, understanding the distinction between trusteeship under a tenancy in common as opposed to a joint tenancy is imperative. The rules on communication and acceptance (of the secret trust obligation) frequently appear in problem questions. The theoretical basis for the English distinction between fully and half secret trusts in terms of the timing for acceptance is more likely to be the subject of an essay question.

Other key issues include silence as acceptance (*Ottaway v. Norman* (1971)), additions to the trust property (*Re Colin Cooper* (1939)), Irish adherence to the same rule of communication for fully and half secret trusts (*Prendiville v. Prendiville* (1990)), situations where a beneficiary attests the will (*Re Young* (1951), *O'Brien v Condon* (1905)), where the legatee attests the will (*Re Armstrong* (1893), where a beneficiary predeceases the testator (*Re Gardner* (1923), beneficial legatees (*Re Pugh's Wills Trust* (1887), *Re Rees* (1920)), and where the legatee predeceases the testator.

CHARITABLE TRUSTS

Irish law on Charitable Trusts has undergone a significant overhaul following the enactment of the Charities Act 2009. The Act is the first attempt by the legislature in Ireland to define what is legally charitable. It provides a new definition of ''charitable purpose'' for the first time in primary legislation. The Act also provides for the establishment of a new Regulatory Authority to secure compliance by charities with the legal obligations and also to encourage better administration of charities. Jurisdiction regarding charities previously vested in the Attorney General is transferred to the authority under the terms of the Act.

The classification of charitable purpose within Section 3(1) of the Act mirrors identically the four broad categories identified by Lord Mac Naghten in *Commissioners for Special Purposes of Income Tax v Pemsel*, namely:

(a) the prevention or relief of poverty or economic hardship;
(b) the advancement of education;
(c) the advancement of religion;
(d) any other purpose that is of benefit to the community.

Moreover, s 3(2) of the Act explicitly states that as well as falling into one of the four classifications, the gift must be for the public benefit. Unlike the McNaghten classification, the concept of public benefit established in the Act does not vary as between the different categories of charitable trusts.

Section 3(3) of the Act also allows great flexibility in construing ''public benefit''. Whilst stating that a gift will not be regarded as being for the public benefit unless it is intended to benefit the public or a section of the public, the Act goes on to provide a gift which confers a benefit on a person other than in his or her capacity as a member of the public or a section of the public will not fail if any such benefit is reasonable in all of the circumstances, and is supplementary to, and necessary for the furtherance of the public benefit.

Section 3(7) of the Act provides factors that shall be taken into account in determining whether a gift is of public benefit or not. Account will be taken of any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift, and whether such limitation is justified and reasonable, having regard to the nature of the purpose of the gift. Section 3(7)(b) provides that account will also be taken of the amount of any charge payable for any service provided in furtherance of the purpose for which the gift is given and whether it is likely to limit the number of persons or classes of person who will benefit from the gift.

Section 3(8) establishes that a limitation shall not be justified and reasonable if all of the intended beneficiaries of the gift or a significant number of them have a personal connection with the donor of the gift. Section 3(11) lays out a list of charitable purposes that are of ''benefit to the community.'' Included in this list is:

- the advancement of community welfare, including the relief of those in need by reason of youth, age, ill-health, or disability,
- the advancement of community development, including rural or urban regeneration;
- the promotion of civic responsibility or voluntary work within the community;
- the promotion of health, including the prevention or relief of sickness, disease or human suffering
- the advancement of conflict resolution or reconciliation;
- the promotion of religious or racial harmony and harmonious community relations;
- the protection of the natural environment;
- the prevention or relief of the suffering of animals
- the advancement of the arts, culture, heritage or sciences and;
- the integration of those who are disadvantaged, and the promotion of their full participation, in society.

According to Tobin (Annual Review of Irish Law, 2009, at p.447) 'gifts for sporting and recreational purposes are not recognised under s.3(11), and neither are gifts for political purposes because an "excluded body" under s.2 includes a political party, or a body that promotes a political cause, *unless* the promotion of that cause relates directly to the advancement of the charitable purpose of that body. Thus, it would appear that a body that is primarily charitable may use political means to achieve its charitable goals under s.2, as recognised by Oonagh Breen in (2008) 59 *Northern Ireland Legal Quarterly* 223 at 227'. Later (at p.449) he notes that 'section 3(7) and (8) and s.2(2)(a) of the 2009 Act are significant provisions in that they effectively make it impossible for trusts for poor relations/employees to attain charitable status in this jurisdiction from now on given the personal connection between the donor and beneficiaries of the gift. These sections will also enable the Irish courts to continue to disqualify trusts for the advancement of education from charitable status where there is a personal connection between the donor and the intended beneficiaries.'

Recent judicial consideration of the concept of charitable purpose is found in Charleton J's decision in *National Tourism Development Authority v. Coughlan* (2009) (claim for charitable status for three golf courses denied).

QUISTCLOSE TRUSTS, _RE OSABA_ & THE PRESUMPTION OF ADVANCEMENT

While the entirety of Resulting Trusts is ripe for examination, certain sub-topics has proven to be particularly popular with your Examiner, for example, the rule in *Re Osoba*, *Quistclose* Trusts, presumed resulting trusts, joint-deposit accounts, and the presumption of advancement. *Quistclose Trusts* were last examined in April 2011, *Re Osaba* way back in April 2008, and the Presumption of Advancement in April 2009.

Suggested Solutions:

A Note on Quistclose Trusts

Hanbury and Martin state ''there can be no resulting trust where a donor has parted with the property in pursuance of some contract except in rare cases exemplified by the 1970 case of *Barclays Bank plc v Quistclose Investments*''. A *Quistclose* trust may arise where a lender and borrower intend, in relation to moneys advanced to a borrower for a specific purpose, that: (a) the lender shall retain the beneficial interest in the moneys advanced; and (b) the moneys advanced shall constitute a fund separate from the assets of the borrower until the purpose has been fulfilled. If such an intention can be proved, both the law of trusts and the law relating to debt will govern the relationship of the parties. There have been various and confused explanations of the *Quistclose* trust including analyses based on the illusory trust, the purpose trust and the constructive trust (Burns, 1992, *Monash University Law Review* 7). Lord Millett has observed that "the so-called *Quistclose* trust probably represents the single most important application of equitable principles in commercial life." (Foreword, *The Quistclose Trust; Critical Essays*, Swadling). Delany notes that ''considerable debate has surrounded the manner in which the so called '*Quistclose*' trust should be classified. While it may be considered to be a form of express trust, the secondary trust which will arise in some circumstances can be classified as an automatically resulting trust… Although there has been no consideration given to the type of trust recognised in the *Quistclose* case yet in this jurisdiction, trusts of this nature are likely to assume increasing significance in the future".

