Nella primavera 1992, Kate Standley (lecturer of law) e John Standley hanno tenuto un ciclo di lezioni sul diritto inglese dei *trusts* nell'ambito del corso di Diritto Privato Comparato tenuto dal Prof. Diego Corapi presso la Facoltà di Giurisprudenza della LUISS. Il corso ha costituito l'occasione per un approfondimento istituzionale della disciplina inglese dei *trusts* che si rivela di particolare importanza in questo periodo storico, nella prospettiva del diritto comparato.

Il Diritto inglese dei trusts

di Kate e John Standley

INDICE:

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Chapter I

INTRODUCTION TO THE ENGLISH LEGAL SYSTEM

I understand that in Italy, as in other Roman Law systems, most of the law is codified. The consequence of this is that the Courts are to a great extent able to resolve problems by reference to the codified law and to the works of leading academic legal authorities. Of course, the answer to every problem will not be immediately ascertainable in black and white and it is here that the courts have to interpret the law. I understand that they do this primarily by reference to broad principles laid down in the code, which they apply to the facts of the case.
The situation is somewhat different in English law.
No doubt because we in England have been fortunate enough to enjoy a very long period of stability, the English law (which also relates to Wales and Northern Ireland but not to Scotland, where the legal system is very different from ours) has never been codified. A high degree of uniformity in the application of the law was achieved in mediaeval times, when the King's judges would travel the country, holding courts at each of the major towns in turn and thus there was never a need for codification.

1. PRINCIPAL SOURCES OF LAW

There are two principal sources of English law. On the one hand there is legislation - in other words law which has been enacted by Parliament, such as the Trustee Act, 1925, which we will be encountering frequently in this course ; on the other hand, there is case law - which is the law as laid down by Her Majesty's judges in the courts of superior jurisdiction and which is binding upon all inferior courts.
During this course you will encounter and study a considerable amount of case law. You will come to learn that under English law the judges have the function, at least in theory, of only interpreting and applying the law but not of actually making it.
Some cases are concerned with the interpretation of statutes - that is to say Acts of Parliament, the meaning of which is not always clear. However, a great deal of

English law is not covered by legislation at all; for instance, the laws relating to torts - civil wrongs, such as negligence or trespass -and, more importantly to us, some types of trust - constructive trusts, implied trusts and resulting trusts - are hardly touched upon by laws passed by Parliament, but are regulated by law laid down by judges in what are called leading cases.
A leading case is the case, decided by one of the superior courts, in which a particular legal point was first decided or clarified or a particular legal principle laid down and is the case by reference to which all subsequent cases founded upon similar facts are decided.

2. HOW JUDGES MAKE AND DEVELOP THE LAW

I said just now that, in theory, judges do not actually make the law, but the reality is that in some cases where the existing law is not clear or perhaps where social conditions have changed so that a decision of the courts which was appropriate a hundred years ago would nowadays seem wrong even if the facts were similar, the judges reach decisions which become part of the law and which bind all inferior courts.
I want you to understand when you look at the reports of cases that it is only those cases that clarify a previously unclear area of law or lay down a new legal principle or further develop an existing one that are reported. It is the law established by these cases which binds all inferior courts dealing with any case based on similar facts. Thus if you are a party to litigation and the relevant case law does not appear to be in your favour you will either have to accept the position and expect the court to find in favour of your opponent, or you must attempt to distinguish your case from earlier reported cases on the grounds that the significant facts of your case differ from the facts of those cases. Judges who feel that in a particular case the present law is for one reason or another unsatisfactory will try to distinguish a case on its facts and thus justify reaching a decision differing from those reached in earlier reported cases. Thus, although in theory judges only interpret the law they do in fact play a major part in developing and making the law too.

3. STRUCTURE OF CIVIL COURTS

Before I go any further, I should explain very briefly the structure of the English civil courts, by which I mean those courts which have civil as opposed to criminal jurisdiction.
The High Court, where most actions concerning trusts are brought, is divided into three divisions: the Family Division - dealing, as its name suggests, with divorces,

children and other family matters; the Queens Bench Division - which deals with a great deal of civil litigation; and the Chancery Division - which deals with cases requiring equitable remedies.

Inferior courts, when dealing with a case the relevant facts of which are similar to those of an earlier case decided by the High Court, are bound by the decision of the High Court. In other words, the doctrine of judicial precedent imposes upon the inferior court the duty to decide the case in the same way as that in which the earlier case was decided. Because the High Court is, however, not bound by its own decisions, comparatively few of the cases which you will study will be ones which have proceeded no further than the High Court because the authority of this court, when not tested on appeal, is of comparatively little weight when dealing with difficult areas of the law.

Of much greater authority is the Court of Appeal, which deals with appeals from the High Court; much of the case law which you will study in this course will come from the Court of Appeal. The Court of Appeal is bound by its own previous decisions except

1. Where there are two earlier conflicting decisions, in which case it can choose which one to follow.
2. An earlier decision of the Court of Appeal is inconsistent with a decision of the House of Lords even although that decision of the Court of Appeal was not expressly overruled by the House of Lords. I will explain to you in a moment the function of the House of Lords.
3. The earlier decision of the Court of Appeal was made *per incuriam*, i.e. it failed to follow a relevant authority.

The Court of ultimate jurisdiction in England, to which a minority of important cases come by way of appeal from the Court of Appeal, is the House of Lords, and a decision of this court binds all other English courts, but the House of Lords is bound by the European Court of Justice. The House of Lords is not bound by its own decisions, at least in theory, but because one of the most important aspects of justice is certainty, the House of Lords in practice nearly always considers itself bound by its own previous decisions. Only a tiny minority of cases actually goes as far as the House of Lords, but because these are cases dealing with important principles of law quite a high proportion of the leading cases you will encounter will be decisions of the House of Lords.

Judges are not, of course, above legislation passed by Parliament, and if there is clear and unambiguous statute law upon the point in issue their duty is to apply it whether they like it or not. However, sometimes the statute law is not clear and in other instances there may be no case law upon the point in issue, and it is then that we must rely upon the judges to make the law.

Over the centuries the law has developed and continues to develop to take account of different social needs and circumstances. Numerous common law and equitable principles have evolved and form the basis of the reasoning of the judges in their judgments. I mentioned common law and equitable principles; it is upon the latter that much of trust law is founded and I must therefore attempt now to explain to you the meaning of the terms 'Common Law' and 'Equity' and to distinguish the one from the other.

4. COMMON LAW AND EQUITY

Of course, when a dispute arises the law will in the majority of cases be clear, and even where the law applicable to the case is not laid down by statute it will usually be covered either by common law, which is the law of the land established and developed over a period of many centuries and applied by the judges, or by equity. The common law is called common because it was and is the law common to the whole land.

Equity is a separate system of law which has developed alongside the common law, sometimes conflicting with common law, but more often complementing it. All divisions of the High Court have both common law and equitable jurisdiction, but if your case is in a category such as trust cases, where an equitable remedy is sought, then the case should be brought in the Chancery Division.

We are going to be very much concerned in this course with equity, for it is through the courts of equity that the trust concept has been created and developed. When comparing the position, in any given case, between the way it is dealt with under the common law and the way it is dealt with in equity, it is usual for lawyers to refer to common law merely as 'law'. This carries some risk of confusion, for the law of England embraces both common law and equitable principles. In order to attempt to avoid the risk of such confusion I will, when I am referring to common law try to call it 'common law' rather than 'law', but, if I tell you that the position in equity is such and such, but at law is something different, the term 'law' used in this sense will refer to common law.

5. THE ORIGINS OF EQUITY

It is now necessary to examine the origins of equity, and you are now about to hear the most important and fundamental few words in the whole of your trusts course.

English law recognises two quite different concepts of ownership of property; moreover, it is often the case that one item can be owned at the same time by more than one person, in more than one way. This one short statement is the cornerstone of everything you will hear about the law of trusts. Trust law is very much concerned with people and the relationships between them, but the basic concept of a trust has to do with the ownership of property.

In the case of most personal property - in other words goods, or property other than land - there is one absolute owner whose ownership is recognised both at law, that is common law, and in equity, but sometimes goods, and quite often interests in land, are held in trust. This means that the legal title, that is to say the title to goods or land which is recognised by the common law, is vested in a certain person or persons, but they hold the property on behalf of, or in trust for, another person or persons, who have the beneficial or equitable title.

I said a few moments ago that either goods or land could be held in trust; indeed, anything capable of being owned can be held in trust. There is, however, one point which I shall have to deal with at this stage: under English law you or I can own goods - our cars, furniture, clothes etc. - but strictly speaking we cannot <u>own</u> land, by which term I include houses and anything else which is a permanent part of the land. We can in fact only own an <u>estate</u> in land. The greatest estate in land is called the fee simple absolute in possession. If you own such an estate you will regard yourself for all practical purposes as the owner of the land, for you will be free not only to occupy it but also to sell it, let it or leave it by will. However, the strict legal position is that all land belongs to the Crown and that therefore no person can own land but can merely own an estate or interest in land.

The fact that the Crown owns all land in England and Wales has an important bearing on the development of equity and of the concept of the trust and we are about to look at this in a little detail.

How is it that property can be owned by more than one person in more than one way at the same time? How is it that two legal systems - those of common law and equity - coexist and in general complement each other rather than conflict with each other? I am going to have to touch briefly upon a little English legal history.

Before the Norman Conquest of England in 1066 England, along with other continental countries, was subject to the system of feudalism. After the Norman Conquest feudalism was extended in a more developed form but nevertheless the system began to fall into decline and continued to decline long before the conception or development of equity. However, the feudal system was the unwitting ancestor of equity.

In other European countries, the Crown granted some of its lands to lords in exchange for money or military services, thus becoming supreme lord of some, but not all, land. In England, however, because the principal landowners resisted William I's attempts to assert his supremacy, the king confiscated all land and allowed it to be held or redeemed by overlords in exchange for money or services. That is how all land came to be held from the Crown, and so in theory it remains to this day, even although practically all the old feudal services have not been rendered for many centuries and have long since become time-barred - in other words they could not as a matter of law be revived in view of the time that has passed.

Under the great land-owning lords there were lesser tenants who paid money dues or rendered services to their overlords, and in turn they had other tenants under them who provided goods or services, and so on. This system (called subinfeudation) quickly became cumbersome and impractical, and in 1290 a law was passed prohibiting any further subinfeudation. After this, because of inflation, many feudal dues decreased in value, ceased to be worth collecting and became time-barred. Thus nearly all land is now held directly from the Crown.

Despite the diminution in the value of services and money payments, many important feudal incidents remained; in particular a money payment became due to the lord on the death of a tenant and the succession of his heir to the land. However, if there was no heir the land reverted to the lord. Tenants could have avoided these dues by conveying, that is transferring, the land to younger members of the family or leaving it by will, but taxes were imposed on conveyances in order to discourage them, and until 1540 freehold estates in land could not be left by will.

It was important to know who held land, although many people preferred to transfer their land secretly. The law also tried to prevent the avoidance of dues by rendering it illegal to create future interests - thus I would not have been able to make my house over to Kate for life and after her death to our children; any transfer of land had to take immediate effect.

Another problem in the early years after the Norman Conquest was that the Common Law was obsessed with procedure. Anyone wanting to take any sort of dispute to court had to issue a writ in the correct form, and as the law developed, the number of different types of writ proliferated. This was seen by some as a problem and in 1258 a law was passed forbidding the issue of any new form of writ without the consent of the King's Court. This created further difficulties, for the King was often away in another part of the country or abroad, or in the case of some kings, too young to rule.

Thus the legal system was harsh and onerous and frequently unjust, and it was against this background that equity was born. Those who wanted to turn to the King for relief were often disappointed because of his unavailability, but the high-ranking ecclesiastical officer, the Chancellor, who was the keeper of the King's conscience, and was learned in the law, (nowadays he is the judge known as the Lord Chancellor, who is the head of the judiciary) had power to act on behalf of the Crown and to mitigate the rigours of the common law by acting on notions of conscience and justice. He also had power to enforce his orders - if necessary by imprisoning those who disobeyed them.

By about the fifteenth century the Chancellor's office had evolved into something more like a court and thus the Court of Chancery came about - and remained in being until 1873 when it was succeeded by the Chancery Division of the High Court of Justice. Whereas originally the Chancellor used his discretion in each individual case without applying any fixed criteria governing the manner of its exercise, the Court of Chancery gradually developed so that eventually its decisions were based on various rules and policies which had grown up over the years, so that we now have the position where although the remedies available in equity are of a wider-ranging nature than those available at law (common law) they are nevertheless granted strictly in accordance with the rules of equity and strictly in accordance with precedent established by decided cases.

I do not want to give you too much early history - the purpose of these lectures is to introduce you to English Trust Law rather than English mediaeval history - but I cannot avoid saying a little more.

From very early days, even before the Norman Conquest of 1066, land had sometimes been held by one person on behalf of another for a particular purpose or use. I have mentioned feudal dues which arose on the death of a tenant; if land were conveyed to a number of persons who held the legal estate - in other words the title to the land which was recognised by the common law Courts - on the death of one of them the land would pass automatically by survivorship to the others who survived and no feudal dues would arise. Thus the practice arose of conveying land to a number of persons who held the legal estate on behalf of the true owner of the land, so that on the death of the true owner the land would pass to his heir without any financial penalty being incurred.

Another reason why the legal estate to land was held by persons on behalf of ohers was because certain bodies, notably Franciscan monks, who had sworn vows of poverty, could not hold property in their own name and therefore land was held on their behalf and for their benefit by other people.

The problem with these arrangements was that the common law recognised only the holders of the legal estate as having any interest in the land, and if they, in breach of the trust placed in them, used the land for their own purposes thus depriving the true owner, the law would not intervene to assist the true owner, or, as we call him, the beneficial owner.

However, from about 1700, the Chancellor ensured, by the device of acting upon the conscience of the holder of the legal estate, that the land was held for the benefit of the true owner. The legal estate was unaffected, but equity recognised the beneficial owner as the equitable owner. Thus we have the background to the situation where ownership can be divided and also to the development of the two separate systems of law.

Chapter II

INTRODUCTION TO THE TRUST CONCEPT

At this point we have the beginning of the concept of the trust - I hold land and convey it to you on trust for another person - let us say a person called Roberto. What I convey to you is the legal estate, but you do not own the beneficial interest in the land. That is owned by Roberto. You become the trustee and Roberto becomes the beneficiary.
By means of the trust, became possible to control the transfer of land over several generations. Trustees could hold land on trust for a beneficiary who had merely a life interest - in other words an entitlement to occupy the land (including perhaps a house) for his life, and to enjoy the profits from the land during his life; he could work the land or let it and in either case was entitled to the income produced, but on his death it would pass to, say, his son, who would hold it on the same terms for his life, the land passing thereafter, say, to his son absolutely, at which point the trust ended.

1. DEFINITION OF A TRUST

It is not easy to define a trust because trusts take many different forms and fulfil many different purposes. One definition given by an English authority called Underhill is:

'A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called trust property) for the benefit of persons (who are called beneficiaries or cestuis que trust) of whom he himself may be one and any of whom may enforce the obligation'.

This definition is valid for most forms of trust, but does not cover charitable trusts, which are enforced by the Attorney-General and not the beneficiaries; nor does it cover a small group of trusts for non-charitable purposes recognised as valid despite the absence of beneficiaries who can enforce them. Thus one of the hallmarks of a trust, unless it is charitable, is that there are beneficiaries who can enforce it. I will in due course describe briefly the exceptional non-charitable private purpose trusts, and Kate will later tell you something about charitable trusts.

2. TRUSTS DISTINGUISHED FROM CONTRACTS

It is very important to be able to distinguish trusts from other forms of legal transaction, notably contracts and loans.

Here is an example of a contract: I agree with Kate that in consideration of a payment by me, Kate will confer a benefit on you. Let us say that I agree to pay Kate £1,000 and Kate agrees in return to arrange and pay for a holiday in Colchester for you. Under English law a person who is not a party to a contract cannot enforce that contract. If Kate fails to provide you with your holiday then you cannot sue Kate. I, being a party to the contract, can sue Kate, but you cannot force me to do so. Perhaps you can tell me whether you, who are not a party to the contract, can sue Kate under Italian law?

Now let us take a slightly different example, this time not of a contract but of a trust: I settle £1,000 on you, appointing Kate as trustee. In other words I hand £1,000 to Kate on terms that she holds it for your benefit during your life. You are the beneficiary and are entitled to a life interest in the £1,000, after which it goes to some other beneficiary with whom we are not here concerned. I have completely divested myself of all interest in the £1,000 and cannot enforce the trust. However, if Kate does not pay the income to you, you can sue Kate in equity and obtain an order that Kate complies with the terms of the trust. Because this time we are looking at a trust and not a contract, I could only sue Kate if I were also a beneficiary.

Thus we have a vital distinction between contracts and trusts; in English law a person who is not a party to a contract cannot enforce the contract, but a beneficiary under a trust, even although not a party to the original constitution of the trust, can enforce the trust, and is the only person who can do so unless either the settlor or the trustee is also a beneficiary. If the relationship is purely contractual then the third party has no rights. The courts will, however, endeavour in appropriate cases, to find that a trust has been created.

3. TRUSTS DISTINGUISHED FROM LOANS

Another situation where trusts and contracts must be distinguished from each other is the case of the relationship between a debtor and creditor. If I lend money to you you are liable to repay me as a term of the contract between us. The law of contract applies, but you are not a trustee of my money. If someone steals the money from you you cannot say 'sorry, I cannot repay you'. You are still bound by contract to repay that money.

If, however, I set up a trust and hand money to you as part of the trust assets, then you are under a very high duty to take care of the trust money. However, provided you do take proper care of the money, but through no fault of your own it is lost or stolen, you are under no personal obligation to replace it.

However, if you are holding money in the capacity of a trustee and become bankrupt, then your creditors will not be able to claim any property you hold as trustee. For the purposes of the bankruptcy laws the property or money never belonged to you and therefore is not available for distribution amongst your creditors. There is an equitable maxim that where common law and equity conflict equity shall prevail. Thus in the case of a bankrupt trustee he is at common law the owner of the trust property but the beneficial ownership of the property belongs to the beneficiary. Thus the property never was part of the personal assets of the bankrupt trustee.
There are, however, circumstances where a loan can give rise to a trust. There is an interesting line of cases starting with one called **BARCLAYS BANK LTD v QUISTCLOSE,** and we will be looking at these in some detail.

3.1. A loan can also be a trust

These cases, where both legal and equitable obligations are to be found, are worthy of study and will give you some idea of the versatility of the trust concept. I will therefore run through the cases with you now in some detail.

- QUISTCLOSE
An example of this type of trust, where a loan can also be a trust, is where A hands to B an identifiable sum of money to be used for a particular purpose. In order to create a trust it is not essential that the debtor declares himself to be a trustee or that any express words creating a trust are used. This principle has been established for many years, but the leading authority is the House of Lords decision in **BARCLAYS BANK LTD v QUISTCLOSE INVESTMENTS LTD (1970).** In this case a company called Rolls Razor Ltd was in serious financial difficulties. Their bankers were Barclays Bank Ltd, to whom they owed half a million pounds, although the permitted limit imposed by the bank was only £250,000.
Rolls Razor had already declared a dividend on their ordinary shares but needed another £210,000 to be able to pay them. The only way they could pay the dividend was by borrowing the money. A Company called Quistclose Investments Ltd, the defendents in the case, made them a loan of £210,000 "on condition that it is used to pay the forthcoming dividend due on 24th July next". This sum was paid into a special account at Barclays Bank Ltd on condition, agreed with the bank, that it would only be used to meet the dividend due on 24th July, 1964. Quistclose were thus trying to protect their money from the creditors of the company, should it go into liquidation before paying the dividend.
Rolls Razor in fact never paid the dividend and did go into liquidation at the end of August, 1964. Barclays Bank wanted to take over the money in the special account in reduction of Rolls Razor's debt, but the House of Lords held that Barclays Bank held

the money on resulting trust for Quistclose, so Quistclose were able to recover the entire sum.
This decision seems to depend on the fact that the money was to be used for a special purpose which was known to the recipient, Barclays Bank, and may also depend on the fact that the money was paid into a special account. For Quistclose principles to apply the really vital point is that the money should be earmarked for a specific purpose and no other.
The important point is that it must be made clear that the moneys are not to be included in the company's general accounts; the setting up of a special fund is very strong evidence that they are not to be so included.

- RE EVTR
In a 1987 case, **RE EVTR, (1987)**, decided by the Court of Appeal, Quistclose principles applied even although there was no special fund. In that case the appellant, Mr. Barber, had won £240,000 on premium savings bonds - the nearest thing we have in England to a national lottery, although I understand that we, like many European countries, are soon to have a national lottery. Barber had worked for a company called EVTR and agreed to help them to purchase new equipment. For this purpose he deposited £60,000 with the solicitors to the company and authorised them to release this sum "for the purpose of buying new equipment". This money did not go into a special account, but the new equipment was ordered and the money paid out. Before the equipment arrived EVTR went into receivership. The Court of Appeal held that Quistclose principles applied and that Barber was accordingly entitled to the return of his money, subject only to certain agreed deductions.
Dillon LJ said:

"...in the light of Quistclose, if the company had gone into liquidation, or the receivers had been appointed, and the scheme had become abortive before the £60,000 had been disbursed by the company, the appellant would have been entitled to recover his full £60,000, as between himself and the company, on the footing that it was impliedly held by the company on a resulting trust for him as the particular purpose of the loan had failed."

Despite the absence of a special account the other factors in the case negated the inference that the payments were to be included in the company's assets. Thus, if there is other sufficiently strong evidence upon which the court can decide that a trust has been created, it is not essential that there should be a special account.
In the passage I have just read to you from the judgment of Dillon LJ you heard the trust described as a 'resulting trust'. Where the purpose of a trust fails and the trust moneys cannot be disposed of in accordance with the terms of the trust, then there is usually a 'resulting trust'. This means that the fund 'results', or, in plainer language,

reverts, to the settlor - in this case Barber. In other words in the EVTR case the company was deemed to be trustee of the money for Barber and, as in Quistclose, the money did not become part of the company's general assets.

- CARRERAS ROTHMAN V FREEMAN MATHEWS
Both of these last two cases involved voluntary advances of money. In a third case Quistclose principles were applied even although the payers of the money were already under a contractual obligation to pay the money in any event. The case is **CARRERAS ROTHMAN LTD v FREEMAN MATHEWS TREASURE LTD (1985)**, which was decided in the Chancery Division. In this case the plaintiffs, Rothmans, the tobacco company, used the services of Freeman Mathews, who were an advertising agency. Freeman Mathews in turn made contracts with and incurred liabilities towards production agencies and advertising media.
The terms upon which Rothmans did business with Freeman Mathews were that Rothmans paid Freeman Mathews a monthly fee which was used:

a) as payment in arrears for their services and

b) to enable Freeman Mathews to pay debts incurred to agency and media creditors.

Freman Mathews got into financial difficulties and needed funds to pay its debts to advertising media and production agencies. Without such funds they would have been unable to continue acting for Rothmans.
Rothmans knew that if Freeman Mathews went into liquidation owing money to media creditors those creditors would have sufficient commercial power to compel Rothmans to pay them. In other words they were in a position to make life very difficult for Rothmans if they were not paid, even if Rothmans were not legally liable to pay them. Of course, Rothmans could not risk the collapse of their advertising campaign and were thus faced with the possibility of having to pay twice.
Rothmans therefore agreed with Freeman Mathews that they would pay a monthly sum into a special account at Freeman Mathews' bank, the money to be used "only for the purposes of meeting the accounts of the media and production fees of third parties directly attributable to Carreras Rothmans' involvement with the agency".
The first payment of nearly £600,000 was made at the end of July covering debts incurred by Freeman Mathews in June. Unlike the payments in Quistclose and EVTR, which were made voluntarily, this was money already owed to Freeman Mathews. Freeman Mathews went into liquidation before the debts were cleared. Rothmans immediately found another advertising agency and in order to protect its advertising campaign paid off the debts to the media creditors, taking assignments of those debts, so that if the creditors subsequently received payment from the liquidators they would in turn repay the money to Carreras Rothman.
Gibson J decided that the money in the special account had been held by Freeman Mathews (and was therefore now held by the liquidator of that company) for a specific purpose and he therefore ordered the liquidator to carry out that purpose, ie to pay the third parties. He considered that the fact that Rothmans were already under a contractual obligation to pay was not relevant. He said:

"if the common intention is that property is transferred for a specific purpose and not so as to become the property of the transferee, the transferee cannot keep the property if for any reason that purpose cannot be fulfilled. I am left in no doubt that the provider of the moneys in the present case was the plaintiff. True it is that its own witnesses said that if the defendant had not agreed to the terms of the contract letter, the plaintiff would not have broken its contract but would have paid its debt to the defendant, but the fact remains that the plaintiff made its payment on the terms of that letter and the defendant received the moneys only for the stipulated purpose. That purpose was expressed to relate only to the moneys in the account. In my judgment therefore the plaintiff can be equated with the lender in Quistclose as having an enforceable right to compel the carrying out of the primary trust".

I have already told you that if I create a trust having, say, you as my trustee, and I pay money to you on terms that you are to pay the income on that money to Kate for life and after her death you are to pay the capital to our children, then if you fail to pay the income to Kate it is she and not I who is able to take action to enforce the terms of the trust. In **QUISTCLOSE** and in **EVTR** the provider of the money - the settlor - was able to claim it back, the primary purpose of each trust having failed and there therefore being resulting trusts in favour of the respective settlors.
In the Rothman case the primary purpose of the trust could still be carried out and the order was made to that effect. (In any event the court would not order payment to Rothmans as the money was owed by them under the terms of their contract with Freeman Mathews.) However, in this case it was Rothmans, the settlors, who were able to enforce the trust. Why was this, when there was no resulting trust to the settlor? How can a settlor who is not also a beneficiary enforce a trust? The reason given by the court was that the lender acquires an equitable right to see that the money advanced is applied for the primary designated purpose.
There are two other cases I will mention at this stage to illustrate the versatility of the trust concept.

- OTTAWAY V NORMAN

The first of these cases is **OTTAWAY v NORMAN (1972).** This case involved a secret trust, something I have not yet mentioned and which you will not be studying in detail. The essence of a secret trust is where a testator leaves property to a beneficiary as an absolute gift, but the testator has agreed with the beneficiary that the beneficiary is to hold the property as trustee for the benefit of some other person. The trust is secret because no mention is made of it in the will.
In **Ottaway v Norman** Harry Ottaway left his bungalow to his housekeeper, Miss Hodges and agreed with her that she would in turn leave it by her will to his son. Miss Hodges later changed her mind and did not leave the bungalow to the son. The son

sued Miss Hodges' executor, Mr. Norman and the court enforced the agreement by imposing a constructive trust upon the bungalow in the hands of the executor. Incidentally, we will later be looking at the formalities required in order to set up a trust. In general the Wills Act of 1837 applies to all dispositions made by will, but the secret trust is one way in which you may dispose of property without any mention in your will.

- PAUL V CONSTANCE

The second case, is that of **PAUL v CONSTANCE (1977).** The brief facts are as follows: Mr. Constance was a married man living apart from his wife. He was in fact living with Mrs. Paul. Mr. Constance suffered an injury at work and received compensation of £950, which was put into a bank account opened in the sole name of Mr. Constance because the parties would have been embarrassed to have a joint account in different names. On various occasions Mr. Constance said to Mrs. Paul "The money is as much yours as mine". One withdrawal was made and used for their joint benefit. Mr. Constance died without having made a will and under English law his estate passed to his lawful wife. Mrs. Paul commenced proceedings against the widow claiming that Mr. Constance had been a trustee of the money in the account, holding it on trust for himself and herself jointly. The court found in her favour, so she received half of the money in the account.

In this case you will note that a trust was created without any formal documentation at all.

Chapter III

CLASSIFICATION OF TRUSTS

Trusts can arise in different ways, many of which we are going to look at in this course, but I am now going to cover briefly the main categories of trusts.
The main types of trust are Express, Implied, Constructive and Resulting Trusts.

