FE1 EQUITY & TRUSTS
NIGHT BEFORE NOTES

8 Key Topics for Revision

- Maxims
- Injunctions, particularly Interlocutory *Quia Timet* Injunctions and Anton Piller Orders
- Rescission
- Secret Trusts
- Charitable Trusts
- Resulting Trusts
- Trusteeship
- Tracing

1. MAXIMS

This topic is usually examined as one part of a three part question, where candidates have to attempt two parts. It has always been a straightforward essay style question. In some years, the Examiner asked about their contemporary relevance, thereby catching out students who had rote learned mini essays which were short on modern caselaw. Therefore, you must be able to write about at least four maxims, you must have caselaw which highlights their contemporary relevance, and you will probably have no more than 17.5 minutes to do so.

Important Maxims & Caselaw:

Equity Regards as Done that Which Ought to be Done
- *Attorney General for Hong Kong v Reid* (1994)
- *Davis v Richards and Wallington Industries Ltd* (1990)
- *Shanahan v Redmond* (1994)

Equity will not Suffer a Wrong to be Without a Remedy
- *AG v Rathmines & Pembroke Joint Hospital Board* (1904)
- *Re Diplock* (1948)
- Caselaw concerning all important equitable remedies will illustrate this maxim in action
Equity acts “in personam”
- Re Diplock (1948)
- Agip (Africa) v Jackson (1990)

He Who Seeks Equity Must Do Equity
- Chappell v Times Newspapers Ltd (1975)
- Cheese v Thomas (1994)

He Who Comes to Equity Must Come With Clean Hands
- Smelter Corporation v O’Driscoll (1977)
- Fanning v University College Cork (2002)
- Tinsley v Milligan (1994)

Delay Defeats Equity
- JH v. WJH (1979)
- McGrath v Stewart (2008)

Equity Follows the Law, But Will Not Permit a Statute to be Used as an Instrument of Fraud
- Graf v Hope Building Corporation (1930).
- Rochefoucauld v Boustead (1897)
- McCormick v Grogan (1869)

Equity is Equality
- Burgess v Rawnsley (1975)
- EB v SS (1988)

2. INJUNCTIONS

This key equitable remedy is almost always examined. On the last occasion, the Examiner focused on interlocutory injunctions within the context of defamation proceedings and Mareva injunctions. Students who had not studied Quinlivan v. O’Dea (2009) in detail would struggle to achieve high marks in Part (a).

Nolan v. Emo Oil (2009) has significantly altered the landscape of interlocutory injunctions in an employment context.

Interlocutory quia timet injunctions and Anton Piller Orders are the ones most likely to be examined in October 2011. A good overall knowledge of Mandatory Injunctions is also advisable.

Interlocutory Quia Timet Injunctions
The Quia Timet injunction may be granted if:
(i) An injury to the plaintiff’s rights is anticipated or threatened, ie, it has not yet occurred, or (ii) where an injury to the plaintiff’s rights has already occurred, and the plaintiff fears its recurrence. The principles governing the grant of a quia timet injunction appear to be the same as those governing the grant of non-quia timet injunctions.

**Perpetual Quia Timet Injunctions – The Varying Approaches**

- *Attorney-General v Manchester Corporation* (1893), Chitty J remarked, “[the plaintiff] must show a strong case of probability that the apprehended mischief will, in fact, arise,” in order to establish an entitlement to a perpetual quia timet injunction.

- *Attorney-General (Boswell) v Rathmines and Pembroke Joint Hospital Board* (1904), relief was refused on the basis that no real danger had been proved. In a frequently-quoted passage Fitzgibbon LJ said, “[t]o sustain the injunction, the law requires proof by the plaintiff of a well-founded apprehension of injury -proof of actual and real danger - a strong probability, almost amounting to a moral certainty, that if the Hospital be established, it will be an actionable nuisance.”

- *Independent Newspapers v Irish Press* (1932) Meredith J held that the court would not grant a quia timet injunction ‘unless it is satisfied that there is a reasonable probability that what is threatened to be done is calculated in the ordinary course of events, or according to the ordinary course of business, to cause damage to the plaintiff.’