In the House of Lords' decision, *Barclay's Bank Ltd v Quistclose Investments Ltd*, Rolls Razor Ltd, declared a dividend to shareholders that they couldn't meet, and so borrowed a sum of money from *Quistclose* for that purpose. It was explicitly agreed that the loan could be used for this purpose only. The money was to be paid into a separate bank account in Barclay's Bank. The dividend was payable on 24th July 1964, but had not been paid when, on 27th August, the Company entered voluntary liquidation. Barclays and *Quistclose* both claimed the money. The House of Lords held that the money had been paid into the account on trust for the purpose of paying the dividend, and that since this purpose could not now be carried out, it was held on a resulting trust for *Quistclose*. As Lord Wilberforce said: ''the loan for the express purpose of ensuring the payment of the dividend gave rise to a relationship of a fiduciary character or trust in favour, as a primary trust, of the creditors, and secondarily, if the primary trust failed, of the third person, namely the institution which had made the loan. In such cases, it is not necessary that the term 'trust' is used provided the conditions outlined above namely in relation to segregation of the funds and specifying the purpose for their use, have been complied with''.

Lord Millett considered the limitations placed on the transferee under a *Quistclose* trust in Twinsectra v Yardley (2002) and concluded that "the question in every case is whether the parties intended the money to be at the free disposal of the recipient. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used exclusively for the stated purpose".

Conceptually, the most significant difficulty posed by the approach taken by the House of Lords in *Quistclose* was that the arrangement could be construed as an attempt to create a non-charitable (and invalid) purpose trust. This problem was addressed in *Carreras Rothmans v Freeman Mathews Treasure Ltd* (1985) (FMT Ltd) where the plaintiff employed the defendant to act as advertising agents and book space in the media for them. The defendant was in certain financial difficulties; the plaintiff was worried about this and to protect their good name it set up a dedicated bank account from which advertising bills were to be paid. Subsequently, the defendant went into liquidation and its liquidators sought to establish an entitlement to the money in the account. The plaintiff sought a declaration that the money in the account was held on trust pursuant to a private express trust for their creditors as beneficiaries, and this declaration was granted. The court held that the money in the account was not held on secret trust for the plaintiff, nor was it held on resulting trust for the plaintiff's benefit, nor was it held on trust for Barclays to whom the defendant owed a substantial sum of money. Rather it was held for the benefit of the company's creditors pursuant to an express trust.

In *Re McKeown* (1974), the applicant loaned a sum of money to McKeown, in whose favour an arbitration award had been made, so that the latter might pay the necessary fees and costs to enable him to recover the award. The loan was made on the condition that it would only be used for the purpose of paying these fees and costs and that the applicant would be paid out of the award. McKeown was adjudicated bankrupt before he received the award and the applicant sought a declaration that the Official Assignee held the sum of the loan on trust for him. Lord MacDermott upheld the applicant's claim, and did not appear to be deterred by the lack of the type of language usually associated with the creation of trusts. However, the words used must be sufficiently certain in nature and must show a sufficient intention to create a trust. The principle laid own in *Quistclose* was applied by the English Court of Appeal in *Re EVTR* (1987) in a situation where the loan was made in order that a company might purchase new equipment rather than to ensure payment of a debt. Dillon L.J. concluded that ''on *Quistclose* principles, a resulting trust in favour of the provider of the money arises when money is provided for a particular purpose only, and that purpose fails''.

In *Re Farepak Food and Gifts Ltd* (2006), Mann J considered but rejected the possibility that a *Quistclose* type trust had arisen in circumstances where customers had prepaid for Christmas hampers and other goods. Unlike most *Quistclose* cases, there was no contract of loan between the parties. Mann J stated that 'crucially, there is no suggestion that the money ought to have been put on one side by Farepak pending the transmutation from credited money to goods or vouchers. If there were a *Quistclose* trust then that obligation would have been inherent in it, but the business model would have made no sense. It would have required Farepak to have kept all the customer moneys in a separate account from January until November, untouched until the time when the goods or vouchers were acquired and then sent out. That is completely implausible. It would turn Farepak into a very odd savings organisation. Even banks do not have to do that.'

Q4, October 2006 - A Suggested Solution on *Re Osaba* and the Presumption of Advancement

Answer (a) and (b)
(a) Richard died recently, having made a short will in which he provided that €100,000 shall be held on trust for the maintenance of his brother George for his life, as George had no independent source of income. George, however, died very soon thereafter, and never used any of the monies bequeathed to him. Richard's will provides that €50,000 shall be held on trust to fund the legal studies of his only nephew, Hugh. Hugh commenced his studies in law but hated it and neglected to attend any of the exams. He was give a limited number of opportunities to re-sit his exams but has now used up all of those options. Hugh is now precluded from pursuing further studies I law and €40,000 of the €50,000 assigned to fund those studies remains unused. Hugh is considering taking a
break from it all and spending the unused funds on a backpacking trip around the world.

Richard's will also provides that the Indigent Inn Keepers Association should enjoy the residue, if any, of his estate. The Secretary of the Association has become aware of the terms of Richard's will and seeks your advice as to the prospects of securing any of the above unused funds.

AND

(b) Discuss the law relating to the presumption of advancement.

Examiner's Comments

"Part (A) of this question was well answered by most of the students who attempted it and addressed their mind to the question of whether both sets of facts as outlined gave rise to resulting trusts. As far as Part (B) was concerned, however, a surprising number of students showed only the most basic and general knowledge of the relevant principles regarding the presumption of advancement and were unable, for example, to refer to the categories of relationship giving rise to such a presumption or support their answers with reference to case law."