1. EXPRESS TRUSTS

Express Trusts are created when the settlor (that is the person creating the trust) has expressed his intention of creating a trust. An express trust may be created inter vivos (ie between living persons, in which case the settlor will create the trust during his lifetime) or by the will of the settlor in which case the trust is called a will trust or a testamentary trust and only takes effect after his death.
Certain formalities are required for the creation of an express trust relating to land. These are set out in the Law of Property Act, 1925 and we will look at them in due course. The creation of a testamentary trust must also be attended by certain formalities in that the will itself must comply with the terms of the Wills Act, 1837, whether or not the trust relates to land. These formalities under the Wills Act are important insofar as they relate to signature and witnessing of the will, but are not part of this course.
Express trusts may be either private trusts, in which case they will usually be created for the benefit of members of the settlor's family, or public trusts, as in the case of a charity.
Express trusts may be fixed trusts, where the trust instrument specifies the share which each beneficiary is to take, or discretionary trusts where the trustees have a discretion as to which beneficiaries will receive the trust property and the shares which they will receive.

2. IMPLIED TRUSTS

Implied trusts arise from words or conduct. The settlor does not state in so many words that he intends to create a trust - indeed he will not usually intend to create any sort of trust - but the effect of his words or actions is such as to create a trust irrespective of his intention. Kate will deal in detail with this type of trust, which divides into two categories - constructive trusts and resulting trusts, but I will say a few introductory words about each type.

3. CONSTRUCTIVE TRUSTS

Constructive Trusts are imposed by the court irrespective of the settlor's intention. Constructive trusts most commonly arise where husband and wife or man and woman live together in a house the legal title to which is in the name of one only of them - usually the man. Kate will introduce you to a number of cases on this aspect, but she will also demonstrate that constructive trusts can arise in many different circumstances.
By way of example I will give you one case at this stage, that of **BOARDMAN v PHIPPS (1967)**, which Kate will also deal with. In this case the solicitor who acted for a trust obtained control of a company in which the trust already held a substantial number of shares. The company had not been doing well and the interests of the trust were consequently suffering. After the solicitor had obtained control he sold off some of the assets of the company and as a result made a substantial profit for himself. As the trust had a substantial interest in the company it too made a large profit. However, even although the solicitor had acted honestly and in good faith, the court held that as he had during the negotiations leading to the purchase of control of the company used knowledge which he had obtained in his capacity as solicitor to the trust and which he would not otherwise have had, he was therefore a constructive trustee of the profit he had made and as such was accountable for it to the trust.

4. RESULTING TRUSTS

Resulting trusts occur where property has been transferred from one person to another but the beneficial interest results back (ie goes back) to the transferor.
There are two categories of resulting trust - automatic, ie where the trust fails tor some reason, eg a failure by the settlor to dispose of the complete beneficial interest, and presumed, ie based on the presumed intentions of the parties; eg where A transfers property to B and B provides no consideration, then in the absence of a contrary intention B holds the property for A on a Resulting Trust (this is not in practice a very common situation since A would normally make it clear that the property is either to be taken as an out-and-out gift or to be held on trust).
More common is the resulting trust that occurs where A and B contribute to the purchase of a house but the legal title to the house is in one name alone. A resulting trust where the share of the beneficiary is proportional to her contribution to the purchase price is often the consequence, but this type of case has caused a lot of difficulty in the courts and frequently overlaps with constructive trusts.

4.1. The cy-pres doctrine

Sometimes the beneficiary is a body which has never existed or has ceased to exist. In that case the property usually reverts to the settlor under a resulting trust, but if the body concerned is a charity and the intentions of the settlor are clearly charitable, then under a doctrine called 'Cy-pres' the court can apply the property in a manner as nearly as possible resembling the settlor's original intention. This at its simplest means that if, for instance, I leave a gift on trust for 'Cancer Research' which is not the name of a charity which actually exists, then the court would direct that the gift should go to one of the recognised charities for cancer research.

In **RE THE TRUSTS OF THE ABBOTT FUND (1900)** two deaf and dumb ladies had been defrauded of their rights under an earlier settlement and were consequently in financial difficulties. A fund was collected for their relief. It was contributed to by various friends of the ladies. No provision was made for the disposal of the fund when the survivor of the two ladies died. When this happened there was still £367 in the fund - not a large amount of money now, but a substantial sum in 1900 - and the judge ruled that it should be held on resulting trust for the subscribers. He decided that the ladies had never become absolute owners of the fund, nor did the trustees become absolute owners after their deaths.

This case involved a number of subscribers, but where the whole of a specific fund is given or left by a single individual to maintain other specific persons it is more likely that the court will decide that the gift is an absolute gift to those persons, but in coming to its decision the court will of course have regard to the intentions of the donor.

This is what happened in the other case, that of **RE OSOBA (1979)**, where a testator - that is the maker of a will - left money on trust for the education of his daughter up to university level. He did not specify what was to happen to the money after she graduated. She duly graduated and the court held that she was then entitled to the fund absolutely on the ground that the educational purpose was no more than a statement of the testator's motive, so here there was no resulting trust in favour of the testator's estate. However, sometimes the terms of the settlement will provide for the monies to be paid to the trustee absolutely on trust to pay some other person the income or a certain annual sum during his life. Here there is no resulting trust; the word 'absolutely' indicates that the trustee is entitled to the surplus.

Chapter IV

USES OF TRUSTS

1. FAMILY SETTLEMENTS

The old style of family trust, where, in an attempt to preserve wealth, land was controlled for several generations, is no longer as popular or appropriate as it was, but it does still exist and one of the reasons for its continued existence is still to keep family wealth intact as far as possible and to minimise the impact of taxation upon death. We will not be going into the taxation aspects of trust law in this course. We are not experts in that subject and in any event we do not consider it an appropriate aspect for the purposes of this course.

This type of trust can be very complicated and its creation is a task for specialist lawyers. I will just give you at this stage a very simple example: Anita creates a trust under which property is settled upon Bernado for life and on Bernado's death the property passes to Carlos, at which point the settlement comes to an end. Anita is known as the settlor and Bernado is known as the tenant for life (or life tenant) and is usually entitled to the immediate income from the property. Carlos is entitled to the property absolutely the death of Bernado. He is known as the remainderman.

In this example the extent of Carlos' share is known straight away. His interest is called a vested interest. However, if the trust had been set up on terms that Bernado, as before, had a life interest, but the remainder passes to the first of Carlos and Diana to marry, then the interests of Carlos and Diana are not vested but contingent. It is unknown who will marry first; indeed it is not known if either will marry at all.

2. SHARES

Shares are frequently held by nominees in trust for the shareholder and often are so held when the trustee is the manager of the share portfolio, as in, eg a unit trust. We will be looking very briefly later on at one or two aspects of unit trusts.

3. PENSION FUNDS

Also, pension funds, which I will deal with in more detail later on, may only be held by trust corporations, although clearly the law needs to be examined closely, not only in order to protect against the sort of abuse that appears to have occurred in the case of the Maxwell Corporation pension funds, but also because pension funds place such strains upon the trust framework that it can only cope with difficulty.

Pension cases are a fertile field for litigation, often involving funds worth many millions of pounds and because of the peculiar difficulties which they frequently cause we thought they would be an appropriate subject for study, so I shall be making pension funds the subject of the greater part of my last lecture.

4. LIMITED COMPANIES

Many modern trust cases involve limited companies, the directors of which are in fiduciary position similar to that of trustee of the company's assets. Problems often arise where the personal interests of the directors conflict with those of the company and its shareholders.
(There are other commercial applications of trusts, which I shall tell you about in a later lecture.)

5. MATRIMONIAL HOMES

Most married couples are trustees without even realising it. Since 1926 the legal estate in any real property, (that is to say land), including, of course, the matrimonial home, cannot be held by more than one person except as a trustee for sale. In other words, all husbands and wives who own their homes together do so subject to a trust to sell the home. The trust for sale is often in practice of little significance, since the sale may be postponed by agreement for so long as the parties wish and causes no problems while the marriage remains happy, and in any event the beneficiaries are almost invariably the husband and wife themselves.

6. CHARITIES

Some charities are unincorporated and their property is held by trustees. Charities enjoy valuable tax concessions and receive and spend enormous sums of money each year - at the latest count they handled seventeen billion pounds per annum - that is 40,000,000,000,000 lire - and are increasing at the rate of about 4,000 new charities each year. As such they are a very important branch of English trust law and Kate will deal with charitable trusts in some detail later on.

7. CLUBS NOT SUBJECT TO TRUST LAW

I expect all of you belong to some club or other. Under English law you might expect the property of the club to be held by its officers as trustees for its members. There is however a problem in this. English law considers it undesirable for property to be tied up in perpetuity - in other words for for very long periods of time or for ever. It is not possible to leave your property to your eldest son for life and then to his eldest son for life and so on for ever. We do not have time in this course to study the details of the Rule against Perpetuities, as it is called; for present purposes it is sufficient if you appreciate that it could give rise to problems in the case of clubs. Let us say that you are a member of a boating club and that the club owns a number of valuable boats which members use for sailing on the River Tiber. The boats will in fact be owned by the members of the club for the time being, but the membership of most clubs fluctuates and the interests of future members may not vest until outside the period allowed by the Rule against Perpetuities. To get round this problem the law regards the present members of most clubs as owners of the club property absolutely, but subject to the contractual rights and duties arising from membership. Thus clubs generally fall outside the ambit of trust law.

Chapter V

CREATION OF AN EXPRESS TRUST

Now let us look at the creation of a typical express trust.
There are certain formalities which must be observed in the creation of an express trust and we will go into these later. For the moment I want to deal with what happens on the creation of an express trust rather than the precise way in which it must happen. The original owner of the property is called the Settlor. He creates a trust in one of two ways. The first way is this; in addition to stating his intention to create a trust, he transfers property to trustees. The trustees now become owners of the property at Law, but not of course in Equity. The trust is not actually created until the property is vested in (ie transferred to) them. This is called 'constituting the trust'. As soon as this occurs the trustees are placed under obligation to the beneficiaries.
The second way to create an express trust is for the settlor to declare that he himself holds the property as trustee, in which case there is no transfer of legal ownership although the capacity in which the settlor holds the property changes. This is what happened in the case of **Paul v Constance.**
Please note that settlors, trustees and beneficiaries do not have necessarily to be different people. As we have already seen the settlor may constitute a trust by declaring himself trustee of his own property on behalf of one or more beneficiaries. If he does this he cannot subsequently change his mind any more than he could if he had appointed you or me to be trustee.
The settlor may, however, be a beneficiary or one of a number of beneficiaries. If, however, all the beneficiaries are of full age (18 in England) and subject to no legal disability (ie they are of sound mind) then they may agree between themselves to terminate the trust and to have the trust property transferred to them on such terms as they agree **(SAUNDERS v VAUTIER, 1841).**
In cases where real property is held jointly the settlor, trustees and beneficiaries are usually the same persons **-** eg husband and wife buy a home, the legal estate in which is vested in them. Under LPA 1925 they must hold it on statutory trust for sale as trustees for themselves as beneficiaries. Saunders v Vautier cannot therefore apply here unless they execute the trust for sale by actually selling the property.

1. CERTAINTIES

We have just been dealing with some principles and cases in detail. I would now like to return to something more basic. In order to create an express private trust relating to land certain requirements must be observed. I have already mentioned that some formalities have to be complied with. I shall come to these very shortly, but what I want to deal with now is the three certainties. In order for a valid express private (non-charitable) trust to be created there must be certainty of:

i) Certainty of Intention. We have already met the case of Paul v Constance where there was held to be an intention to create an express trust of personalty (ie a bank account) without the need for formalities. As you will soon learn,in the case of land there are stricter requirements and an express trust cannot be created by mere word of mouth.

ii) Certainty of subject matter (that is to say that the property which is to be the subject of the trust must be certain).

iii) Certainty of objects - the beneficiaries of the intended trust must be certain.

1.1. Certainty of intention

Until about the middle of the 19th century an expression of hope or desire would be held sufficient to create a trust. However, these days the courts look at all the words used by the testator or settlor and establish whether on their true construction a trust was intended. Thus it has been held in a 1977 case **(TITO v WADDELL (No.2))** that even the use of the word 'trust' is not conclusive proof that a trust was intended, although it will of course always be strong evidence of such intention.

In more recent cases where words such as 'hope' or 'desire' or 'in full confidence' have caused difficulties, the court has looked at all the words used rather than taking one phrase out of context. Thus in one case the words 'in full confidence' have been held to create a trust and in another case the same words were held not to create a trust. It is not uncommon for a testator to state his wishes but not want to tie the beneficiary down to a formal trust. He might for instance leave money to his sister and express the wish that she make provision out of that money for her children. When I met this problem in practice in the preparation of wills I always used to use the words 'I wish, but without imposing any trust or legal obligation'.

I do not think it is necessary for you to make a close study of individual cases, but this is a convenient moment to mention that you will, as you study trusts, come across various equitable maxims and principles. They are not strictly rules, but they are guidelines and you will meet them time and again in judgments. One of these maxims is 'Equity looks to the intent rather than to the form,' and the examples I have just given you are a good illustration of this. To put it another way, equity looks behind the mere words which are used and tries to establish the true intention behind the words.

We have already met the case of **Paul v Constance**, where there was held to be an intention to create an express trust of personalty (a bank account) without the need for formalities. As you will soon learn, in the case of express trusts of land there are stricter requirements
where land is concerned and also where trusts are created by will.

1.2. Certainty of subject matter

The subject-matter has to be certain in two ways: the exact property to be left on trust must be certain and the extent of the beneficial interests must be certain.
That the exact property left on trust must be certain seems to be an easy and logical concept to grasp, but its application has led to difficulties in the courts. In an old case the words 'the bulk of my estate' were held not to be certain and the intended trust therefore failed. This is easy to understand. However, in the more recent case of **RE GOLAY'S W.T. (1965)** a direction in a will that a beneficiary should be allowed 'to enjoy one of my flats during her lifetime and to receive a reasonable income from my other properties' was held certain. In such cases the courts attempt to make a distribution in accordance with the testator's wishes, as there is certainty as to the overall amount of property available for distribution. The court in this case held that the trustees could select a flat and that the words 'a reasonable income' could be objectively quantified by the court itself, possibly by reference to the beneficiary's previous standard of living.
The extent of the beneficial interests must also be certain. This means that the shares to be taken in the trust property by each beneficiary must be certain. In the old case of **BOYCE v BOYCE (1849)** a testator left his houses to trustees on trust to convey one to his daughter Maria 'whichever she may think proper to choose' and the other to another daughter, Charlotte. Maria died before the testator and the court decided that as Maria, being dead, could not choose her house, Charlotte's share was uncertain. I am not sure that the court would today come to such an unreasonable decision and I feel that it would now try to reach some solution such as that in the Golay case.
Another option open to the court where the property is certain and so is the identity of the beneficiaries but where their precise shares have not been specified is to apply another equitable maxim 'equality is equity' and to distribute the fund equally between the beneficiaries.

1.2.1. Effect of a lack of certainty of subject-matter

a) If the settlor has not specified the trust property at all the trust fails completely.

b) Where the settlor gives the whole beneficial interest to one beneficiary subject to the rights of others to a portion which is uncertain then the beneficiary receives all the property absolutely - ie free of any trust.

c) Where the beneficial **shares** have not been specified, as in **Boyce v Boyce**, there will be a resulting trust for the settlor or his estate.

1.3. Certainty of objects

The beneficiaries of a private trust must be ascertainable. If they are not ascertainable there will be no one who can come to court to enforce the trust.

In this context there are two types of trust - fixed trusts and discretionary trusts.

1.3.1. Fixed trusts.

The trust instrument - ie the document creating the trust - specifies the share of each beneficiary in the case of a fixed trust. If the beneficiaries of a fixed trust cannot be ascertained the trust fails and there is a resulting trust for the settlor or his estate. If I create a trust providing for £1.000,000 to be shared equally amongst all students of Luiss University studying English Trust Law in 1992 the beneficiaries could be ascertained and the trust would be valid.

1.3.2. Discretionary trusts.

A discretionary trust is one where the trustees have a discretion as to which beneficiaries will receive the trust property and as to the shares which they will each receive. This sort of trust has caused the courts great difficulties where the beneficiaries of the trust could not readily be identified. The details of these difficulties are beyond the scope of this course, so I will take them very shortly. The test for certainty is that laid down in the case of **MCPHAIL v DOULTON (1971)** where Lord Wilberforce said 'Can it be said with certainty that any given individual is or is not a member of the class?'

The case is quite complex. If you want to read about it please do so, but there is not enough time for us to deal with it in detail in these lectures, but I can give you another imaginary example: if I create a trust providing for my trustees to distribute £1,000,000 between such of the students of Luiss University studying English Trust Law in 1992 as my trustees shall in their discretion see fit then again the trust is valid. One can look at any one person and say whether or not he or she falls within that class of persons.

1.4. Conceptual uncertainty and evidential uncertainty.

There is, however, one thing I should mention before leaving the subject of uncertainty of objects and that is that you should appreciate that there is a distinction between conceptual uncertainty and evidential uncertainty. If a class of beneficiaries is conceptually uncertain, eg 'all my friends' the trust fails, for it is impossible for the court to reach a conclusion as to whether or not everyone who comes forward and claims that he is a friend is or is not a friend. This is because the term 'friend' is not capable of sufficiently precise definition. If, however, the class of beneficiaries is merely evidentially uncertain, - in other words, the class can be determined, but only after the court has heard evidence as to who may or may not be included, as in the case of a trust for 'relatives' or 'dependants', the trust is valid. The mere difficulty of adducing evidence to establish who is and who is not a relative or a dependant is not fatal to the trust. The court can hear the evidence and reach a decision.
I said just now that the beneficiaries of a private trust, unlike those of a charitable trust, must be ascertainable and that if they are not there will be nobody who can enforce the trust. There are, in fact, a few types of private trust in which the beneficiaries cannot be ascertained, but which the courts have held, for some reason or another - the reasons are not entirely clear - are nevertheless valid. These exceptions, established many years ago by the courts, were given judicial blessing in the case of **RE ENDACOTT (1960).** They are known as unenforceable trusts as no one can compel the trustee to carry the trust out. These are valid even although they can last indefinitely and thus would, if they had not been held valid by the courts, offend the Rule against perpetuities, and also although they have no identifiable objects - ie beneficiaries who can enforce the trust.
The five categories are as follows:

i) Trusts for the erection of monuments or graves.

ii) Trusts for the saying of masses.

iii) Trusts for the maintenance of particular animals.

iv) Trusts for the benefit of unincorporated associations - but this category gives rise to certain problems and is unlikely to receive judicial approval in future.

(v) Miscellaneous cases, including in particular, trusts for the promotion of fox-hunting.

I am quite sure that if these rather strange exceptions to the genaral rule did not already exist, the courts would not be prepared to create them today.

Having given you the exceptional categories where the courts uphold non-charitable purpose trusts, let me now deal with two cases which do not fall within these categories, and where the attempted creation of trusts failed for lack of certainty of objects.

In **RE ASTOR'S SETTLEMENT TRUSTS (1952)** an attempt was made to set up an inter vivos trust to hold the trust fund upon various trusts including 'the maintenance of good relations between nations' and also 'the preservation of the independence of newspapers'. These objects, as you will learn from Kate, are not charitable, but even although the terms of the trust avoided infringing the Perpetuity Rule, it was held to be void because there were no human beneficiaries capable of enforcing it.

The other case is **RE SHAW (1957).** In this case, which makes entertaining reading, the Irish dramatist and critic, George Bernard Shaw, attempted by his will (made when he was 94 years old!) to establish a trust to research into the development of a 40-letter alphabet. Again, in this case, the opbjects were held to be non-charitable, and the trust failed for want of identifiable beneficiaries who could enforce it.

2. FORMALITIES.

In addition to the presence of the three certainties it is necessary that certain formalities are observed in the creation of a trust.

I am not going to go through the formalities with you; you will find them in your handouts, but there are a few things I want to say about the formalities.

You will from time to time come across what is known as the 1925 Property Legislation. In that year Parliament passed some very important laws including the Law of Property Act (LPA), The Trustee Act (TA), and The Settled Land Act (SLA). Although they deal to a large extent with the law of real property (land), parts of them are important to us in that they had a considerable effect upon the law of trusts, as is evident from the titles of the Trustee Act and the Settled Land Act; indeed the formality requirements for the creation of trusts and for the disposition of equitable interests are contained in LPA, 1925.

Although I am repeating what it says in your handouts I think it is important to stress that the statutory formality requirements contained in **s53(1)(b) LPA 1925** for the creation of trusts relate only to trusts of land or of an interest in land and only to express trusts. However, if the trust is created by will it must comply with the Wills Act which imposes strict requirements relating to writing, signature and witnesses whatever the subject-matter of the trust.

The reason why trusts of land have their own special rules is because of the high value of land and the complexities encountered in dealings with land. The rules re-enact the provisions of a very old Act of Parliament, the Statute of Frauds, 1677. However, there are cases where the very absence of writing might enable a fraud to take place.

Equity will not permit this; one of the maxims of Equity is 'Equity will not permit the provisions of a statute intended to prevent fraud to be used as an instrument for fraud'. Thus if I convey land to you and make it quite clear that the land is to be held on trust Equity would not allow you to turn round and say to me "I own the land absolutely as there is nothing in writing about a trust".

There are several cases demonstrating the above principle, which under English law applies more widely than just to the formalities for the creation of a trust in land, but some of them relate to cases where the trust is constructive rather that express. There is, however, an old case on express trusts, **ROCHEFOUCAULD v BOUSTEAD [1897] 1 Ch 196**, in which the plaintiff, the Comtesse de la Rochefoucauld owned coffee-producing estates in Sri Lanka which were subject to a large mortgage which she was unable to repay. In order to stop the mortgagee taking possession she sold the estates to the defendant subject to the mortgage. The court decided that the defendant took the estates as trustee for the plaintiff. At a later stage, when the plaintiff attempted to recover the estates, the defendant argued, amongst other things, that the trust claimed by the plaintiff was not evidenced in writing as required by the Statute of Frauds (this was before the 1925 legislation). The court rejected this argument on the ground that Equity will not allow a statute to be used as a cloak for fraud.

S53(1)(c) LPA 1925, dealing with the disposition of equitable interests, is considerably stricter than s53(1)(b), (which I will remind you relates to the creation of an express trust in real property), for it relates both to real property and personalty and requires the disposition to be in writing, not merely to be evidenced by writing. Its purpose is not only to prevent fraud, but also to ensure that trustees know what is happening to the beneficial interests. However, in recent years it has been used for a purpose quite different from that envisaged by our legislators - the avoidance of stamp duty.

Stamp duty is a tax levied on certain transactions and its payment is evidenced by the stamping of the documents effecting those transactions. It was until recently levied, amongst other things, on an ad valorem basis (ie the amount of duty payable varies in proportion to the value of the transaction) on documents transferring the beneficial interest in property. Therefore most of the recent cases on the section have to do with attempts to avoid stamp duty. The leading cases are complex and I will mention just two, the cases of **GREY v IRC** and **VANDERVELL v IRC.**

As I have mentioned, part of the purpose of the rule is to ensure that trustees know who owns the beneficial interests. Thus, where the trustees are themselves parties to the disposition of the beneficial interest the disposition does not have to be in writing. One might assume that the same would apply where the trustees are directed by the beneficiaries to transfer the interests, but the case of **Grey** suggests that writing is required even in this case.

In **GREY v IRC (1960)** Mr Hunter owned 18,000 shares beneficially but the legal title was held by nominees (ie trustees). He wanted to transfer his beneficial interest and orally directed the nominees, one of whom was Grey, to hold the shares on trust for beneficiaries under six settlements of which the nominees were the trustees. Subsequently the nominees executed six deeds declaring that they held the shares upon the trusts in accordance with Hunter's request.

The idea of the scheme was to enable the trustees to claim that the oral direction effected the transfer of the beneficial interest in the shares and that as stamp duty is only payable upon a document there was no stamp duty payable. The House of Lords found in favour of the Inland Revenue on the basis that the direction to transfer the interest constituted a disposition and had to be in writing.

There has been much litigation upon this section and the correctness of the decision in Grey has been doubted. It may be that if the legal and equitable interests are merged, by being transferred together to the same person, no writing is required, this not being a transaction which is hidden from the trustees. On the rather similar facts of the subsequent case of **VANDERVELL v IRC (1967)** it was held by the House of Lords that where an equitable owner orally directs the trustees to transfer both their legal and his equitable interest to a single third party the equitable interest is transferred with ther legal interest and the transaction cannot be secret from the trustees and therefore does not require to be in writing. Kate will have more to say about the case of Vandervell.

Chapter VI

THE OFFICE OF TRUSTEE

1. APPOINTMENT OF TRUSTEES

Who can be a trustee? Anyone who can hold legal title to property can be a trustee. This excludes minors save in the cases of implied, resulting or constructive trusts.

2. SPECIAL TYPES OF TRUSTEE

There are some special types of trustee, the first two of whom are not in the main important as far as this course is concerned.
The Public Trustee was, but is nowadays rarely, used where there is no other person willing or able to act as trustee. He also looks after the affairs of some mental patients under powers conferred on him by statute.
Judicial trustes are appointed by the court and act under the directions of the court in cases where there is particular difficulty in the administration of the trust estate.
Trust corporations are much more important than the previous two categories of special trustee. They can be used instead of private trustees and are frequently appointed by will to act as executors and trustees. They can bring considerable experience and expertise to bear but they will not agree to undertake trusteeship unless the trust instrument authorises them to charge for their services, and their fees can in fact be quite high.

3. APPOINTMENT OF TRUSTEES

The initial appointment is usually by the settlor or testator who creates the trust.
New trustees are appointed in a number of different circumstances. There is occasionally an express power contained in the trust instrument but more usually the appointment takes place under the provisions of **s36(1) TA 1925.** This provides that a new trustee can be appointed to replace an existing trustee who either

(i) Is dead

(ii) Remains outside the UK for more than 12 months continuously.

(iii) Desires to be discharged

(iv) Refuses to act

(v) Is unfit to act (eg through bankruptcy)

(vi) Is incapable of acting (eg mental disorder or infirmity through old age)

(vii) Is an infant (ie under 18 years of age) This does not apply to express trusts as infants cannot be trustees of these.

(viii) Has been removed under a power in the trust instrument

The appointment must be made in writing, normally by deed, and is made by:

(a) The person(s) nominated in the trust instrument, or if none are able and willing, by

(b) The surviving or continuing trustee(s)

(c) If there is none such, then by the personal representatives of the last surviving or continuing trustee, and failing that by

(d) The court under **s41(1) TA 1925** in substitution for or in addition to any new trustee.

Additional trustees can under **s36(6) TA 1925** be appointed by any person empowered to do so by the trust instrument, or if none are willing and able to do so, then by the trustees. There is no obligation to appoint extra trustees and there may in any event be no more than four trustees.

4. RETIREMENT OF TRUSTEES

A trustee may retire:

(a) Under a power in the trust instrument.

(b) Under **s36(1) TA 1925**, in which circumstances he must be replaced.

(c) Under **s39 TA 1925**, provided that at least two trustees or a trust corporation remain and consent to his retirement. In such a case he does not have to be replaced.

(d) Under order of the court.

5. REMOVAL OF TRUSTEES

A trustee may be removed involuntarily where:

(a) He has remained out of the UK for more than 12 months.

(b) The court acts under s41.

(c) Under an express power of removal contained in the trust instrument (rare).

(d) Under the court's inherent jurisdiction, eg where the court fears for the safety of the trust property or fears that there will be a breach of trust unless the power is exercised.

6. DUTIES OF TRUSTEES

Trusteeship is onerous in nature and usually carries many duties.
There are of course frequently cases where some trustees may take a much more active part in the administration of the trust than others. However every trustee is under the same obligations.
The nature of the trustees' duties is a fiduciary one. They are in a position of trust and must act towards the beneficiaries at all times in good faith. This being so, trustees must take care to ensure that their duties towards the trust do not conflict with their own interests. For this reason a trustee who makes unauthorised profits can be held to be a constructive trustee of them and as such accountable to the trust. I would refer you to the case of **BOARDMAN v PHIPPS**, mentioned in my first lecture.
The very high standards of conduct expected of trustees were described by a famous American judge, Cardozo, J., in **MEINHARD v SALMON (1928)** as follows:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Trustees may not be paid for their work as trustees but are entitled to reimbursement of reasonable expenses. In practice payment is an fact authorised by the trust instrument where professional trustees or a trust corporation are appointed. Trustees are under a duty to protect trust funds, if necessary by engaging in litigation, and costs reasonably incurred in doing so are recoverable from the trust funds.

6.1. Duties on appointment as trustee.

On appointment a trustee must

(1) Make sure that he has been properly appointed and familiarise himself with the terms of the trust and the state of the trust property.

