REMEDIES OF BENEFICIARIES AND OF THIRD PARTIES FOLLOWING BREACH OF TRUST

The question at issue is, of course, a fundamental one: what happens when a Trustee, either through incompetence or with fraudulent intent, acts in breach of trust and deals with or disposes of trust property in a manner contrary to the rules of equity or of the instrument governing the trust relationship ? Are the beneficiaries of the trust protected from loss ? Equally, where property has been transferred to a third party in such a situation, what are the rights and liabilities of that party *vis a vis* the property, the trustees, the beneficiaries of the trust and any future successors in title to which the property is further transferred?

As is often the case in law, the answer is not a simple one, but dependant on the features of the particular legal situation in question and the consequent applicability of underpinning general principles.

The aim of this chapter is to complete the general treatment of the Trust contained in this lecture series with some preliminary detail on certain aspects of this important topic.

1. Breach of trust - the measure of the trustees liability

The fundamental principle in this context is that, where there has been a breach of trust, the trustee is personally liable for the loss which such breach has caused to the trust estate. As this liability is not necessarily a result of any intent or fraud on the part of the trustee, the aim of the liability rule is not to levy punishment on the trustee in breach, but to ensure compensation to the estate. In general terms, the trustee guilty of breach of trust, is required to compensate any loss caused to the trust estate , directly or indirectly ([1]) In contrast to other areas of the law - such as contracts and torts - rules of remoteness (rules relating to causality, nexus, and proximity of damage) do not apply. Special rules have however been established for particular situations in relation to the remoteness of damage. Special subsidiary rules have also been developed to cover cases of passive breach and vicarious liability, especially in circumstances where the breach has been perpetrated by a co-trustee.

Apart from the actions which beneficiaries may have against the trustee in breach, a trustee is always open to criminal liability (in larceny, for example) if his actions were such as to warrant prosecution. In a civil action, the extent of the trustee's liability is limited by normal principles of law . In all cases, court will decide if the breach was

[1]) Knott v. Cottee (1852) 16 Beav. 77

merely technical or substantial, so that the trustee's position is never one of strict liability. ([2]) In addition, there are numerous instances in which it is acknowledged that the trust estate may incur loss following a proper exercise of discretion by the trustee; in these circumstances, detailed rules protect the trustee from undue liability. Where, however, the trustee is found to be liable for the consequences of a breach, then beneficiaries will have direct recourse against his property.

To the extent that the trust property which is involved in the breach remains in the hands of the trustee and the trustee is solvent, then personal actions against him by the beneficiaries for breach of trust may be effective. Such actions are of an *in personam* nature and are satisfied by judgement against the trustee who is then required to compensate the beneficiaries from his own personal assets.

2. The insolvent trustee- tracing trust property

However, where the trustee is insolvent, personal actions against him will often be ineffectual. The claims of beneficiaries will only rank *pari passu* with the claims of other unsecured creditors of the trustee. Where assets are insufficient to satisfy all the claims of creditors, then the trust estate will only obtain a portion of the trust property which has been improperly dealt with.

In these circumstances, the law, in reality, has had to balance two undeniable exigencies : the established principles of commercial law which recognise equal treatment of creditors of the same ranking. ; and the general expectation that beneficiaries be well protected in a legal relationship based on a fiducial rapport, and not the result of any commercial endeavour, and that, in consequence, they have a primary right to the protection of the trust property placed in trust by them.

As a means of resolving this dilemma, the solution which has for centuries been adopted has been that of granting the beneficiary to a trust a possible means of keeping the trust property immune from creditors through the *in rem* remedy of *tracing*.

Tracing is a proprietary action which entitles beneficiaries, or those who have the rights of beneficiaries, to claim direct recourse against specific property , a portion thereof or property considered the equivalent of trust property, from the trustee, on the grounds that the subject property remains his property by virtue of the trust. In effect, this enables him to side-step the creditors net, on the basis that he is not a creditor, but an owner. Such a remedy is available to beneficiaries both where there has been a dissipation or alienation of trust property following (or constituting) a breach of trust, and where trust property has been misapplied.

In considering the topic of tracing one ought to bear in mind the fact that the modern ambit of the tracing principle is a combination of two historical branches of tracing -

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[2]) "Strict liability" in the English law sense of automatic, or objective, liability.

common law tracing and tracing in equity - which have now coalesced into a single set of precepts, but which continue nonetheless to constitute the necessary background to proper understanding.

