of English assets governed by a foreign law (such as that of Jersey or the Isle of Man or Bermuda or the British Virgin Islands or the Cayman Islands) that treats such a trust as valid where the terms of the trust appoint an enforcer?

5–04 If such a foreign trust concept were either repugnant to the core of the trust concept or contrary to English public policy then the English court could only hold the trust to be void for infringing the beneficiary principle, so that a resulting trust would arise for the settlor, whose creditors, heirs or divorcing spouse could then enforce their claims against the trust assets.[4] However, English law is not so insular as to refuse to recognise any aspect of foreign law that is different from English law,[5] and on one view, the English court should recognise the validity of trusts whenever they clearly supply a mechanism for the positive enforcement of the trust so that the trustees are under an obligation to account to someone in whose favour the court can positively decree performance, whether this person is a beneficiary with a proprietary interest in the trust assets or an enforcer with no such proprietary interest.[6]

5–05 On this view, English law could accept that a trust simply needs an enforcer, whether a beneficiary or the Attorney-General or Charity Commission for charitable purpose trusts or some person expressly appointed by the trust instrument to be enforcer with locus standi[7] positively[8] to enforce the trust. After all, as Lord Walker made clear in *Schmidt v Rosewood Trust Ltd*,[9] rights to disclosure of trust documents and supporting information are not based on beneficiaries' proprietary interests but on the court's inherent jurisdiction to supervise matters and make the trustees account for their trusteeship at the behest of sufficiently interested persons, e.g. objects of powers[10] or new trustees[11] or protectors.[12]

5–06 Thus, the English courts should not hold the above Jersey trusts to be void so that the settlor is entitled from the outset to the beneficial interest under a resulting trust. Where then is the beneficial interest? Should a non-charitable purpose trust be treated like a charitable purpose trust where the trustees are the legal beneficial owners[13] but are under fiduciary and equitable duties owed to the Attorney-General and the Charity Commission or any "interested person"[14] having the permission of the Commission to hold them to account? The trustees of a non-charitable purpose trust can similarly owe fiduciary and equitable duties to the enforcer, but what if the enforcer does not enforce the trusts or, worse still, what if the trustee and the enforcer appropriate the property for themselves?[15] Under

[4] Note that the Recognition of Trusts Act 1987 gives the right to choose any foreign trust law to govern a trust so long as not "manifestly incompatible with public policy"; and cf. the approach taken to wide exemption clauses in *Armitage v Nurse* [1998] Ch. 241 at 253.

[5] The inalienability of an alimentary life interest under Scots law was accepted by the Court of Appeal in *Re Fitzgerald* [1904] 1 Ch. 573 though English life interests cannot be inalienable.

[6] D.J. Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 L.Q.R. 96. cf. P. Matthews "From Obligation to Property, and Back Again" in D.J. Hayton (ed.), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (2002), who argues that arrangements of the latter sort may be valid under English law on contract law principles, but cannot be trusts because these necessarily entail equitable property ownership.

[7] See the emphasis on locus standi to enforce in *Re Denley's Trust Deed* [1969] 1 Ch. 373 at 382–383; *Re Astor's ST* [1952] Ch. 534 at 542; *Re Shaw* [1957] 1 W.L.R. 729 at 745.

[8] The fact that the residuary legatees or the next-of-kin will take property in default of specific purposes being carried out does not indicate that the settlor-testator intended such "negatively" interested persons to be enforcers, and so the presence of such persons will not save a trust for non-charitable purposes: *Re Shaw* [1957] 1 W.L.R. 729 at 745; *Re Davidson* [1909] 1 Ch. 567 at 571.

[9] [2003] 2 A.C. 709.

[10] *Schmidt v Rosewood Trust Ltd* [2003] 2 A.C. 709.

[11] *Young v Murphy* [1996] 1 V.R. 279.

[12] *Re Hare Trust* (2001) 4 I.T.E.L.R. 288; *Von Knierem v Bermuda Trust Co Ltd* [1994] S.C.B. 154.

[13] Just like executors of a testator: *Commissioners of Stamp Duty v Livingston* [1965] A.C. 694.

[14] Charities Act 1993 s.33.

[15] An individual enforcer cannot bind his *ex officio* successors not to enforce the trustee's duties.

the rule in *Saunders v Vautier*[16] they are not entitled to take the trust property for themselves unless they are the persons exclusively beneficially entitled to the trust property. This cannot be the case where another person becomes beneficially entitled at the end of the trust period with the right to make the trustee account for its trusteeship.

5–07 The key issue, then, is whether until the end of this trust period it is correct that the beneficial interest is not vested in the settlor under a resulting trust subject to the trustee having a valid power to carry out the non-charitable purposes,[17] and the enforcer having a valid power to ensure that the trustee exercises its power: such powers seem to be valid even under English domestic law because the approach of the courts is to facilitate settlor's intentions unless illegal or otherwise contrary to public policy. Surely, by expressly using language imposing a duty to the enforcer upon the trustee to use all the trust property exclusively to carry out the non-charitable purposes (and so not to benefit the settlor), the settlor by necessary implication has abandoned any beneficial interest in the trust property so as to oust any resulting trust.[18] Thus, the trustee must have legal beneficial ownership of the trust property but subject to fiduciary and equitable duties owed to the enforcer.