(2) Make sure that no trustee, past or present, has been guilty of a breach of trust.

(3) Ensure that the trust fund is properly invested. Details of the investments authorised by law for the investment of trust funds are outside the scope of this course, but you should know that there are very strict rules laid down by that Trustee Investments Act 1961, although this will only apply to such extent as it is not varied by the terms of the trust instrument.

(4) Ensure that the trust assets are in proper custody.

(5) Take all necessary steps to safeguard the trust property. **RE BROGDEN**, a case of 1888, concerned a covenant to pay £10,000 to trustees of a family trust. The covenantor died but the payment was not made. The trustees asked many times for payment but did not sue for fear of causing a family crisis. The covenantor's estate had become the basis of a business partnership between his sons but the firm eventually became insolvent. The trustees were held liable to the trust for the lost £10,000. In the eyes of the courts the only excuse available to a trustee who fails to enforce payment of moneys due to the trust is a reasonable belief on his part that to do so would be fruitless.

Trustees have a duty to protect trust property even when this means that they may have to act dishonourably as opposed to illegally. Under English law an oral agreement to sell real property is not enforceable uless it is evidenced in writing. Most people who have orally agreed to sell would consider themselves morally bound to go through with the sale and so did the trustees in the 1950 case of **BUTTLE v SANDERS**, who refused to consider a subsequent offer at a higher price. They were held to be in breach of trust.

All the duties I have described which the trustee must observe upon his appointment continue for so long as he remains a trustee.

6.2. Duty to invest.

The duty properly to invest the trust funds is of course one of the most important of the trustee's duties. As I have already mentioned the question of which investments are authorised for the investment of trust funds is governed by the Trustee Investments Act 1961, but the Act is frequently modified or excluded by the terms of the trust instrument. The rules are very technical and I do not think that any useful purpose can be gained by studying them in the context of this course.
What is of more interest and importance to you is what happens when the rules are not observed - in other words when the trustees invest in unauthorised investments or fail to invest in authorised investments.

7. LIABILITY OF TRUSTEES FOR BREACH OF DUTY TO INVEST FUNDS PROPERLY

Trustees are liable for the loss caused to the trust estate. This principle is subject to the following rules:

(a) Profits made on the sale of unauthorised investments belong to the trust. If sold at a loss the trustees must make the loss good to the estate.

(b) If a trustee improperly retains unauthorised investments he is liable for the difference between their present value and their value when he first came under a duty to sell them.

(c) If authorised investments make a loss the trustee will not normally be liable provided he sought professional advice.

(d) If a trustee improperly sells authorised investments he can be required either to account for the proceeds or to replace the investments.

(e) One of the authorised investment requirements is that trustees must spread the risk by investing in a range of investments. Failure to do this will render the trustees liable to make good any shortfall between the interest actually received and the rate fixed by the court. They can also be ordered to purchase so much of the security as they should have done in the first place.

(f) Gains made in any unauthorised transaction belong to the trust and cannot be set off against losses in another transaction.

(g) Trustees are liable to pay interest on wrongly invested trust funds.

There is an interesting question which has come before the courts from time to time. To what extent should the trustees follow their own personal views in selecting investments? Should the trustees, for instance, refuse to invest as a matter of policy, in investments which offend their personal or political beliefs? There is a number of cases involving company pension funds where the courts have had to consider this question and similar questions, such as the desirability or otherwise of investing the funds in the company itself or in rival organisations. I will deal with these later when we take a look at pension funds.

8. DUTY TO DISTRIBUTE TRUST PROPERTY

The trustees are under a duty to distribute the trust funds at the appropriate time to those entitled. This means distributing both income and capital to those respectively entitled. They must also keep accounts and trust documents available for inspection by the beneficiaries, although the beneficiaries are not entitled to see documents relating to the exercise of any discretions the trustees may have been given under the terms of the trust. Failure to distribute the trust estate properly this results in liability on the part of the trustees. This was so even in a case **(EAVES v HICKSON 1861)** where they paid the wrong persons as a result of acting on the basis of a forged marriage certificate and were thus morally innocent.
This rule is mitigated to some extent by the following:

i) A trustee who has paid the wrong person as a result of a mistake of fact, as in the above case, may recover it, but if the mistake was one of law he cannot do so.

ii) A trustee can, in the case of a payment to the wrong beneficiary or in fact in the case of any breach of trust that occurred when he was acting honestly and in good faith, apply to the court under s61 TA 1925 to be excused from liability. We will look at s61 in a little more detail soon.

iii) Where a trustee is doubtful as to who is entitled to trust property he should apply to the court for directions. Provided he does this and complies with the directions he will be protected.

(iv) Trust money should be paid into court where beneficiaries entitled to have money distributed to them cannot be traced. The court can order distribution as if the missing beneficiaries were dead. This protects the trustees even although the missing beneficiaries subsequently come forward, in which case, provided their actions have not become time-barred they may proceed either against the property or against those wrongly paid.

(v) Provided trustees advertise for claims by any creditors of the trust of whose existence they are not aware, they may safely distribute. A creditor who comes forward later may be able to follow the trust property (this is called tracing and I will deal with it soon) but may not proceed against the trustees.

9. DUTY TO ADMINISTER THE TRUST FUND HONESTLY AND IMPARTIALLY

This is an important duty which requires the trustees to keep a fair balance between those currently entitled and those entitled inn future. For instance, the remainderman would have a legitimate grievance if a substantial part of the trust funds were invested in mining shares producing a large income for the tenant for life but eventually having little capital value.

10. DUTY TO ACT, IF UNPAID, AS A PRUDENT MAN OF BUSINESS.

This requires the unpaid trustee to act with the same standard of care as he would in the management of his own affairs, but to invest as such a prudent man of business would invest for persons for whom he felt morally obliged to provide. A higher standard is required if the trustees are paid, as we shall shortly see when I mention the case of **BARTLETT v BARCLAYS BANK TRUST CO LTD.**
So much for the duties of trustees. The duties I have mentioned are by no means exhaustive but are the most important ones.

11. POWERS OF TRUSTEES

We have seen that trustees MUST carry out their duties, but some trusts also contain powers, the exercise of which by the trustees is at their discretion. Sometimes the carrying out of a duty will involve the exercise of a discretion. For instance trustees may be under a duty to distribute income but if the trust is what is known as a discretionary trust they will have a discretion in deciding which beneficiaries receive it and how much they each receive.

A discretionary power which trustees often have to consider is the power given to them under s31 TA 1925 to use the income accruing during a beneficiary's minority for the purpose of his maintenance, education or benefit. To the extent that this discretion is not exercised the income must be accumulated.

Another common discretionary power is the discretion under s32 TA 1925 to pay or apply up top half a beneficiary's prospective share of capital to him whether his share is contingent or, if a minor, vested. The life tenant has the right to prevent this discretion being exercised unless the trust deed gives the trustees power to appoint capital as they see fit.

The courts do not compel trustees to exercise a discretion, nor will they compel trustees to give reasons for exercising or not exercising a discretion. However, if trustees do give reasons the court can investigate the decision and correct it if the trustees have acted in error. This does not seem to be very logical and is therefore not a satisfactory position.

Where a discretion is exercised on irrelevant considerations or for an improper purpose the court can hold the trustees to be in breach of trust. There is also a breach where the discretion is not exercised at all as in the case of **TURNER v TURNER (1983)**, where the trustees signed deeds of appointment on orders of the settlor without any knowledge of trust matters or any enquiry as to the propriety of what they were being asked to do. They were acting mechanically rather than exercising their discretion, which calls for proper consideration to be given to the proposed distribution.

11.1. The power to sell.

One power that I must mention because it is very important is the power to sell. Land held on trust for sale is vested in the trustees, who hold it on trust for sale with power to postpone the sale. The power to postpone is given to them by statute (s.25 LPA 1925).

However, land can also be held in trust under the terms of a settlement under SLA 1925 where it is held by trustees for a tenant for life, after whose death it goes either to another tenant for life or to the remainderman. In this case it is the tenant for life who has the power of sale; thus if I create a strict settlement of my house appointing

Alberto and Bernadette as trustees, requiring it to be held for Carlos for life and then for Donna, it will be Carlos who has the right to sell the house, after which Alberto and Bernadette as trustees must invest the proceeds in accordance with the terms of the settlement (or, if I have not specified any requirements for investment of trust funds) in accordance with the Trustee Investments Act, 1961, upon which Carlos will receive the income from the proceeds for his life, with the capital sum passing on his death to Donna.

Chapter VII

BREACH OF TRUST

A breach of trust occurs when a trustee fails to observe the duties imposed upon him by Equity and the trust instrument. We have already encountered various examples of breach but I would now like to go over the consequences of a breach of trust.

1. REMEDIES OF THE BENEFICIARY.

1.1. An action in personam against the trustee.

The beneficiary may bring actions *in personam* - ie against the trustee - for damages for breach of trust. He may also bring an action *in rem* to recover the trust property or, if it has been disposed of he may be able to trace the proceeds of sale and obtain an order that they be returned to the trust. This is the equitable remedy of tracing, available where the property can be traced, (followed), into the hands of a transferee. This is a very important remedy and may be vital if either the trustee or the transferee is insolvent. However, there is one important exception where this is not possible; this is where the property has passed into the hands of a bona fide purchaser of the legal estate for value without notice of the trust.

1.2. The bona fide purchaser for value without notice of the breach of trust is protected from a tracing action.

Even if the bona fide purchaser for value of the legal estate in land has notice of the trust he will be protected from a tracing action if he obtains a receipt from at least two trustees or from a trust corporation. **(SLA 1925, s14).** There is a great deal of law on the issue of whether or not a purchaser has notice of the trust; this aspect of trust law lies more within the field of land law and is certainly outside the scope of this course.

1.3. Tracing.

Even where the remedy of tracing is available the court will not permit it if to do so would not be equitable. In **RE DIPLOCK [1948]** money had been spent on alterations to buildings and the erection of new buildings. It was held that it would be inequitable to allow tracing since the result would be that a charge on the land would be imposed and an innocent volunteer might have to sell his own land in order to satisfy it.
Also, the property must be in traceable form. If the proceeds of sale of a trust asset wrongfully disposed of are in the possession of the trustee then tracing is available if

the proceeds can be identified. If the trustee has bought other property with the proceeds the beneficiary can follow this and either take the property bought or have a charge on it for the amount of trust money used to buy it. If, however, the money has gone - for instance on a holiday or on payment of fees to the University of Luiss to study law - then tracing is not available, although the beneficiary can still, of course, pursue an action against the trustee in personam.

1.4. Tracing and mixed funds.

When the trustee has mixed trust money with his own money problems can arise in tracing the trust funds and the courts have devised certain complicated rules for identifying the trust money, which are not within the scope of this course

2. COMPENSATION IN CASES OF BREACH OF TRUST.

In the case of a breach the trustees must compensate the beneficiaries for any loss to the trust estate. The trustee's motive for the breach, honourable or otherwise, is irrelevant; if there has been a breach the beneficiary must be compensated with no discount if the trustee's intentions were good and no penalty if they were dishonest. In the latter case the trustee might be guilty of criminal fraud, although breach of trust is not in itself a criminal offence. If he is guilty of crime he can of course be prosecuted.
I should add that if all the beneficiaries are of full age and subject to no legal disability they can agree if they wish to take no action over any particular breach of trust.

3. BREACHES BY CO-TRUSTEES.

A trustee is liable for breaches of trust committed by him but is not vicariously liable for breaches committed by other trustees. However, a trustee cannot just stand back and take no interest in what his fellow trustees may be doing. If you and I are trustees and you say to me "I will just leave you to get on with the running of the trust and will sign any papers you put in front of me", then if I invest the trust funds in unauthorised investments or commit some other breach of trust you will be held liable as well as me.
A trustee is not liable for breaches by other trustees which occurred before his appointment as a trustee but may become so if he fails to take steps to remedy such breaches when he discovers or should have discovered them.

4. THE COURT'S DISCRETION TO RELIEVE A TRUSTEE FROM LIABILITY FOR BREACH OF TRUST.

We have already come across s61 TA 1925 by which the court may relieve from liability a trustee who is in breach but who has nevertheless acted honestly and reasonably and ought fairly to be excused both for the breach and also for failing to obtain the directions of the court. Such relief is at the discretion of the court and is more likely to be granted to private trustees than to professional trustees such as a trust corporation. In the case of **BARTLETT v BARCLAYS BANK TRUST CO LTD (No 1) (1980)**, which I have already mentioned, the court refused relief to a trust corporation which had failed to prevent a huge loss to the trust through foolish property speculation. The court was satisfied that the trust corporation had acted honestly but not that it had acted reasonably.

5. THE POSITION WHERE THE BENEFICIARY IS PARTY TO THE BREACH.

Sometimes a beneficiary will instigate, participate in or consent to a breach of trust. In this case the court can impound his interest in the trust so that it is available to replace any loss to the trust and to that extent the trustees obtain an indemnity from the wrongful actions of the beneficiaries. In order for the court to impound the beneficiary's share these conditions must be satisfied:

a) The beneficiary must have had full knowledge of all relevant facts.

b) The beneficiary must be of full age and sound mind.

c) The beneficiary must have intended to derive a personal benefit from the breach irrespective of whether or not he actually did so.

d) The beneficiary must freely consent to the breach.

In the case of **RE PAULING (1964)** the trustees were under the terms of the trust empowered to make advances of capital to and for the benefit of children who were beneficiaries under the trust. Some of these advances were made improperly to the parents on behalf of and with the agreement of the children but the trustees did not take care, as they should have done, to ensure that the advances were used for the benefit of the children, and in fact the advances were used for the benefit of the parents. The Court of Appeal held that in the case of the advances made to one of the children, although she had attained the age of majority, the advances were nevertheless made under the influence of her parents. There is a presumption under English law that where a child makes an advance or gift to a parent he does so under the influence of the parent. If this is the case the child can have the gift set aside by the court. This presumption, which applies in a number of relationships as well as that of parent and child, is called the presumption of undue influence. Thus in this case the consent of the beneficiary was held to have been given in circumstances where undue influence existed and was therefore not a free consent. Therefore the trustees in this case were not permitted to impound the beneficiary's share.

6. LIMITATION OF ACTIONS AGAINST TRUSTEES.

Under English law most actions must be commenced within a certain time of the right of action first arising. Actions against trustees are in general subject to statutory time limits, depending on the type of action, but I do not think it is necessary for you to study these time limits. However, in certain cases including cases of fraud by trustees and actions *in rem* (for a proprietory remedy - which I shalll come to in a few moments) against those who have received trust property other than purchasers in good faith and without notice there are no statutory time limits. There is, however, an equitable doctrine called 'laches', which means 'delay' under which a substantial lapse of time in bringing the action coupled with circumstances such that it would be inequitable to allow the claim to be brought may debar the plaintiff from obtaining an equitable remedy.

7. PERSONAL ACTON AGAINST RECIPIENTS OF TRUST PROPERTY.

In some limited circumstances a personal action (action *in personam*) may be brought in Equity against recipients of trust property as well as against the trustees. It may be based on a mistake of fact or of law by the personal representative, but cannot be brought against a bona fide purchaser of the legal estate without notice. It is limited to claims arising out of the administration of estates of deceased persons and is subject to a number of other limitations too.

8. VARIATION OF TRUSTS.

I want to close this introductory part of the course with a few words about the variation of trusts. Under the Variation of Trusts Act 1958 the court can on behalf of persons who cannot do so themselves (eg because they are minors, or unborn) vary the terms of the trust. This enables the trustees to take action which would otherwise be unauthorised and for which they might be liable for breach of trust. The court must be satisfied that the proposed arrangements are for the benefit of those on whose behalf it gives approval. The Act was used extensively in the past to rearrange the terms of trusts so as to reduce the burden of taxation. Nowadays the tax position is not so burdensome and in any event the trust deed will usually contain sufficient powers of variation should this be necessary.

Chapter VIII

IMPLIED TRUSTS

In the lectures so far we have looked at trusts generally, what they are, how they are created, the duties and powers of trustees and so on. You have also learned that one way of classifying trusts is into express and implied trusts. Express trusts are trusts created intentionally either to take place as inter vivos trusts during the settlor's lifetime or as testamentary trusts, which take effect on someone's death. Implied trusts, on the other hand, are not created expressly but arise when the law says they should do so.

The aim of this next group of lectures is to give you a fairly detailed knowledge of implied trusts in English law.

As you already know, there are two sorts of implied trust in English law. One is called the resulting trust and the other the constructive trust. These trusts arise in a great variety of situations and the principles and reasoning used by the courts for finding such trusts differ according to the situation in which they are found. Sometimes the courts hold that such a trust exists because evidence of the express or implied intentions of the party or parties to the litigation requires that such a trust be imposed to do equity in the particular case (for example in the context of the matrimonial or quasi-matrimonial home). In other cases, implied trusts are imposed by the law, irrespective of the intentions of the parties, in order to provide a remedy where no remedy is available in tort and contract. For instance, a bank, which has assisted in a breach of trust, may find a constructive trust imposed in order for that bank to be made liable to account, and irrespective of the intentions of the parties.

It is not possible for a person to sit down and create a resulting or constructive trust; such trusts arise by operation of law, in other words, when judges decide whether they should exist. In this area of trusts there is no legislation which states when a resulting or constructive trust shall or shall not occur. It is all judge made law. English judges law will not generally, however, admit to finding an implied trust according to some broad notion of what is or is not fair, just or equitable in a particular case. The judges apply principles and precedents found in earlier case law to later cases, but at the same time developing the law to meet changing situations. This is important for the sake of legal certainty and fairness. Like cases are treated alike.

The two sorts of implied trust, the resulting trust and the constructive trust, are generally kept conceptually distinct, and a lawyer will have to decide which sort of trust he will wish to plead. During the 1960's and 70's Lord Denning, a famous judge, the Master of the Rolls in the Court of Appeal, tended to treat resulting trusts and constructive trusts as if they were the same thing, and, in his search for a just result in all the circumstances of the case, felt that it did not much matter whether such trusts were called resulting, implied or constructive trusts. In Hussey v Palmer, he said:

'Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words than anything else. The two run together.'

Lord Denning's amalgamation of the two concepts is contrary to other judicial pronouncements, both then and now, and we can safely say that resulting trusts and constructive trusts are separate and distinct concepts.
Certainly all the textbooks treat them as separate entities.
There is no statutory definition of what an implied trust is, athough there is statutory recognition that such trusts exist. Section 53 Law of Property Act 1925, as you have already been told, lays down certain formal requirement in respect of trusts of land (ie that a declaration of trust of land must be evidenced in writing), but exempts from the formality requirements 'implied, resulting and constructive trusts'. It seems from this particular section of the statute that there are three sorts of trusts other than express trusts but the term 'implied' in that section is now taken to refer to the two sorts of trust, in other words the resulting and constructive trust.
The reason why implied trusts are an exception to the strict requirement of formalities in respect of trusts of land is to prevent someone, who is holding real property, from relying on the need for written formalities, in order to defraud someone else from a right to the land in equity. This section originates in the old Statute of Frauds 1677, and it is still possible to acquire an interest in land by arguing that an implied trust exists in equity even though there is nothing in writing. There is also a maxim of equity which states that 'Equity will not allow a statute to be used as an instrument of fraud' and this same principle is enshrined in s. 53 Law of Property Act 1925.
I will first of all talk fairly briefly about resulting trusts. They are fairly straightforward, but have not been used quite so extensively and in such interesting situations in English law as the constructive trust has. I will then go on to consider the constructive trust in English law in much more detail.

1. RESULTING TRUSTS.

There are two sorts of resulting trust in English law. The first is sometimes referred to as the 'automatic resulting trust' and the second is called the 'presumed resulting trust'.

1.1. The 'automatic resulting' trust.

An automatic resulting trust will come into existence if there is some attempt to create a trust but for some reason the trust fails. Say for example a settlor, a father, transfers property to trustees to hold for his daughter when she reaches the age of 18. If she were to die at the age of 16, then the trust could not be carried out, and so equity imposes a resulting trust so that the trustees hold the property on resulting trust for the father, the settlor. In other words, the trustees hold the legal title, but the equitable title remains in the settlor. It results back to the settlor, who effectively becomes the beneficiary of his own trust. By way of further example, the settlor may transfer property to trustees to hold on trust but fail to state who the intended beneficiaries are. As it is usually impossible to have a trust without beneficiaries, except in the case of charitable trusts and certain non-charitable trusts (because there must be somebody to enforce the obligation imposed on the trustee), then the trustee will hold the property on resulting trust for the settlor.

An automatic resulting trust arose in Vandervell v IRC (1967) AC 29. This case involved a transaction, the aim of which was to escape payment of tax. Mr Vandervell wanted to endow a chair in pharmacology at the Royal College of Surgeons, a charity, but he wanted to avoid paying tax. He therefore transferred shares in his company to the College, but retained an option to purchase back the shares when the College had raised the £150,00O needed to set up the chair. This money would come from dividends payable on those shares. This option to purchase them back was held by a trustee company which was under Mr. Vandervell's control. The idea behind this scheme was a tax saving one. In other words, Mr Vandervell, by divesting himself of the shares and the dividends, would not have to pay surtax, a kind of income tax payable at a very high rate of tax, and the Royal College of Surgeons, being a charitable body, would be exempt from paying tax altogether.

The Inland Revenue, who deal with tax, were not very happy about this transaction, and successfully argued on appeal to the House of Lords, the highest court in England, Wales and Scotland, that Mr Vandervell had not divested himself of his interest in the shares and was therefore liable to pay surtax. The Inland Revenue argued that, because Mr Vandervell had left no clear instructions with the trustee company as to the terms on which the option was to be held by the trustee company, he had not divested himself of the equitable interest in the option to repurchase back the shares. This argument was successful and Mr. Vandervell's trustee company were therefore deemed to hold the shares on resulting trust for Mr. Vandervell, so that he was therefore liable to pay surtax on the dividends. He was effectively the owner of the shares in equity.

Another sort of situation where a resulting trust might arise is where donors give money to a person or an organisation not for that person but on trust for a valid non-charitable purpose. If there is any surplus money left over when the purpose has been fulfilled then, if it can be proved that the donors did not make an out and out gift to the organisation, but gave it for the particular purpose, then equity will hold that the organisation or the person to whom the money has been given holds the surplus funds on resulting trust for the donors. The resulting trust analysis is not often used in such circumstances, because of the impracticable result that the donors will have to be found in order for the money to be returned.

In the Re Gillingham Bus Disaster case, for instance, money was given to a fund to provide for the care of and funeral expenses of some boys who were run over tragically by a bus when marching in a procession. When all the purposes had been provided for, there still remained a considerable amount of money in the fund. The question for the court was who should own the surplus ? As it was not a charitable fund it could not be applied to other similar charitable purposes under what is called the cy pres scheme, so the question was whether the money should go back to the donors or go as bona vacantia back to the Crown because nobody owned it. It was held that the fund should go back to the donors, and that the fund should therefore be held on resulting trust for them.

This was rather an impracticable solution, because of the impossibility of finding all the donors who had contributed to the fund. Eventually, after some years, the fund was apparently given to charity.

Resulting trusts can also arise in the context of testamentary trusts. For example a testator might leave his property on his death to his 'old friends'. The words 'old friends' might fail for uncertainty, in other words the court or the trustees might not know who are 'old friends' and therefore not be able to carry out the trust. If the trust failed for uncertainty of objects, the trustees of the testator's estate (in other words his personal representatives or executors) would hold the property on resulting trust for the residuary legatees or those entitled on intestacy.

1.2. Presumed resulting trusts.

There are basically two sorts of presumed resulting trust: first, where A transfers property to into B's name and B provides no consideration, and secondly where A contributes to the purchase of property or pays money into a bank account held in B's name.

In equity, if Alberto were to tranfer property into the name of Bruno and Bruno provides no consideration, in other words no payment, then, in the absence of any evidence of a contary intention, equity will presumes that Bruno holds the property in question on resulting trust for Alberto.

A good example of this sort of trust is to be found in the case of Hodgson v Marks (1971). Here an old lady, Mrs Hodgson, conveyed the legal title of her house to her lodger (Evans) purely, so Evans said, to protect him against her nephew who disapproved of him. This was a voluntary transfer of the title, but it was done on the understanding that Mrs. Hodgson would retain an interest in the property. Subsequently Mr Evans, the lodger, attempted to sell the property to a third party, a Mr. Marks, but the Court of Appeal held that the old lady had an interest in equity under a resulting trust, because only the bare legal title and not the equitable interest had been passed to Mr. Evans. Because she had the equitable interest and was still in occupation she was able to defeat any claim to the house made by the third party, Marks. In this situation it was impossible for the lodger to turn round and argue that the old lady had not complied with the formalities required for trusts of of land, as laid down in s.53 Law of Property Act 1925, for 'Equity will not allow a statute to be used as an instrument of fraud'. Indeed, as I have already mentioned, s.53 itself actually states that the 4requirement of formalities does not apply to the creation of resulting trusts.

The second sort of presumed resulting trust is where property is bought in the name of Bruno, the legal owner, but Alberto provides part or the whole of the purchase money. Equity presumes, unless there is any evidence to the contrary, that Bruno holds the property on resulting trust for Alberto in proportion to the money paid by Alberto to the purchase.

For example, imagine that Bruno buys a house in his name for £30,000. Bruno provides £20,000 (ie two-thirds of the purchase price) and Alberto provides £10,000 (ie one third of the purchase price). Then, unless there is any evidence to the contrary, Bruno, the legal owner is deemed in equity to hold the house in equity on resulting trust for himself and Alberto, their shares in the property being in proportion to their respective contributions, in other words 2/3 to Bruno and 1/3 to Alberto. This would mean that if Bruno later sold the house say for £90,000, then the proceeds of sale would be divided up according to their respective contributions, Bruno getting £60,000 of the proceeds of sale and Alberto getting £30,000. Obviously, had Alberto paid the whole of the purchase price, then Bruno, the legal owner would hold the house on resulting trust for Alberto absolutely in equity.

Resulting trusts can also arise in respect of personal property, for example in the context of bank accounts. For example, Alberto might have a bank account in his name in law, but Bruno might make payments of money into that account. Equity presumes, again unless there is any evidence to the contrary, that Alberto will hold Bruno's share in the bank account for Bruno by way of resulting trust. A woman who has contributed to a bank account held in the sole name of her husband may be able to acquire an interest in the money in the account by this route. A resulting trust can also occur in relation to personal property for instance in the context of shares. If Alberto bought shares in his name and Bruno paid some or all of the purchase price, then in equity a presumption would arise that Alberto holds the shares on resulting trust for himself and Bruno according to their respective monetary contributions.

2. CONSTRUCTIVE TRUSTS.

Constructive trusts arise in many different sorts of situations and the aim of these lectures is to give you a general idea of the nature of constructive trusts and of the sorts of situation in which such trusts can arise. We will, however, look at some particular categories of constructive trust in more detail. We will look at the following situations in which constructive trusts arise:

(i) in the context of the matrimonial or quasi-matrimonial home, where constructive trusts provide a useful weapon for the non-owner cohabitee on breakdown of a relationship to prove they have an interest in equity;

(ii) in the context of breach of trust, where a constructive trust can be imposed on a third party or a stranger to the trust who knowingly assists in a breach of trust or receives trust property in breach of trust;

and

iii) where a constructive trust is imposed when a fiduciary makes an unauthorised profit and in other situations where there is an actual or potential risk of a conflict of interest and duty.

In situation (i) the constructive trust is imposed because of the express or implied intentions of the parties and in that sense is similar to the presumed resulting trust. In the other two situations a constructive trust is imposed irrespective of the intentions of the parties, in order to provide a remedy where tort or contract do not provide for one.

2.1. The nature of a constructive trust.

A constructive trust cannot be created by private individuals, but is imposed by the court in certain sorts of situations. Different rules relate to the constructive trust depending on the sort of situation in which they occur. There is no definition of what a constructive trust is and few attempts have been made to lay down any general principle governing the imposition of such a trust. A fairly typical judicial pronouncement is that of Edmund Davies LJ in Carl-Zeiss Stiftung v Herbert Smith (1969) where he stated:

'English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.'

In order to understand what a constructive trust is, it is therefore necessary to look at the sorts of situations in previous case-law where constructive trusts have been held to arise. These situations are varied. It will still be necessary however to bring a case within one of these previously decided situations in order for a constructive trust to be imposed.