Suggested Answer

(A)
In advising the Indigent Inn Keepers Association, it is necessary to have regard to the law relating to resulting trusts, and, in particular, to the situations where an automatic resulting trust may arise on foot of a failure to exhaust the beneficial interest in the assets in question.

A resulting trust is one which arises to fill a gap in the beneficial ownership of property (*Vandervell v. IRC* (1974)). Sometimes known as implied trusts, such trusts can be categorised as either automatic or presumed resulting trusts (*Vandervell,* per Megarry J.). An automatic resulting trust arises where property is transferred *on trust*, but the transfer left some or all of the beneficial interest undisposed of. The general rule in respect of such situations is represented by *Re Trusts of the Abbott Fund* (1900) and *Re Lane's Trust* (1863). For example, in *Lane*, the assets held under a marriage settlement became subject to a resulting trust because the couple had died childless.

In certain circumstances, a resulting trust will *not* arise even though there has been a failure to exhaust the beneficial interest. Professor Pettit, in the sixth edition of *Equity & The Law of Trusts*, suggests that a distinction may be drawn between cases where the beneficiaries are dead (as in *Re Abbot*t) and where they are still living. In the former case, the court will more readily hold that there is a resulting trust, since the major purpose of the trust can no longer be carried out. However, if the beneficiaries are still alive, the major purpose of providing a benefit for them can still be accomplished, and so they may be held to take beneficially. This exception is exemplified by *Re Andrew's Trust* (1905) where a trust fund was subscribed to by the friends of a deceased clergyman for the education of his children. Kekewich J. held that when their formal education was complete, no resulting trust should arise, and that it should instead be divided amongst the children.

This approach was followed in *Re Osoba* (1978) where a testator transferred property on trust for his widow to be used for her maintenance and ''for the training of my daughter up to university grade and for the maintenance of my aged mother''. The testator's mother predeceased him and his wife died shortly after his own death. When the daughter completed her university education, a surplus of funds remained. The question for the court to decide was whether the daughter could retain the surplus or whether it resulted back to the testator's estate, which would have allowed his children from a previous marriage to stake a claim. Megarry V.C. stated that one must consider who the testator intended to benefit. If they are dead, then a resulting trust should arise in favour of the testator's estate. However, if they are still alive, ''the major purpose of providing help and benefit for the beneficiaries can still be carried out even after the stated means have all been accomplished, and so the court will be ready to treat the stated means as merely indicative and not restrictive''. Therefore, in the present case, it was held that the testator's overriding intention was to provide for his mother and daughter, and that the specified purposes should merely be regarded as an expression of his motives. Accordingly, no resulting trust arose.

When considering the application of the principles stated above to the Association's case, it is necessary to pay particular attention to that fact that Hugh is still alive, while George is deceased, and to the words of Lord Wood VC in *Re Sanderson's Trust*, where he stated that "if a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this court always regards the gift as absolute and the purpose merely as the motive for the gift, and therefore holds that the gift must take effect as to the whole sum or the whole income as the case may be''.

Therefore, and in conclusion, it may be stated with some confidence that since George can no longer enjoy the benefit of the transfer, an automatic resulting trust will arise to carry the beneficial interest in the €100,000 back to Richard's estate, and that the Association of Indigent Innkeepers will benefit on foot of the residuary legatee clause as a result.

In respect of Hugh's €40,000, it is submitted that this is an instance where the exception exemplified by *Osaba* and *Re Andrews* will be adopted. It seems clear that the gift to Hugh in this instance should be considered absolute, and that the purpose assigned to it, namely the funding of Hugh's legal education, is merely the motivation lying behind it.

(B)
Where a distinct and definable obligation rests on one person to provide for another, and the person so obliged transfers property to the person to whom he owes a duty, then the court will presume no resulting trust has arisen and that the transfer was an outright gift. In *Murless v. Franklin* (1818), Lord Eldon referred to the presumption as being one which arises where the transferor "is under a species of natural obligation to provide for the nominee". The relationships giving rise to the presumption are as follows: fathers and their children, persons standing in loco parentis, and husbands and wives.

The presumption arises in regard to transfers of property from a husband to his wife, but allegedly not in relation to transfers from a wife to her husband. Delany notes that in Ireland, in light of the constitutional guarantee of equality, it would seem difficult to justify the continued existence of a principle which undoubtedly seems to benefit a wife and not a husband. The presumption was affirmed by Finlay P in *W v W* (1981), and Keane J. in *JC v JHC* (1982). However, Keane J. seemed to be in favour of restricting the presumption to cases where there is a lack of evidence of the parties' true intentions.

There is also considerable debate as to whether the presumption arises when a mother makes a transfer of property to her child. English law denies its existence in these circumstances (*Bennet v. Bennet* (1879)), while the Irish courts have not had an opportunity to rule on the issue in modern times.

In the Supreme Court decision *RF v MF* (1985), the presumption was held to have been rebutted where a wife refused to live in a house purchased by her husband unless it was put in their joint names. The husband did so but the wife still refused to live in the house. The presumption that the husband intended the wife to hold 50 per cent of the beneficial interest in the house was rebutted by their course of dealings up to and after the purchase of the home.

In the English decision of *Pettitt v Pettitt* (1969), it was recognised that the presumption is rebuttable and easily so in relation to transfers of property by a husband to his wife. Lord Diplock said it would be "an abuse of the legal technique for ascertaining or imputing intention" to apply the presumption to many transactions entered into by modern married couples.

A party who wishes to rebut the presumption merely has to prove, on the balance of probabilities (*Pecore v. Pecore* (2007), that he did not intend a gift to his wife. It seems that the presumption does not arise between unmarried couples, but does arise where a transfer of property is made by a father to his non-marital child. It seems the presumption will also arise when a mother makes a transfer to her child. The presumption will probably also arise where an adult has custody or guardianship of a minor.

In another Canadian decision, *B v. B* (1976), the presumption was held to apply where a father purchased a winning lottery ticket for his daughter.

In the English decision, *Sekhon v Alissa* (1989), the presumption of advancement which arose between a mother and her daughter was successfully rebutted. Here the daughter bought a house which was conveyed into her sole name for £37,500; her mother having contributed £22,500 of that sum. Hoffman L.J. considered all aspects of intention and came to the conclusion that the mother did not intend the entire beneficial interest to be held by the daughter.