- In *Szabo v Esat Digiphone Ltd* (1998), Geoghegan J thought that the test expounded in Attorney-General v Manchester Corporation for perpetual quia timet injunctions probably went too far, and that the plaintiff should instead have to prove a “substantial risk of danger”.

**Interlocutory Quia Timet Injunctions**

It is well settled that, in deciding whether or not to grant an interlocutory quia timet injunction, the court will apply the *Campus Oil* principles. In *Szabo v Esat Digiphone Ltd* Geoghegan J remarked:

> “I would adopt and accept the treatment of [interlocutory quia timet injunctions] in Spry on Equitable Remedies, 4th ed., p. 459. The author makes it clear that there is no difference in the legal principles to be applied to a quia timet injunction as to any other injunction and that ipso facto there is no difference between the principles to be applied to an interlocutory quia timet injunction than to the granting of any other kind of interlocutory injunction. In each case what is being stopped is future conduct or misconduct and the fact that there may have been legal wrongs of the nature sought to be enjoined committed already is of evidentiary significance only. That is to say, it may aid in the consideration of whether such future wrongs may in fact occur.”

Geoghegan J’s remarks were approved of in *Ryanair Ltd. v Aer Rianta cpt* and *Garrahy v Bord na gCon*. Your Examiner tends to examine this topic in a reasonably straightforward and predictable way. See, for example, Question 7, April 2008 (‘Holiday Bliss’).
The Anton Piller Order

Anton Piller orders were developed as a means of dealing with cases where there is a serious risk that a defendant may destroy or otherwise dispose of prejudicial, probative material in his possession which may be of vital importance to the plaintiff if he is to establish his claim at a trial. An Anton Piller order requires the defendant to consent to a plaintiff, attended by his solicitor, entering his premises to inspect and, if necessary, take away any documents or articles specified in the order. Unlike a search warrant, an Anton Piller order does not authorise the plaintiff to enter without the defendant’s will.

It has been variously described as a “draconian power which should only be used only in very exceptional cases” (Donaldson LJ in Yousif v Salama (1980)) and “an innovation which has proved its worth time and time again” (Lord Denning in Rank Film Distributors Ltd v Video Information Centre (1982)). While such orders have been made in this jurisdiction, the dearth of written judgments makes it extremely difficult to ascertain current Irish judicial thinking on the concept. Such orders are particularly useful to plaintiffs who are the victims of commercial malpractice, such as breach of confidence, breach of copyright, and passing off. The Anton Piller order is obtained ex parte (applications are often heard in camera). By way of justifying the ex-parte nature of the application, Smyth J, in Microsoft Corporation v Brightpoint Ireland Ltd (2001), reiterated that the essence of an Anton Piller order is surprise, and so the publication of the existence of such an order in advance of its execution could weaken or deprive it of its element of surprise. The order may also require the defendant to disclose to the plaintiff the whereabouts of any document or item listed in the order.

The first reported case where an Anton Piller order was made was EMI v Pandit (1975). This case concerned a claim of copyright infringement. The court made an order ex parte allowing the plaintiff to enter the defendant’s premises to photograph equipment, inspect files and remove tapes. This form of injunction got its name from the 1976 Court of Appeal decision in Anton Piller KG v Manufacturing Processes Ltd (1976). The defendants had received confidential information and plans concerning the plaintiffs’ electrical equipment in their capacity as the plaintiffs’ selling agents in London. The plaintiffs had reason to believe that the defendants were selling the information to the plaintiffs’ competitors but were unable to prove this without access to documents situated in the defendants’ premises. The Court of Appeal made an ex parte order requiring the defendants to permit the plaintiffs to enter their premises and inspect documents relating to the equipment. Such an order would only be made in exceptional circumstances where it was essential that the plaintiffs should inspect the documents between the parties and there was a danger that vital evidence would otherwise be destroyed. See also Joblin-Purser v Jackman (1999), Carroll J.

Conditions
In Anton Piller, Ormrod LJ laid down four conditions for the grant of the order. The plaintiff must:
(1) Have an extremely strong prima facie case;
(2) Show actual or potential damage of a very serious nature;
(3) Have clear evidence that the defendant has incriminating documents or things and a real possibility of their destruction before an inter partes application can be made;
(4) Establish that the inspection will do no real harm to the defendant. The Anton Piller order must not be used for “fishing expeditions”.