In the United States, American law treats the constructive trust as an instrument for remedying unjust enrichment. In other words, all that has to be shown is that the constructive trustee has received some benefit which, as against the constructive beneficiary, he cannot justly retain.
Paragraph 160 of the American Restatement of Restitution provides:

'Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.'

This provision represents the attitudes of American judges. Also in Beatty v Guggenheim Exploration Co (1919) 225 NY 380, 386 Cardozo J stated:

'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.'

Thus the attitude of American law towards the constructive trust is clear. It is an instrument for remedying unjust enrichment. In England, however, the position is different. A general principle of fairness or equity or unjust enrichment does not provide the court with a sufficient justification for imposing a constructive trust. The English courts refuse to impose a constructive trust solely on the basis of broad principles of equity. The court has to look at rules developed over the centuries in particular cases. English law also does not like to treat the constructive trust merely as a remedy. Professor R. H. Maudsley, a reputable trusts scholar, has stated that 'English law has always thought of the constructive trust as an institution' rather than as purely a remedial institution, in other words that a constructive trust is the same as an ordinary trust, and, once imposed, creates the same rights, duties and obligations as an ordinary trust expressly created. The constructive trustee, like an ordinary trustee, will have certain duties in respect of the property held on constructive trust and the beneficiaries will have proprietary rights in respect of that property and be able to enforce those rights as against the constructive trustee. The constructive trustee will also have a duty to account personally to the beneficiaries for any of his actions. The constructive trust creates property rights and obligations. It is not just a remedy.
This may be true of some of the categories of situations in which constructive trusts arise, for instance in the context of the quasi-matrimonial home, but to say that the

constructive trust is never a remedy in English law is somewhat misleading. The constructive trust may not be a remedy in the same way as an injunction or damages is, but it can hardly be said that the person seeking to have a constructive trust imposed is not seeking a remedy. Where a constructive trust is imposed on a third party to make him liable to account for losses to the trust fund made in breach of trust, in that situation the constructive trust certainly seems remarkably close to a remedy. The general principle underlying the concept of the constructive trust may well be that of unfairness, injustice or unjust enrichment, but the English judges, as I have said, will not admit to imposing such a trust just because the justice of the case requires it. In the late 1960s and early 1970s, however, Lord Denning MR in the Court of Appeal, much against the authority of the higher courts, was imposing constructive trusts where equity and good conscience required it, irrespective of the intentions of the parties. In Hussey v Palmer (1972), for example, Lord Denning MR stated that a constructive trust 'is a trust imposed by law whenever justice and good conscience require it. .... it is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.' Lord Denning's rationale for finding constructive trusts was based on a liberal and flexible concept of justice and was based on the American model of the constructive trust. In fact, as a result of a string of decisions of Lord Denning, it was thought for a while in English law that a constructive trust similar to the constructive trust in America had been invented. In fact for a period of time during the 1970s the Denning-type trust, imposed where there had been inequitable conduct, came to be known as the 'new model' constructive trust, and provided a model for decisions by other judges in the quasi-matrimonial or matrimonial context. However, this concept of the 'new model constructive trust' was never really endorsed by later judges and the Court of Appeal in later cases rejected it and returned to a more traditional and less flexible approach, which required the application of rules and precedents and proof of certain criteria before a constructive trust could be held to exist. It is therefore true to say that English law has a different attitude to the constructive trust than that of American law.

The imposition of a constructive trust alters property rights imposes on the constructive trustees liabilites of both a personal and proprietary nature. He can be sued and made personally liable to pay damages for any loss to the beneficiaries and can be ordered to hand over property which he holds for the beneficiaries or property which the original property now represents. We might ask whether as a matter of principle such alterations of property rights by the law should be allowed, just because of the desire of the court to do justice in the instant case. In fact it has never been the practice of the courts to alter existing property rights, just because fairness requires it. In Cowcher v Cowcher Bagnall J stated:

'In any individual case the application of (established principles of property law) may produce a result which appears unfair. So be it: in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and not omniscient, is justice according to law; the justice that flows from the application of sure and settled principles to proved or admitted facts. So in the field of property law the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past child-bearing; simply that its progeny must be legititmate - by precedent out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.'

Many academic commmentators have by contrast argued that the English courts should adopt the American approach and impose constructive trusts as a remedy to prevent unjust enrichment. In 1964 Professor Waters writing on the constructive trust stated:

'What English law needs is a practical down to earth remedy, as vivid as specific performance and injunction, within which the courts are brought immediately face to face with the policy decisions or the equities that the courts must and do already respectively make or weigh.'

David Hayton, probably the foremost equity lawyer in England at the moment, has also advocated that, instead of pigeonholing cases into one situation or another that English law should recognise a general principle of unjust enrichment.

The arguments against having some broad and flexible concept of justice as the only principle for imposing a constructive trusts are arguments based on legal certainty and predictability. The consequences of imposing a constructive trust provide powerful arguments against the use of a constructive trust merely as a means to do justice between the parties. It is thought that the United States of America is readier to impose a constructive trust as a remedy to do justice in a particular case because that country is also readier to interfere with existing third party rights than is the law of England.

The English courts will not therefore invoke a constructive trust merely to do justice in the particular case and to prevent unjust enrichment. A constructive trust will only be imposed by the English courts if the case before them fits one of the previous categories of cases where such a trust was held to exist. This does not mean that the list of situations in which they occur can be regarded as closed.

In order to understand the nature of a constructive trust in English law it is therefore necessary to look at the different situations in which these sorts of trusts have arisen, because the principles differ to some extent in each situation. The classification of situations in which constructive trusts arise is not rigid. Some of the cases overlap.

Constructive trusts exist in a rather amorphous rag bag of situations on which it is sometimes difficult to impose any sort of order. Briefly some of the situations in which they arise, other than those three situations already mentioned (which we will look at in detail in the later lectures), are:

2.2. Equity will not allow a statute to be used as an instrument of fraud.

One broad category of cases where a constructive trust is imposed is where there has been fraudulent or unconscionable conduct. Equity will impose a constructive trust, for example, upon a criminal who has made a benefit from his crime, or where a person acquires property under undue influence, in other words through unlawful pressure. The courts will also impose a constructive trust upon a person who has acquired property by other sorts of fraudulent or unconscionable conduct. For example, a constructive trust will be imposed on A, where A agrees to transfer land to B under an oral agreement or understanding that A will retain an interest in that land. If B attempts to sell that land to a third party, C, then a constructive trust will be imposed on B who will hold the property as a constructive trustee for A. B will not be able to rely on the fact that the agreement was made without compliance with the formalities required for that transaction under s.53 LPA 1925 that the agreement be in writing, for it is a rule of equity that equity will not allow an statute to be used as an instrument of fraud. In Rochefoucauld v Boustead Lindley LJ stated:

'It is a fraud on the part of a person to whom land is conveyed to deny the trust and to claim the land for himself.'

Bannister v Bannister is a straightforward illustration of the constructive trust being applied to remedy unconscionable or fraudulent conduct and to prevent a statute being an instrument of fraud. The defendant owned two adjoining cottages, which she was negotiating to sell to the plaintiff, her brother in law. They orally agreed that she could continue to live in one of the two cottages rent free as long as she wished. However, the conveyance, the deed effecting sale, contained no reference to the right of the defendant to reside. The plaintiff, the brother in law, subsequently gave the defendant notice to quit and brought an action claiming possession of the cottage. The defendant counter-claimed for a declaration that the plaintiff held the cottage on constructive trust for her during her life-time. The plaintiff tried to rely on the absence of writing, which the Law of Property Act 1925 requires for the creation of an interest in land, but the Court of Appeal rejected his arguments and rejected his claim to possession. A constructive trust was imposed upon the plaintiff and the Court of Appeal declared that the plaintiff held the cottage on constructive trust to permit the defendant to occupy it during her lifetime.

Bannister v Bannister was applied in Binion v Evans. In that case the Tredegar Estate had entered into an agreement with the defendant, a Mrs Evans, who was a widow of one of their employees, under which she was to live in a cottage rent-free for the rest of her life in return for her keeping the property in good order. Later, the Estate sold the cottage expressly subject to Mrs. Evans' interest, on account of which they paid a lower price. Despite this, the plaintiffs gave Mrs Evans notice to quit and subsequently claimed possession. The Court of Appeal, applying Bannister v Bannister, held that the plaintiffs held the cottage on constructive trust to give effect to Mrs Evans' interest.

In these cases, a constructive trust was imposed on a person to prevent them arguing on a strict application of a statutory provision that they should not be bound to comply with an oral agreement which was required to be in writing. The constructive trust is used in this context because s.53 of the Law of Property Act 1925 states that the requirement of writing does not affect the creation of such a trust. A constructive trust is imposed to prevent a person being able to rely on the strict letter of the statutory provision, because of the maxim of equity which states that 'Equity will not allow a statute to be used as an instrument of fraud.'

Another situation where the constructive trust is imposed to prevent a person relying on the strict formality requirements has also occured in the context of the Wills Act 1837. To create a valid will in English law it is necessary for the will to be witnessed and signed by two witnesses. However, it is not possible as you learnt in the case of Ottaway v Norman, for someone to go back on an oral undertaking to leave property to a certain person and argue that the oral undertaking is not valid because it did not comply with the formal requirements of the Wills Act, for again equity will not allow a statute to be used as an instrument of fraud.

The use of constructive trusts in respect of inequitable conduct has been developed extensively in the context of ownership of the matrmonial and quasi-matrimonial home, which we will look at later. However, in that context the emphasis is not such much on inequitable conduct as it used to be during the late 1960's and early 70's, but on giving effect to the express or implied intentions of the parties.

2.3. Mutual wills

Another situation where constructive trusts are imposed, but which I do not want to go into in any great detail, is in in the context of mutual wills, which are wills made in the same terms by a husband and a wife and where there is a mutual agreement that neither party will revoke the will. For instance, in one will H leaves his property to W and then to X and in the other will W leaves her property to her H and then to X. While the husband and wife are still alive each can revoke his or her will, although revocation may be in breach of contract. On say H's death, the W will, assuming no revocation has occurred, become absolutely entitled to any property under H's will and will also become a constructive trustee of the terms of the will.

2.4. Contracts for the sale of land.

In the context of contracts for the sale of land, on exchange of contracts but before actual completion of the sale, the vendor of the property becomes a constructive trustee and hold the property on constructive trust for the purchaser.

In the rest of these lectures I shall go on to look in more detail at three particular sorts of situation where the constructive trust had been used: (i) in the matrimonial or quasi-matrimonial context; (ii) where a third party has assisted or received property in breach of trust; and finally (iii) where a fiduciary gains a profit by virtue of his position.

We shall see that each situation has developed its own set of rules, principles and precedents, because of the unwillingness of the judges to impose constructive trusts on the basis of general principles such as equity, justice, unjust enrichment or unconscionability. Despite this, you may feel that there does in fact exist an underlying thread that runs through all the cases, that thread probably being the notion of equity, justice or fairness. It will be for you to decide.

Chapter IX

TRUSTS OF THE MATRIMONIAL OR QUASI-MATRIMONIAL HOME

The nature of implied trusts, in other words resulting trusts and constructive trusts, has already been discussed in the previous lecture. The aim of this lecture is to give you some idea of the use of implied trusts, particularly the constructive trust, in one area of English law where they have become particulary important. That area is that of the matrimonial and quasi-matrimonial home. By quasi-matrimonial home is meant the home owned by a cohabiting couple, who, although unmarried, are living together in a close and stable relationship as if they were a husband and wife.

Most couples today, whether they be married or unmarried, will own the house they live in jointly both in law and in equity, but in some cases the house will be owned only by one party, usually the husband or the male cohabitee. What happens in that sort of situation when the relationship breaks down ? Will the non-owner in law get nothing, or be entitled to part ownership of the property and eventually a share of the proceeds of sale ? The answer will depend on whether or not the couple are married and whether or not they are divorcing. If the couple are married and divorcing then the divorce court can do what it likes in respect of the home and indeed any other property, irrespective of strict English law property principles. The court under the divorce legislation (Matrimonial Causes Act 1973) has a discretion to distribute and allocate property, including the matrimonial home, as it sees fit according to the needs and resources of the parties. There is nothing to stop the divorce court ordering, for instance, that a former husband, who is the sole owner in law and in equity, transfer the matrimonial home to his former wife without her having to make any compensating payment. If the husband has plenty of money and has no problem finding accommodation for himself, and particularly where the wife needs a house for the children, then the court might well decide to order such a transfer.

When a relationship between two cohabitees who have been living together as man and wife breaks down, or where a married couple are not divorcing, the court has no such adjustive and discretionary jurisdiction to interfere with property rights and traditional property rights will prevail. If the man, say, owns the house both in law and in equity, then that is the end of the story and there is nothing the woman can do to get a share of that house, unless she can claim that she has an interest in equity under a trust, either by virtue of a resulting or constructive trust. Alternatively, the non-owning cohabitee may be able to acquire an interest via estoppel, but, as we shall see later, it is better to try and claim a right of ownership under the law of trusts.

You have already learned that generally, where rights in land are involved, English law requires strict compliance with particular formalities laid down in legislation. Section 52 Law of Property Act 1925 requires conveyances of land to be in writing and s.53 requires that declarations of trust in respect of land shall be evidenced in writing. The requirements of writing exist to create certainty in relation to transactions involving land. However, section 53(1)(c) Law of Property Act 1925 states that the requirement of writing for declarations of trust in respect of land does not affect the creation of implied, resulting and constructive trusts. The result of this section is that a non-owner in law and in equity, for instance a cohabitee, may be able to acquire a beneficial interest in the home in equity, and thereby be entitled to a share of the proceeds of sale by arguing that he or she has an interest under a constructive or resulting trust.

A married couple, who are not divorcing and who are not able to resort to the discretionary and flexible approach of the divorce court, may in certain situations also be able to argue on similar lines in order to acquire a beneficial interest in the matrimonial home. In the rare situation where a couple wish to separate and not divorce, perhaps for religious reasons, such arguments based on implied trusts could be used to acquire an interest in the former home. Married couples not divorcing and cohabitees not separating might also use arguments based on resulting or constructive trusts where a claim for possession and sale of the house is being made by a third party. The sole owner, say the man, may have mortgaged the house to a bank as security for a loan, either to buy the house itself or to pay for some business enterprise of his. If the man fails to make repayment of that loan to the bank plus interest, then the bank can bring an action to repossess the house, have it sold and recoup its loan from the proceeds of sale. Obviously, particularly in times of recession, there will be cases where this will happen. What is the non-owner in law and in equity to do ? Under s.70(1)(g) Land Registration Act 1925 it is possible for a person who is in actual occupation of the house and who has a beneficial interest in the house, for example under a trust, to resist any claims made by a third party, whether it be a prospective purchaser or a bank. In this situation a woman in actual occupation may wish to claim a beneficial interest under a resulting or constructive trust (more usually a constructive trust) in order to defeat a claim by a third party, so that she can remain in occupation or to claim a share of the proceeds of sale if the house has to be sold so that the loan can be recovered.

As I mentioned briefly just now, another way in which the non-owner in law or in equity may be able to establish an interest is by way of the equitable doctrine of estoppel. We shall learn later that the law of trusts in the context of the matrimonial or the quasi-matrimonial home has absorbed some of these estoppel principles. To get an interest via estoppel it will be necessary for the non-owner in law, say for example the female cohabitee, to prove that the following factors exist: representation, detriment, reliance and acquiescence. It has to be proved that there was a representation by the owner of the property that the non-owner should have an interest in the house, and, on reliance of that representation, the non-owner acted to his or her detriment while the representor acquiesced in the action of the non-owner. For example, imagine a situation where the man owns the house both in law and in equity. He says to his girlfriend that she can live in his house as long as she likes. On the basis of that representation she moves out of her flat and does improvements to the house and the man acquiesces in her doing so. She can go before the courts and claim that she has an interest either under a trust or by way of estoppel. It is usually, however, in her interests to argue that she has an interest under a trust rather than by way of an estoppel because if the court finds that a trust exists then that is more advantageous. With a trust she may get a share of the ownership and with it a right to the proceeds of sale. The owner of the house will hold the propety on contructive trust for them both in such shares as determined by the court. If an estoppel argument is successfully pleaded before the court, the judges have a discretion to do as they please to satisfy the equity and by this route the claimant may find that he or she has only obtained remuneration, or a right to occupy the house for a specified period rather than a right of ownership. Estoppel is not therefore so commonly argued before the courts in this context at least.

There are two ways of acquiring a beneficial interest in property under the trust analysis. One way is to argue that there is an interest under a presumed resulting trust. The non-owner in law can argue that by virtue of a contribution to the whole or part of the purchase of the property in question, that he or she gains an interest in equity.under a resulting trust. Payment of money to the purchase of property only raises a legal presumption of a resulting trust in favour of the non-owner. It can be rebutted by contrary intention, for example if it could be proved that the contribution was intended as a loan or a gift rather than as a means of acquiring a share in the property. The other way for the non-owner to acquire an interest in equity under a trust is to argue that a constructive trust should be imposed because there is evidence the it was the express or inferred intention of the parties that the non-owner in law should have a beneficial interest in equity.

There will obviously be certain advantages and disadvantages in arguing on the basis of either the resulting or constuctive trust. If the resulting trust argument is used it may be easier for the claimant to establish an interest in the property, but the quantum, in other words the amount, of the beneficial interest gained by this route will only be proportional to the amount of money contributed. With a constructive trust it may be more difficult to establish an interest by this route, unless there has been an actual contribution to the purchase of the property, or there is clear evidence of intention to have an interest, but if the court does decide to inmpose a constructive trust exists, then the court can then go on to look at all the evidence, all the circumstances of the case, in order to assess what share the claimant is to have. The court, for instance, might in an appropriate case order that the man, who is the owner in law, is to hold the property on constructive trust for his cohabiting girlfriend and himself in equal shares. This would mean that on sale she would be entitled to half the proceeds of sale, although she might in fact only have contributed a fraction of the purchase price.

1. THE RESULTING TRUST.

Cases based on the resulting trust are less common in the case-law, but a good illustration is to be found in the case of Sekhon v Alissa (1989). The litigation here was not between husbands and wifes and cohabitees but between a mother and a daughter, but the same principles would apply in the matrimonial or quasi-matrimonial home context. Here a house was bought in the name of the married daughter, the defendant. The house cost £36,000. The daughter contributed £15,000 to the purchase price and the mother, the plaintiff in the case, contributed the remainder. Both paid for improvements to the property. The mother argued on the basis of a resulting trust that the purchase of the house had been a joint commercial venture and that both parties intended to own the house in proportion to their respective financial contributions.
The daughter contended that the mother's contribution was intended to be a gift or alternatively a loan and that she, the daughter, was the sole owner in law and in equity of the property, although she did acknowledge that she had a moral rather than a legal obligation to return her mother's contribution if the mother so wished.
The Chancery Division of the High Court, the court below the Court of Appeal, stated that the law presumed a resulting trust in the mother's favour, unless that presumption could be rebutted by evidence that she intended a gift to the daughter or a personal loan. The question for the court was what was the actual or presumed intention of the parties at the time of the conveyance. On the balance of probabilities, the civil burden of proof, the court held it was intended that the mother should have a beneficial interest in the property under a resulting trust and that on the evidence no gift or loan was intended.
It is important to stress that the payment of a contribution to the purchase of property only raises that presumption that the contributor will have a share of the beneficial interest in equity. That presumption can be rebutted by evidence to the contrary.
In Howard v Jones, on the breakdown of a relationship between two cohabitees, the woman argued that she had an interest under a resulting trust in a derelict house purchased in the sole name of the man which he planned to restore as part of his building business. She argued that by virtue of her contribution to the purchase of the house and the general expenses of running the house they had been living in, she had enabled the man to develop his business and use any spare money to purchase the house to restore. The case went on appeal to the Court of Appeal, where Dillon LJ stated that, where unmarried parties were cohabiting and a property was purchased in the sole name of one of them and the other alleged that by her contributions towards the household expenses she had acquired a beneficial interest, the courts had to apply strict equitable principles. Here, despite a contribution by the female cohabitee to the house purchased in the sole name of the male cohabitee, there was no evidence that

there had been a common intention that the property should be acquired as a joint asset or that the woman should have a beneficial interest in it, and her claim therefore failed.

2. THE CONSTRUCTIVE TRUST.

Most of the claims to an interest in this context (ie in the context of the matrimonial or quasi-matrimonial home) have been based on the constructive trust argument where the non-owner will argue that they are entitled to an interest in the property under a trust by virtue of either an express or implied an agreement that they are to have such an interest. Where the non-owner has made a contribution to the purchase price or to the mortgage or there has been some oral agreement about a share of the property then the court is more likely to find that there is evidence of intention, and hold that an interest in the property has been acquired under a constructive trust. It is possible to argue on the basis of a constructive trust rather than a resulting trust even where there has been a monetary contribution. The court is able to infer from the payment of money that the non-owner was to have a share in equity.

We will discover when we look at the cases that judicial willingness to hold that there is or is not an interest under a constructive trust has fluctuated in the development of the law in this area. The courts now, it seems, are much less willing to find constructive trusts in this context than they were, which seems rather anomalous where there is increasing dissatifaction with marriage and increasing cohabitation.

In order to understand these sorts of trust, it is important to consider the House of Lords' decisions in this area, because these decisions create principles which are binding on the lower courts. In the early 1970's two very important decisions of the House of Lords, Pettitt v Pettitt and Gissing v Gissing, laid down the principles applicable when establishing whether or not an interest under a constructive trust could be found. There had to be evidence of an express or implied intention that the non-owner should have a share of the equity before a constructive trust could be imposed. The principles laid down in Pettitt and Gissing are still relevant today, but the House of Lords in a more recent decision in 1990, Lloyds Bank v Rosset, has severely cut back the scope of the earlier two decisions of the House of Lords and made it arguably more difficult to establish a constructive trust. In Lloyds Bank v Rossett the House of Lords seems to have tightened up the principles applicable in this area and, while making the law rather more certain, has made it more difficult for the non-owner to establish an interest in equity. After Rosset it now seems that there must be an express intention that the non-owning party is to have an interest or evidence of an implied intention, coupled with detrimental acts of reliance performed by the non-owner on the basis of that intention while the owner has acquiesced in those acts. There has been a merging of trust principles with those of estoppel in this area.

Providing money to the purchase of the house or making substantial improvments to the property might give an non-owner an interest, but each case depend on its facts. It must be stressed, however, that the court has no power to impose a constructive trust in order to justice in the particular case. There has to be evidence of an express agreement, or evidence from which such an agreement can be inferred, before the non-owner can establish an interest under a constructive trust. It is the actions of the parties themselves at the time of purchase or subsequently that matters and the court cannot impose a solution just to do justice in the case, although we shall see later that Lord Denning MR in the Court of Appeal in the 1970's, in complete defiance of the binding precedents of the House of Lords, found constructive trusts where equity and good conscience would require it, without being meticulously concerned about the intentions of the parties.

In Pettitt, the house was rather unusually owned by the woman and not the man. They were married and their relationship had broken down. At the time of the case the divorce court had not been given the statutory powers it now has to distribute property at its discretion according to the needs and resources of the parties irrespective of who owns it. The man, therefore, had to resort to the constructive trust as a means of arguing that he had an interest in the property held in his wife's sole name, because there was nothing in writing to give him an interest as required by statute. He had done some fairly minor work on the house. He had decorated the house inside and built an ornamental well and a small wall in the garden. He claimed he had an interest under a constructive trust, which he had acquired by virtue of his efforts in improving the property and he sought a declaration to that effect. His claim failed, because the House of Lords held that the work he had done on the house was too insubstantial to give him a interest in equity. There was no justification on the evidence for imputing to the spouses that there was a common intention that he should have an interest, and there was no evidence of an express or implied agreement that he should have a share. The House of Lords reversed the decision of the Court of Appeal.

It is difficult to decide exacty what the ratio of Pettitt is because each of their Lordships' reasoning was different. Lord Reid stated that where money contribution is made towards the purchase price, then the contributor will acquire a beneficial interest in the property, but where improvements are made then, in the absence of an agreement, the person who effected the improvements will not acquire an interest or have any claim against the owner. Lord Upjohn stated that the beneficial ownership of the property in question must depend on the agreement of the parties determined at the time of acquisition. His Lordship emphasised that the facts of the case involved no expenditure on the acquisition of the property but only expenditure of money and labour on improvements by the husband to the property to the wife. His Lordship stated:

'On this it is quite clearly established that by the law of England the expenditure of money by A on the property of B stands in quite a different category from the acquisition of property by A and B. It has been well settled by your Lordship's house... that if A expends money on the property of B prima facie he will have no claim on such property. In the absence of an agreement, and there being no question of estoppel, one spouse who does work or expends money on the property of another has no claims on the property of the other.'

These dicta of Lord Upjohn were applied in a more recent case, Thomas v Fuller-Brown, where a man, the non-owner, made substantial improvements to the property held in his cohabitees's name. He rewired, and replumbed the house, put in a new kitchen and built a two-storey extension, but was held to have no beneficial interest under a constructive trust as the more spending of money or labour on the improvement of property did not give rise to a successful claim to a beneficial interest. Lord Diplock in Pettitt adopted a more generous approach then the other Lordships and held that the court could infer that the parties to a marriage had a common intention that the non-owner should have a beneficial interest. His Lordship stated that it would even be possible to impute to the parties a common intention which they had in fact never formed but by the court forming its own opinion at to what would have been the common intention of reasonable men.
The case of Gissing was much the same as Pettitt. In Gissing the wife on marriage breakdown (before the divorce court could at its own discretion allocate property on divorce irrespective of traditional property principles) claimed a beneficial interest in the home owned solely by her husband under a constructive trust. There was no express agreement that she should have a beneficial interest but she had provided some furniture and equipment for the house and bought clothes for herself and her son. The House of Lords held that it was impossible on the facts of the case to draw an inference that there was any common intention that she should have any beneficial interest in the home under a constructive trust. In Gissing, which was in fact heard very shortly after Pettitt, the House of Lords made the chances of a claimant succeeding on the basis of a constructive trust slightly more difficult. Lord Diplock in Pettitt had stated that the court could impute an intention that someone should have an interest under a constructive trust even where there was no evidence of an express or implied agreement. In Gissing he recanted and held that the court could not impute, in other words impose an agreement where one did not exist either expressly or impliedly. The more restricted approach of the House of Lords in Gissing is clearly seen in dicta of Lord Morris in that case:

'The court does not decide how the parties might have ordered their affairs; it only finds how they did. The court cannot devise arrangments which the parties never made. The court cannot ascribe intentions which the parties in fact never had.'

Lord Diplock in Gissing also recanted from his position in Pettitt and held that the court could not impute an intention to parties

After these two decisions in the House of Lords, Lord Denning MR, the leading judge in the Court of Appeal, in a string of cases in the 1970's, and it seems in total defiance to the more principled and rule-based decisions of the House of Lords in Pettitt v Pettitt and Gissing v Gissing, held that the courts could impose a constructive trust to do justice in the particular case, irrespective of the intentions of the parties. Lord Denning's more flexible and more generous approach was contrary to the decisions in the House of Lords, where evidence of either an express or inferred intention that the non-owner in law should have a beneficial interest was required.

An illustration of this more generous and more fluid approach of Lord Denning in the Court of Appeal is to be found for example in the case of Cooke v Head (1977). Here the couple were unmarried. Land was bought in the name of the man and he paid the deposit and mortgage. They built a bungalow on the land with the plan that when she was divorced they would get married and live in the house. She did some work on the bungalow. She did quite heavy work. She demolished a path and built a patio. She wielded a sledge hammer. Lord Denning did not think the approach should be looked at not in terms of the parties' respective money contributions but in broader terms. His lordship stated that:

'Where two parties by their joint efforts acquire property which is to be used for their joint benefit the court should impose or impute a constructive or resulting trust.'

Note that his lordship uses the word 'impute', which had been rejected by Lord Diplock in Gissing. This generous approach of Lord Denning's, based on broad concepts of justice was quite out of line with the requirement of the House of Lords, based on the strict application of principle, of the need to find some evidence of an express or inferred intention. Lord Denning was also not concerned to treat resulting trusts and constructive trusts separately as two distinct concepts. In another case he said that it did not much matter whether the court called the trust an implied, resulting or constructive trust, thereby implying that the aim in the cases was to do justice rather than to be concerned with the legal difference between such trusts.