The presumption cannot be rebutted by evidence that the transfer was made for an improper purpose, *Re Emery's Investment Trust* (1959) and *Gascoigne v Gascoigne* (1918). In the first case, the property was transferred to evade tax, in the latter the property was transferred to the defendant's wife in order to avoid his creditors. It was held that both transfers were for an improper purpose, and therefore the court would not consider such evidence in determining whether the presumption of advancement had been rebutted. In *Parkes v Parkes* (1980, High Court decision) Costello J. refused to accept evidence in rebuttal that the transfer had been made into the wife's name to obviate the need for Land Commission consent. In *Malone and Fagan v Liam McQuaid and the Registrar of Titles* (1998), O'Sullivan J. had to decide whether the presumption arose in relation to money provided by the second plaintiff to the first plaintiff. The first named defendant was liquidator of a company in which the plaintiffs had invested. The court held that the first named plaintiff (the wife) was entitled to the benefit of the presumption of advancement in circumstances where the second named plaintiff was expected to provide any monies which he contributed for the benefit of his wife and/or children. That presumption had not been rebutted.

Another relevant decision which concerned the presumption of advancement is *Fitzpatrick v Criminal Assets Bureau* (1998), which concerned a dispute about whether a car seized by the first named defendant was in fact the property of an individual or of a company. The High Court refused to contemplate the extension of the presumption of advancement to a relationship of a commercial nature. As Shanley J. stated that he knew "of no decided case, and none was opened to me, which suggests that the relationships to which the presumption of advancement extend include those of a shareholder and the company in which he owns shares".

In *Pecore v. Pecore* (2007) the Supreme Court of Canada considered the presumption, and the law relating to joint accounts, in circumstances where a father created accounts in the joint names of himself and his daughter, Paula. These accounts contained mutual funds, bank accounts, and income trusts. He alone made deposits into the accounts, and at the time of his death, assets of just under CAN$1,000,000 were contained in the accounts. It was accepted that Paula was particularly close to her father, and that the other siblings were considered to be financially secure. Her husband, Michael, the plaintiff in these proceedings, was a quadriplegic, and Paula was in fairly low paid employment. Her father supported them during his life in various ways. However, on creating the joint accounts, his stated aim was to support Paula since "the system" would support Michael. Paula and Michael divorced after Paula's father's death, and Michael unsuccessfully claimed a beneficial entitlement to the property contained in the joint accounts. There was insufficient evidence to rebut the presumption of advancement which arose in Paula's favour.

TRUSTEESHIP

TRUSTEES' DUTIES

A trustee is a fiduciary. He owes elaborate fiduciary duties to the beneficiaries under the trust. He may breach his fiduciary duties in a number of ways, for example, by making unauthorised personal profits, by taking unauthorised remuneration, or by placing himself in a position of conflict of interest.

(a) Remuneration

- *Dale v IRC* (1954)
- S. 24 of the 1893 Trustee Act
- The Rule in *Cradock v Piper* (1850)
- *Re Corsellis* (1887)
- *Guinness v Saunders* (1990)
- *O'Sullivan v Management Agency and Music Ltd* (1985)

(b) Profit

- *Protheroe v Protheroe* (1968)
- *Re Gee* (1948)

The Self Dealing and Fair Dealing Rules

- *Holder v Holder* (1968)
- *Tito v Waddell* (No.2) (1977)
- *Re Thompson's Settlement* (1985)

The Rule Prohibiting the Delegation of Functions

- *Re O'Flanagan and Ryan's Contract* (1905)
- Section 17 of the 1893 Trustee Act

The Duty to Distribute

- Section 49 of the Succession Act 1965
- The ''Benjamin Order''

The Duty to Invest

The trustee must invest in authorised securities only and must exercise ordinary prudence in doing so.21 In relation to the trustees' duty to invest, it is the trustees' duty to ensure that the trust property is invested in the manner which will prove most advantageous to all the beneficiaries. The question of whether an investment is authorised is governed in the first instance by the terms of the trust instrument. In the absence of an express investment clause, or subject to its terms, a trustee may invest the trust property in accordance with Pt I of the Trustee Act 1893. Section 3 of the Act provides that this statutory power of investment is to be exercised according to the discretion of the trustees. The Trustee (Authorised Investments) Act 1958 sets out a list of authorised investments and empowers the Minister to vary the list.

If the beneficiaries sue a trustee pursuant to a number of breaches of trust, some of which have resulted in loss, each breach is usually viewed in isolation. For example, if the trustees made three unauthorised investments and, as a result, £500,000 was lost in the first investment, the same amount in the second, but £1,000,000 was made in the third, the general rule is that the trustees remain liable for the £1,000,000 loss notwithstanding the profits made on the other investment (*Dimes v Scott* (1828)). An exceptional case is *Bartlett v Barclays Bank* (1980) where the defendant trustees got involved in two unauthorised investments, one in the Old Bailey, and the other in Guildford. Money was lost on the Old Bailey project but the Guildford investment made a profit. Brightman L.J. allowed the profits from the Guildford project to offset the losses on the Old Bailey project. He saw the two transactions as part of ''the same course of wrongful conduct''. For this approach to be taken, there must be a close connection between the breaches of trust. Brightman L.J. said: ''I think it would be unjust to deprive the bank of the element of salvage in the course of rescuing the ship''. In *Knott v Cottee* (1852), the trust funds were to be applied in trading in British stocks and bonds. The trustees traded in foreign investments. The trustees were held personally liable for the losses which resulted. Delany notes that ''even where a trustee does not stray outside the ambit of investments authorised either by the terms of the trust or by statute, he must nevertheless observe certain standards in carrying out his duties''. In Learoyd v Whiteley (1886), it was held by the Court of Appeal that a trustee has to take such care, not only as a prudent man would take if he had only himself to consider, but the care that an ordinary prudent man would take if he were making investments for the benefit of those for whom he felt morally bound to provide. However, a more flexible approach was taken in Bartlett v Barclay's Bank Trust Company. The defendant bank was trustee of a trust, the only assets of which were nearly all the shares in a family property company. It was thought that funds might be more readily raised to pay taxes due on the death of the life tenants if the company went public and that a public issue would be more successful if the company was also involved in property development. One speculative purchase resulted in large losses to the trust fund, and the plaintiff beneficiaries succeeded in their claim against the bank for breach of trust. Brightman J. stated as follows:

> ‘‘The cases establish that it is the duty of a trustee to conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs. . . . That does not mean that the trustee is bound to avoid all risk and in effect act as an insurer of the trust fund. . . . The distinction is between a prudent degree of risk on the one hand, and hazard on the other. Nor must the court be astute to fix liability upon a trustee who has committed no more than an error of judgment, from which no business man, however prudent, can expect to be immune’’.