5–08 This position achieved by foreign trust legislation does not appear to be so out of line as to be repugnant to the core trust concept or contrary to English public policy. Indeed, if in an English trust deed, a settlor abandoned all beneficial interest in the trust property to the intent that the trustee must use its legal beneficial ownership of the trust property to carry out workable non-charitable purposes for a royal lives and 21 years perpetuity period and appointed an enforcer expressly required to ensure that the trustee carries out the trusts and expressly given sufficient enforcement rights against the trustee, there seems plenty of scope for the House of Lords or a bold Court of Appeal to accept the validity of such a non-charitable purpose trust where, crucially, there is a designated enforcer to whom the trustee owes duties in respect of its legal beneficial ownership of all the trust property.

5–09 It does not matter that the enforcer only has a power and not a duty to enforce the trustee's obligations: a beneficiary is in exactly the same position. A beneficiary has much self-interest in enforcing the trust, but so will often be the case for the person appointed to be enforcer who may, indeed, have something to lose if not enforcing the trust, e.g. removal by the members of his body from the office that led him to be the enforcer or censure at an extraordinary general meeting. Moreover, a reputable trustee duly performs trusteeship duties because he is good at them, enjoying doing them and getting paid for them, while any successor trustee is under a duty to make the old trustee remedy any breaches of duty that are discovered.[19]

BERMUDA TRUSTS (SPECIAL PROVISIONS) ACT 1989 SECTIONS 12A AND 12B[20]

Purpose Trusts

5–10 12A—(1) A trust may be created for a non-charitable purpose or purposes provided that the conditions set out in subsection (2) are satisfied; and in this Part such a trust is referred to as a "purpose trust".

[16] (1841) 4 Beav. 115; discussed at paras 7–03 ff.

[17] *Re Shaw* [1957] 1 All E.R. 745 at 759; endorsed in *Re Wooton's WT* [1968] 1 W.L.R. 681 at 688.

[18] "If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust": *Westdeutsche Landesbank v Islington LBC* [1966] A.C. 669 at 708, per Lord Browne-Wilkinson.

[19] *Young v Murphy* [1996] 1 V.R. 279.

[20] Inserted by the Bermuda Trusts (Special Provisions) Amendment Act 1998.

(2) The conditions are that the purpose or purposes are—

(a) sufficiently certain to allow the trust to be carried out,
(b) lawful, and
(c) not contrary to public policy.

(3) A purpose trust may only be created in writing.

(4) The rule of law (known as the rule against excessive duration or the rule against perpetual trusts) which limits the time during which the capital of a trust may remain unexpendable to the perpetuity period under the rule against perpetuities shall not apply to a purpose trust.

(5) The rule against perpetuities (also known as the rule against remoteness of vesting) as modified by the Perpetuties and Accumulations Act 1989 shall apply to a purpose trust.

Enforcement and Variation of Purpose Trust by the Court

5–11 12B—(1) The Supreme Court may make such order as it considers expedient for the enforcement of a purpose trust on the application of any of the following persons—

(a) any person appointed by or under the trust for the purposes of this subsection;
(b) the settlor, unless the trust instrument provides otherwise;
(c) a trustee of the trust;
(d) any other person whom the court considers has sufficient interest in the enforcement of the trust;

and where the Attorney-General satisfies the court that there is no such person who is able and willing to make an application under this subsection, the Attorney-General may make an application for enforcement of the trust.

(2) On an application in relation to a purpose trust by any of the following persons—

(a) any person appointed by or under the trust for the purposes of this subsection;
(b) the settlor, unless the trust instrument provides otherwise;
(c) a trustee of the trust,

the court may if it thinks fit approve a scheme to vary any of the purposes of the trust, or to enlarge or otherwise vary any of the powers of the trustees of the trust.

(3) Where any costs are incurred in connection with any application under this section, the Supreme Court may make such order as it considers just as to payment of those costs (including payment out of the property of the trust).

3. Exceptions?

A. "Anomalous" Testamentary Purpose Trusts

5–12 The Court of Appeal[21] has held that there are some anomalous cases, not to be extended, where testamentary trusts infringing the beneficiary (or enforcer) principle have been held valid as concessions to human sentiment. These anomalous cases are:

[21] *Re Endacott* [1960] Ch. 232 (residuary gift to a parish council "for the purpose of providing some useful memorial to" the testator held void for uncertainty and for infringing the beneficiary principle).

- trusts for the maintenance of particular animals;[22]
- trusts for the erection or maintenance of graves and sepulchral monuments;[23]
- trusts for the saying of masses in private;[24] and
- trusts for the promotion and furtherance of fox-hunting.[25]

5–13 These trusts are sometimes referred to as trusts of imperfect obligation since the trustees are not obliged to carry out the trusts in the absence of anyone able to apply to the court to enforce the trust. The trusts are subject to the rule against inalienability and so must be restricted directly or indirectly[26] to the common law perpetuity period. If the trustees do not take advantage of what, in substance, amounts to a power to carry out a purpose, then the person otherwise entitled to the trust property will be able to claim it. The courts here have created an exception to the principle[27] that they will not treat words creating a trust as if only creating a power.

5–14 However, it may be questioned how anomalous these trusts really are.[28] As discussed immediately below, some other "purpose" trusts have effectively been reinterpreted as trusts for persons because the performance of the purpose enures to the benefit of specific individuals, and trusts for the maintenance of particular animals can also be characterised as trusts for persons on this basis, since animals are chattels that belong to particular people. The maintenance of private graves for 99 years may be possible in any case under the Parish Councils and Burial Authorities (Miscellaneous Provisions) Act 1970 s.1, and if the construction is part of the fabric of a church then the trust will be charitable and valid on that ground.[29] Gifts for the saying of masses in private are very close to gifts for the saying of masses in public, which are charitable, and it is only the dubious rule in *Re Hetherington*[30] that divides the two—this holds that the saying of prayers can only be for the public benefit (and thus legally charitable) if persons other than the clergyman can hear them being said and are thereby benefited by his edifying example. Trusts for the promotion of fox-hunting are irreducibly anomalous, but the relevant case—*Re Thompson*—is very weakly reasoned since Romer J. erroneously based his judgment on negative enforceability by the default beneficiary when positive enforceability is necessary.[31] Moreover, fox-hunting has now been made illegal by the Hunting Act 2004.