Lord Denning's use of the constructive trust concept as a tool to do justice in the particular case came to be known as the 'new model' constructive trust and was thought to be more in line with the approach of the courts in the United States of America where the courts, in order to do justice in the particular case, imposed trusts in a much broader way without strict adherence to principle. Lord Dennnings broader approach was eventually cut back in the 1980s in a case called Burns v Burns where the Court of Appeal overruled the Denning decisions and endorsed a return to orthodoxy, in other words the more rule-based approach of the House of Lords in

Pettitt and Gissing, decisions which Lord Denning had tended either to ignore or to misapply. After Burns it was no longer possible for a claimant to gain an interest under a contructive trust on the basis of broad conceptions of unconscionability and fairness.

In Burns v Burns, the couple were unmarried although the woman concerned had taken on the man's name. Even though the woman had lived with the man, the sole legal owner, for about 20 years, had brought up their children, bought some items for the house and contributed to general household expenses such as paying for electricity and so on, the Court of Appeal held that she had acquired no beneficial interest in the home on relationship breakdown. There was no evidence of an intention, express or inferred, that she should have such an interest under either a resulting or constructive trust. The judges in the Court of Appeal expressed their sympathy for Mrs Burns but stated that the only way in which women in her position could be protected by the law was for the legislators, in other words Parliament, to make new laws to protect the ownership rights of cohabitees. In some jurisdictions this has been done and the court will also enfore cohabitation contracts which allow for the distribution of interest in the quasi-matrimonial home on relationship breakdown. Had she been married and divorcing, then she would have been in a much better position and the result would have been quite different.

After the decision of Burns v Burns it is now more difficult for a non-legal owner, for example a cohabitee, to establish an interest under a trust. The courts will not hold that there a beneficial interest exists because equity and good conscience require it. Evidence of intention is needed either expressly or impliedly. If there is no express intention, then intention can be implied by proof of direct contribution to the purchase price or by substantial indirect contribution referrable to the acquisition of the house. What is meant by substantial indirect contribution is substantial contribution to household expenses which make it easier for the other party, the owner, to make payment to the purchase. For instance indirect contribution could include payment of gas and electricity bills, food and clothing for the children, payments which would make it easier for the other party to pay the mortgage.

After Burns v Burns the position has become arguably even more difficult for the non-owner to acquire an interest in equity because of two subsequent decisions, one in the Court of Appeal called Grant v Edwards and a decision of the House of Lords, Lloyds Bank v Rosset, which I have already mentioned. It seems after these cases that not just evidence of an express or implied agreement is necessary to establish an interest under a constructive trust but that there must be some acts of reliance done on the basis of this agreement. There must be an intention plus detrimental reliance based no the intention. It seems as if the courts have merged the concepts from trusts and estoppel to create a hybrid sort of concept. There has been a cross-fertilisation of concepts.

This requirement of detrimental reliance originated in the case of Eves v Eves where the parties were cohabitees and the house was in the man's sole name. At the time of purchase the man told the woman that if she had been 21 years old (which was the age of majority in England at the time, although it is now 18) he would have put the house in their joint names because it was intended that it should be their home. After they moved in she did extensive decorative work. The Court of Appeal stated that there was an understanding that she should have a beneficial interest because although there was no writing, the parties had made their intentions plain and on the basis of that intention the woman had performed acts of detrimental reliance. She was therefore entitled to have a beneficial interest under a constructive trust.
In Grant v Edwards, a decicision of the Court of Appeal, which is considered to be a leading case alongside the three House of Lords decisions of Pettitt, Gissing and Rosset, the parties were not married but set up home together. The house was bought by the man but conveyed into the joint names of himself and his brother, who had no beneficial interest. The man told that woman, his cohabitee, that he would have put her name on the title to the house but felt that to do so would have been detrimental to her in her pending divorce proceedings. The man paid the deposit and mortgage instalments while the woman made substantial contribution to the household expenses. When the relationship broke down and they separated the woman claimed a beneficial interest in the house in equity under a constructive trust and succeeded. It was held that there was a common intention that she should have an interest otherwise no excuse would be needed for not putting her name on the title deeds. She had made very substantial contributions to the housekeeping and to the feeding and bringing up of the children. There was evidence of conduct which amounted to an acting upon that intention or conduct upon which she could not reasonably have been expected to embark unless she was to have an interest in the house. The Court of Appeal followed and approved of the decision in Eves v Eves. Once a beneficial interest is held to exist then the court can take into account all the circumstances of the case in order to decided what the quantum of that interest should be. In Grant v Edwards the Court of Appeal held that the plaintiff, the female cohabitee, was entitled to a half share of the beneficial interest.
The House of Lords in LLoyds Bank v Rosset has endorsed the approach of the Court of Appeal in Grant v Edwards. Here the parties were married and the house was in the husband's sole name. The wife helped to renovate the house but made no financial contribution to the house. The marriage broke down and the husband had charged the house to a bank as security for a loan, the wife knowing nothing of this. When the husband went into debt, the bank claimed possession of the house and an order for sale. The wife, by way of defence, claimed that she had a beneficial interest under a constructive trust and this coupled with her actual occupation in the property gave her a right to resist the claims of the bank. The House of Lords rejected her claims and held that she had no interest by way of constructive trust. Her activities in relation to

the renovation of the property were insufficient to justify the inference of a common intention that she should have a beneficial interest. Lord Bridge, who gave the leading opinion, stated that any judge required to resolve a dispute between former partners as to the beneficial interest in the home should always have in the forefront of his mind the critical distinction between two different types of situation where a constructive trust might arise. The first situation was where there was an express agreement or arrangment to share the beneficial interest. Here the claimant would only need to show that he or she had acted to his or her detriment or significantly altered his or her position in reliance of the agreement. The second type of situation was where there was no evidence of an express agreeement or arrangement but where the court must rely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. His Lordship stated that in the second category of cases, in other words where there was no agreement, it was at least extremely doubtful whether anything less than direct contribution to the purchase price by the non-owning partner would be sufficient to establish an intention that the non-owner was to have a share of the beneficial interest in equity.

3. CONCLUSION

It certainly seems from the case-law and particularly after the Rosset case, that the English courts will take a more rigid and less generous approach in considering whether or not a beneficial interest in property will arise under a constructive trust. The approach of the courts is now far removed from the generous approach taken by Lord Denning in the 1970's where such trusts, which were called the 'new model' constructive trust, were found and imposed irrespective of intention but where the justice of the case required it. A cohabitee in English law is therefore at a severe disadvantage on relationship breakdown if the house is owned at law by the other party, because establishing an interest under a trust has become much harder. The court will require evidence of an intention, express or implied, that the non-owner is to have an interest in equity and the House of Lords has stated that it is unlikely that anything less than a contribution to the purchase price will give the non-owner at law an interest in equity under a constructive trust. Where the parties are married then on relationship breakdown the divorce courts can do what they like in respect of property regardless of ownership and without resorting to the application of strict property principles. The onus is therefore on cohabitees to regularise their own positions by seeing to it that they are either joint owners of property or by drawing up a cohabitation contract defining their respective property rights and how any property they acquire should be allocated and distributed on relationship breakdown.

Some academic commentators have advocated a return to a more flexible approach to the creation of property rights and have recommended instead a return to the application of a broad principle of unconscionability in these sorts of cases. David Hayton, a professor at Kings College, London, and probably the top academic property lawyer in England at the moment, has stated in an article:

'Surely it is time the courts and counsel moved beyond pigeon-holing circumstances into constructive trusts and proprietary estoppels and looked at the basic principle of unconscionability underlying both concepts.'

This is more akin to the Denning approach in the seventies but it is unlikely that the English courts will adopt such an approach based on broad principles of unconscionability or unjust enrichment, preferring instead to look at all the circumstances and facts of the case in order to find evidence of intention and detrimental reliance. English law, as we shall see, prefers to apply rules and principles adopted and moulded from earlier case law rather than adopting general principles of liability such as unjust enrichment or unconscionability. In fact the English judges have been keen to deny the existence of any principle of unjust enrichment in English law. In Canada, I believe, the principle of unjust enrichment is recognised as a general basis of liability but in English law it will necessary to follow the traditional principles and traditonal categories of constructive trusts. In Australia, it seems that there has fairly recently also been a move towards recognising a general concept of unconscionability for imposing a constructive trust in the cohabitation context. In Baumgarter v Baumgarter (1987) 164 CLR 137 the High Court of Australia had to deal with a dispute between a man and a woman where there was insufficient evidence to establish a common intention. Nevertheless the court held:

'the appellant's assertion, after the relationship had failed, that the... property is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.... We consider that the constructive trust to be imposed should declare the beneficial interest of the parties in the proportion 55 per cent to the appellant and 45 per cent to the respondent.'

Until the British government decides to introduce legislation to improve the position of cohabitees, particularly those living together as husband and wife, it is unlikely that the courts will impose constructive trusts on broad principles of equity to do justice in the particular case. Cohabitees will therefore have to ensure they put their affairs in order by either purchasing property jointly or drawing up a cohabitation contract.

There is evidence that more cohabitees are drawing up such contracts and there is even talk of encouraging the use of pre-marital contracts.

Chapter X

OTHER EXAMPLES OF CONSTRUCTIVE TRUSTS

I wish now to look at another area where constructive trusts have been imposed. In this area constructive trusts are imposed more as a remedy and are not based on finding evidence of an express or implied intention as constructive trusts in the matrimonial context are. The imposition of a constructive trust provides a legal basis on which a third party can be made liable as a constructive trustee to account for any money or property received in breach of trust when there may be no suitable remedy available in tort and contract.

When trust property has been disposed of in breach of trust, the courts will, in certain circumstances, impose a constructive trust on third parties or what are sometimes called strangers in three broad sorts of situations. First, where a third party has intermeddled in the administration of a trust and should not have done. Secondly, where a third party has assisted in disposing of property knowing that the disposition is a breach of trust; and thirdly where a third party receives property knowing that the receipt of the property is in breach of trust.

What I mean by third parties or strangers to the trust are persons other than the settlor, trustee or beneficiary. A third party might for instance be a bank, a solicitor, an accountant or someone else who receives property in breach of trust.

Let me give you an example of each of the three situations I have mentioned. For instance, in the first situation, intermeddling in the administration of a trust, a constructive trust might be imposed for instance on a solicitor who has interfered in the administration of a trust so that he could be liable to make good any losses to the trust. An example of the second situation would be perhaps where a bank pays out a large and unexplained sum of money to a trustee whom the bank knows to be a compulsive gambler. A constructive trust could be imposed on the bank in order to make the bank liable to pay back any losses to the trust because it has assisted in a breach of trust. In the third situation if a trustee were say to give trust property, for example a painting by Picasso, to his sister for her birthday and she knew it was trust property then the court might well hold that she held the painting on constructive trust for the beneficiaries. It it could be proved that she had the requisite degree of knowledge of the breach of trust either at the time when she received the painting or later on she would then be liable to return the painting to the trust or the proceeds of sale if she had sold it or might be held liable if she had got rid of it to pay damages to the trust. Obviously it will also be open for a beneficiary to sue the trustee who gave away the trust property for breach of trust. If, however, he has no money, then it will be necessary to impose a constructive trust on the recipient of the trust property in order either to seek a personal remedy or a proprietary one.

Let us look at the first of these three situations in which a constructive trust might be imposed.

1. INTERMEDDLERS IN THE ADMINISTRATION OF A TRUST

A person who intermeddles in the administration of a trust is often described as a 'trustee de son tort'.
A.L.Smith LJ in Mara v Browne has said:

'...if one, not being a trustee and not having authority from a trustee takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong -ie., a trustee de son tort, or, as it is also termed, a constructive trustee.'

A neat little illustration of the rule is to be found in the case of Blyth v Fladgate (1891) 1 Ch 337. Here trust funds were, on the direction of the sole trustee, paid to a firm of solicitors and invested in investments held in the name of the firm. Following the death of the sole trustee and before the appointment of new trustees the investments were sold and reinvested. As a result of this transaction money was lost. The partners of the solicitors firm were held liable to account to the trust for the money lost as they had intermeddled in the administration of the trust. They were in effect acting without the authority of the trustees. They were held to be constructive trustees of the proceeds of sale and thereby responsible for the improper investment. Such a constructive trustee will be liable for any depreciation or appreciation in the trust property.
Similar principles apply to both trustees and to fiduciaries, so that any person who takes it upon himself as trustee or other fiduciary without having been appointed as such will be a constructive trustee of any property acquired by him in the course of his intervention and will in every respect be treated as if he had been expressly appointed to the office in question.

2. PERSONS WHO HAVE ASSISTED IN BRINGING ABOUT A DISPOSITION IN BREACH OF TRUST.

A third party, or as they are sometimes called a stranger to the trust, can be liable as a constructive trustee if he knowingly assisted in a breach of trust. For instance, a solicitor who draws up documents knowing that by doing this he will be perpetuating a breach of trust may be liable as a constructive trustee to account to the trust. A person may be liable in this sort of situation event though he or she does not actually have trust property in his or her possession. It seems that for a constructive trust to be imposed it is sufficient for the trust property to have passed through the stranger's hands even though that person no longer has the property. A constructive trust will, however, only be imposed in this sort of situation if the person who is assisting in a breach of trust knew that a breach of trust was being committed.

In the case of Lipkin Gorman v Karpnale a solicitor drew out a large sum of money belonging to his firm's account which was held at a bank. This was done in breach of trust because the account was owned by all the partners in his firm and he had done this without their knowledge or consent. The solicitor spent all the money on gambling at the Playboy Club. There would have been nothing to gain in suing the solicitor because he had no money and so the plaintiffs sued the gambling club and the bank for the money that had been lost on the basis that they had knowingly assisted in disposing of property in breach of trust. The question was whether the bank or the Playboy Club could be fixed with constructive trusteeship in order for them to be liable to account for the loss. The Playboy Club were held to have no knowledge of the breach of trust and were therefore not liable. The Bank, on the other hand, the court held ought to have known about the breach of trust and was therefore liable to account to the partners for the money as constructive trustees, even thought they no longer had the money, the trust property, in their possession.

Given that a trust is a relationship in respect of property it seems somewhat strange that a constructive trust can be imposed on someone whether or not they still hold the trust property. It seems that it is sufficient that the trust property in question had at some time passed through the hands of the third party assisting in breach of trust in order for a constructive trust to have been imposed.

Some commentators have argued that this sort of constructive trust, where there is no property existing in the hands of the constructive trustee, should be treated as a distinct and separate kind of constructive trust, as a constructive trust that does not confer any proprietary rights on the constructive trustee but merely imposes on the constructive trustee a personal liability to account to the beneficiary for his actions. For this reason the constructive trusteeship imposed in these situations has been described as 'a fiction which provides a useful remedy where no remedy is available in contract or tort.' (David Hayton (1985) 27 Malaya Law Review 313,314). It has to be admitted that it is virtually impossible to justify some of the existing authorities without accepting the argument that there is indeed such a second kind of constructive trust. Nevertheless, it is not easy to see how an obligation which is not imposed in respect of any identifiable property can be properly classified as a trust. It seems more appropriate to regard such cases as examples of equity imposing a quite distinct remedy - a personal liability to account in the same manner as a trustee.

As I have mentioned earlier, not every third party or stranger who assists in a breach of trust will be liable as a constructive trustee. The stranger must have some knowledge that there has been a breach of trust. The classic statement of the law was enunciated by Lord Selbourne LC in Barnes v Addy (1874) 9 Ch App 244 and has been used as the starting point in almost every subsequent decision. The Lord Chancellor said this:

'....strangers are not to be made constructive trustees merely because they act as agents in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.'

In other words, there has to be some knowledge of a fraudulent transaction before someone who assists in a breach of trust will be liable as a constructive trustee. That is a question of fact in each case.

In Barnes v Addy the surviving trustee of a fund appointed as sole trustee of part of the fund the husband of the life tenant who duly sold the trust property, misapplied the proceeds of sale and became bankrupt. The beneficiaries sought to impose a personal liability to account upon the solicitors of the two trustees who had advised against the appointment but who had prepared the requisite deeds. The application was dismissed as the solicitors had had no knowledge or suspicion of any dishonest intention on the part of the trustees and so could not be personally liable to account. In other words the defendants were not liable because they did not have the requisite knowledge.

In Lee v Sankey, on the other hand, a firm of solicitors were held liable as constructive trustees. Here trustees employed a firm of solicitors to receive the proceeds of sale of part of the trust property. The solicitors paid part of this money to one of the trustees who employed the money in various unwise speculations and died insolvent. The other trustee and the beneficiaries successfully claimed that the solicitors were liable to account for the sums so paid away on the grounds that they should have obtained the receipt of both trustees before parting with the proceeds of sale in their hands.

In the Baden Delvaux case Peter Gibson J isolated four requirements which had to exist before a stranger could be liable as a constructive trustee for knowingly assisting in a breach of trust. These were: i) the existence of a trust; ii) the existence of a dishonest and fraudulent design on the part of the trustee; iii) the assistance by the agent in that design; and iv) the knowledge of the agent.

The first three requirements are fairly straightforward. The fourth requirement, the requirement of knowledge of the dishonest or fraudulent design has provoked considerable judicial disagreement in respect of the degree and scope of the knowledge needed to impose liablity as a constructive trustee. Should it be actual knowledge of a fraudulent or dishonest design, or should it be sufficient if there was a failure to make enquiries, or recklessness as to whether the transaction was fraudulent.

A series of early cases involving solicitors clearly established that a stranger to a trust would not be personally liable to account to the beneficiaries unless he had either

actual knowledge of the breach of trust involved or had wilfully closed his eyes to the possibility of such a breach. The test was really whether the person knew not that it was reasonable to have expected them to know.
The case of Selangor United Rubber Estates v Cradock (no 3) (1968), however, complicated the position somewhat as it was held in that case that an agent could be liable to account as a constructive trustee whether he knew or ought to have known of the breach of trust. The case involved an extremely complex company fraud, the facts of which I do not want to go into in any detali. A bank involved in the transaction had, without knowledge of the fact, enabled Cradock to purchase the plaintiff company with its own money. In due course the true facts emerged and an action was brought in the name of the company against the various participants in this company fraud. The directors of the plaintiff company were liable for breach of trust in that they had paid away the property of the company for an improper purpose. Cradock and other defendants involved were all liable as constructive trustees as recipients of the property disposed of in breach of trust. Much more controversial was the decision of the judge to impose upon the Bank a personal liability to account to the company even though the Bank had clearly acted in good faith without the actual knowledge of the breach of trust being perpetrated by the directors. Previous authorites had, on the other hand, clearly established that an agent of a trust who had assisted in bringing about a disposition of trust property in breach of trust would not be personally liable to account to the beneficiaries unless he had either actual knowledge of the breach of trust or wilfully closed his eyes to the possibility of such a breach. The judge held that a reasonable banker would have realised that by allowing the company's money to be paid into Craddock's account he was enabling Craddock to purchase the company with its own money. He held that an agent of a trust who has assisted in bringing about a disposition of trust property in breach of trust will be personally liable to account if he knew of ought to have known of the breach of trust in question. Ungoed-Thomas J distinguished the earlier authorities on the grounds that they were concerned with persons who were intermeddling in the administration of the trust and were not agents. It is, however, very difficult to accept this distinction because in an earlier authority it had been held that the defendant solicitors in the cases were agents and not intermeddlers. It is suggested that im imposing personal liability to account on an agent on the grounds that he ought to have known of the breach of trust, the judge in the Selangor case was departing from the principles of earlier authorities.
While an appeal in the Selangor case was pending the first instance decision of that case had to be considered in the Court of Appeal in the Carl-Zeiss Stiftung v Herbert Smith (No.2). I do not want to go into the facts of the case but what is is important about the decision for our purposes is that two members of the Court of Appeal stated that in any event an agent of a trust who has assisted in bringing about a disposition of trust property in breach of trust cannot be personally liable to account unless he has actual knowledge of the breach of trust. Their lordships preferred the view taken by

the earlier authorities before the Selangor case. Their lordships did not criticise the Selangor decision, however, because they did not wish to prejudice the pending appeal of that case. Consequently the conflict between the older authorities and the Selangor case remains unsolved.

Neither have subsequent authorities resolved the conflict as to what sort of knowledge is necessary to impose a constructive trust when assisting in a disposition of trust property in breach of trust. Later authorities have cited the two conflicting views with approval on several occasions. For instance the Selangor case was followed and applied in Karak Rubber Company v Burden (No 2), which again, like the Selangor case, involved a successful attempt to purchase a company with its own money. Because of the similarity on the facts to the Selangor case, the judge held that the Bank (Barclays) were personally liable to account to the company.

The Bank were also held liable in Rowlandson v National Westminster Bank (1978) 3 All ER 370. Here the settlor had deposited funds at the defendant bank for the benefit of her grandchildren without giving any instructions as to how the funds were to be dealt with. The bank placed the funds in a trust account for the grandchildren, the joint signatories and hence trustees of the account being the two sons of the settlor. One of the sons, ie one of the trustees, drew a cheque on the account in favour of his stockbroker and the bank honoured the cheque even though it only carried his signature alone. Later the same trustee, without the signature of the other trustee, transferred the balance in the account to another account held in his sole name. The beneficiaries claimed that the bank was personally liable to account to thme for the sums paid away. Their claim was upheld, the judge applying the Karak Rubber case. In other words, it was sufficient if the bank ought to have known for liability to be imposed.

Perhaps the most important of this group of cases is that of Baden v Societe General where both Peter Gibson J and counsel for both parties accepted the correctness of the decisions of Selangor and Karak Rubber. The Baden case involved a complicated and gigantic financial fraud with the aim of transferring funds from one jurisdiction to another and eventually to Panama where they would not be able to be recovered. The defendant bank who held some of this money obtained by fraud, eventually transferred part of this money to Panama where it subsequently disappeared. The plaintiffs claimed that the defendant bank was personally liable to account as constructive trustees for the sum transferred. Peter Gibson J held that an agent of a trust who has assisted in bringing about a disposition of trust property in breach of trust will be personally liable to account if he has any one of the following five types of knowledge:

i) actual knowledge;

ii) knowledge that he would have obtained but for wilfully shutting his eyes to the obvious;

iii) knowledge which he would have obtained but for wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;

iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man;

v) knowledge of circumstances which would put a reasonable and honest man on inquiry.

His lordship held, however, that only in exceptional circumstances, should the fifth type of knowledge be imputed to an agent acting honestly in accordance with the instructions of his principal. Here on the facts of the case the bank were not liable as it had not failed in its duty.

Cases after Baden Delvaux have held that only the first three types of knowledge and not the last two will lead to the imposition of a constructive trust as a means of making a defendant personally liable to to account for having assisted in bringing about a disposition of trust property in breach of trust. The Court of Appeal so held in Belmont Finance Corporation v Williams Furniture which was another attempt to purchase a company with its own money.

In Re Montagu's Settlements, which was actually a case involving knowing receipt of trust property in breach of trust rather than knowing assistance in breach of trust, Megarry V-C also expressed that only the first three sorts of knowledge would suffice, in other words what he called actual, Nelsonian, or naughty knowledge.

Megarry V-C's opinion was followed and applied in the case of Lipkin Gorman v Karpnale (1986) NLJ 659 where a personal liability to account was imposed upon a bank who had permitted a solicitor of whose gambling it was aware to draw money from his firm's client account. Here it was held that the bank had shut its eyes to the obvious source of his gambling money or had wilfully and recklessly failed to make such inquiries as a reasonable and honest man would make. In other words the bank was held to be within the first three categories of knowledge and therefore liable to account as a constuctive trustee even though it no longer held the money.

It now seems clear from the authorities that personal liability to account will be imposed on an agent who has assisted in bringing about a disposition of trust property in breach of trust if he has any of the first three of the first types of knowledge set out by Peter Gibson J in Baden v Societe General. Whether there was the requisite degree of knowledge to impose a constructive trust and personal liability to account in each case is essentially a question of fact, but one conclusion we could perhaps draw out from these cases is that there is a greater duty for banks in particular to make more thorough enquiries when they suspect there might be the possibility of fraud.

3. RECIPIENTS OF TRUST PROPERTY DISPOSED OF IN BREACH OF TRUST.

What is the position if a trustee in breach of trust passes trust property to a third party ? For instance the trustee gives someone a painting belonging to the trust? As long as the person who receives trust property is not the bona fide purchaser for value without notice (actual, constructive or imputed) of the beneficiaries equitable interest then the beneficiaries of the trust can follow the property into the hands of the recipient or impose a constructive trust on the recipient. Any recipient of property disposed of in breach of trust who is liable to such an equitable tracing claim will of course be a trustee of such property as is in his hands. This is simply because the equitable interests of the beneficiaries must take effect behind a trust of the legal estate. However, the fact that it is possible to trace the property into its product does not necessarily mean that the recipient will be held to be a constructive trustee of the property transferred to him. Indeed it will only be necessary to impose a constructive trust in certain circumstances, for example where the property in question has depreciated in value or been dissipated while in the hands of the recipient. The equitable tracing claim only allows the beneficiaries to claim identifiable property if it remains in the hands of the recipient. The imposition of a constructive trust will be necessary to make the recipient personally liable for the property itself or the reduction in the value of the property. If the recipient has obtained some incidental profit from the property while it has been in his hands, the imposition of a constructive trust will be necessary in order to make the recipient liable to account to the beneficiaries for this incidental profit.

In what circumstances then is the court prepared then to impose a constructive trust? If the recipient takes free of the equitable interest in the property then a constructive trust could not be imposed on the recipient. If for example the trustee sold an antique chair belonging to the trust to an antique dealer who knew nothing of the breach of trust, then a constructive trust could not be imposed on the dealer and the beneficiares would have no claim against him either by way of a tracing remedy, a personal remedy or by virtue of a constructive trust because the antique dealer is the bona fide purchaser for value without notice of the breach of trust. All that the beneficiaries could do in this situation would be to sue the trustee in his personal capacity for damages for breach of trust, in other words compensation for the loss of the trust property. Authority for the principle that the courts will not impose a constructive trust upon recipients of property disposed of in breach of trust who received the property in good faith without any knowledge of the breach of trust in question is the decision of the Court of Appeal in Re Diplock. Under the provisions of a will which were later held void by the House of Lords because the provisions were uncertain, executors distributed large sums of money to various charities who had received the property in good faith without the slightest idea that the House of Lords would at a later date hold that the will was void. The next of kin of the testator who were entitled under the resulting intestacy brought an action against the charities to recover the money. The Court of Appeal held inter alia that they were not constructive trustees of the money they had received. This did not of course prevent the next of kin from tracing the property in equity into the hands of the constructive trustees. The Court of Appeal held that such sums that could not be recovered by the equitable tracing claim could not be recovered by the imposition of a constructive trust upon the charities.

A recipient of trust property disposed of in breach of trust will, on the other hand, be liable as a constructive trustee if he or she does have knowledge of the breach of trust in question. This again raises the question of what sort of knowledge is necessary for the imposition of a constructive trust. It seems that a constructive trust will be imposed where there was either actual knowledge of the breach of trust or where there had been an obvious shutting of eyes to the possibility of breach of trust , in other words that if the degree of knowledge is within the first three categories of knowledge in the Baden classification then a constructive trust can be imposed. This view is confirmed by the case of Re Montagu's Settlements where his lordship made a definitive review of the law.

This case concerned a settlement made in 1923 under which certain property, largely comprising furniture, silver, pictures and other heirlooms of the Montagu family were assigned to trustees who where under a duty after the death of the ninth Duke of Manchester in 1947 to select and make an inventory of such of the chattels they considered suitable for inclusion in the settlement and to hold the rest on trust for the tenth Duke of Manchester. The trustees, however, made no selection and inventory but treated all the chattels as the property of the tenth Duke, who subsequently sold many of them and took the remainder to Africa with him. On the tenth Duke's death, the eleventh Duke of Manchester sought to recover the chattels or their value from the executrix of the tenth Duke. It was held that such chattels as were in the hands of the testatrix could be traced in equity into her hands. It was claimed that the tenth Duke had received the chattels as a result of a disposition of property in breach of trust because they should have been included in the settlement and that his executrix was therefore constructive trustee of the chattels for the settlement and therefore liable to account for their loss to the settlement. Megarry V-C held that 'the equitable doctrine of tracing and the imposition of a constructive trust by reason of the knowing receipt of trust property are governed by different rules and must be kept distinct' and stated that 'whether a constructive trust arises in such a case primarily depends on the knowledge of the recipient, and not on notice to him.' His lordship reviewed all the earlier authorities and held that only the first three of the five types of knowledge will lead to the imposition of a constructive trust and the subsequent personal liability to

account, in other words there had to be actual knowledge, or knowledge that he would have obtained but for wilfully shutting his eyes to the obvious or knowledge that he would have obtained byt for wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make.
It was held on the facts that the tenth Duke had not been a constructive trustee of the selected chattels. It seemed there had been an honest muddle.