A further important principle, which was confirmed by Brightman J., was that in his opinion a higher duty of care is expected of a professional trustee, such as a trust corporation which carries on the specialised business of trust management. Delany notes that: ‘‘while liability was imposed on the defendant in Bartlett, despite the fact that a higher standard than that required of ‘an ordinary prudent man of business’ did not seem to be demanded of the trustees, the application of this test had more disturbing consequences from the point of view of the beneficiary in *Nestle v National Westminster Bank plc* (1993). By virtue of the terms of a settlement made in 1922, the defendant bank, the successor to the original trustee, was given wide powers to invest in equities. However, the bank never obtained legal advice about the scope of its powers of investment and assumed that these were narrower than they in fact were. The plaintiff, the remainder beneficiary, contended that the trust fund, which was worth approximately £269,000 when she became absolutely entitled in 1986, should have been worth well over £1 million by then if the fund had been properly invested. Hoffman J. rejected the plaintiff’s claim and concluded that the bank had acted conscientiously, fairly and carefully throughout its administration of the trust. The Court of Appeal dismissed the plaintiff’s appeal and concluded that the plaintiff had not succeeded in establishing that she had suffered loss. Legatt LJ stated that it had not been established that a prudent trustee, knowing the scope of the power of investment and having conducted regular reviews, which the bank had not done, would have invested the fund in such a manner that it would have been worth more than it was when the plaintiff became entitled to it. The Court of Appeal appeared to apply the same standard laid down by Brightman J. in *Bartlett*: and as Legatt LJ stated: ‘the essence of the bank’s duty was to take such steps as a prudent businessman would have taken to maintain and increase the value of the trust fund. Unless it failed to do so, it was not in breach of trust’. Although the Court of Appeal did not find the bank liable, the judges did not agree with the trial judge’s conclusion that the bank had acted conscientiously and as Legatt LJ commented: ‘No testator, in the light of this example, would choose this bank for the effective management of his investment’’’.

In the 1995 decision, *Stacey v Branch* (1995), Murphy J. set out his thoughts on the nature of a trustee’s duty of investment. He said: ‘‘what is the nature of the duty imposed on a trustee? A trustee must, of course, invest trust funds in the securities authorised by the settlement or by statute. To invest in any other securities would be of itself a breach of trust; but, even with regard to those securities which are permissible, the trustee must take such care as a reasonably cautious man would take having regard not only to the interest of those who are entitled to the income but to the interest of those who will take in the future. In exercising his discretion a trustee must act honestly and must use as much diligence as a prudent man of business would exercise in dealing with his own private affairs; in selecting an investment he must take as much care as a prudent man would take in making an investment for the benefit of persons for whom he felt morally bound to provide. Businessmen of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of the trustee to confine himself not only to the class of investments which are permitted by the settlement or by statute, but to avoid all such investment of that class as are attended with hazard’’.

In *Spencer v Kinsella* (1996), the High Court confirmed that the primary issue to which a court should have regard in deciding whether to order the removal of a trustee is the welfare of the beneficiaries. In this case, a trustee was held not to be liable for failing to let the trust property, the Showgrounds in Gorey, over a 14-year period. Instead, he appointed a caretaker to manage the property which was used by the local football and coursing clubs. The trustee had been given an absolute discretion as to how to deal with the property. However, Barron J. held that this was not enough to absolve him from liability if he had failed to carry out his duties with reasonable care and prudence. Yet the trustee avoided liability because his decision to appoint the caretaker, instead of letting the property, was one made bona fide in the exercise of his discretion.

The Duty to Properly Exercise Discretion

If a trustee enjoys discretion in the performance of a duty or the exercise of a power, he must exercise such discretion properly. This means that, in exercising such discretion, the trustee must (i) take all relevant considerations into account and (ii) ignore all irrelevant considerations. The duty to properly exercise discretion was articulated in the following manner by Buckley LJ in Re Hastings-Bass, and has become known as ''the Principle in *Re Hastings-Bass''*:

[W]here by the terms of a trust . . . a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.

This principle means a court may set aside the exercise of a trustee's discretion if it is proved that the trustee would not have acted as he did had he taken into account all and only relevant considerations. 'In Sieff v. Fox (2005) 3 All ER 693, Lloyd LJ enumerated the grounds upon which a trustee's exercise of a discretionary power may be deemed to be invalid. He noted that: 'The best formulation of the [Hastings-Bass] principle seems to me to be this. Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account....... It does not seem to me that the principle applies only in cases where there has been a breach of duty by the trustees, or by their advisers or agents, despite what Lightman J said in *Abacus Trust Co (Isle of Man) v. Barr*.'

More modern authorities suggest that a court may set aside the exercise of a trustee's discretion if it is proved that the trustee might not have acted as he did had he taken into account all and only relevant considerations. These authorities were applied in Abacus Trust Co. (Isle of Man) v Barr. Lightman J held that the principle does not require that the trustee's mistake fundamental. ''All that is required in this regard,'' he said (at 417), ''is that the unconsidered relevant consideration would or might have affected the trustee's decision.''

TRUSTEES' POWERS

In ascertaining the powers of a particular trustee, the first step should be to examine the trust instrument itself. In addition, certain powers are conferred on trustees by the Trustee Act 1893. These are powers which are additional to those conferred by the trust instrument. If a conflict exists between the powers in the Act and those found in the trust instrument, the trust instrument will take precedence.