[22] *Pettingall v Pettingall* (1842) 11 L.J. Ch. 176; *Re Dean* (1889) 41 Ch.D. 552. Many trusts for animals generally are charitable: *Re Wedgwood* [1915] 1 Ch. 113; and see paras 6–278 and 6–281 ff.
[23] *Re Hooper* [1932] Ch. 38; *Mussett v Bingle* [1876] W.N. 170; *Pirbright v Salwey* [1896] W.N. 86; *Trimmer v Danby* (1856) 25 L.J. Ch. 424.
[24] *Bourne v Keane* [1919] A.C. 815 at 874–875. In Malaysia and Singapore trusts for ancestor worship (Sin Chew or Chin Shong ceremonies) have been held valid anomalous non-charitable purpose gifts if restricted to the perpetuity period: *Tan v Tan* (1946) 12 M.L.J. 159; *Hong Kong Bank Trustee Co v Farrer Tan* [1988] 1 M.L.J. 485.
[25] *Re Thompson* [1934] Ch. 342, but the default beneficiary, a charity, only objected *pro forma*.
[26] *Pedulla v Nasti* (1990) 20 N.S.W.L.R. 720. If a will restricts a bequest expressly "so far as the law allows" this is construed as restricting the period to 21 years so satisfying the rule against inalienability: *Re Hooper* [1932] Ch. 38. The court will not imply such a term: *Re Compton* [1946] 1 All E.R. 117. If the legacy does not have to be kept intact as endowment capital but can be spent as soon as practicable on the purpose then the rule against inalienability has no application: *Trimmer v Danby* (1856) 25 L.J. Ch. 424; *Mussett v Bingle* [1876] W.N. 170.
[27] *IRC v Broadway Cottage Trust* [1955] Ch. 20 at 36; *Re Shaw* [1957] 1 W.L.R. 729 at 746.
[28] As argued in P. Matthews "The New Trust: Obligations Without Rights?" in A.J. Oakley (ed.) *Trends in Contemporary Trust Law* (1996).
[29] *Hoare v Osborne* (1866) L.R. 1 Eq. 585.
[30] [1990] Ch. 1.
[31] *Re Davidson* [1909] 1 Ch. 567 at 571; *Re Shaw* [1957] 1 W.L.R. 729 at 745.

B. "Purpose Trusts", the Performance of which Enures to the Benefit of Persons

5–15 In *Re Denley's Trust Deed*,[32] reproduced below,[33] Goff J. upheld a trust of a corporate settlor's land "to be maintained and used as and for the purposes of a recreation or sports ground primarily for the benefit of the employees of the company and secondarily for the benefit of such other persons (if any) as the trustees may allow to use the same." He considered that the attainment of these trust purposes was sufficiently for the benefit of certain individuals that the settlor should be taken to have intended that they should have locus standi to enforce the trust positively in their favour.[34] In effect, the trust was primarily for the benefit of particular people (the employees), with the specified way in which they were to be benefited being a secondary consideration. As trusts which are in effect for the benefit of people and thus similar to discretionary trusts, *Re Denley*-type purpose trusts have the benefit of the liberal Perpetuities and Accumulations Act 2009 and are not subject to the strict rule against inalienability.[35]

5–16 *Re Denley*-type purpose trusts typically involve a large fluctuating class of beneficiaries never intended to have, and never capable of having,[36] absolute ownership of the trust property, and only having a positive right to the performance of the trustee's duties in the form prescribed by the settlor. What of the cases, however, where there is a small class of identified beneficiaries who could be intended to have absolute ownership of the trust property, though the settlor purportedly qualifies this by requiring the property to be used for a specified purpose?

5–17 Take the case of a trust fund set up for the education of the seven children of a deceased clergyman. Once their formal education was over, Kekewich J.[37] held this to be an absolute gift with the reference to education expressing merely the motive of the gift. He applied the well-established, and difficult to rebut,[38] presumption of construction,[39] "If a gross sum be given, or if the whole income of property be given, and a special purpose be assigned for this gift this court regards the gift as absolute and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income as the case may be."

5–18 This was applied by the Court of Appeal in *Re Osoba*[40] where a bequest to the testator's widow upon trust "for her maintenance and for the training of my daughter, Abiola, up to university grade and for the maintenance of my aged mother" was held to be a trust for the three females absolutely as joint tenants. Similarly in *Re Bowes*[41] a trust to spend £5,000 on planting trees for shelter on the