3. Common law tracing

It is usually contended that remedies at common law only provide for a very limited form of tracing; while the extent of common law tracing may still be a contentious issue, it is undoubtedly true that the common law remedy is more limited than its equitable counterpart. So, while tracing in equity yields back the trust property, common law tracing does not necessarily lead to its recovery.

The most fundamental reason for this lies in the fact that the common law never developed a real action in relation to chattels. Any plaintiff in an action for conversion or action for *money had and received* pursued an *in personam* remedy against the defendant. This meant that the plaintiff did not have a right to demand specific recovery of the chattel. In actual fact, the defendant always had a choice between returning the chattel or paying damages. The procedural exception to this rule was established in 1854 when a discretion to award specific recovery in an action in detinue was awarded to the court ([3]) but the basic principle remained unchanged. There being no mandatory rule of restitution, it is clear that the conspectus of a tracing remedy was essentially limited.

On the other hand, the ownership of the chattel by the plaintiff in a common law action, albeit insufficient to require specific restitution ([4]), was nonetheless highly relevant where the defendant was bankrupt. In such a case, the plaintiff would be entitled to receive from the bankrupt estate either the specific chattel (at the estates discretion) or its full value. On one view([5]), this would mean that the plaintiff would be entitled to the full value and not merely a dividend share in the insolvency. This was the result of the principle that the chattel, being owned by the plaintiff, remained his property, in contradistinction to, for example, a credit, which is only a debt obligation and therefore subject to abatement. On the other hand([6]), it may be,in principle, that the personal right of the plaintiff would not be proprietary, being merely

[3]) Common Law Procedure Act 1854 s.78. Specific recovery of chattels was of course always available in Equity actions. Detinue was abolished by the Torts (Interference with Goods) Act 1977 (s.2).

[4]) Again we are here concerned with actions at common law. Specific performance and restitution were actionable in equity.

[5]) Goff and Jones "The Law of Restitution"

[6]) Hanbury and Maudsley Modern Equity (12th Edition,Stevens & Sons, 1987)

a right to prove for a dividend in insolvency in competition with other creditors. In the case of a trustee the issue is resolved by the Bankruptcy Acts, which affirm that assets held in trust by a bankrupt cannot be regarded as part of the bankrupt's estate.Without attempting to explore the issue in this note, it may be sufficient to say that it clearly, in either case, the plaintiff does possess some ability to attach his claim to the property. The perplexities surrounding the common law action are undoubtedly due to the nature of the interests protected by it. As has often been noted the common law was concerned with possession more than ownership and its actions were constructed on this basis. Consequently , one question yet to be fully resolved in legal theory in this connection, is the extent to which this precludes a proprietary basis for the tracing claim. It is submitted that the better view is that any claim is indeed essentially a proprietary one, and that any limitation on it is simply referable to the factual inability of the courts to ensure the return *in specie* of the property, or of its substitutes or products.

In any case, it was well established that the owner of a chattel could sue for possession (and obtain recovery or damages) if the chattel remains an "identifiable" object. For the chattel to remain identifiable does not mean that it needs to retain its original form: the chattel for instance may have been exchanged for another chattel, or converted into a sum of money; or any money at issue improperly converted into chattels. It is sufficient at common law that "the product of or substitute for the original thing still follows the nature of the thing itself, [so that]it can be ascertained to be such"([7]).

In the leading case of *Taylor v Plumer* , it was firmly established that the property could be traced into the possession of the plaintiff through whatever form it was converted to , whether different to or similar to the original (cash, goods, realty, documents) on the condition that it was not mixed with similar property of another party. The facts of the case itself provide an illustration. The facts were that a stockbroker was handed money with which to purchase exchequer bonds. Instead he purchased American investments, money and gold bullion. Before being able to flee the country he was intercepted by the investor and the assets seized. Upon the stockbrokers bankruptcy, the assignees challenged the recovery of the assets arguing that they should form part of the bankrupt estate and the investor's claim should compete with that of other creditors. They failed. It was held that the assets were ascertainable products of the investor's money and owned by him. As they had not been mixed with other assets of the stockbroker or third parties and as they had been wholly purchased with the lenders money, the latter could validly claim a common law right to trace them.