The Power of Sale

A trustee has no inherent power to sell trust property; his duty is to preserve the trust property in the form he received it. However, a power of sale exists in three situations:

(1) if the trust instrument confers the power;

(2) if the power to sell is conferred pursuant to statute;

(3) if the court makes an order of sale.

If the trust was created within the terms of the Succession Act 1965, then s 50 thereof permits the sale of the property of a deceased person for the purpose of paying his debts and for effecting a distribution between the beneficiaries. Under some trust instruments the trustee is obliged to sell, and this obligation may be implied.

The *Rule in Howe v Dartmouth* (1802) provides that if a trust is created which contains a residuary clause which settles property other than realty on persons in succession andwhere the assets are of a wasting nature or if they constitute unauthorised securities, then the trustees must sell the property and convert them into a permanent and secure formcapable of bearing interest. So if the residuary clause in a will settles a stable of race-horses on A, B, and C, then a trust for sale will arise and the trustees will be obliged to convert the property.

The Trust for Sale

Section 13 of the 1893 Act confers broad powers on a trustee concerning the method of sale to be adopted when carrying out a trust for sale or exercising a power of sale. Section 14 empowers a trustee to sell any property which he holds under the trust which is subject to depreciation. Unlike the Rule in *Howe v Dartmouth*, s 14 also applies to real property.

Section 20 gives trustees the power to issue receipts to purchasers for any property which they sell, and that receipt has the effect of exonerating the purchaser from any liability should the trustees be acting in breach of trust at the time of issue or at a later stage. The general rule is that all trustees must sign the receipt to give it validity (although only two thirds of the trustees of a charitable trust must sign the receipt).

The Power to Compromise Actions

Section 21 confers on trustees the power to compound liabilities as they consider expedient. So long as they are acting in good faith, the trustees are not responsible for any loss suffered by the trust through an ill-advised settlement.

The Power of Maintenance in Relation to Minors

Section 43 of the Conveyancing Act 1881 provides that wherever land or personal property is held by a trustee in trust for a minor, whether for life or for any greater interest, whether absolutely or conditionally contingent upon him attaining the age of majority, the trustees have an absolute discretion to pay to the minors ''parent or guardian income from the trust, to be applied for the benefit of the minor's maintenance, education or other benefit, and they can do so whether or not any other party is responsible for the minor's maintenance''.

Under s 11 of the Guardianship of Infants Act 1964, the court can direct the payment of capital or income from the trust for the benefit of a minor, but only where the court is satisfied that it is necessary for the education and maintenance of the infant in question.

The Power to Insure the Trust Property

Section 18 of the Trustee Act 1893 provides that a trustee is entitled to insure trust property against fire, flood, or storm damage. The insurance premium must be paid out of trust income (not capital). The insurance cover must not exceed three quarters of the value of the property in question.

APPOINTMENT, RETIREMENT AND REMOVAL OF TRUSTEES

Appointment

Appointment may occur in one of five ways:

(1) The settlor may appoint the trustee when creating the trust.
(2) The settlor may give the power to appoint to one of the trustees or some other party nominated for that purpose by the settlor in the trust document,
(3) Under s 10 of the Trustee Act 1893, a trustee may be appointed in writing (and preferably by deed). The power to appoint under s 10 can be exercised by the person or persons nominated for the purpose of appointing new trustees by the trust instrument, if any, creating the trust or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee. This power can be exercised where a trustee:

(a) is dead; or
(b) remains out of the jurisdiction for more than 12 months; or
(c) desires to be discharged from his duties; or
(d) refuses to act; or
(e) is unfit to act or incapable of acting.

(4) Section 25 of the 1893 Act gives the court a power to appoint a trustee where it is expedient to do so and it would be ''inexpedient, difficult or impracticable so to do without the assistance of the court''. Section 12 of the Act makes provision for the vesting of trust property in new or continuing trustees.
(a) In *Re Wheeler* (1896), a power to appoint a new trustee in circumstances where an existing trustee was incapable of acting was held not to be exercisable where an incumbent became bankrupt on the grounds that while he might as a result have been deemed ''unfit'' to act, this did not mean that he was ''incapable'' of performing his duties.
(5) There is an inherent power in all the beneficiaries to appoint a trustee where they are all *sui juris* and absolutely entitled.

Retirement and Removal of Trustees

The circumstances where a trustee may retire or be removed from his position include:

(1) where the trust instrument provides for this;
(2) where the beneficiaries, being sui juris give unanimous agreement;
(3) where ss 10 or 25 of the 1893 Act are applicable;
(4) where s 11 of the 1893 Act applies;
(5) where a successful application is made to court.

Retirement of Trustees

A trustee may disclaim his appointment and refuse to take up the office at the outset and if he wishes to do this. To avoid any possible uncertainty, he should preferably express his intention by deed. However, once a trustee has accepted the office and has failed to disclaim it within a reasonable time, he can only retire in specified circumstances. First, he can retire if there is an express clause in the trust instrument permitting him to do so, or if he receives the consent of all the beneficiaries provided that they are all sui juris and between them are entitled to the entire beneficial interest in the trust property. In addition, statutory provision is made for retirement by virtue of s 11 of the Trustee Act 1893 which lays down that, provided there will be at least two trustees left to administer the trust, a trustee may by deed declare that he wishes to retire; and if his co-trustees consent by deed, he will be permitted to do so. Alternatively, an existing trustee may retire as a result of the exercise of the statutory power to appoint new trustees provided in s l0. In addition, a trustee may seek a court order under s 25 of the 1893 Act which empowers the court to appoint new trustees for existing ones whenever it is expedient to do so without the court's assistance.

Removal of Trustees

A trustee may be removed from his office where express provision is made for this in the trust instrument or by the beneficiaries where they are sui juris and between them absolutely entitled to the trust property. In addition, a trustee may be removed where the court exercises the power conferred on it by s 25 of the Trustee Act 1893 to appoint a new trustee where an existing trustee refuses or is unfit to act. The court also has an inherent jurisdiction to remove trustees where they act dishonestly or incompetently, or even where their conduct is deliberately obstructive. This point was confirmed by Murnaghan J. in *Arnott v Arnott* (1924). The defendant was removed from the position of trustee to which she had been appointed on the basis that the business, the subject matter of the trust, was to be managed by the plaintiff in circumstances where her persistent non-co-operation rendered the trust virtually unworkable. Murnaghan J. stated that the jurisdiction of the court to remove a trustee should be exercised if the welfare of the beneficiaries demanded it, even though no dishonesty or incompetence had been alleged or proved against the trustee in question. He said that the jurisdiction of the court was usually resorted to when a trustee has mismanaged a trust or has been proved dishonest or incompetent but the guiding principle to which all others must be subordinate was the welfare of the beneficiaries.