[32] [1969] 1 Ch. 373.
[33] At paras 5–19 ff.
[34] See too *Re Saxone Shoe Co's Trust Deed* [1962] 1 W.L.R. 934 (which would now be valid under the *McPhail v Doulton* [1971] A.C. 424 test for discretionary trusts); *Wicks v Firth* [1983] A.C. 214; *Grender v Dresden* [2009] W.T.L.R. 379 at [18]. Persons named in a trust deed and benefiting directly or indirectly (e.g. as employees) but not intended to have a right to enforce the trust have no locus standi to apply to the court: *Shaw v Lawless* (1838) 5 Cl. & Fin. 129 at 153; *Gandy v Gandy* (1885) 30 Ch.D. 57 at 69–70.
[35] *Grender v Dresden* [2009] W.T.L.R. 379 at [18]. For discussion of the perpetuity rules affecting trusts, see paras 7–62 ff.
[36] A fluctuating class can never exercise *Saunders v Vautier* rights to make the trust property their own: *Re Levy* [1960] Ch. 346 at 363; *Re Westphal* [1972] N.Z.L.R. 792 at 764–765. Exceptionally, where the beneficial class consists of members from time to time of a club who, on dissolution of the club, are entitled to divide the assets between them, the beneficiaries will be able to acquire absolute ownership: see paras 5–72 and 14–48 ff.
[37] *Re Andrew's Trust* [1905] 2 Ch. 48.
[38] *Re Abbott Fund Trust* [1900] 2 Ch. 326: fund subscribed for maintenance of two deaf and dumb ladies (so not of normal capacity) held after their deaths to pass to subscribers under resulting trust and not to survivor's estate. For other cases where the beneficiary was only entitled to claim what was necessary for the specified purpose see *Re Sanderson's Trusts* (1857) 3 K. & J. 497; *Re Gillingham Bus Disaster Fund* [1958] Ch. 300.
[39] *Re Sanderson's Trusts* (1857) 3 K. & J. 497, and see *Re Skinner* (1860) 1 J. & H. 102 at 105.
[40] [1979] 2 All E.R. 393.
[41] [1896] 1 Ch. 507.

Wemmergill Estate was held to be a trust for the estate owners absolutely with the motive of having trees planted, and so the owners could have the £5,000 to spend as they wished.

RE DENLEY'S TRUST DEED

Chancery Division [1969] 1 Ch. 373; [1968] 3 W.L.R. 457; [1968] 3 All E.R. 65

In 1936 land was conveyed by a company to trustees so that until the expiration of 21 years from the death of the last survivor of certain specified persons the land should under clause 2(c) of a trust deed "be maintained and used as and for the purpose of a recreation or sports ground primarily for the benefit of the employees of the company and secondarily for the benefit of such other person or persons (if any) as the trustees may allow to use the same." The main question was dealt with as follows in a reserved judgment:

5–19 GOFF J.: It was decided in *Re Astor's Settlement Trusts*,[42] that a trust for a number of non-charitable purposes was not merely unenforceable but void on two grounds; first that they were not trusts for the benefit of individuals, which I refer to as "the beneficiary principle", and, secondly, for uncertainty.

5–20 Counsel for the first defendant has argued that the trust in clause 2(c) in the present case is either a trust for the benefit of individuals, in which case he argues that they are an unascertainable class and therefore the trust is void for uncertainty, or it is a purpose trust, that is a trust for providing recreation, which he submits is void on the beneficiary principle, or alternatively it is something of a hybrid having the vices of both kinds.

5–21 I think that there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any locus standi to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust, quite apart from any question of uncertainty or perpetuity. Such cases can be considered if and when they arise. The present is not, in my judgment, of that character, and it will be seen that clause 2(d) of the trust deed expressly states that, subject to any rules and regulations made by the trustees, the employees of the company shall be entitled to the use and enjoyment of the land.

5–22 Apart from this possible exception, in my judgment the beneficiary principle of *Re Astor*,[43] which was approved in *Re Endacott (decd.)*,[44] see particularly by Harman L.J.,[45] is confined to purpose or object trusts which are abstract or impersonal. The objection is not that the trust is for a purpose or object per se, but that there is no beneficiary or cestui que trust. The rule is so expressed in *Lewin on Trusts*,[46] and, in my judgment, with the possible exception which I have mentioned, rightly so. In *Re Wood*[47] Harman J. said:

5–23 "There has been an interesting argument on the question of perpetuity, but it seems to me, with all respect to that argument, that there is an earlier obstacle which is fatal to the validity of this bequest, namely, that a gift on trust must have a cestui que trust, and there being here no cestui que trust the gift must fail."

5–24 Again, in *Leahy v Att.-Gen. of New South Wales*[48] Viscount Simonds, delivering the judgment of the Privy Council, said:

"A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object: so, also [and these are the important words] a trust may be created for the benefit of persons as cestuis que trust but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it."

[42] [1952] Ch. 534.
[43] [1952] Ch. 534.
[44] [1960] Ch. 232.
[45] [1960] Ch. 232 at 250.
[46] 16th edn, p.17.
[47] [1949] Ch. 498 at 501.
[48] [1959] A.C. 457 at 478.

> "When the summons was previously before me, I decided that the trustees could in the exercise of their discretion under the powers of advancement, if they thought fit, advance out of capital a sum sufficient to pay this legacy duty. The public trustee thinks that their discretion should be so exercised, but his co-trustee, the mother, declines to join him in so doing, not because she has considered whether or not it would be for her daughter's welfare, that the advance should be made, but because her daughter has married without her consent, and her letters show, in my opinion, that she has not exercised her discretion at all. . . . In such circumstances, it is the duty of the court to interfere and to direct a sum to be raised out of capital sufficient to pay off . . . the legacy duty."

It seems that no other course of action could be taken by the trustees (unless they acted in a way that no rational adequately informed body of trustees could act) so the court should direct such course.

10–05 Exceptionally in the pensions fund context the courts[7] have also been prepared positively to exercise fiduciary powers to augment pensions of beneficiaries where there is no one who can exercise the power, the employer-trustee being a company in liquidation and the liquidator being in the irreconcilable position of acting for the creditors interested in a non-exercise of the power to benefit the ordinary beneficiary-members of the pension scheme, while acting as trustee required to look after such members' interests. The court[8] acts in the manner in which a reasonable trustee could be expected to act in the light of all the material circumstances so as to do what is just and equitable.