Subsequent cases have required the first three sorts of knowledge and although the views of Megarry are not totally reconcileable with earlier authorities it does seem at least for consistency's sake that for both knowing assistance in breach of trust and knowing receipt in breach of trust that the test should be the same for both and that only the three sorts of knowledge mentioned will suffice. It seems likely that the courts will require the presence of either actual or constructive knowledge. Even so, the position as to the degree of knowledge is likely to remain very uncertain and whether or not a constructive trust will be imposed in these sorts of cases will largely depend on the facts of each case.
It is to be noted that a constructive trust can be imposed on a third party where the recipent does not know of the breach of trust at the moment of receipt of the property but later on discovers the property he holds is held in breach of trust and deals with the property in a manner inconsistent with the trust.

4. WHERE A FIDUCIARY GAINS A PROFIT BY VIRTUE OF HIS POSITION.

Now I would like to consider the use of the constructive trust as a means of imposing a liability to account on a fiduciary who acts in breach of a fiduciary duty and gains a benefit from his position. There is no definition of what a fiduciary is but it is someone, who though not specifically called a trustee, is nonetheless in a position of trust. The word fiduciary comes from the latin word fiducia which in turn comes from the verb fidere to trust. Whether a particular relationship is of a fiduciary nature is simply a question of fact in each case. In general terms, however, a fiduciary is someone who undertakes to act for or on behalf of another in some particular matter or matters. That undertaking might be of a general nature of it might be more specific. Cases in this context have dealt with such fiduciaries as company directors, solicitors, accountants and so on. The House of Lords in the case of Reading v AG gave a very wide interpretation to the meaning of fiduciary by holding that a member of the armed forces of the Crown was a fiduciary in respect of the use of his uniform and the opportunities and facilities attached to it.
The rationale for the imposition of liability on a person in a fiduciary postion by way of the constructive trust is based on the need to prevent a conflict of duty and interest

between the fiduciary duty owed to others and and temptations to put one's own self-interest first. Unless expressly provided for, there is a strict rule that a fiduciary like a trustee must not profit from his position and will be liable to account for any profits made and often even when those profits were made in good faith.
The starting point for any discussion of the constructive trust in this context must without doubt be the classic statement of the rule laid down by Lord Herschell in Bray v Ford (1896) where he said:

'it is an inflexible rule rule of a court of Equity that a person in a fiduciary position .... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and his duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But, I am satisfied that this might be departed from in many cases, without any breach of morality, without any wrong-doing being inflicted, and without any conscious wrongdoing.'

The attitude of English law to the liability of a fiduciary is generally speaking a very harsh one. There are many illustrations in the case-law of courts taking a strict approach and penalising fiduciaries, particularly trustees, irrespective of whether there was any serious conflict of interest between their duty to their duties and their own personal interests. It is enough if there is a potential risk of such a conflict. The case of Boardman v Phipps, which is the leading authority today in this context, demonstrates the harsh attitude of the courts to those in a fiduciary position. We shall look at this case later but the reason for liability being strict where there is no provision made for the retention of profits is because a less rigid application of the rule would open up the gates to the possibility of fraud.
If a constructive trust is imposed where an illegal profit has been made then both personal and proprietary remedies can be sought against the fiduciary. In other words the fiduciary will be liable to account for profits or by way of a tracing action any property he possesses can be restored to the claimant.
English law's treatment of fiduciary relationships in the context of constructive trusts differs from one fiduciary relationship to another. A director of a company may well be in a more a more favourable position for instance with regard to property transactions with his company than is a trustee with regard to property transactions with his trust. The law treatment of fiduciaries also differs depending on the nature of the benefit obtained by the fiduciary. Some of the distinctions made in the case law are somewhat absurd particularly that an agent who receives a commission will be liable

to account for that commission as a constructive trustee while, after the case of Lister v Stubbs, an agent who receives a bribe to induce him to deal with the property in a particular way will not be obliged to account for that bribe as a constructive trustee but will be obliged merely to pay over the value of the bribe to his principal. Thus it seems that constructive trust can be imposed on remuneration which is honestly earned but not on an illicitly earned payment.

There are broadly three sort of situations in which a fiduciary may be liable to account for any profits as a constructive trustee. First where a fiduciary as a result of his position obtains unauthorised remuneration. Secondly where a fiduciary enters into a transaction in a double capacity; and thirdly where profits are obtained by a fiduciary as the result of his position but to the exclusion of his principal. We shall look at each situation in turn.

5. UNAUTHORISED REMUNERATION OBTAINED BY A FIDUCIARY AS A RESULT OF HIS POSITION.

It is a basic rule of English law that a trustee or fiduciary is under a duty to act without remuneration. He acts voluntarily for the trust and can not expect to receive payment. However, in practice trustees and fiduciaries are usually given payment for their services in one of more of several ways. Indeed, if payment were not made then it would be difficult to persuade professional people to act as trustees or fiduciaries.

There are many ways in which payment or remuneration can be authorised. Payment may be made under statute (for instance under s.30(2) Trustee Act 1925 which allows a trustee to reimburse himself for his expenses). There can be express provision for payment in the trust deed or the will. Clauses in trust deeds authorising payment are usually drafted very widely. The court can also under it statutory s.42 Trustee Act 1925 and under its inherent jurisdiction (ie its non-statutory jurisdiction) authorise the payment of remuneration, but only in exceptional cases. In Boardman v Phipps, a case we will look at later, for example, the court under its inherent jurisdiction allowed the solicitor, Boardman, as fiduciary to the family trust to be paid remuneration for his work done for the benefit of the trust, even though the House of Lords had held him liable as a constructive trustee to account for the profits he had made in good faith. Similarly in O'Sullivan v Management Agency and Music Ltd (1986), a contract between a pop star and his agent was set aside by the courts because of undue influence on the part of the agent and breach of fiduciary duty, but the agent was awarded remuneration by the court under its inherent jurisdiction as he had contributed significantly to the plaintiff's success.

Under its inherent jurisdiction the Court of Appeal in Re Duke of Norfolk's Settlement Trusts (1982) authorised that fees payable to a corporate trustee should be increased, as the work for the trust was likely to become more onerous in the future.

A trustee can also retain any remuneration he is entitled to under the law of another jurisdiction in which he is administering the trust property. Special rules about remuneration also apply to solicitor-trustees under the rule in Craddock v Piper but I do not want to go into that case as it is outside the ambit of this course.
A trustee or fiduciary may have a right to remuneration by virtue of a contract for remuneration, although such contracts are not common. Even if made, they will be scrutinised carefully by the court for fear of fraud or undue influence. A director of a company who owes a fiduciary duty to the company may for instance enter into a contract with his company for remuneration, but the contract must be one that the company is allowed to make. In Guiness plc v Saunders (1990) two Guiness' directors, Ward and Saunders, claimed that they were contractually entitled to fees of £5.2 million for advice and services rendered to Guiness in relation to a take-over bid for another company. The purported contracts were made by a committee of three of Guiness's directors (two of whom were Ward and Saunders), but under Guiness's articles of association the committee had no power to authorise remuneration and the House of Lords held that the directors were therefore not entitled to the £5.2 million they received and were constructive trustees of the £5.2 million received in breach of a fiduciary duty.

6. DIRECTORS' FEES

It is not uncommon for a trustee by virtue of his office to hold an office of profit, such as a directorship in a company in which the trust has a shareholding. For example, some trust property may consist of substantial shareholdings in a company and it may be necessary for the trustees to appoint one of the trustees to be a director of the company in order to ensure that the interests of the trust are protected. In this situation the basic rule is that, unless provided for otherwise, a trustee-director will be liable to account to the trust for any remuneration he receives as a result of holding the office of director. In Re Macadam, for example, the trustees had power to appoint two directors to a company in which the trust had a substantial shareholding. The trustees appointed themselves as directors and were held liable to account for the director's fees they had received because they had obtained those fees by virtue of their position as trustees.
The trust deed setting up the trust may of course either expressly or impliedly authorise the retention of remuneration by director-trustees, and the beneficiaries themselves may also allow the trustees to retain such remuneration. In which case the director-trustee will be able to keep director's fees.
The case of Re Dover Coalfield Extension held that a trustee who became a director before becoming trustee was also entitled to retain any remuneration. And in Re Gee it was held that a trustee who secures his appointment as director by use of shares held in his own personal capacity will also be able to retain any remuneration received.

Not only will trustee-directors be liable to account to the trust for unauthorised profits, company directors per se are treated as fiduciaries and are prohibited from making an illegal profit out of their office, as indeed we saw in the Guiness case.

7. TRANSACTIONS INTO WHICH A FIDUCIARY OR TRUSTEE HAS ENTERED IN A DOUBLE CAPACITY.

This category covers situations where a fiduciary enters into a transaction in both his personal or private capacity. In these situations there is a possibility of a conflict of interest and duty, so that equity may impose a constructive trust on any property obtained by the person acting in a dual capacity.

We must start by considering the old case of Keech v Sandford decided 1726 is important because it case had a profound effect on the general question of what opportunities a fiduciary is entitled to use for his own benefit and the case is still applied in cases heard today.

In Keech v Sandford the lease of a market was held on trust for a child. The trustee sought unsuccessfully to renew the lease for the benefit of the trust. The landlord was not prepared to renew the lease to the trust but was prepared to grant a renewal of the lease to the trustee in his own personal capacity and so the trustee took the lease in his own right. This was done in good faith. The trustee was held to be liable to account to the trust for the transaction and was deemed to hold the lease on constructive trust for the benefit of the child. The rationale for this strict rule was that if a trustee, on the refusal of a lessor to renew a lease to the trust, were permitted to take the lease for himself then few leases would ever be renewed in favour of trusts. In other words if the strict rule were relaxed there would be a danger that trustees generally would be tempted to commit breaches of trust by entering into transactions for their own benefit rather than for the benefit of the trust. Fiduciaries cannot retain the benefit of transactions entered into in their personal capacity, because of the likelihood of a conflict of interest and duty and the consequent possibility of fraud.

The rule in Keech v Sandford has been applied to other situations not necessarily involving a lease. For instance in Protheroe v Protheroe (1968) a husband held a leasehold on trust for himself and his wife in equal shares. After they separated the husband acquired the freehold reversion. The Court of Appeal held that a trustee of leasehold property cannot acquire the freehold for himself and imposed a constructive trust.

The 'self-dealing rule' is similar to the rule in Keech v Sandford and states that a fiduciary or trustee cannot purchase trust property for himself. The trust property must be kept separate, because there is again a danger of a conflict of interest if the trustee, who is both vendor and purchaser, is allowed to purchase such property. If such property is obtained then a constructive trust can be imposed on the fiduciary or trustee who will be liable to account for the property.

A trustee is entitled, however, to purchase the beneficial interest of one of the beneficiaries under the trust, because in this situation the trustee is not simultaneously both vendor and purchaser. The courts have upheld such purchases as long as there is no evidence that the trustee obtained an unfair advantage by virtue of his position. This rule is sometimes known as the 'fair-dealing rule'. In Tito V Waddell (No 2) Megarry V-C said: 'The fair-dealing rule is that if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable ex debito justitae, but can be set aside by the beneficiary, unless the trustee can show that he has taken no advantage of his position and had made full disclosure to the beneficiary, and thus that the transaction is fair and honest.'

While the 'self-dealing rule' clearly applies to purchases of property by a trustee from his trust, purchases of property by other fiduciaries from their principals are governed by the 'fair-dealing rule' and will thus be upheld if the fiduciary did not abuse his position in any way, revealed his interest in the property and any information he possessed concerning it, and paid a fair price.

8. SECRET PROFITS: BENEFITS OBTAINED BY A FIDUCIARY AS A RESULT OF HIS POSITION.

A constructive trust may be imposed on a fiduciary or trustee who makes a profit from his position. Such a profit might be gained for example by a trustee or fiduciary using confidential information only obtainable in his capacity as trustee or fiduciary. In such a situation, even though the fiduciary or trustee acted honestly and in good faith, he will be held liable to account for any profits he made, which he will hold on constructive trust. Another situation where a fiduciary might be liable to account for profits is where he sets himself up in competition to a business to which he had earlier obligations. Obviously in these situations if the fiduciary ortrustee is specifically authorised either prospectively or retrospectively to keep those profits, then there will be no liability to account. A fiduciary or trustee is also lawfully entitled to use for his own benefit opportunities which have arisen independently of his fiduciary or trust obligations. For example, the fact someone is a trustee of a large investment fund does not preclude him from purchasing shares in that fund in his own professional capacity. Nobody would want to become a trustee if the position was different.

A simple illustration of the rule that a fiduciary or trustee will be liable as a constructive trustee for any secret profits he makes is to be found in the case of Williams v Barton. Here a trustee used a firm of which he was a member to value trust securities. His action was completely bona fide, but he was nevertheless held liable to account as a constructive trustee to the trust for the commission he had made out of the introduction of the trust business.

Different rules apply to bribes. If bribes are obtained by reason of a fiduciary position then it seems from the case of Lister v Stubbs, although that case has been much criticised, that a constructive trust will not be imposed in that situation but that the only obligation is for the defendant to pay over the sums received to the plaintiff. The relationship is simply one of debtor and creditor and not trustee-beneficiary. The decision of the Court of Appeal in Lister v Stubbs has been criticised and it seems illogical that the defendant in Williams v Barton was held to be a constructive trustee of a commission he earned in good faith, whereas the defendant in Lister v Stubbs was held not to be a constructive trustee of an illicitly obtained bribe. Some commentators suggest that a constructive trust should have been imposed in the Lister case and that the case was wronglky decided and it should not be followed.

When considering secret profits the courts take a particularly wide view of what constitutes a fiduciary relationship. In Reading v AG an army sergeant obtained large sums of money from smugglers by riding in his uniform through Cairo in lorries in which smuggled goods were being transported. His presence enabled the lorries to pass the civil police without them being searched. He was caught and some £19,000 found in his hands confiscated. He petitioned for return of the money. His action failed but the basis of the Crown's right to confiscate the money caused some difficulty. The House of Lords held that a fiduciary relationship existed. The soldier had a fiduciary relationship with the Crown by use of his uniform and the opportunities attached to it. This decision has arguably stretched the concept of a fiduciary too far. A better solution for the courts would perhaps have been to have imposed a constructive trust on the soldier of the profits made from his position as solider by applying the principle that no criminal can benefit from his crime and on the basis of a general principle of unjust enrichment.

As I said earlier, equity adopts a harsh attitude towards fiduciaries and even a fiduciary who makes a profit in good faith may be liable to account for that profit as a constructive trustee. Two cases in the House of Lords demonstrate the harshness of the rule. Those two cases are Regal (Hastings) Ltd. v Gulliver and Boardman v Phipps. The Regal case involved a transaction by company directors. Company directors are treated as fiduciaries in so far as they are prohibited from making certain profits out of their office. In this case Regal, who owned a cinema in Hastings, wished to acquire the leases of two other local cinemas with the intention of selling the whole enterprise as a package. Regal set up a subsidiary company to acquire these leases. The subsidiary company had authorised share capital of 5,000 £1 shares. The owner of the two cinemas Regal wanted to purchase was only willing to lease them if the share capital of the subidiary company was completely subsribed for. As Regal could not afford to put more than £2,000 into the subsidiary, it was agreed that the directors of Regal and some other persons should subscribe to the remaining 3,000 shares. This the directors did and when the combined concern was transferred to the new controllers each holder of the shares in the subsidiary company made a profit. The new controllers of Regal then brought an action against all five directors and the company solicitor claiming that they had made a profit out of a breach of their fiduciary duty and that they were liable to account for this profit. In this action the new controllers of Regal were successful, the House of Lords applying the case of Keech v Sandford. The directors had made a profit out of their position as directors and, in the absence of shareholder approval, they were obliged to account for the profits. Thus, the purchasers of the cinemas paid less than they had bargained to pay and the directors were deprived of any return on the money they had invested. The House of Lords stated that the directors had unquestionably acquired their shares by virtue of their fiduciary position. It made no difference that the company, Regal, could not have itself have subscribed for the shares . In Keech v Sandford, if you remember, the position was similar; the trust could not itself have obtained the new lease, but that point had made no difference to the outcome of the case. The directors in the Regal case therefore had to surrender their profits.

This decision does seem extremely harsh. The company could not afford to put in more than £2,000 into the subsidiary and the directors had no real alternative. They appeared to have acted in good faith. Lord Russell thought that the directors could and should have protected themselves by obtaining the consent of the shareholders in a general meeting. That was probably the crux of the case.

Another case where the attitude of the English courts has been very harsh is in the controversial case of Boardman v Phipps which was also heard by the House of Lords. In this case a testator established a trust for the benefit of his widow and children. Some 12 years after the testator's death, Boardman the trust solicitor became concerned about one of the principal investments of the fund - a 27% holding in a private company. After an unsuccessful attempt to elect one of the testator's sons to the board of the company Boardman reached the conclusion that the only way to protect the trust investment was to acquire a majority holding in the company. He suggested this to the managing trustee who said it was quite out of the question for the trust to acquire such a holding. Boardman and the son who was one of the beneficiaries ignored that statement and decided to go ahead and purchase the outstanding shares for themselves. This was done in good faith and with the aim of benefiting the trust. They bought the shares and thereby obtained control of the company and by capitalising some of the assets were able to make distribution of capital to the shareholders without reducing the value of the shares. The trust benefitted by this distribution by about £47,000 and Boardman and the son made a profit of about £75,000.

However, in the course of negotiations leading up to the take-over, Boardman had purported to represent the trust and had thereby obtained information which would not have been made available to the general public. One of the other sons of the testator who had not been fully consulted therefore claimed that the profit of £75,000 had been made by the use of information which had reached Boardman while acting on behalf of the trust and therefore in a fiduciary capacity and should therefore be held on constructive trust for the benefit of the trust. This claim was upheld by the House of Lords, who held that the shares which had been acquired by Boardman and the son were subject to a constructive trust in favour of the trust. They had placed themselves in a fiduciary relationship by acting as representatives of the trust for a number of years and that out of this fiduciary relationship they had obtained the opportunity to make a profit and the knowledge that there was a profit to be made. Several of their Lordships held that the information the defendants had used by virtue of their position as trustees made this information trust property and that they had therefore made a profit out of speculating with trust property. Lord Cohen held that the information was not property in the strict sense of the word but that, as the information had been acquired by the defendants while purporting to represent the trust, then they were therefore liable to to account for their profit under the same principle in Regal (Hastings) Ltd. v Gulliver. The majority also felt that Boardman had placed himself in a position where his interest and duty might conflict and it was quite immaterial that the defendants had acted honestly and openly in a manner that had been highly advantageous to the trust. Thus the trust by this route obtained the whole of the profit made on the take-over, less an allowance the House of Lords awarded under its inherent jurisdiction to Boardman by way of remuneration for the work he had done. Two of their lordships, Viscount Dilhorne and Lord Upjohn, dissented. They felt that the possibility of any conflict of interest and duty in the case was too remote and that there had been no breach of duty or loyalty to the trust. Lord Upjohn said there could be a conflict of interest and duty only if it appeared to the reasonable man that there appeared to be such a conflict. Such a result was untenable where there was only the possibility of a conflict of interests. Lord Upjohn also doubted whether the information they had used to buy the shares and make a profit could indeed be classified as trust property. Some academic commentators have felt more persuaded by Lord Upjohn's dissenting opinion and have produced strong arguments based on other case-law in support of his Lordship's view that the information used was not in any sense trust property. Be that as it may, it does seem that the English courts are not prepared to allow a fiduciary to exploit his position in these circumstances. The rule is a strict one.

The problem with the rule in Boardman v Phipps is trying to establish the limits, of the rule. What is the scope of the rule ? Hanbury and Maudsley in their book on Equity point to the problem in assessing the extent of the rule by creating an imaginary scenario. Take for example, they say, a merchant banker, stockbroker, insurance broker, solicitor or company director who acquires through a proper source confidential information which may be of advantage to other clients in companies with which he is associated. Having satisfied the requirements of a particular client, is he precluded from making use of this information in respect of other trusts with which he is concerned? Can he use this information for himself? What if a person is director of

several different non-competing companies? Does the director's fiduciary duty to his other clients place him under a duty to provide that client with confidential information, in order to avoid the risk of liability for misrepresentation through failure to disclose relevant information to a trustee?
There is in fact a danger that the strict rule in Boardman if applied inflexibly, might impose an impossible burden on trustees and fiduciaries. In Boardman v Phipps Lord Cohen said:

'....it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit which comes his way as the result of the use he makes of that information and opportunity. His liability depends on the facts of the case.' Viscount Dilhorne said: 'to hold that a partner can never derive any personal benefit from information which he obtains from a partner would be manifestly absurd.'

In fact, referring back to the statement from Bray v Ford by Lord Herschell it seems that the strict rule of liability was not always to be applied.
Hanbury and Maudsley state that it is difficult to formulate any single test which may be applied to determine whether a fiduciary has incurred liability. They submit that liability will arise if any of the following factors are present:

i) A fiduciary had used trust property, even if there is no potential conflict of interest and duty (Boardman v Phipps);
ii) The opportunity to make a profit arose from the fiduciary relationship, even if no trust property was used (Reading v AG);
iii) There was a conflict of interest and duty, even if no trust property was used, and the opportunity did not arise from the fiduciary relationship (Industrial Development Consultants Ltd v Cooley).

The imposition of strict liability in these cases is also open to criticism on the ground that it fails to draw any distinction between the honest and the dishonest fiduciary. It would seem more logical to make the fiduciary liable only if there has been some actual abuse of the fiduciary position.
There has been much academic criticsm of the decision in Boardman v Phipps. Professor Gareth Jones (1968) 84 LQR 472 has argued that the courts of other jurisdictions have declined to impose constructive trusts upon fiduciaries who have profited from their fiduciary positions, unless it can been shown that a real conflict of interest exists He refers to the Canadian case of Peso Silver Mines v Cropper (1966),

where the Supreme Court of Canada had to consider a situation very similar to that in Regal (Hastings) v Gulliver. The defendant, Cropper, was on the board of the plaintiff company, Peso Silver Mines, at a time when the company geologist invited and advised the board to purchase certain mining claims. The board rejected this offer partly for financial reasons but partly because some of the directors considered the claims to be inviting a business risk. Subsequently, the geologist with the defendant and two other directors of the plaintiff, formed a company to purchase and exploit these claims. Eventually the plaintiff was taken over and its new board claimed that the defendant held his shares in the new company on constructive trust for the plaintiff. The claim failed. The British Columbia Court of Appeal rejected the Regal (Hastings) case, and held by a majority that the strict penal rules of equity had been carried far enough and were not appropriate for a modern country in a modern era. On appeal to the Supreme Court of Canada, that court took a much narrower view and preferred to distinguish the Regal case on the grounds that the defendant in the Peso case had acted entirely in good faith in participating in the original decision and therefore was entitled to take up a subsequent offer in his private capacity without being liable to account for his profit.

The sort of approach adopted in the Peso case seems to have more to commend it than the Regal case which adopts a harsh and punitive sort of approach in these situations. It would seem reasonable that a person who in good faith makes a profit for himself in his private capacity and where there is no evidence of dishonesty and no evidence of conflict of interest and duty should be entitled to keep that profit, rather than hand it back via a constructive trust.

Another decision that went the other way to the Regal case and which suggests that the courts may be taking a more kindly or benign attitude to company directors is that of Queensland Mines v Hudson (1977) a case to the Privy Council from Australia. The Privy Council is the court which hears appeals from Commonwealth countries. Queensland Mines wanted to develop certain mining operations and the managing director, the plaintiff Hudson, obtained licences for the company to do so. Because of liquidity problems the company could not pay for the licences. Hudson resigned and with the full knowledge of the plaintiff company's board, successfully developed the mines. He found valuable mineral resources and eventually leased the land to an American mining company who payed Hudson royalties for the ore mined. Queensland Mines claimed to be entitled to those royalties. The Privy Council held that Hudson was not liable for two reasons. First of all because the company director had rejected the opportunity because of cash difficulties which took the venture out of the scope of Hudson's fiduciary duties. Secondly because Hudson had acted with the full knowledge of the plaintiff company's board and by virtue of that knowledge the company could be taken to have consented to Hudson's activities. It was really an estoppel sort of argument. The decision in the Queensland case was undoubtedly influenced by the fact that Hudson had worked extremely hard and risked everything, while Queensland Mines had risked nothing and were attempting to deprive Hudson of the fruits of his success.

A case, on the other hand, where it was clearly appropriate for a constructive trust to be imposed on a fiduciary who used for his own benefit information which had come to him in his fiduciary capacity was that of Industrial Development Consultants v Cooley (1972). Here the defendant was managing director of the plaintiff company. In 1968 he had been attempting on behalf of the plaintiff to obtain contracts to design certain depots for the Eastern Gas Board. These attempts had failed because the Gas Board did not like the plaintiffs organisation and were not prepared to deal with that company in any capacity. In 1969 a representative of the Gas Board sought a meeting with the defendant in his private capacity and intimated to him that if he could free himself from his ties with the plaintiffs he had a very good chance of obtaining the contracts for himself. The defendant therefore secured his release from the contract with the plaintiffs by a totally false representation that he was on the edge of a nervous breakdown and then accepted an offer from the Gas Board to do substantially the same work which he had unsuccessfully attempted to obtain for the plaintiff in 1968. The plaintiff now claimed that the defendant was constructive trustee of that contract for benefit of the plaintiff organisation and sought an account of the defendants profits. This action succeeded. It was held that at the time when Cooley the defendant first realised he had an opportunity of obtaining the contract for himself the only capacity in which he was carrying on business was as managing director for the plaintiff. He was therefore under a fiduciary duty to pass onto the plaintiff information which reached him while carrying on business in a fiduciary capacity. Since he had failed to pass on that information but had used it for his own ends, he was a trustee of the contract for the plaintiff and must account for his profit. Roskill J applied Boardman v Phipps. Here there was a clear use of information used in confidence to gain a profit. There was clearly a conflict of interest and duty.

9. CONCLUSION AND CRITIQUE

Despite the criticsms that can be made of Boardman v Phipps the case is still good law and under English law the courts take a strict position in relation to secret profits made by a fiduciary or trustee. English law is not prepared to allow a fiduciary to utilise for his own benefit an opportunity which falls within the scope of his fiduciary obligations to his principal, unless the principal gives his fully informed consent. The English courts seem less ready to find out whether there was in fact a real conflict of interest and duty but is happy to impose a constructive trust even if there was the likelihood of a conflict of interest and duty. Other jurisdictions have adopted a less rigid and less penal approach by allowing fiduciaries to enter into transactions on their own where they are able to demonstrate that there was no real conflict of interest and

duty. This is many ways seems emminently more sensible. The English rationale for such a restrictive approach is probably one of policy. There is strict liability for fiduciaries because of a slippery slope or thin end of the wedge argument. If the courts allow fiduciaries to keep profits at all then this may be an incentive for them to keep them in other situations where there may have been dishonesty. To allow profits to be kept in one situation may encourage fraudulent conduct in another situation when there is a conflict of interest and duty. On the other hand to make fiduciaries and trustess liable in the Boardman v Phipps sense will, it is submitted, act as a disincentive perhaps to becoming a fiduciary or trustee at all. Dr. Finn concludes that the effect of Boardman v Phipps is that 'if a person thinks he might be asked in the future to undertake duties for another which will clothe him for a fiduciary character, he cannot beforehand benefit himself in any manner in which he might be asked to advise.' If Boardman v Phipps does represent the law it is difficult to see how any professional person can safely enter into a transaction on his own behalf in any area in which he habitually advises. For these sorts of reasons academic commentators have suggested that it is wrongly decided. It is suggested that the English courts should adopt the more flexible approach of other jurisdictions. We need another case in the Court of Appeal or the House of Lords to determine what the position should be in the future. I strongly suspect that it will be hard to draw out any general rules and that each case will be very much treated on its individual facts.
Another point it is perhaps worth mentionning here is that Hanbury and Maudley in their book, Modern Equity, make the point (at page 577) that it is often said that a fiduciary who is required to account for profits becomes a constructive trustee. They point to a conceptual lack here because a duty to account is a personal remediy and a constructive trust is a proprietary remedy. They write: 'Liability to account is not synonymous with constructive trusteeship, but the cases do not always maintain the distinction.'