While, therefore, the common law could lead to recovery of the traced property, it could not adequately cope with more complicated situations. A major problem arose,

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[7]) Lord Ellenborough in Taylor v Plumer (1815) 3 M & S 562 at 575

for instance, at common law when the specific chattel was not kept, or was converted into money, which then was mixed with other moneys.
In this situation the common law remedy would not be available and the equitable action in tracing would need to be invoked to recover the property.

4. Tracing in Equity

Though wider than the common law equivalent, equitable tracing requires several conditions to be satisfied before it can be claimed.

5. The requirement of a fiduciary relationship

First, it is often asserted that a fiduciary relationship needs to exist as a necessary prerequisite to tracing in equity. This position is based on an interpretation of leading cases such as *Re Hallett* ([8]) and *Sinclair v. Brougham* ([9]) which however has been disputed.
Trustees are of course fiduciaries, and were the basis of the equitable action founded in a fiduciary relationship, actions following breach of trust would fit comfortable within its bounds. In the event, the important point raised by authority is that the fiduciary relationship need not be between the plaintiff and the defendant so long as it existed between the rightful owner of the property and the person to which it was originally entrusted. For example, B may confer property to the trustee T , who then improperly transfers it to C. B may recover from C even though there was no fiduciary relationship between them.

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[8]) Re Hallett's Estate (1880) 13 Ch.D. 696

[9]) (1914) A.C 398

6. The necessity of a proprietary interest?

Secondly, in order to establish the right to trace, the claimant needs to show that he had a proprietary interest in the property purporting to be traced at the time it was originally dealt with.

There is a great deal of discussion as to whether the interest needs to be equitable or whether a legal interest is also protected by this equitable remedy. In part the problem is a mere product of history. Born of the equity jurisdiction, equitable tracing could only adjudicate upon "equities". The concept of "ownership" claimable was therefore always equitable ownership. A complex subject, it need not concern us unduly in the context of breach of trust, as in that circumstance, the interest of the beneficiary is undoubtedly equitable.

An important departure from tradition, however, is the suggestion that the tracing remedy should not be limited to cases of proprietary interests alone. This notion has often been stimulated by a review of the controversial authority of Lister v Cobbs ([10]). In that case a purchasing agent received secret commissions from a firm supplying the plaintiff. Part of the funds were in cash at the time of litigation and part had been invested in land. The action requested recovery of the cash and moneys owed, an injunction against dealing with the land and a request to bring the investments into court (a tracing action). There was no difficulty in recovering the money. However the court refused the tracing action on the basis that the plaintiff had shown no proprietary interest in the land. The Court held that the plaintiff could not follow the money into the land, on the basis that he had had in fact no proprietary interest in the purchase money. Rather , the court held that there was a debtor-creditor relationship between the parties. In short it can be said that the court took the view that the money was "owed", rather than "owned", by the plaintiff. Those commentators who argue that equitable tracing should be based on the principle of unjust enrichment, decry decisions of this sort as being inadequate and as enabling one party (or its creditors) to unduly benefit at the expense of the other.

Despite the validity of these theoretical attacks on the present state of the law, it must also be said that, in practical terms, case law has evidenced a certain flexibility in discovering fiduciary relationships and equitable interests in order to arrive at appropriate results.

7. The beneficiaries interest

On the basis that a proprietary interest is needed for a tracing remedy to apply, one of the vital matters to ascertain initially, is the exact nature of the beneficiaries interest in

[10]) (1890) 45 Ch.d 1

the property improperly dealt with. If the trust is a fixed trust in specific property, then there is no question that the beneficiary has a proprietary interest and may claim a tracing remedy. The problem arises where the trust is a discretionary one.

In a fixed trust the beneficiary has a proprietary interest. He is regarded as the owner of an equitable interest in the trust property. In a discretionary trust on the other hand, the beneficiary is dependant on the exercise in his favour of the trustees power of selection. It has been held that he does not, in fact, have any quantifiable property. Even a sole member of a class of discretionary beneficiaries is not entitled to any fund while there is the possibility of another member coming into existence.

It follows from this that the beneficiaries of a discretionary fund will not be able to invoke the equitable remedy of tracing.