10–06 One accepts this in the pensions context where the member-beneficiaries have earned their entitlements as deferred pay and as settlors have some justified expectations that powers to augment their entitlement out of surpluses will be seriously considered for exercising in certain circumstances. In the private family trust context, however, where the trustees are in a position to exercise their powers in favour of persons who are not beneficiaries at all but only objects of a power of appointment, and the trustees choose not to exercise them, stating that they have fairly considered exercising their powers but have chosen not to, then one might expect that should be the end of the matter.

10–07 However, in *Schmidt v Rosewood Trust Ltd*[9] Lord Walker asserted the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts, whether dealing with the rights of beneficiaries under discretionary trusts or the rights of objects of fiduciary powers of appointment. Thus, in an extreme case where, in the light of the settlor's letters of wishes, the trustees are not exercising their fiduciary powers of appointment in the manner intended by the settlor, the trustees can be replaced by more amenable trustees or even a particular exercise of the power could be directed by the court if it would be perverse to any sensible expectation of the settlor to exercise—or no rational trustee could possibly exercise—the power other than in the directed fashion.[10]

2. Family Trusts

10–08 Various legal rules affect the exercise of discretionary powers by trustees.[11] First, there are mandatory rules of law governing the *creation* of powers in the first place, e.g. rules against perpetuity which

[7] *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587; *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd* [2008] Pens. L.R. 345; *Scully v Coley* [2009] UKPC 29 at [29].
[8] *Thrells Ltd v Lomas* [1993] 1 W.L.R. 456. Now, under Pensions Act 1995 s.25(2) an independent person as trustee exists to exercise the power.
[9] [2003] 2 A.C. 709 at [51].
[10] cf. *Klug v Klug* [1918] 2 Ch. 67.
[11] P. Matthews, "The Doctrine of Fraud on a Power, Part 1" [2007] P.C.B. 131; R.C. Nolan, "Controlling Fiduciary Power" (2009) 68 C.L.J. 293.

prevent certain powers being created at all,[12] and rules on certainty of objects which invalidate powers of appointment if the class of objects is conceptually uncertain.[13] Second, there are rules determining the *extent* of powers, e.g. rules of construction which enable the court to determine a power's scope, the rules which hold that a power of appointment must be exercised in favour of a person who is within the class of objects, and within the limits laid down by the power itself,[14] and the doctrine of fraud on a power, which holds that a purported exercise of a power is a nullity if the trustee acts for an improper purpose. Third, there are rules which go to the trustee's *exercise* of a power, under which the court may review the trustee's decision-making and set a transaction to one side if they find that this is flawed, for example by invoking the rule in *Re Hastings-Bass*,[15] which holds that trustees must consider relevant matters and exclude irrelevant matters from consideration when exercising powers. In this section we will look at the doctrine of fraud on a power and the rule in *Re Hastings-Bass*.

A. *Fraud on a Power*[16]

10–09 In *Vatcher v Paull* Lord Parker said that:[17]

> "The term [fraud] in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could properly be termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

Thus a trustee may commit a fraud on a power even though he acts in good faith, for example because he purports to exercise a power to achieve a purpose that is impermissible on its face, e.g. by appointing property to a person who is not a beneficiary.[18] He may also commit a fraud on a power if he purports to exercise a power in a way that produces a permissible outcome on its face, but with the bad faith intention of achieving a larger purpose that is impermissible. For example, it might well constitute a fraud on a power for trustees to appoint property to a beneficiary who has previously agreed to apply the property for the benefit of a person who is not an object, as in *Wong v Burt*,[19] which is reproduced below.[20] As Lord Parker noted in *Vatcher*,[21] it would also constitute a fraud on a power for a father to exercise a power of appointment in favour of his child, although such an appointment is basically valid,[22] if he does so when the child is ill with the intention of taking the child's estate for himself on the child's death—and in such a case, the appointment will constitute a fraud on the power even if the child subsequently recovers.[23]

[12] *Re De Sommery* [1912] 2 Ch. 622 at 630.
[13] *Re Gulbenkian's ST* [1970] A.C. 508. For discussion, see para.4–105.
[14] *Re Keele Estates (No.2) Ltd* [1952] Ch. 603; *Re Brinkley's WT* [1968] Ch. 407.
[15] [1975] Ch. 25.
[16] See P. Matthews, "The Doctrine of Fraud on a Power, Parts 1 and 2" [2007] P.C.B. 131 and 191.
[17] [1915] A.C. 372 at 378. See too *Duke of Portland v Topham* (1864) 11 H.L. Cas. 32 at 54.
[18] *Kain v Hutton* [2008] 3 N.Z.L.R. 589 at [18].
[19] [2005] 1 N.Z.L.R. 91. See too *Lane v Page* (1755) Amb. 233; *Re Turner's Settled Estates* (1884) 28 Ch.D. 205; *Re Greaves* [1954] Ch. 434. But cf. *Netherton v Netherton* [2000] W.T.L.R. 1171, followed in *Re X Trust* (2003) 5 I.T.E.L.R. 119; *Kain v Hutton* [2008] 3 N.Z.L.R. 589.
[20] At paras 10–13 ff.
[21] *Vatcher* at 379–380.
[22] See too *Henty v Wrey* (1882) 21 Ch.D. 232.
[23] See too *Lord Hinchbrooke v Seymour* (1789) 1 Bro. C.C. 395.