Lord Lane in Re AG's Reference (No 1 of 1985) said:

'We find it impossible to reconcile much of the language of these decisions.' In Boardman v Phipps, for instance, it was held that the shares were held on constructive trust for the beneficiaries and that Boardman was accountable for profits he had made less a sum for his skill and effort in relation to the trust property. The House of Lords in that case did not distinguish between accountability and the constructive trust in that case so that it seems there is some conceptual lack of clarity in this area.

Chapter XI

COMMERCIAL APPLICATIONS OF TRUSTS

I have dealt in my introductory lectures with some commercial applications of the trust and would now like to start by telling you quite briefly about some further commercial applications and then looking in more detail at pension trusts, which is a very important aspect of trust law and one where developments are taking place at present and where we may well see very considerable changes in the near future.

1. AUTHORISED UNIT TRUSTS

I mentioned Unit Trusts in my first lecture. Authorised Unit Trusts are subject to strict statutory controls, but are nevertheless trusts and subject to the same rules of Equity as other trusts. They are trusts authorised by the Securities and Investment Board under the Financial Services Act 1986. Under the rules, investors, who are the beneficiaries, purchase units with money which is paid to a manager, which has to be a company, who in turn deposits the money with a Trustee, which is an independent company. The cash is used to purchase securities chosen by the manager within certain limits permitted by the law. Investors may redeem their investment at any time. The price of each unit varies from day to day and is a direct reflection of the value for the time being of the securities representing the trust fund. Obviously, at any given time, the purchase price of units will be greater than their redemption price, but the difference is small and, like other matters, including the amount which the managing company may charge for its services, is subject to strict regulation. Unit trusts are thus a relatively safe and easy way of investing in the stock market.

2. INVESTMENT TRUSTS

You may have heard of investment trusts. It is worth mentioning at this stage that an investment trust is not a trust at all in that the investor buys shares in the so-called investment trust company, which operates by buying and selling shares in other companies. Investment trusts are not subject to the same strict rules as unit trusts. The price of shares in an investment trust is related to but not strictly geared to the value of the company's investments. In order to dispose of your shares it is necessary to sell them through a broker or dealer in the same way as you would sell shares in any other public limited company. Investment trusts offer a chance of attractive profits but carry a greater risk than authorised unit trusts.

3. PROFIT-SHARING SCHEMES

There has in recent years been an increasing trend by companies to share their profits with their employees by allocating to them shares in the company as an incentive to greater loyalty and more productivity. This is achieved by creating and funding a trust. The trustees use the trust monies to purchase shares in the company which are appointed to individual employees. Provided an employee does not dispose of these shares within five years the shares do not count as his income for income tax purposes. There is also relief from corporation tax - that is the tax paid by limited companies on their profits - on the monies paid into the fund by the company. Profit sharing schemes are not only open to companies quoted on the stock exchange - usually the largest public limited companies - but also to smaller companies. Such schemes have the incidental effect of creating a market in the shares of such companies, which can result in a considerable commercial advantage to the company.

4. DESIGNATED ACCOUNTS HELD ON TRUST

A further important application of the trust principle is that of the designated account held in the names of clients by solicitors, accountants, stockbrokers, estate agents and the like - in other words professional firms who are always holding and handling large sums of money on behalf of their clients. Such accounts, called client accounts, are subject to strict rules laid down by the professional body responsible for the regulation of each particular profession, but the basic concept behind a client account is that of the trust. The professional person or firm - let us say it is a firm of solicitors - must keep clients' money in a separate account from the firm's own money. In the event of the firm's bankruptcy the money held on behalf of clients will not be available for distribution amongst the creditors of the firm.

5. PROFESSIONAL COMPENSATION FUNDS

I have just told you about client accounts. Unfortunately there will occasionally be cases of dishonest professional people who commit fraud upon or theft from their clients. Therefore the bodies which regulate each profession (in the case of solicitors it is the Law Society) organise compensation schemes to which members of the profession contribute. The funds are held by trustees under a discretionary trust for the benefit of persons who have suffered loss as a result of dishonesty.

6. TRADE UNIONS

Trade unions enjoy a unique status under English law. Unlike limited companies they are not incorporated and therefore a trade union does not have its own distinct legal personality. However, under the Trade Union and Labour Relations Act 1974 trade unions may sue and be sued in their own name just as if they were limited companies. However, as far as the ownership of union property is concerned, we once again turn to the trust. Property is held by trustees on trust for the union, but the rights of an individual member are protected to the extent that he may apply to the court to prevent a breach of trust. The Employment Act of 1988 prevents a majority of union members from changing the union rules retrospectively in order to authorise a breach of trust and thus protects the rights of the individual member.

7. OTHER APPLICATIONS OF THE TRUST FOR SECURITY PURPOSES

We have already looked in detail at the cases of **Quistclose, EVTR and Carreras Rothman.** In each case a company or person was trying to guard against loss by the imposition of a trust upon money advanced by it or him on a particular occasion. There are other common situations where a seller of goods will attempt to take steps to protect his position before he is paid for the goods by specifying that they are to be held upon trust for him pending payment or until they are sold to customers. Likewise a person who has ordered goods through the mail may try to impose on the seller a trust relating to the purchase price with the intended result that the money should be held in a separate account upon trust for the buyer pending despatch of the goods. The problem of trying to protect your own goods or property from the creditors of persons with whom you are dealing has given rise to many ingenious solutions, some successful, some not. One of the leading cases is that of **ALUMINIUM INDUSTRIES VAASEN BV v ROMALPA ALUMINIUM LTD (1976)**. In cases of the Romalpa type the seller supplies goods under a reservation of title clause and authorises the buyers to resell on condition that they account to the sellers for the proceeds of sale. The sellers may thus acquire an equitable right to trace the proceeds if the buyer becomes insolvent. Detailed study of these cases is outside the scope of this course.

8.. PENSION FUND TRUSTS

In England all employees and employers have to pay National Insurance contributions to the government,. which are used in part to provide us with pensions when we retire. I expect it is the same in Italy. Unfortunately, the level of state pension which we may expect is low and in many cases quite inadequate. Again, I would guess that the same may be true in Italy.

Funds set up by employers and contributed to partly by them and partly by employees with the object of providing additional and often extensive pension benefits for former employees and, in some cases, their dependants, have been with us for many years, but it is only in comparatively recent times - say the last twenty or thirty years - that company pensions have become commonplace. You will probably not be surprised to learn that company pension funds involve in many cases enormous sums of money - currently £275,000,000,000 (275 billion pounds) - and no doubt by now you will be even less surprised to learn that in most cases they are administered by trustees and subject to trust law.

Because of the great burden that the provision of adequate pensions for everybody, upon retirement, would place an intolerable strain upon public funds, governments have been only too happy to encourage companies to set up their own pension schemes for their former employees and their families.

There are features which make participation in a pension scheme attractive from the point of view both of employer and employee. Apart from the obvious benefit to the employer that he hopes to secure the loyalty of his employee and the equally obvious benefit to the employee of security, there are tax advantages. The employer benefits in that he may deduct his contributions from his profits and thus save income tax, or, in the more likely case that the employer is a company, corporation tax, and the employee benefits in that the employer's contributions are not regarded as taxable income in his hands, and also in that he is not taxed on the amounts the employer deducts from his pay and makes over to the fund. There are also other significant tax advantages, which need not concern us here.

The company pension scheme can be run on the basis that the contributions made by the employer and the employee are paid to an insurance company which will then provide a pension on retirement or, in the event of the employee's death before retirement, return to the employee's estate all contributions paid. We are not going to examine this option but are going to look at the alternative arrangement where the company sets up its own pension fund the contributions to which are paid to trustees who are responsible for investing the monies paid to them and for providing the appropriate benefits in due course (which may be a pension, or a combination of a lump sum and a pension).

I would like to be able to tell you that the interests of all beneficiaries of company pension schemes are in every case adequately protected as they should be by the application of trust law and principles. Unfortunately this is not always the case. This particular branch of trust law is one that is actively developing at the moment in order to try to cope with situations where conflicts of interest involving the trustees, the beneficiaries (the interests of some of whom may be quite different from those of others) and the company are always likely to occur. There are interesting decided

cases, one or two of which we will be looking at to see how the courts have attempted to solve these difficulties.
Unfortunately, as we have seen in the events following the death in October, 1991, of Mr. Robert Maxwell, it is possible as things stand at the moment for a trustee who is an intelligent and strong-willed fraudster to abuse his position of trust in a way that shakes the very foundation of the trust concept upon which pension funds are built. Because Mr. Maxwell's dishonesty and its consequences have caused untold misery and anxiety to a great many British families I will return to it before I close. However, before doing this I would like to take a look at some of the ways in which pension trusts differ in fact from other trusts and then to look at some of the other problems that have given rise to litigation in recent years.

8.1. Pension trusts distinguished from other trusts

Pension trusts can be distinguished from other trusts in the following ways:

(a) They are often very much larger.

(b) They are of great significance to the British economy.

(c) Their members interest in the scheme differs from that of beneficiaries of other trusts and raises problems peculiar to pension trusts.

(d) The level of benefits may be the result of collective bargaining between employers and trade unions.

8.2. Size of pension fund trusts

Pension funds in the UK by 1990 accounted for 31.4% of all securities. They are funded by contributions from employers (amounting to something like 11% of the employee's pay) and from the employees (something like 4 to 5%) Some of the funds are enormous, amounting to many billions of pounds in value.

8.3. Significance to the economy

Because of the huge sums invested in pension trusts it is easy to appreciate that such funds are of great economic significance. For instance, pension trust funds can be invested so that the trust has a very large holding in large public limited companies. Investment policy by pension fund trustees can also affect the national economy - in particular there has been debate about whether or not pension fund managers invest sufficiently large sums in new issues of securities as opposed to dealing in existing securities.

It is also easy to imagine that pension trusts can and do hold very considerable interests in many companies.

8.4. Members' interest

One area of difficulty arises where employees leave their employment before pensionable age. We will call these early leavers. These days many, but not all, pensions are transferable. If a pension is transferable there will be no financial penalty for changing employment, but unfortunately many pension schemes do not provide for an early leaver to transfer to another pension fund when he changes his job. In the case of many occupational pensions, the ultimate pension paid is a proportion of final salary multiplied by the number of years of service, and the size of the contributions to be made by the employer and by the employee will be calculated by an actuary - a professional expert in such calculations. You will appreciate that by leaving pensionable employment before pensionable age and joining another employer the employee will lose financially, even if the new employer operates a pension scheme. He will be entitled on retirement to a pension from each employment, but the earlier employment will carry an inadequate pension in view of the effects of inflation, for I would remind you that the size of the pension is linked to final salary.

A similar problem arises where the employee has retired but the value of this pension is eroded away over the years by inflation. Some pensions provide for annual increases to counter inflation, but invariably the increase is insufficient to keep pace with inflation.

These two categories of members - the early leavers and the pensioners - can create difficulties when the pension fund is in surplus - how do the trustees balance the needs of these members against the expectations of members of the scheme still in employment and still contributing?

8.5. Level of benefits - collective bargaining

These days the trustees of many pension trusts include employees of the company who have been nominated by their trade union or indeed the company itself may be a trustee. These trustees have exactly the same duties as any other trustees, which are to administer the fund in the best interests of the beneficiaries. The fixing of benefit and contribution levels may well be a matter for collective bargaining between employers and union, but should be a separate question from the management of the fund. However, in practice, as we shall shortly see, conflicts of interest can arise upon investment policy, and in one case that we are going to study the trustees were divided upon investment policy, the union members having quite different ideas from the non-union members, so that the court had to resolve the dispute.

8.6. Regulation of pension trusts

One might suppose that such an important aspect of the national economy and of the domestic economies of millions of families would be regulated by extensive and comprehensive legislation, but this is not the case. Pension schemes are created voluntarily, not as the result of any obligation imposed by legislation, and like many large developments, had small beginnings. It seemed only natural that the law of trusts should apply to funds of this nature, and indeed it is only comparatively recently that the number and size of trust funds has become such that their management has become fraught with potential problems.
There is today some statutory control of pension trust funds; the Occupational Pensions Board has a supervisory role; in order to obtain tax advantages the scheme has to be approved by the Superannuation Funds Office of the Inland Revenue, and some schemes, as we shall see, have to be registered with Investment Management Regulatory Organisation Ltd (IMRO), but the basic framework of the rules concerning pension funds is that of the law of trusts.

8.7. Advantages of trust framework to pension funds

Initially the concept of a pension 'trust' held an emotional appeal for those whose aim it was to create a more harmonious relationship between employer and employee. There are also other more tangible advantages in the application of trust law to pension funds. As you know, if a company were to enter into a purely contractual arrangement with an employee to pay him a pension on his retirement, that employee would have no redress if the company were to become insolvent. However, because a trust fund is administered not by the company, but by trustees for the benefit of beneficiaries, the trust fund is protected from claims by the creditor of the company in the event of the insolvency of the company.
If the company does become insolvent, then of course all further contributions to the fund will cease. This is, however, not the only way in which contributions to the fund can come to an end. It is common for pension trust deeds to contain a provision entitling the company to cease paying contributions to the fund, at which point the liability of the members of the fund (ie present employees) to contribute further sums ceases. As long as the scheme has been adequately funded accrued benefits will be met, but the fund will not be added to further. The trustees may well be left with surplus funds in their hands. Who do these belong to?

8.8. Problem areas

Thus there are four areas where we may expect to meet problems:

(a) Investment policy and practice
(b) Beneficial ownership of the trust fund
(c) Delegation of fund management and trustee liability
(d) Members' rights and remedies

Most pension funds consist of such great sums of money and securities that trustees are able to invest in a very wide range of investments. They will of course be permitted to do so by the terms of the trust deed, but because of the size of the fund they will be in a position where they may wish to place some money in investments carrying a considerable amount of risk. Some pension funds, for example, have invested in works of art - a particularly risky form of investment at the moment. Obviously, a well-run scheme will not invest too high a proportion of its funds in high-risk investments, but a wide-ranging range of investments received judicial approval in the case of **TRUSTEES OF THE BRITISH MUSEUM v ATTORNEY-GENERAL (1984)** when the court approved a scheme for the investment of the British Museum's trust funds, - (these were not pension funds, but a large trust for the benefit of the nation, having similar characteristics to a pension fund) - including approving the purchase of some high-risk investments. This is contrary to the normal basis of assessing the liability of a trustee of a private trust for 'imprudent investment' by examining each individual investment, in which circumstances it is most unlikely that the court would approve of any high-risk investment. Here we perhaps have the first of several indications that the law relating to pension trusts both differs from other trust law and is beginning to proceed in a direction of its own.
We come now to the question of the extent (if any) to which trustees should or may have regard to the social or political effects of their investments. Should they avoid investments they find offensive, even if not all the members of the scheme also find them offensive? Should they invest in the parent company? Should they refuse to invest in a rival company? This issue is known as social investment.
Investment policies for this purpose may conveniently be divided into three types:

1. Neutral. The fund managers invest in the investments on purely financial criteria, without reference to external factors. Here there is no problem.

2. Socially sensitive. The fund managers look at investment factors and then choose between financially comparable investments by using social factors. For instance, an investment offering the same rate of interest and the same prospect of growth as another investment in a rival company or a company in a country whose politics were considered unacceptable would be preferred to the latter. Here again, at least in practice, there is no problem.

3. Socially dictated. The trustees choose investments dictated by considerations other than the interests of the beneficiaries.

The problem was considered by the court in the case of **COWAN v SCARGILL [1984] 2 All ER 750.** This case concerned the investment policy of the Mineworkers Pension Scheme, set up under the Coal Industry Nationalisation Act 1946. Under the scheme pensions were payable to coalminers employed by the National Coal Board on retirement or upon injury or the contraction of certain diseases caused by coal dust, and were also payable to widows and children. The scheme was funded by mineworkers' contributions, payments made by the employers, (the National Coal Board), and by investment profits. There were ten trustees, five appointed by the NCB and five by the mineworkers' union, the National Union of Miners (NUM). The trustees had very wide powers of investment but a general strategy was laid out in four year plans. In 1982 a plan amending the 1980 one was put to the trustees for approval. The trustees appointed by the union and led by Mr. Arthur Scargill, a militant trade unionist, refused to approve the plan unless it was amended

(i) To prohibit any increase in overseas investment

(ii) To provide for withdrawal from overseas investment at an opportune time
(iii) To prohibit investment in energy industries competing with coal

The proposed amendments were in line with the policy of the NUM.
The plaintiffs, the NCB trustees, applied to the court asking for directions that the union-appointed trustees were in breach of their fiduciary duties as trustees in refusing to concur in the adoption of the 1982 plan. The union-appointed trustees were represented by Mr. Scargill.
I will try to summarise the judgment of Sir Robert Megarry V-C. He immediately went right to the kernel of the case when he said that the starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. He went on to say that that duty was paramount. He said that when the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are usually their best financial interests; the trustees must invest so as to obtain the best return for the beneficiaries, judged in relation to the risk involved. Trustees might disagree on principle with investment in South Africa or other countries, or in companies manufacturing armaments, tobacco, alcohol or other things. Nevertheless they should not refrain from making these investments if they offer a sufficiently attractive return unless they can justify not making any particular investment on purely commercial grounds - eg that it is too risky or unlikely to be sufficiently profitable. The judge referred to the case of **BUTTLE v SAUNDERS**, mentioned in my last lecture, as authority for the

proposition that trustees may sometimes be bound to act dishonourably (though not illegally) in the interest of the trust.
He referred to the standard required of a trustee in choosing investments - ie that of the ordinary prudent man making an investment for others for whom he felt morally bound to provide. He also mentioned the need for diversity of investment when dealing with funds as large as those in the present case. He rejected Mr Scargill's argument that somehow the rules which applied to pension funds were different; indeed the fact that the beneficiaries themselves had contributed a substantial proportion of the fund made it all the more important that the trustees should exercise their powers of investment in the interests of all the beneficiaries.
He concluded that the NUM trustees were trying to impose the prohibitions in order to carry out union policy and therefore were in breach of their trust duties.
Among the points raised by the judgment but not dealt with by the court you might like to consider the following:

(a) There is a number of cases where "benefit" has been held not to be limited to financial benefit; for instance, in one case Lord Denning refused to approve the proposed variation of the terms of a settlement so that in order to enjoy tax advantages the children who were the beneficiaries would have to take up domicile in Jersey. He felt that to uproot them from their native England would be more to trheir disadvantage than refusing to enable the trust to take advantage of tax concessions.
I should add that there is a strong tradition of loyalty in mining communities and for all we know most of the beneficiaries of the trust in the Scargill case might have supported the union-appointed trustees.

(b) Another point is that of the possible conflict of interest between classes of beneficiaries. Mineworkers who are made redundant might benefit best from a socially neutral investment policy; present employees might benefit from a policy that stimulates the consumption of home-produced coal and enhances job security. How should trustees try to hold the balance?

(c) It would not be possible in practice to obtain the consent to any particular investment policy of all the beneficiaries - but should the beneficiaries be consulted and should a majority be able to bind the minority? What if the minority were mainly of a different class from the majority - say existing pensioners as opposed to currently employed miners?

(d) Is this type of dispute better dealt with through the industry's disputes procedure by way of negotiation rather than by the High Court?

(e) I am shortly going to tell you that surplus funds in pension schemes that are wound up may belong to employers. In view of this does it matter if the funds are invested according to a socially dictated policy even although this may not be best from a strictly financial viewpoint?

(f) Should pension funds be invested in the parent company or business? This form of investment can provide loan capital at preferential rates, not necessarily the best rates that could be obtained elsewhere, or to help to block a takeover bid. Neither of these purposes may necessarily be in the best interests of the beneficiaries, although they may well be in the best interests of the company. In this connection there is the case of **EVANS v LONDON COOPERATIVE SOCIETY LTD. (1976)** where the Society's pension fund had power to lend money to the society at a rate to be agreed upon between the society and the trustees with a minimum of 3.75% per annum. Money was lent at the minimum rate and the trustees were held to be in breach because the rate had not been agreed and no doubt could have been negotiated at a higher figure. Nowadays, because of the potential for conflicts of interest, self-investment, as it is known, has been limited by law to a maximum of five per cent of total trust funds, but this can still make a significant difference both to the trust fund and to the position of the fund and of the parent company.

8.9. Beneficial ownership of the pension fund

If you think that in accordance with trust principles the trust fund always belongs entirely to the beneficiaries I am afraid that you may not be correct. This is because there is a very important and basic distinction to be drawn between the workings of a pension trust and the workings of any other trust.

In the case of express trusts other than pension trusts the settlor hands money or transfers property to the trustees, who deal with and distribute that money or property as they are directed to do in the trust deed. The trust may be a family trust or it may be a charity. In either case the beneficiaries have done nothing - they are not parties to the trust deed nor have they entered into any obligations with either the settlor or the trustees.

In the case of a pension trust the rights of the beneficiaries derive from a contractual and commercial relationship between them and their employers. An employee entering employment and joining a pension scheme may expect in due course to benefit from the pension scheme, but this depends on the employee performing his part of the bargain, which is to work for the employer and to suffer the deduction from his pay of regular contributions to the pension fund and on the employer performing his part of the bargain, which is to employ the employee and to make contributions to the same fund.

When an employee enters into pensionable employment he knows that when he leaves that employment he will be in a position to calculate the amount of his pension. This is because the pension scheme will contain information that enables his exact entitlement to be calculated by reference to his final salary and to the length of his service. He will be entitled to his pension - no more, no less. If there is insufficient money in the pension fund the employers will be under an obligation to make good the deficit, but if there is a surplus the employees and former employees will not be able simply to claim it as their own.

Because in the 1980's most pension funds built up large surpluses and the Revenue considered that they were being used as tax shelters, the Finance Act, 1986, required the reduction of surplus assets over liabilities to not more than 5% of total funds, by

1. Improving benefits
2. Reducing or suspending contributions for up to five years by employers or employes
3. Payment to the employer (in which case the employer became liable to pay tax at 40%.

If the surplus amounted to more than 5% the tax exemptions were lost.

However, some funds no doubt still carry surpluses and there are provisions under a statutory instrument of 1990 - a law made under the authority of an act of Parliament and having the same force as an act of Parliament - for surpluses to be repaid to the employer provided certain stringent c onditions are met and approved by the Occupational Pensions Board. These conditions give considerable protection to the employees, who have the opportunity of having their say before the OPB approves the scheme.

This problem becomes very real where a company becomes insolvent and stops trading or for some other reason decides, upon proper notice, which may be as little as three months, to close its pension scheme. Existing liabilities must be met by the pension fund, but what happens if there are surplus funds? If the pension trust deed deals fully with the position there is no problem, although there may be injustice or unfairness. However, if the deed does not cover the position fully then the trustees may have discretionary powers either to pay the surplus to the company (or its receiver if it is insolvent) or to augment pensions. These discretionary powerts may be vested in an employer who is also a trustee; if this is so there is a conflict of interest and the court has to exercise the discretion.

What approach should the court adopt? The employing company may argue that as it has performed its obligations in paying the pensions of retired employees and undertaken to make good any deficit in the funds it should be entitled to the surplus. The employees and former employees may argue that as the fund was set up for their benefit and forms a trust of which they are the beneficiaries it should be divided amongst themselves. Millett J in **RE COURAGES GROUP'S PENSION SCHEMES (1987)** gave some support to the latter view when he stated *obiter* that any surplus belongs to the employer alone up to the full extent of its contributions and only if there is still a surplus does any of the money belong to the beneficiaries.

The judge went on to say that it is precisely in relation to a surplus that the relationship between 'the company' as the employer and the members as its past or present employees can be seen to be an essential feature of a pension scheme. In the case in nquestion employees were, on a company takeover, being transferred compulsorily from their former pension scheme to a new one with a much smaller surplus. The judge said they had no right to participate in the surpluses in their former scheme but were entitled to have them dealt with by consultation and negotiation between their employers and the trustees and not to be irrevocably parted from the funds by the unilateral decision of the company which had taken over their former employer.

However, in the case of **METTOY PENSION TRUSTEES LTD v EVANS (1991)** Warner J. stated:

"One cannot in my opinion, in construing a provision in the rules of a...pension scheme relating to surplus, start from the assumption that any surplus belongs morally to the employer...in deciding whether the employer owed a duty to the objects of the

power, one must have regard to the fact that the beneficiaries under a pension scheme are not volunteers...their rights are derived from the contract of employment as well as from the trust instrument. Those rights have been earned by the service of the members under those contracts as well as by their contributions...In construing the trust instrument one must bear in mind as an important part of the background the origins of the beneficiaries' rights under it.
In view of these remarks have the courts yet gone far enough in protecting the interests of the beneficiaries?"

8.10. Delegation of fund management and trustee liability

The management of large pension funds is very different from the management of a family trust. Under the Financial Services Act of 1986 a distinction is drawn between managers involved in strategic decisions on investment and those involved in the day to day running of the trust. If trustees personally involve themselves with day to day management they must register with the Investment Management Regulatory Organisation Ltd (IMRO). Many large pension trusts, in order to avoid the expense of registration, charge their trustees with the responsibility of making the strategic decisions and delegate the day to day management to professional fund managers. You might expect that trustees who are in this position can sit back and relax, but this is not so. The fund managers will be large financial organisations with many interests apart from the management of trust funds. They will be exposed to temptations such as investing pension trust funds in the banking departments of their own companies or in unit trusts issued by a company associated with them. Such action will not always be in the best interests of the pension trust. If this results in a loss to the trust fund or if unbiased investment would have produced a bigger profit it is the trustees who may be held accountable for a breach of trust. Trust deeds may contain clauses absolving the trustees from liability for such a loss or providing that the employer indemnifies the fund against such a loss, but the position is still potentially unsatisfactory.

8.11. Members' rights and remedies

We have now seen that conflicts of interest can occur in many different circumstances. Trustees should act in the best interests of members, but they may have divided loyalties. They may be nominated by the employer or may even be directors of the employing company, as the late Mr. Robert Maxwell was. The problem of conflicting interests has been causing the government some concern for a number of years. As a matter of established trust law, beneficiaries have always been entitled to a considerable degree of disclosure by the trustees of information concerning the trust assets. Regulations were made in 1986 providing for disclosure of certain information to be made available to members, but there is some doubt whether this replaces the existing equitable rules insofar as they apply to pension trusts, or whether it augments them. If the former it may have had the effect of diminishing the rights of beneficiaries. In any event, as recent happenings have demonstrated, we still have a long way to go before a satisfactory position is achieved.

In the meantime it can be difficult for an individual member to obtain redress against pension fund trustees for a breach of trust. My favourite litigant of this course is the plaintiffin a caser I have already mentioned, that of **EVANS v LONDON COOPERATIVE SOCIETY LTD**. Mr. Evans, a retired milkman, had to struggle for ten years without legal aid to bring his case to court. The result as far as he was concerned (although doubtless a great many other pensioners benefited too) was an increase of £1.81 - about 4,000 lire - in his weekly pension!

8.12. Conclusion

In July, 1991, as a result of the unease of the government concerning the present trust framework regulating pension funds, a Committee of the House of Commons started to investigate pension laws. Within three months Mr Maxwell, Chairman of Mirror Group Newspapers, a man with interests in a very large publishing empire and a trustee of a pension fund with 8000 members, had jumped into the sea, taking his own life and ruining the lives of the families of those members and of present employees, for it was discovered that most of the pension funds, a sum of no less than £400,000,000, was missing, having been removed and misused by Mr. Maxwell. The government has pledged itself to make good at least a substantial part of the deficiency, but the question remains of how one man, cunning, intelligent, forceful and thoroughly dishonest as he was, could have been responsible for such a huge loss to trust funds without being detected.

Over the coming months no doubt these questions will be answered, at least in part, but what is clear at the moment is that those bodies whose duty it is to exercise a supervisory role over pension funds, such as IMRO and the Occupational Pensions Board, have failed miserably.

The trust is a versatile device and copes successfully with many diverse legal situations, but the House of Commons Committee has not surprisingly decided that trust law is not able to handle the particular problems which occur in relation to pension schemes. Trust law has for some years been struggling to deal with the demands which pension trust problems impose and these have been such that piecemeal legislation has been enacted by Parliament to try to deal with particular problems and the courts have been and are developing principles peculiar to pension trusts. However, in view of the nature of these problems and our failure to resolve them satisfactorily and because we cannot afford any repetition of the Maxwell disaster, the committee has now recommended that pension funds are taken out of trust law altogether and that legislation is passed dealing with their regulation and providing for much stricter supervision.