A further ground on which a court may exercise its inherent jurisdiction to remove a trustee is where there is a clear conflict of interest between the trustee's duty to the trust and his own personal interests. In *Moore v McGlynn* (1894), the defendant was discharged from further performance of the duties of trustee where he had set up a rival business in competition to that of which he was trustee for the benefit of the family of his deceased brother. Although Lord Chatterton held that the new business should not be affected with a trust for the benefit of his brother's estate, he was satisfied that it would be improper for the trustee to continue in a position where his personal interests and his duty to the trust might conflict. As he stated: ''his new position disqualifies him from remaining any longer a trustee, and it would have been better for him to have procured his removal from trustee-ship before setting up for himself. He should not have continued in a position where his duties and his self interest may conflict''.

In her last report, your Examiner commended "some very good answers [which] discussed the proposals for reform made by the Law Reform Commission in its consultation paper". The Law Reform Commission published two consultation papers on February 15th, 2005 which recommended a raft of legislative changes to clarify the roles, duties, powers, and responsibilities of trustees. Here follows a brief summary of the principle recommendations:

- Recommends that trustees should be subject to a general statutory duty of care, involving a requirement to act with objective ''reasonable care and skill''. This duty should take into account any special knowledge or expertise a trustee may have.
- For charitable trusts, it is recommended that the duty of care should apply with modifications, by providing that trustees must act in the interests of charity and to ''seek in good faith to ensure that the charity acts in a manner which is consistent with its purposes''.
- Recommends that certain persons would not be eligible for appointment as a trustee, for example a minor; a ward of court; a bankrupt person; a corporate trustee of a trust in liquidation or wound up; a person convicted of an indictable offence or sent to prison; a person who was disqualified or restricted from being a director of a company or had been removed from the office of charity trustee.
- Recommends an expansion of trustees' powers of delegation subject to the proposed general duty of care.
- Recommends removal of the restriction that trustees could only insure trust property up to a maximum of three quarters of its value, and only in respect of loss or damage caused by fire. Recommends that trustees be entitled to insure trust property to its full replacement value in respect of loss or damage, however caused.
- The Commission said that the current arrangements under which trustees could invest in ''authorised securities'' operated satisfactorily and should be retained.
- The Commission did not favour a statutory provision on payment of trustees in general. In relation to charity trustees, the Commission said a statutory provision for payment would not be appropriate because the voluntary nature of charitable activities should be maintained to ensure public confidence in their administration.

TRACING

Key Rules:
The Rule in *Foskett v McKeown*
In *Foskett v McKeown* (2001), a trustee fraudulently misappropriated trust funds and used them to pay a number of premiums on a life assurance policy. After the trustee died, the beneficiaries of the trust claimed an entitlement to a share of the life assurance policy. The House of Lords held that they were entitled to a share proportionate to the premiums which had been paid out of trust monies. Importantly, Millet L.J. stated: ''Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money''. Therefore, a beneficiary can choose how best to realise his claim. If the misappropriated money has been invested poorly and is now worthless, a lien over the trustee's assets would be far more useful. However, if the misappropriated trust money has been invested wisely and has matured, then the beneficiary can claim a proportionate share of the investment.

The Rule in *Roscoe v Winder*

Delany states that ''[t]raditionally, a beneficiary's right to trace into a mixed fund in a bank account only applied to the extent that the trust monies could be shown to be still there and if the account fell below the sum said to constitute the trust funds, they were then deemed to have been spent''. The property to be traced must have a continued existence, in one form or another: ''the equitable remedy presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as an interest in property acquired by means of such a fund. If on the facts of any case such continued existence is not established, equity is as helpless as the common law itself. If a fund mixed or unmixed is spent on a dinner equity can do nothing''.

The Rules in *Re Oatway* and *Re Hallett's Estate*

In *Re Hallet's Estate* (1880), a solicitor misappropriated funds of a trust and of a client into his own personal bank account. Various payments were made to and from this account. After his death, it emerged that there were insufficient funds to meet his debts, and the question emerged as to whether the trust and the client could claim priority over the solicitor's general creditors in administering his estate. The Court of Appeal held that they were entitled to a lien or a charge over the remaining monies in the account in priority to the general creditors. Importantly, the Court of Appeal held that the solicitor was presumed to have spent his own money first and not to have drawn on trust monies irrespective of the order in which these funds were paid into the account.

This rule has been summarised as follows:

> ''the trustee is presumed to be honest rather than dishonest and to make payments out of his own private moneys and not out of the trust fund that was mingled with his private moneys''.

However, the rule will not be strictly applied if to do so would lead to an injustice. In *Re Oatway* (1903), Oatway paid £3,000 of trust money into his own account which also contained substantial funds. He purchased shares and dissipated the balance in his account. His executors contended that the shares belonged to the estate and not the trust. The High Court rejected this proposition and stated that where the trustee purchased assets he was deemed to be using trust funds as he had first dissipated his own funds. Had the Court strictly applied the *Re Hallet's* principle, it would have led to the conclusion that the money withdrawn and invested was the trustee's own. Instead, they felt that the justice of the case demanded that they hold the beneficiaries entitled to the shares.

Clayton's Case & the *Barlow Clowes* Exception

An innocent volunteer is neither guilty of any wrongdoing nor has provided any consideration. Where an innocent volunteer has mixed trust funds, there is a right to trace, subject to two qualifications:

(1) Where the trust fund and the money of the innocent volunteer is mixed and then used to purchase property, the beneficiaries and the volunteer will be entitled to a charge over the property purchased using the trust funds. The volunteer and beneficiaries will rank *pari-passu*, or in accordance with their contribution. The same rule applies as between two trust funds which have been used to purchase an asset, the two sets of beneficiaries rank *pari passu*.