8. Mixed bank accounts

It has been emphasised thus far that tracing is available only when the trust property is identifiable. Identifying the property can be a most difficult exercise when the trustee in breach has mixed the trust funds with his own in a single bank account.
As a matter of principle, equity will allow property to be traced into money and money to be traced into bank accounts. The difficulty is, of course, that there it tends to lose its separate identity. Fortunately, this is not an insurmountable problem.
In the final analysis, even the common law remedy had no difficulty in theory in asserting that mixed moneys are not disqualified *per se* from being traced. As long as they were not confounded in the otherwise indistinguishable mass : tracing is allowed for "money on a bag or otherwise kept apart from other money , guineas or other coin marked, if the fact were so , for the purpose of being distinguished , and so far ear-marked as to fall within the rule on this subject" ([11]). In modern terms, if the trust moneys are kept separate in some manner - separate accounts, or separate accounting, then tracing would be available. Moreover, it would appear doubtful that the principle of tracing is based on any premise that the funds *in species* be separated, for then the remedy would, in effect, only relate to coin, rather than money, which it clearly does not.
Where the trustee has only one bank account (which, of course, in itself constitutes a breach of trust) and trust and non-trust moneys flow into it, it is often the case that withdrawals and deposits are made on a regular basis. This creates a real difficulty in recognising as trust property the property which effectively lies in the account (or what property was actually purchased with trust money from the account and consequently should be deemed to be trust property).
Equity has evolved a number of rules which govern the allocation of remaining moneys and of moneys paid out in these situations.
The general rule is that the trustee is presumed to have withdrawn his money first from the mixed account. This corresponds to the notion that whenever an act "can be done rightfully, [one] is not allowed to say , against the person entitled to the property or the right , that he has done it wrongfully."([12]) This was well exemplified in the case of *Re Hallet's Estate*. There a solicitor had, before his death, mixed funds pertaining to himself and to a trust, of which a certain Mrs Cotterill was beneficiary (and of which he was not trustee). At his demise the account did not contain sufficient funds to pay the solicitor's personal debts and meet Mrs Cotterill's claim. The court held that payments from the fund were withdrawals of the solicitor's personal funds, thus

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[11]) Lord Ellenborough in Taylor v Plumer (1815) 3M & S 562 at 575

[12]) Re Hallets Estate (1880) 13 Ch D 696

leaving enough in the account to pay Mrs Cotterill. A mathematically precise ruling which acts as a comfortable guide in tracing matters.
This rule is however only a reflection of a more general principle and should not be automatically applied. In *Re Otaway* ([13]) a trustee withdrew money from a mixed fund and converted it into investments; later he withdrew the balance and dissipated the money. The court in this instance did not hold that the money invested was to be considered the trustees own funds. Rather, the beneficiaries were allowed to trace to the investments on the basis that these represented an identifiable part of the mixed fund. This judgment is consistent with the principle that the onus is on the trustee to prove that specific property in a mixed fund is his property and not the beneficiary's. Various writers interpret the ruling in different ways. It may be that regard should be had to intention. More convincing, perhaps is the view that the beneficiary may be said to have a first charge on any property in the mixed fund. This in turn means that he will have a first charge either on the remaining balance in an account (as in *Re Hallet*) or on any property brought out of it (as in *Re Ottaway*), depending on the circumstances of the case.

9. The advantages of tracing

Aside from the obvious advantage that tracing does not depend on the solvency of the trustee, the remedy also offers other advantages over a personal action.
To begin with, the action is not subject to the *Limitation Act 1980* (according to which the limitation period for a personal action for breach of trust is six years) but only to the equitable doctrine of *laches*. This in effect permits a tracing action to be instituted many years after the date of breach.
Secondly, interest on an income-producing asset carries interest from the time it comes into the hands of the defendant, rather than from the date of judgment, as in the case of the personal action.
Finally, there is no doubt that the plaintiff in a tracing action usually has an election to take the property in question in full or partial satisfaction of his loss, rather than to accept damages.

10. The limits of tracing

As mentioned above, the tracing remedy in its most significant context- that of insolvency - is a delicate balance between two competing interests: that of the beneficiaries to the trust, and those of creditors of the insolvent trustee.