10–10 To determine what the proper purpose of a power is, reference must be made to the settlor's (objectively understood) expectations,[24] although trustees must beware of slavishly following a settlor's directions and exercising no independent judgment of their own as this could lead to a finding that the purported trust is a sham.[25]

10–11 If a personal power is released so as to benefit the person entitled in default of the exercise of such power so that he can then benefit the person who has released the power, this is outside the fraud on a power doctrine, the person who released the power not being in a conflict of interest situation and the default beneficiary being the owner of the property (subject to divestment by exercise of the power) and capable of dealing with it as he or she likes.[26] However, if the donee of a personal power of appointment positively exercises it, then like the donee of a fiduciary power, he is subject to the fraud on a power doctrine, since it would constitute a wrong against those entitled in default of appointment for the donee to exercise the power for an improper purpose.[27]

10–12 As Lloyd L.J. noted in *Sieff v Fox*:[28]

"If the exercise of a power is vitiated by the doctrine of fraud on a power, the result appears to be that the exercise is declared void: see *Topham v Duke of Portland*,[29] and the form of order made in that case,[30] and see also *Cloutte v Storey*.[31] This may be because the appointment is treated as having been, in effect, to a non-object, and plainly a direct appointment to such a person would be void. On the other hand, if, as Warner J held in the *Mettoy* case,[32] the principle could result in part of a document being set aside but not the rest, the process would come close to rectification, and it would be difficult to say that a part of it was altogether void."

WONG v BURT

New Zealand Court of Appeal [2005] 1 N.Z.L.R. 91

10–13 HAMMOND J.: The essential facts relating to this issue can be shortly stated.

10–14 Clause 5 of William Wong's will, in summary, provided as follows:

- The residuary estate was to be held in trust with the net annual income payable to Estelle Wong until her death.
- After the death of Estelle Wong, the net annual income was to be payable in equal shares to those of Phillipa and Wong Liu Sheung who were still alive. It is of singular importance to this case that there was no substitutionary provision in favour of grandchildren, if one of those daughters predeceased Estelle; in that event, all the income was to be paid to the other surviving daughter.

[24] *Re Manisty's Settlement* [1974] Ch. 17 at 26; *Re Hay's S.T.* [1982] 1 W.L.R. 202 at 209; *Re Beatty's WT* [1990] 1 W.L.R. 1503 at 1506.
[25] See paras 4–28 ff.
[26] *Re Somes* [1896] 1 Ch. 250. Similarly revocation of a revocable appointment made under a personal special power of appointment, even coupled with a release of the power, falls outside the fraud on a power doctrine unless the revocation is solely for the purpose of making a new appointment which is a fraud on the power: *Re Greaves* [1954] Ch. 434.
[27] *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587 at 1613–1614, citing *Re Mills* [1930] 1 Ch. 654 and *Re Greaves* [1954] Ch. 434. See too *Hillsdown Holdings Plc v Pensions Ombudsman* [1997] 1 All E.R. 862.
[28] [2005] 1 W.L.R. 3811 at [78].
[29] (1869) L.R. 5 Ch. App. 40.
[30] Printed in *Seton's Judgments and Orders*, 7th edn, vol.2 (1912), p.1672.
[31] [1911] 1 Ch. 18.
[32] *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587.

- After the death of the last surviving child, the estate is to be distributed among the children, or grandchildren, or great grandchildren of Phillipa. The exclusion of Wong Liu Sheung's children appears to have been quite deliberate, as a result of a family falling out.

10–15 Clause 6 of the will conferred upon the trustees a discretion to pay to Estelle, out of the capital of the estate:

". . . such sum or sums as they in their absolute discretion may think fit if they shall consider it necessary, desirable or expedient so to do by reason of the state of my wife's health or her desire to travel or to acquire a home or by reason of a fall in the purchasing power of money or for any other reasons whatsoever whether similar or dissimilar to the foregoing."

10–16 When Phillipa Wong died in 1995 Mrs Estelle Wong became concerned as to the position of Mei-Ling and Matthew. She viewed the inability of these two children to take their mother's share of the estate income, in the event of their mother's death, as inappropriate, and unfair.

10–17 To overcome this disability, in 1996 the trustees distributed $250,000 of the capital of the William Wong estate to Estelle. Estelle then lent this sum of $250,000 to the Phillipa Estelle Wong Trust (PEW Trust). The beneficiaries of PEW are Mei-Ling and Matthew.

10–18 In effecting this payment of $250,000, the trustees relied on their powers under clause 6 of the will. The debt was then periodically forgiven over a period of years, and by this will.

The Claim in the High Court

10–19 Wong Liu Sheung bought proceedings in the High Court claiming that, in so proceeding, the trustees:

- had acted ultra vires the terms of the trust;
- breached their duty to exercise their discretion for a proper purpose; and
- breached their duty to act impartially and even handedly towards all classes of beneficiaries.

The Judgment in the High Court

10–20 Ronald Young J. dismissed this claim, in its entirety, in a judgment delivered on 6 May 2003. . . .

The Grounds of Appeal

10–21 Ms Peters argued that the exercise of the discretion by the trustees in the impugned respect was for an improper purpose. This submission rested essentially on two propositions. First, that the sole purpose of the exercise of the discretion was to "remedy" a perceived inequality that had arisen under clause 5 of the will (the appellants really say as a device to circumvent the plain meaning of clause 5). Second, that the distribution made was to benefit a person who was not an object of the clause 6 discretion (i.e. not Estelle).