(2) Where trust funds are mixed in an active account, the rule in *Clayton's Case* (1814-25) will apply, i.e. first in/first out. This rule, which applies to competing claims between beneficiaries of different trusts, and between beneficiaries and innocent volunteers, provides that payments out are deemed to have been made in order of payments in. Rules such as that in Clayton's Case can result in

arbitrary results, and in *Barlow Clowes (in Liquidation) v Vaughan* (1992), the Court of Appeal considered the first in/out approach was not appropriate where many small investors were defrauded. The rule certainly does not apply to claims between a trustee and a beneficiary, where the trustee is presumed to spend his own money first. Where a number of beneficiaries have suffered from a breach of trust but the recovered funds are insufficient, the rule in Clayton's Case will apply between them.

The application of the rule *in Clayton's case* has been considered by the Court of Appeal in England in *Barlow Clowes International Ltd v Vaughan* (1992) where Woolf L.J. made it clear that ''the rule need only be applied when it is convenient to do so and when its application can be said to do broad justice having regard to the nature of the competing claims''.

Similarly, the circumstances in which the rule may usefully be employed has been considered by the High Court in *Re Money Markets International Stockbrokers Ltd* (1999). The applicant instructed the company, a stock-broking firm, to buy shares on the Irish Stock Exchange on his behalf and the sum due was transferred and credited to the company's bank account several days before the settlement date. The following day, the Irish Stock Exchange suspended the right of the company to transact business on the exchange and the company was subsequently wound up and an official liquidator appointed. The liquidator acknowledged that the applicant's situation was different to that of other clients of the company as he had transferred monies to the company before the settlement date, and these were identifiable in the client account of the company. While some other clients had made lodgements in transactions which remained unsettled or partially unsettled, these were distinguished from the applicant's case by the fact that they were for settlement before the company was suspended. Laffoy J. stated that it was agreed that the company stood in a fiduciary relationship to the applicant, and that the funds transferred by the applicant to the company's account were held by the company as trust funds. These funds had been mixed with other funds, and the dispute between the parties was in broad terms whether the rule in *Clayton's case* should be applied to determine who was entitled to the monies represented by the credit balance in the company's account. Counsel for the applicant submitted that it is settled law that where funds belonging to various beneficiaries are generally determined by bank account, priority as between the beneficiaries is generally determined by the rule in Clayton's case, namely on a ''first in, first out'' principle. Counsel for the liquidator submitted that the rule should not be followed, it being merely a rule of convenience and not an invariable rule of law. He argued that it is open to the court to exclude the application of the rule where it would be impracticable or where it would result in an injustice as between client creditors, and submitted that it in the event of a deficit, as in this case, pari passu distribution is the fairest and most equitable mode of distinction of client funds. Laffoy J. referred to the decision of Budd J. in *Shanahan's Stamp Auctions Ltd v Farrelly* (1962) and to the decision of the English Court of Appeal in Barlow Clowes International v Vaughan. She continued as follows (at p.13): ''The conclusions I draw from the authorities are that, as far as this Court is concerned, in the case of a current account such as the account in issue here where trust funds sourced from various beneficiaries are mixed or pooled in the account, it is settled law that as a general proposition the rule in Clayton's case is applicable in determining to whom the balance on the account belongs. However, the application of the rule may be displaced in the particular circumstances of a case, for instance, if it is shown or to be inferred that it does not accord with the intention or the presumed intention of the beneficiaries of the trust funds''. Laffoy J. stated that on the application before her, she did not propose to determine whether as between all the parties who might have a claim to the balance in the current account, the rule in *Clayton's case* was applicable to determine entitlement. What she proposed to consider was whether, as between the applicant and all other claimants, in accordance with equitable principles the applicant should be bound by a *pari passu* distribution. However, she stressed that it was not to be inferred that she was of the view that a *pari passu* distribution was the appropriate method of distribution as between all other claimants to the monies represented by the credit balance on the account; on the evidence before the court the principles to be deduced from *Re Hallett's Estate* might come into play. Laffoy J. stated that having regard to the uniqueness of the applicant's position, she did not think that by applying equitable principles the applicant should be bound by a *pari passu* distribution. Given the circumstances in which the money had been paid into the account, she was satisfied that the equities were not equal and that equitable principles did not require that the applicant be subjected to a pari passu distribution under which he would be treated in the same way as other clients who had equitable claims against the funds. Laffoy J. concluded that if it were the case that the rule in *Clayton's Case* was applicable in determining entitlement to the monies, it was clear from the details of the account that on the application of the rule, the applicant would be entitled to repayment of the entirety of the monies transferred by him. On the other hand, if the rule in *Clayton's Case* was not applicable, in her view the equity of the applicant was superior to the equity of any other client creditor with an equitable claim so that he could not be bound by a rateable distribution. Laffoy J. therefore concluded that the applicant was entitled to the return of the monies in the account transferred to the company.

In the recent decision of Roderick Murphy J., *In the Matter of W & R Murrogh and the Stock Exchange Act, 1995* (2003), the learned trial judge elected to adopt the *Barlow Clowes* approach, noting:

> ''It is clear that the rule [in *Clayton's* Case] can be displaced in the particular circumstances of a case. The monies standing to the credit of the client bank accounts are very much in the nature of a mixed pool. In the *Barlow Clowes* case,Woolf L.J. took the view that the application of the rule in *Clayton's* case should not be applied if it would result in injustice between investors or ''if there is a preferable alternative.'' ''In the view of the court a compelling argument has been made by all of these appointed to argue against the application of the rule in *Clayton's* case. They stressed that its application would result in injustice between clients because it would favour those clients whose monies entered the accounts in the days immediately prior to the appointment of the Receiver.''

This document attempts to assist students completing 'last-minute' revision of the Equity & Trusts syllabus for the Law Society (FE1) Entrance Examinations. Key exam topics and most recent case law are highlighted. Students are advised that this document should not be used as a substitute for good overall coverage of the syllabus. Please feel free to contact me should you suffer last-minute nerves having read these last-minute night before notes! (087) 76 79 576. Philip Burke, City Colleges

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