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[13]) (1903) 2 Ch 356

Two solutions are logically possible in a contest of this sort. The first is to sustain that the paramount interest to be protected is that of the beneficiaries: they , in a sense, are passive spectators, who did not appointed the trustee and therefore expressed any commercial judgement in that regard; any breach of trust will not imply any fault of judgement on their part. Creditors of the trustee, on the other hand - it may be argued - place commercial faith in the trustee and his bankruptcy is the price of misjudgement which, they will, in the normal course of events be expected to pay. Under this perspective, the paramount choice for the system is to ensure that the trustee first perform the trust. In order to ensure this, it may be argued that his entire assets be available for that purpose, even if this exhausts them. The second extreme view would be to argue that any trust funds should not be in the personal account of a trustee and that creditors, in assessing the financial viability of a trustee would expect this to be the case.According to this view, it is considered unduly harsh on creditors to unexpectedly find that the trustee in bankruptcy has to pay beneficiaries out of the trustees personal estate before satisfying any of their claims

As is obvious from the principles cited above, the law has attempted to steer a course between two extremes in order to provide a balanced solution to a difficult problem. And it has had to do so while maintaining theoretical coherence.

In partial answer to the strong, "creditors" position, it may be possible to entertain the following line of thought: if indeed it is true to say that trust moneys in a fund are ,in terms of legal principle, considered to be subject to an *equitable charge* (in favour of the beneficiary) then may actually mean that - for all intents and purposes - a tracing beneficiary is himself also a creditor; the crucial difference being, of course, that he is treated as a creditor having a

preferential claim (the charge) over other creditors ([14]).
One last question to briefly consider in this short note, is the manner in which third party rights, and the rights of beneficiaries in respect of third parties, are treated following a breach of trust.

11. The position of third parties receiving property

Generally speaking, where property is transferred by a trustee to a third party following a breach of trust, regard must be taken of both the status of the recipient and the nature of the property which is purported to be transferred. Normally the matters which need to be determined are issues such as the following:

- do third parties have title ?
- can they sue the trustee ?
- can beneficiaries have the property back?
- what occurs where there is collusion between the beneficiary and third parties ?
- questions of notice
- is there a personal action against third parties by beneficiaries ?

Where the property transferred are tangible assets, the first question to be asked is whether title to the goods is validly passed when the trustee in breach of his trust. Theoretically, where, for instance, the trustee acts ultra vires the trust deed, it would have been possible for equity to say that the transfer was inoperative. However, this would clash with the deportment of the common law, which viewed the holder of the legal title (the trustee) as the owner of the goods with the full right to dispose of such property([15]). In fact, it would have meant that equity would have openly contradicted the position of the common law courts.
As equity was complementary rather than in competition with the common law system of remedies, this would not have been a correct result ([16]).

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[14]) Jessel J. in Re Hallets Estate (1880) 13 Ch D 696 at 709 thought that the beneficiary could "elect either to take the property purchased, or to hold it as security for the amount of trust money laid out in the purchase :or, as we generally express it , he is entitled at his election either to take the property , or to have a charge on the property for the amount of the trust money." Contrary dicta can be found in other cases such as Re Tilley's Will Trusts (1967) Ch 1179.

[15]) at law.

[16]) Indeed one of the historical maxims of the equity is that "Equity follows the law".

So a transfer of trust property by a trustee in breach of trust remains a valid alienation of title, or there is a breach of legal logic.
Of course this is not a satisfactory state of affairs from the beneficiaries point of view. The principle needs to be supplemented with an equitable precept. Fortunately,it is.
To begin with , in terms of formal analysis, the trustee is said to be entitled at all times to alienate his legal estate, or interest, in the goods, but not the equitable estate, or interest, which is not his, but the beneficiary's. Consequently it is open to the equity jurisdiction to hold that, not only does the beneficiary have a personal right against the trustee for the breach, but (as we have seen in the tracing remedy) an *in rem* right in the property, to the extent of the equitable interest therein.
Now, on the basis of this logic it would be expected that when property is sold or otherwise transferred to a third party, then this third party's title is actually second to that of the beneficiary's. This is not, of course, the law, for otherwise it would be inconsistent with common law principle, as we indicated above.
How can one reconcile these two apparent contradictions.?
Part of the answer is to be found in a study of the nature of legal and equitable estates, or interests (which, however, we will not dwell upon in this context), which must not be seen in a strict Roman sense, and part is to be found in an analysis of the historical roots of the equitable doctrine.
In this last respect, it is immediately noticeable that, rather than focusing on the nature of the interest transferred, equity, historically, tended to focus on the status of the alienee (the receiver of the goods). It is usually said -in rather picturesque terms - that it fixed upon the "conscience" of the defendant. This meant that, if the court felt that in the circumstances the third party ought to have held the property for the benefit of the beneficiary - for example, he had known of the breach of trust at the time of transfer - then his conscience was said to be "bound". The courts did not merely exercise a discretionary judgement but based their ruling on analytical grounds. In analytical terms, the third party was treated as if he was the trustee of the goods and the beneficiary was allowed the same remedies against him as against the trustee . In this manner, it was possible for equity to maintain legal logic, while applying a technical doctrine yielding desirable results.
In essence, then, it may be said that a trustee in breach of trust may validly transfer the legal property of the trust goods to a third party . However, if this party does not have any "merits" in equity., he may not, by virtue of the beneficiaries equitable estate, or interest, deal with the goods as if he had unfettered title to them, but will hold them on trust for the beneficiary; since the trust is not express or implied, it is known as a "constructive" trust. ([17])