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In *Emmanuel v Emmanuel*, the Anton Piller order granted allowed the wife’s solicitor to enter the husband’s residence and inspect a filing cabinet full of documents containing information on his earnings. The House of Lords upheld the concept in *Rank Film Distributors Ltd v Video Information Centre* (1982), although the Irish Supreme Court has yet to approve of the Anton Piller order.

It is unclear whether or not a defendant would be held to be in contempt of court for refusing to comply with an Anton Piller order that was later discharged. Buckley J, in *Hallmark Cards Inc v Images Art Ltd* (1977), held that while a defendant who does not comply with the Anton Piller order prior to the court’s setting it aside is technically in contempt of court, he did not feel that the defendant was liable if the order was discharged. However, this approach was not accepted in the later case of *Wardle Fabrics v Myristis Ltd* (1984). Here Goulding J held that contravening an Anton Piller order constituted contempt irrespective of whether or not the order was later set aside. As punishment for the defendant’s contempt he held that they were required to meet the cost of the plaintiff’s motion for contempt on an indemnity basis.

In *Elvee Ltd v Clive Taylor* (2002), the Court of Appeal reiterated the key criteria in applications for this form of relief, namely that:

- there be a strong prima facie case;
- the potential damage to the applicant be very serious; and
- that there be clear evidence that the defendants had incriminating material in their possession.

Remarking on the severity of the conditions, the Court of Appeal considered that it was necessary that such a high threshold attach to the relief given in light of the fact that the order would be made without hearing the other side’s arguments, and that the respondent would be required to afford access to the applicant to his premises, which might be his home. In light of this first reason, there was an especially pressing onus on the applicant to provide full particulars. In *Universal Thermosensors Ltd. v Hibben* (1992), Nicholls VC suggested that the order must be carried out during working hours and that a solicitor should be accompanied by a female if executing the order against a female respondent who may be present in the premises alone.

In an Irish context, two recent applications of this drastic remedy may be found in the High Court decision *Microsoft Corporation v Brightpoint Ireland Ltd* (2001), a case concerning alleged infringements of licensing agreements regarding computer software, and again in *O’Neill and Chiswick Ltd v Manro Group International* (2002) which involved a Swissbased investment fund. In the *Brightpoint* case, Smyth J cautioned that in the case of an affidavit sworn in support of Anton Piller relief, the deponent should err on the side of over rather than under-disclosure, since it is for the trial judge and not the applicant to decide on relevance.

In *O Ltd v Z* (2005), the Anton Piller order was considered within the context of the privilege against self-incrimination. During the execution of the applicant’s order, pornographic images of children were discovered on one of the respondent’s computers. Lindsay J held that the respondent’s failure to claim the privilege against self-incrimination at the time the inspection was carried out has caused him to lose the protection. As a result, the incriminating evidence was admissible against him.
3. RESCISSION

Key Decisions
- *Gregg v. Kidd* (1956)
- *UCB v. Williams*
- *Mooreview Developments v. First Active* (2011)

4. 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 Pughs Wills Trust* (1887), *Re Rees* (1920)), and where the legatee predeceases the testator.

5. 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).

6. RESULTING TRUSTS

While the entire topic is ripe for examination, particular sub-topics has proven to be particularly popular with your Examiner, for example, the rule in Re Osoba, where there is a surplus of funds voluntarily subscribed, Quistclose Trusts, presumed resulting trusts, joint-deposit accounts, and the presumption of advancement. Quistclose Trusts were examined in the last sitting. It would be advisable to have mini essays prepared for Osoba, the presumption of advancement and joint accounts at the very least.

7. 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) Renumeration
- 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 Thompsons 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. 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”:

Where 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 and where 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 form capable 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.
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 10. 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 interest.
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 selfinterest 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.

8. 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”. (See also, Bishops Gate Investment Management v Homan (1994)).

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 Hallet’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.
Innocent Volunteers
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, ie 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
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.”
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