As I speak to you a general election is about to take place in Britain. The new government, be it Conservative or Labour, will have much to do. I for one will wait with interest to see what it does about pension fund law.

Chapter XII

CHARITABLE TRUSTS

Charity is very important in England and has been for many centuries. The foundation of many schools and universities in England was originally founded on charitable donations. The Government is keen to promote voluntary contribution. It is believed to be good for people to contribute to charity. The public is also able to benefit from charitable donations in areas which the Government is unable to provide for. Charity also has the advantage of being able to respond more immediately at the grass roots level to current social situations and the need for financial assistance. Legislation, on the other hand, takes time to get through Parliament and cannot respond to social needs so quickly and effectively. For instance, in the last few years, there have been many charities established for AIDs victims and about 14 charities for Roumanian Orphans were set up overnight at the time of the political crisis in Roumania. Many different kinds of charity exist, some being vast organisations and others very small. Some of the largest charities in Britain are for the starving and poor in third world countries, for the blind and the disabled and for research into cancer. You might also be surprised to know that there are many charities established for animals. There are relatively small charities such as the National Goat Society, the Hedgehog Preservation Society, but there are also large charities such as the RSPCA, which exists for the prevention of cruelty to animals.

Some of these charitable institutions exist as corporations but many hold property in the trust form. The property is held by charity trustees not for their own benefit but for the benefit of the public as a whole or for a section of the public. Vast sums of money are raised each year. Charities are big business in England with over 170,000 charities in existence with a turnover of £17 billion a year. Television charity raising events for instance raise huge sums of money. Last year one telethon, as they are called, raised more than £13 million over the course of a few days. Obviously where there are such vast sums of money, the potential for fraud is very great and does in fact occur. New legislation is currently going through Parliament to try and tighten up the control of charities to prevent abuse by charity trustees. Millions of generous people give to charity each year and the Goverment believes they must be assured that their donations will reach the charity they wish to support and that the charity will use the money properly.

1. DEFINITION

Charity is considered to be so beneficial to the public that charitable trusts are given certain concessions by the law which do not apply to private trusts. Although

charitable trusts are in essence the same as ordinary trusts we shall see that in certain respects the law is not so rigid in its application to charitable trusts as it is to private trusts.
The distinguishing feature of the charitable trust is that the trust property is not devoted to the use of specific persons, in other words beneficiaries, but to the performance of purposes which are of benefit to the public. There is no need for specific beneficiaries as there is with a private trust. The trust property is held by charitable trustees who are under an equitable duty to deal with the property for a charitable purpose, in other words for a purpose which is beneficial to the community. By contrast with private trusts where the beneficiaries can enforce the trust, charitable trusts are enforced by an officer of the State, the Attorney General, who represents the public interest. Charity trustees and other aspects of the trust are controlled by a State run body called the Charity Commissioners who have powers deriving from the Charities Act 1960 to give advice, remove trustees and to demand the submission of yearly accounts. The role and function of the Charity Commissioners is currently under scrutiny and a draft Bill has gone before the House of Lords because it is felt that the Charity Commissioners are inadequately controlling and supervising charities and should be given greater powers to do so. Vast sums of money pass through the hands of charity trustees each year and there is evidence of widespread fraud by charity trustees. It is very easy to set up a trust say for Roumanian orphans and then to abscond with the funds. There is also some concern that the trustees of charities are mismanaging charitable trusts so that vast sums of money are being wasted on administration costs so that all in all only a fraction of the money donated to charity is actually reaching its intended destination.

2. A CHARITABLE TRUST CAN LAST FOR EVER.

Another feature of the charitable trust that distinguishes it from other trusts is that a charitable trust can last for ever. It is not limited in time.

3. WITH A CHARITABLE TRUST THE PURPOSES NEED NOT BE CERTAIN.

Also, unlike private trusts, there is no need for the purpose of a charitable trust to be certain. The words 'for a charitable purpose' will be sufficient.

4. WITH A CHARITABLE TRUST THE TRUST IS NOT LIKELY TO FAIL IF THE PURPOSES CANNOT BE CARRIED OUT.

A charitable trust is less likely to fail for some reason than a private trust is. For instance, if with a private trust no mention is made of the intended beneficiaries of the trust or they are conceptually uncertain, then the trust will lapse and the trustees will hold the property on resulting trust for the settlor or testator. With a charitable trust, on the other hand, if the charity no longer exists so that the funds cannot be devoted to that charity, the gift does not necessarily fail but can be devoted to other similar purposes, in other words another similar charity, under what is called the cy pres scheme (which means as nearly as possible in Norman french). Under this scheme a Government body called the Charity Commissioners will devise a scheme so that the funds can be applied to another similar purpose. Obviously if the next of kin can successfully argue that the intended gift to a named charity which no longer exists was for that particular charity rather than for charitable purposes generally, then they may be able to claim that the gift lapses and goes to them under a resulting trust.

5. CHARITABLE TRUSTS ENJOY TAX ADVANTAGES

Charitable trusts, unlike ordinary private trusts, also enjoy certain tax advantages or concessions, the aim of these being to promote and encourage gifts to charity. For instance charities are exempt from income tax and stamp duty on conveyances.

6. SIMILARITIES WITH ORDINARY PRIVATE TRUSTS.

Despite the fact that charitable trusts have certain features which distinguish them from ordinary private trust, they do have similar characteristics to those or private trusts.

For instance, like a private trust, a charitable trust lacks legal personality and the legal capacity to sue and be sued and deal with the trust property is in the trustee. Like a private trust it involves a fiduciary relationship with respect to property. The trustees of a charitable trust have similar duties and powers as the trustees of a private trust. They have similar duties of administration and management of the trust property. They have duties of investment for instance. Charity trustees must keep the trust property separate from their own property and like trustees of private trusts must not allow their own self-interest and their duties to the trust to conflict. The Charity Commissioners, who monitor, supervise and control charity trustees, have power to remove charity trustees and charity trustees who abuse their position can be sued in the same way as private trustees and be held liable to make good any losses to the trust. For instance, charity trustees must not spend trust funds on political purposes. If a trustee does so then he may well be personally liable to make good the losses and/or liable to be removed from office.

7. THE FOUR HEADS OF CHARITY.

What is or is not a charitable purpose is determined according to law. The wishes and motive of the donor are irrelevant.

Broadly speaking there are four broad categories of purposes which the law considers charitable. These categories or heads of charity as they are called were laid down by Lord Macnaughten in a case in the nineteenth century called Commissioners of Special Income Tax v Pemsel (1891). These heads of charity as they are called are: first trusts for the relief of poverty, secondly trusts for the advancement of education, thirdly trusts for the advancement of religion and fourthy what is called the residual head of charity, trusts for other purposes beneficial to the community. Under the first three heads of charity the public benefit element is assumed. Most modern charitable trusts will in fact be charitable under the fourth head of charity. Not only can the courts decide whether or not a purpose is charitable but the Charity Commissioners can also do so. In fact only a small number of cases involving the question of charitable status comes before the courts. A case for instance recently came before the House of Lords as to whether a gift for sporting purposes was charitable and it was held that it was. These cases and the rulings of the Charity Commissioners act as precedents for later decisions as to whether or not a purpose is charitable, although there is room for flexibilty in the application and interpretation of these precedents as the charitable needs of society are constantly changing.

(i) Trusts for the relief of poverty.
(ii) Trusts for the advancment of education.
(iii) Trusts for the advancement of religion.
(iv) Trust for other purposes beneficial to the community.

8. TAX IMPLICATIONS OF CHARITIES.

Sometimes the question as to whether a trust should be considered charitable or not is brought before the courts by the Inland Revenue because it is felt that the creation of a trust is to avoid paying tax. The courts will in fact look to see if there is a tax motive for the creation of a trust and if there is, and even if the trust is ostensibly charitable, the court can manipulate the use of the public benefit test in order to come to the conclusion that the trust is not charitable. For instance in a case called Oppenheim v Tobacco Securities Trust Co. Ltd., heard in 1951, the House of Lords had to consider whether or not a discretionary trust to provide for the education of children or employees or former employees of the British-American Tobacco Co Ltd. or any of it subsidiary or allied companies should be charitable. Prima facie a trust for the advancement of education is charitable, but the House of Lords held that there was insufficient public benefit here despite the fact that the number of employees in the company, its allied companies and subsidiaries was in excess of 110,000. Basically the creation of the trust had been for tax motives and the courts are obviously unwilling to endorse such schemes. Some academic commentators have argued that the tax motives behind such charitable schemes should not be considered relevant when it comes to deciding whether or not a trust is charitable or not.

9. POLITICAL PURPOSES AND CHARITIES.

Another area of interest in the case-law is the unwillingness of the courts to grant charitable status to bodies whose main purposes are political, particularly where those purposes involve political purposes overseas. Amnesty International, for instance, an organisation which campaigns for the protection of human rights and the abolition of torture world wide, was not granted charitable status by the House of Lords in the case of McGovern v AG in 1982, because of any abolition of torture and the protection of prisoners of conscience would necessitate a change in the law of countries overseas. The law's antipathy to political purposes is based on several reasons. One is that the judges would find it difficult to decide whether or not a proposed change in the law is

for the benefit of the public either locally or internationally. It is also felt that if judges condoned political purposes then it would undermine the role of the legislature whose function in a democracy is to make law rather than that of the judges.
It is also felt that if the courts gave organisations like Amnesty International charitable status thereby condoning changes in the law overseas, it would prejudice the United Kingdom's relationship with countries overseas. There might also be problems in deciding whether or not a change in the law of a foreign country is for the public benefit. It seems that the public benefit requirement relates to the public benefit in England.

10. WHAT ABOUT CONFLICTING PUBLIC BENEFITS ?

Another interesting case involved the question of whether the National Anti-Vivisection Society could be granted charitable status in order to gain exemption from the payment of income tax. This Society campaigns to abolish experimentation on animals for the purpose of medical research. The House of Lords in the case of National Anti-Vivisection Society v Inland Revenue in 1948 held that the Society could not be granted charitable status. The protection of animals generally was held to be a charitable purpose, but their Lordships held that vivisection was a necessary part of medical research and that the provision of medical research was of a far greater benefit to the public than the protection of animals. The court had to make a value judgment weighing up conflicting moral considerations. On balance, on the evidence available to the House of Lords, the suppression of vivisection was not beneficial to the public and the claim failed.
This position English law takes might be compared with the position in the United States of America, where under the American Restatement of the Law of Trusts the courts can stand neutral. The judges do not have to weigh up conflicting public benefits. The American Restatement sees nothing improper in upholding trusts for both armament and disarmament and by an application of the same reasoning vivisection and anti-vivisection would both be regarded as charitable as being for the public benefit. The American view greatly simplifies the task of the court. The balancing of the merits of two different forms of public benefit is a matter on which opinions may vary and one on which the court may not be the best judge.
One area of controversy as regards charitable status is that there is a discrepancy between what the law considers to be charitable and what the public' perception of what should be charitable is. It seems rather odd that Eton College, a famous public school, and the Vegetarian Society for instance are charitable, but that Amnesty International and the Anti-Vivisection Society are not. The question in law as to whether a purpose is or is not charitable is very much left to the subjective evaluation by judges as to what is a worthy sort of activity. Trusts to promote the works of

famous classical music composers and to promote the playing of chess in schools have for instance been upheld as charitable, but one wonders if a trust to promote the musical works of the Beatles or to promote the playing of Scrabble in schools would ever be regarded as charitable by either the courts or the Charity Commissioners.

11. THE CONTROL OF CHARITABLE TRUSTS AND THE PROPOSALS FOR REFORM

Undoubtedly the feature of the charitable trust that is most troublesome is one that has already been mentioned, the fact that unlike the private trust the charitable trust ordinarily involves no definite or ascertained beneficiaries. The trust exists for the benefit of the public as a whole or for some section of the public. The charitable trust therefore lacks a mechanism for private enforcement but is controlled by the State via the Attorney General, a public officer, and by the Charity Commission set up under statute.

The Charity Commission consists of five Commissioners, who are barristers or solicitors and a staff of hundreds of civil servants. Until fairly recently there were only three Commissioners but their number has been increased from three to five because of their increased work load. For example, 4,000 new charities joined the register last year. The Commissioners have various powers under the Charities Act 1960. They give advice and guidance to charity trustees, require annual accounts to be submitted, and keep a register of all the charities in England and Wales. Only organisations with charitable status will exist as an entry on the register. A charity can be removed by the Commissioners from the register if there is any evidence of fraud or malpractice. Last year the Commission supervised 171,000 charities and actually removed 749 from the register as a result of their investigation. The Commissioners also help devise schemes for charities to apply charity funds to other analogous charities when the original purposes for which a charity was founded are no longer useful or no longer exist. Although the Commissioners are meant to control and supervise charities and particularly the function of charity trustees, in fact they perform a very ineffective role. For instance, apparently only 10 per cent of charities actually submit annual accounts. The new legislation will make persistent failure to submit annual accounts a criminal offence and generally tighten up on the powers of the Commission. Even so, it will remain relatively easy for charity trustees to engage in fraudulent activity. One major criticism of the new proposals, which I do not want to go into in detail, is that small charities will find themselves strangled by the new regime and many trustees who act voluntarily for small charities will be less willing to do so because of the greater accountability requirements of the Commission.

12. CONCLUSION.

In this short talk I have tried to give you a general introduction to the law of charities and charitable trusts. Obviously there is not time to give you any great detail. What I would like you to grasp is two things. First of all that in England the trusts are important in the context of charities. Charity trustees control vast amounts of public money. Second, that with charitable trusts, although in essence the trust is the same as an ordinary private trust, that there are significant differences, the main one being that with a charitable trust there is no need for there to be specific beneficiaries to enforce the trust. The State via the Attorney General and the Charity Commission peform this function. It will be interesting to hear from you how Italian law manages to administer and manage charitable funds for the benefit of the Italian public and also to hear whether you have any concept of charity, how it is defined and whether charities likewise enjoy any particular concessions in the law.

Chapter XIII

THE HAGUE CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION

The Hague Convention on Trusts was signed at the Hague by 32 Member States, including the UK and Italy, on 10th. January 1986. In the UK the Convention was brought into English Law by the Recognition of Trusts Act 1987. Italy ratified the Convention in early 1992.

The aim of the Convention is not to introduce the trust concept into the domestic law of Member States which do not possess such a concept, in other words into non-trust States, such as Italy. Its aim is to establish common conflicts of law principles to be applied to trust States and non-trust States and to emphasise the consequences of recognising a trust created under the applicable law. In fact the Preamble to the Convention states that the Convention aims to 'establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts'. The Convention will unify the conflicts principles for those legal systems which may have a highly developed law of trusts, those which may be wholly without the trust or those legal systems which may have devices analogous to the trust in function or structure. The principal benefit to be derived from the Convention it seems according to a Report made at the Hague Conference on the recognition of trusts, however, is for the common law States to have trusts recognised in civil law States and for civil law States to have an instrument which will permit them to grasp the trust, that being a concept which is not only unknown to them but which is not easy to comprehend. Obviously it is acknowledged that the Convention will not be able to solve every problem.

Before the Convention there was considerable uncertainty at least in England and I suspect in other trust jurisdictions as to what law governed a trust. Say a for example an English testator leaves property in New York to be held by trustees in Canada for the benefit of his granddaughter who lives in England. Should the law of the Umited States, Canada or England apply? There was very little case-law and literature on the subject before the Convention on what the position was. Obviously with greater mobility of persons and capital world-wide more and more trust assets will be administered in different jurisdictions and more and beneficiaries are to be found in trust and non-trust States.

What the Hague Convention does is quite simple. It lays down a rule which states that the validity, construction, effects and administration of a trust are governed by the law chosen by the settlor, or in the absence of any such choice, by the law with which the trust is most closely connected.

Hayton, an academic writing in the ICLQ, states:

'Obviously it is in the best interests of States to adopt the Convention and harmonise their approach to trust issues to prevent the aggravation of differences between them and to produce greater certainty and greater protection for property rights.'

1. DEFINITION OF A TRUST UNDER THE CONVENTION

As you have already learned in the introductory lectures on trusts, it is very difficult indeed to draw up a precise definition of a trust. However, under the Convention it was necessary to provide a description of a trust to enable lawyers in Member States to know in a general sort of way what they are dealing with.

Article 2 is as follows:

'For the purposes of this Convention, the term 'trust' refers to the legal relationships created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics:
(a) the assets constitute a separate fund and are not a part of the trustee's own estate;
(b) title to the trust assets stand in the name of the trustee or in the name of another person on behalf of the trust;
(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law.
The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.'

The first paragraph obviously covers the classic Anglo-American trust where the trustees have the legal ownership of the trust assets while the beneficiaries have the equitable or beneficial ownership. The last phrase of the first paragraph which refers to purposes means that charitable trusts will be included in the definition.
The second paragraph contains the main characteristics of trusts so that if they are found to be present it is possible that the Convention may cover certain trust-like institutions which may have developed in certain countries.
Article 3 however, puts two limits on the application of the Convention. It states that 'The Convention applies only to trusts created voluntarily and evidenced in writing', thereby reinforcing the first paragraph of Article 2 which restricts trusts to legal

relationships created by a person as opposed to a court. The trust must be created by a positive exercise of free will and, although the trust itself does not have to be created in writing, there must be some written evidence of trust but that need not be signed by the settlor or indeed come from the settlor. A letter from the trustees would for example be sufficient even if there were no formal deed or will creating a trust.

2. IMPLIED TRUSTS ACCORDING TO THE CONVENTION

2.1. Resulting trusts

Von Overbeck, commenting on the Convention seems to think that the convention will apply to resulting trusts. Hayton states that the Convention clearly applies to 'automatic' resulting trust in other words those sort of resulting trusts which arise automatically on the failure or exhaustion of express trusts. The problem with the presumed resulting trust, trusts that arise in favour of the non-owner in law but who gets an interest in equity by reason of contribution to the purchase price or where the property is gratutitously transferred, is that there is initially no evidence in writing of the trust presumed to arise because of S's voluntary act.
For instance, what happens if the legal owner John holds property in England in his name on resulting trust for Thomas? What happens if John sells the property in England and with the proceeds of sale buys a villa in Tuscany, and Thomas subsequently writes a letter to John saying: 'Of course you realise you held the English property and its proceeds of sale on resulting trust for me so that you now hold the Italian property on trust for me'? What is to happen in this case? The position seems uncertain. Could this letter or a declaration by the English court declaring that John initially held the property on trust for Thomas constitute sufficient written evidence of a trust voluntarily created by Thomas?

2.2. Constructive trusts

In a Report by von Overbeck on the Convention given at the Hague Conference, he states that by virtue of article 3 and the requirement the trusts must be created voluntarily, constructive trusts will be excluded since they have been established contrary to the will of a person, in other words they are imposed by the court.
It is clear that the Convention, concerned as it is with trusts of specific property, cannot possibly apply to the constructive trust which is imposed on a person against whom there is no remedy in tort or contract who is contructively treated as a constructive trustee as a formula for the equitable remedy of making him personally liable to account for his losses or profits on the same basis as an express trustee. In these situations constructive trusteeship is imposed by a Court of Equity as a personal remedy quite distinct from the proprietary institutional trust of specific property. The defendant holds no property on constructive trust and may never have even had any property of the plaintiffs vested in him.
Constructive trusts are ofen imposed then by the court of Equity. Trusts created in this way by judicial decision are not intended to fall within the Convention. The Rapporteur to the Hague Convention stated:

'The exclusion of judicial trusts extends to constructive trusts imposed by the courts and to trusts that the courts create by virtue of an express provision of law.'

This is because trusts created in this way are not 'relationships created by a person' (art. 2) and are not 'trusts created voluntarily' (art 3).
It may be possible, however, that the Convention could apply to those sorts of constructive trusts where there is an express oral declaration of trust but which cannot take effect as an express trust because there is a lack of compliance with the statutory formalities but where the court intervenes and imposes a constructive trust to prevent the owner in law fraudulently retaining the property for himself by relying on the strict requirement of writing.

<u>A testamentary example</u> :
Charles by will leaves his house to John. There is nothing in the will to this effect but John has agreed to Charles request that John should hold the house on trust for Charles' illegitimate daughter, Elizabeth. What if John ignores the oral trust imposed on him and sells the house and buys a house in Rome? Can Elizabeth invoke the Convention and have the house in Rome sold or the title transferred to her, despite the absence of any writing signed by Charles. If there was a will then there would be evidence of writing. Would a declaration by the English court be sufficient evidence in writing of the existence of an express trust?

An inter vivos example:
A cohabitee Phillip buys a house in his name but it is the common intention of the parties that he and his girlfried Jane will own it together in Equity. The absence of writing makes the express trust unenforceable because in English law trusts of land must be evidenced in writing. It would be unconscionable to allow Phillip to plead the lack of written formalities so as to retain the house for himself. Could a decision of the Court of Equity imposing a constructive trust in this case amount to sufficient written evidence to bring the trust within the Hague Convention?
It seems that there is no reason why this type of common intention trust as opposed to that sort of constructive trust imposed by the courts without reference to the intention of the parties, should not be included in the Convention. Von Overbeck in his Report to the Hague Conference stated that resulting trusts should in principle be covered by the Convention because he says they are based on implied intent. Surely on the same reasoning an argument could be made for including those sorts of constructive trusts based on intention in the Convention?
In fact article 20 specifically authorises a contracting State to 'declare that the provisions of the Convention will be extended to trusts declared by judicial decisions', since such trusts are excluded by the effect of articles 2 and 3. The purpose of Article 20 is to allow the UK and other EEC states to comply with the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments and subsequent Accession Conventions.

3. LAUNCHING THE TRUST: PRELIMINARY ISSUES.

Article 4 states:

'The Convention does not apply to preliminary issues relating to the validity of wills or other acts by virtue of which assets are transferred to the trustee.'

If one draws an analogy between say a rocket-launcher and a rocket, an analogy used by various commentators on the Convention, then the Convention only applies to the rocket and not the launcher, in other words the trust once created and not the machinery used to set it up.
Thus if a trust is imposed on property left under a will in Italy and that will is invalid under Italian law then the trust may fail in the first place. Similarly if an Italian declared himself a trustee of specific Italian property for the benefit of English beneficiaires and stated that the applicable law was English law the Convention would not apply to the preliminary issue of whether or not the declaration of trust was effective in Italian law.

4. THE APPLICABLE LAW.

Just as the parties to a contract are free to choose the law which is to govern it, so the settlor is entitled to select the law which is to govern the trust he establishes. A testator or settlor domiciled in England is free to set up a trust governed by some foreign law and such a person domiciled in a foreign country may establish an English trust. In the absence of an express or implied choice by the parties, then, as in the law of contract, the trust will be governed by the system of law with which the trust has the closest and most real connection.
It is common for instance for people in England to invest in trusts outside the jurisdiction in order to gain tax advantages. In Chellaram v Chellaram (1985) it was held that the English court had jurisdiction to administer a foreign trust even where the trust funds were outside the jurisdiction and had power to remove trustees and appoint new ones by orders in personam against the existing trustees requiring them to resign and to vest the trust funds in the new trustees.

Article 6 provides:

'A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.'

An implied choice of law will most readily be found where the settlor's trust instrument mentions a particular State's law. For example a reference to certain sections of the Trustee Act 1925 or the Trustee Investments Act 1961 would imply that English law is the law that is to govern the trust.
Clearly the applicable law chosen is likely to be the law of a trust-state rather than that of a non-trust State. If such a chosen law 'does not provide for trusts or the category of trust involved the choice shall not be effective' (art ?).
Where no choice of applicable law is made by the settlor, then article 7 provides that 'Where no applicable law has been chosen a trust shall be governed by the law with which it is most closely connected.' To ascertain this law reference shall be made in particular to:

(a) the place of administration of the trust designated by the settlor;

(b) the situs of the assets of the trust;

(c) the place of residence or business of the trust;

(d) the objects of the trust and the places where they are to be fulfilled.

A settlor may pick and choose different laws to govern different aspects of the trust eg matters of validity or construction or administration as well as different laws to govern assets situated in different States.

Article 9 states:

'A severable aspect of the trust, particularly matters of administration, may be governed by a different law.'

Article 10 continues:

'The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law.'

Matters governed by the applicable laws.
Article 8 contains a detailed but not exhaustive list of various issues which are submitted to the law applicable to the trust. The particularised issues are:

(a) the appointment, resignation and removal of trustees, the capacity to act as trustee, and the devolution of the office of trustee;
(b) the rights and duties of trustees among themselves;
(c) the rights of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
(d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets or to acquire new interests;
(e) the powers of investment of trustees;
(f) restrictions upon the duration of the trust, and upon the power to acccumulate the income of the trust;
(g) the relationships between the trustees and the beneficiaries including the personal liablity of the trustees to the beneficiaries;
(h) the variation or termination of the trust;
(i) the distribution of the trust assets;
(j) the duty of the trustees to account for their administration.

5. THE PRINCIPLE OF RECOGNITION.

Chapter III deals with the effects of recognition.
Strictly if the Convention describes what a trust is and then states what is meant by the applicable law, then it would seem to follow that if the applicable laws is that of State A then the courts of State B, a contracting State are bound to recognise the State A trust without the need for express recognition provisions. It was felt desirable, however, to spell out for the benefit of jurists in civil law countries what recognition of a trust - or recognition of a trust - consists of.

Article 11 therefore provides as follows:

'A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust.

Such recognition shall imply, as minimum, that the trust property constitutes a separate fund, that the trustees may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.
In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular:

(a) that personal creditors of the trustee shall have no recourse against the trust assets;
(b) that the trust assets shall not form part of the trustees estate upon his insolvency or bankruptcy;
(c) that the trust assets shall not form part of the matrimonial properyt of the trustee or his spouse not part of the trustees estate upon his death;
(d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law of the forum.'

The aim of Article 13 is to protect Contracting States against the obligation to recognise trusts which have a real connection only with States which do not have the institution. That article states:

'No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of the trust involved.'

One example of this might be where a State has the equivalent of a charitable purpose trust but not of a private trust for persons. Under this article a trust or a non-trust State has a discretionary power to refuse to recognise a trust if the significant elements of the trust (eg the place where the assets are, settlor's and beneficiaries' habitual residence) are more closely connected with non-trust rather than with trust States, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee.
A court can decide what are the significant elements which connect the trust to a non-trust State and the relevant time for these significant elements to be connected is at the time of recognition and not the time of creation of the trust.
Otherwise an Italian could transfer £100 to English trustees in London on an English trust for the benefit of the Queen and John Major but with power to delete and add new beneficiaries a year later. Italian beneficiaries could be added to replace the English beneficiaries and valuable shares in an Italian company could be added to the trust assets.

6. REGISTRATION OF TITLE TO ASSETS.

Article 12 allows a trustee to register trust assets in public registers so that the existence of the trust is disclosed. Delegates from non-trust States were keen to afford a trustee the facility to register title to assets there.

Article 12 provides:

'Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in some other way that the existence of the trust is disclosed.'

7. PRESERVATION OF APPLICATION OF MANDATORY RULES.

Article 15 lays down the general principle that the Convention does not oust mandatory conflicts of laws rules and particularises some instances of the rules.

Article 16 preserves certain mandatory rules of fundamental importance which will apply despite the Convention and apply to international situations irrespective of conflicts rules. These are law specifically designed to protect the interests of the State for example preventing the export of currency, or of cultural heritage objects, or limiting export of technical equipment to favoured States or preserving public health.

Article 16 provides:

'The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflicts of laws.
If another State has sufficiently close connection with a case then, in exceptional circumstances, effect may be given to the rules of that State which have the same character as mentioned in the preceding paragraph.
Any contracting State may, by way of reservation, declare that it will not apply the second paragraph of this article.'

The ambit of the second paragraph is uncertain and the UK govenment will therefore make the reservation allowed by the third paragraph.

8. OTHER MATTERS.

Article 18 contains the customary public policy clause and states:

'The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (ordre public)'.

By article 18 'Nothing in this Convention shall prejudice the powers of States in fiscal matters.'
For instance, for a charitable trust to qualify for UK tax privileges it needs to be charitable according to English domestic law as opposed to conflicts of law.