[17]) The original concept of constructive trust in the common law is not to be confused with the device used in modern American law, an offshoot of the original notion, which is still part of its common law.

12. No merits

Equity will obviously not regard a third party with notice of the breach of trust as having any merits to answer the beneficiaries case. Nor will it regard the claim of the beneficiary to be a good one if there was any hint of acquiescence or collusion between him and the trustee ([18]).

Even where the trust property has found its way into the hands of a person who has not had actual or constructive notice of the breach of trust (also known as the Innocent Volunteer), the rule is that his title is subject to the beneficiaries equity. This usually means that, given a choice between the interests of a gratuitous alienee who has received the property without paying for it, and that of the beneficiary who has been defrauded of it , the courts have generally decided that principle (if not, indeed, policy) requires that the latter's interests be better protected. An easy choice usually. Complications arise however, when the trust funds have been mixed with the innocent party's funds or have, in the normal course of events, been dissipated. In these circumstances the applicable law makes allowances for the fact that the innocent volunteer is not actually guilty of any fault, and has established a set of distinct principles to reflect this ([19]).

13. Bona fide purchaser for value without notice

The choice between the equities of a wronged beneficiary and the rights of a third party receiving trust property improperly is in a sense easier to resolve in the case of a purchaser for value without notice. Where a third party has purchased trust property for consideration,then he is exposed to loss in the same way as the beneficiary and it is obviously not possible to say that such a party has no equity. In addition, if the purchase was made in good faith without notice of the breach of trust (whether actual or constructive), then the purchaser is said that he had a clear conscience. In the case of a sale to such a bona fide purchaser for value without notice, equity will recognise that the purchaser's title is good as against the beneficiary and the latter will not be able to trace his interest to the property. In those circumstances, the beneficiary can claim from the trustee the moneys received by him on the sale.

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[18]) The law has always applied the principle that "ex turpi causa non oritur actio"(no action arises from a base cause). Equity has always asserted that "he comes with to equity must come with clean hands" (a maxim of equity). Vide eg. Court of Appeal in Tinsley v Milligan (1991)The Times 22 August.

[19]) Though important, the strictures of space prevent the author from treating this aspect here.

Though a powerful exception to the general rule, it is subject to a number of significant provisos. For instance, the purchaser must purchase the legal estate, and not, for example an equitable interest ([20]).
As the concept of constructive notice is often extensively applied, the purchaser of any property from a trust is usually well advised to be cautious in his dealings. In modern conditions ([21]), this fails to present a serious problem except perhaps in complicated structures such as that of trading trusts.

14. Non-tracing remedies of the beneficiary against third parties

One final question that needs to be touched upon, is the extent to which, failing a tracing remedy, beneficiaries would have any recourse on an *in personam* basis directly against third parties, including innocent volunteers, in possession of the trust property.
It appears that such a personal action is available. The leading authority in this regard is Re Diplock([22]). In that case, executors distributed large sums of money to 139 charities on the basis of a testamentary gift. The residual bequest in question proved to be invalid and the next-of-kin claimed a right to recover in rem with respect to the money and an action *in personam* against the recipient for the remainder. The House of Lords upheld the action.
Although the propositions of law at the basis of the decisions have not all been finally settled, it appears that such an action in equity is possible. The exact boundaries of the claim are still, however, the subject of some discussion.

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[20]) Dearle. Hall (1828) 3 Russ. 1

[21]) for reasons which will not be treated here.

[22]) (1948) Ch.465