10–22 As to remedies, Ms Peters submitted that the $250,000 can be traced to the PEW Trust, and as such, the trustees of that trust hold the funds as constructive trustees for the William Wong estate.

10–23 Alternatively, the appellants submit that the trustees are personally liable. The essential issue both under clause 13 of the will (the exoneration provision) and s.73 is whether the trustees acted dishonestly. The appellants submit that the trustees' actions, particularly when they were specifically warned that the will prohibited the course of conduct proposed, amounted (at least) to "recklessness". . . .

The Law

10–24 The notion of a fraud on a power itself rests on the fundamental juristic principle that any form of authority may only be exercised for the purposes conferred, and in accordance with its terms. This principle is one of general application.

10–25 The particular expression, a "fraud on a power", applies to both a power and a discretion. The word "fraud" here denotes an improper motive, in the sense that a power given for one purpose is improperly used for another purpose.

10–26 Over the years a number of attempts have been made to categorise the circumstances in which a fraud on a power will arise. For instance, Hanbury and Martin, *Modern Equity*[33] divides the cases into three

[33] 16th edn, 2001, p.188.

categories. The first arises where the appointment is made as a result of a prior agreement or bargain with the appointee as to what he or she will do with the proceeds. Secondly, there are those cases where the power is exercised improperly so as to benefit the appointor. The third category are those cases in which an appointment is drafted so that the intent appears to benefit objects of the power, but the real intent is to benefit non-objects.

10–27 These distinctions are useful for analytic and descriptive purposes, but it is necessary to recall that the sine qua non which makes the exercise of a discretion or power "improper" is the improper intention of the person exercising it. The central principle is that if the power is exercised with the intention of benefiting some non-object of the discretionary power, whether that person is the person exercising it, or anybody else for that matter, the exercise is void. If, on the other hand, there is no such improper intention, even although the exercise does in fact benefit a non-object, it is valid.[34]

10–28 In the case of a discretionary power to be exercised in favour of one of its objects, but in the "hope" that the recipient will benefit a non-object, the validity of such an exercise will depend upon whether the recipient had legal and moral freedom of action.[35]

10–29 The case law in this area is difficult, not so much for the underlying principles, which seem plain enough, but in their application to often quite complex estates, or interrelated transactions. Assume, for instance, a case in which a discretionary power is exercisable in favour of an adult male (X) who states that, if it is in fact exercised in his favour, he will give part of the relevant fund to his parents, Y and Z, who are not objects of the discretionary power. If the true intention of the appointment is to benefit the parents, the exercise is invalid. If that is not the case, but X is under some distinct pressure to benefit Y and Z, the exercise would also be invalid.[36] On the other hand, if X has genuine freedom of action and wishes to give Y and Z a benefit, then it appears that the exercise of the power would be good.[37]

10–30 As to the effect of a finding of a fraud on a power, it has long been held that where a power is successfully impugned, its exercise is totally invalid,[38] unless the improper element in the appointment can be severed from the remainder of that appointment.[39]

This Case

10–31 It is necessary at this point to add some further facts. On the evidence, Mrs Estelle Wong was devastated by the death from cancer of her daughter Phillipa, in August of 1995. Phillipa was then only 43 years old, and Matthew and Mei-Ling were teenagers. Estelle was very close to Phillipa. Although Phillipa's family were in Australia, Estelle spoke regularly to Phillipa, and she would frequently go to Australia to visit her daughter.

10–32 On one occasion, after she had returned from Australia, Estelle expressed concern to Mr Burt (who is now a retired chartered accountant and had a long association with the Wong family) "about the effect of Bill Wong's will". Estelle suddenly came to appreciate that, under the will, Phillipa's share of the income would not pass to her children.

10–33 It was in those circumstances that advice was sought from Chapman Tripp on this issue. It seems that it was Mr Burt who calculated various figures, and "concluded that $250,000 would partly redress the situation and should be loaned to the PEW Trust, and successively forgiven". As Mr Burt put it, "the purpose of the loan and forgiveness programme was to restore the expected benefit that Mei-Ling and Matthew would have received on their mother's death had they been entitled under Bill's will to her life interest in the PW Estate Trust. . . .

10–34 In their opinion (which was disclosed to the Court) Chapman Tripp advised that clause 5 must be read in "its plain words". The solicitors said, "In other words there is no statutory remedy to allow Phillipa's two children to receive the income that she would have received". The solicitors then detailed three options which, as they saw it, were "available to remedy this matter". One was to resort to the discretionary power available to the trustees under clause 6 of the will, which "[Estelle] could then invest in [her] own name".

[34] See *Vatcher v Paull* [1915] A.C. 372 at 378, per Lord Parker.
[35] *Birley v Birley* (1858) 25 Beav. 299.
[36] *Re Dick* [1953] Ch. 343.
[37] *Re Marsden's Trusts* (1859) 4 Drew. 594; and see Parker and Mellows, *The Modern Law of Trusts* (8th edn, Oakley), p.222.
[38] *Re Cohen* [1911] 1 Ch. 37.
[39] *Topham v Duke of Portland* (1858) 1 De G.J. & S. 517.

Estelle could then amend her will to provide for that sum to be left equally to Mei-Ling and Matthew. Secondly, the capital sum received from the estate could be loaned to the PEW Trust and then, on Estelle's death, the assets of that trust automatically vest in Mei-Ling and Matthew. A third option was identified as being an interest-free loan from the husband's estate, but repayable on Janice's death.

10–35 Although some disadvantages in each of these alternatives were identified, it was at no point suggested by the solicitors that the potential difficulties relating to a fraud on a power might have to be addressed in relation to the first option.

10–36 The evidence in the case in this respect is well documented and quite clear. In summary, on Phillipa's premature death, Mrs Estelle Wong became concerned that there was no gift-over provision as to income for Phillipa's children. A member of Chapman Tripp recorded in a file note: "this is of great concern to Mrs Wong and although she accepts that her late husband may never have anticipated their daughter predeceasing Mrs Wong she is adamant that it would have been his intention for Phillipa's share of the income to pass to her children". Thus it was that a scheme was settled by Mrs Wong, with the trustees, and after taking legal advice, which had the overt and pre-determined idea that the trustees would utilise clause 6 of the will to avoid the effect of clause 5 of the will, in the circumstances which had arisen. This exercise was not undertaken as a distinct, or separate advance to Mrs Wong or in the "hope" that Estelle Wong would benefit a non-object. The exercise was already constrained by a pre-considered course of action which also avoided Mrs Estelle Wong having to resort to any assets under her control or direction to assist her grandchildren.

10–37 In our view, this deliberate, and pre-conceived, device amounted to a fraud on the power. If Mrs Estelle Wong had simply been advanced the money out of the estate and had then exercised genuine freedom of action to benefit the children (as for instance by setting up a trust for them), that would not have been unlawful. But what was knowingly erected was a deliberate scheme to subvert the terms of the will. What was overlooked was that the property was vested in those entitled in default of the exercise of the power, subject to its being divested by a proper exercise of the power in clause 6, and the steps in fact taken gave rise to a fraud on those entitled in default.

10–38 *Held*: to the extent that the $250,000 could not be recovered by tracing into the PEW Trust, the trustees were personally accountable and were not protected by an exemption clause which provided that they should "not liable for any loss not attributable to dishonesty".

C. *The Rule in Re Hastings-Bass*

10–39 The Court of Appeal's decision in *Re Hastings-Bass*[40] has now obtained the status of a "rule" or "principle". The case concerned a statutory advancement that was made out of an old settlement into a new settlement with intent to avoid estate duty at 75 per cent. It transpired that the advancement of capital out to trustees for B for life, with remainders over to his family, was void for perpetuity as to these remainders. The Revenue argued that an advancement of capital only for B's life did not fully dispose of the capital, so that this fell outside the scope of the Trustee Act 1925 s.32 so as to be void, or was not "for the benefit of B" when the remainders failed so that it was outside s.32 and void.[41] The Court of Appeal held[42] that where the trustee "acts in good faith" the court should not interfere with his action:

> "notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred on him or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken

[40] [1975] Ch. 25.
[41] As in *Re Abrahams WT* [1969] 1 Ch. 463.
[42] [1975] Ch. 25 at 41.

sale proceeds received by the vendor, and assert a proprietary claim to these proceeds, subject to accounting to the vendor for the price agreed between the two of them.[28] This will be useful if the contractual claim against the vendor for damages is not worthwhile, e.g. if the vendor is bankrupt or has generated a surplus through his dealings with the third party.[29] Note, too, that a vendor of shares in an unquoted company can use his votes to protect his lien for the price, but he cannot use them for any purpose that might damage the purchaser.[30]

3. Assignments for Value of Future Property

15–07 As Swinfen Eady L.J. stated in *Re Lind*:[31]

> "An assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any future act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for."

15–08 Here a constructive trust arises as a result of the maxim "Equity regards as done that which ought to be done".[32] If A makes a settlement in consideration of marriage under which he covenants to pay to trustees T1 and T2 any money inherited from X, then such money will be held on a constructive trust for T1 and T2 at the moment when A receives it.[33] Similarly, if F, for a consideration received from G, contracts to hold on trust for G any future receipts arising in respect of payments for specified future sales or services, then such payments are immediately subject to the trust when F receives them.[34] In the latter case, it is crucial that G has actually paid the consideration to F.

4. Purchasers' Undertakings

15–09 A contractual licence to occupy a house or flat is not an interest in land, and binds the contracting parties alone.[35] However, a purchaser P may undertake to a vendor V that he will take the property positively subject to the rights of a contractual licensee C. After completion of the purchase, C might be able to take advantage of a term for his benefit in V and P's contract under the Contracts (Rights of Third Parties) Act 1999. But if he cannot, then P might try to evict C by claiming that C only has contractual personal rights against V. In *Ashburn Anstalt v Arnold*,[36] the Court of Appeal held that Equity would prevent this by imposing a constructive trust on the property, compelling P to recognise C's rights under the contractual licence. However, as this case also reveals, if V conveys or contracts to convey the property defensively subject to whatever rights C may happen to have, so as to satisfy V's obligation to disclose all possible incumbrances and to protect him against any possible claim by

[28] *Bunny Industries Ltd v FSW Enterprises Pty Ltd* [1982] Qd. R. 712.
[29] *Lake v Bayliss* [1974] 1 W.L.R. 1073.
[30] *Michaels v Harley House (Marylebone) Ltd* [2000] Ch. 104.
[31] [1915] 2 Ch. 354 at 360.
[32] *Palette Shoes Pty Ltd v Krohn* (1937) 58 C.L.R. 1 at 16; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 C.L.R. 588.
[33] *Pullan v Koe* [1913] 1 Ch. 9; *Re Gillott's Settlement* [1934] Ch. 97 at 158–159.
[34] *Barclays Bank Plc v Willowbank International Ltd* [1987] B.C.L.C. 717; *Associated Alloys*, above.
[35] *Ashburn Anstalt v Arnold* [1989] Ch. 1.
[36] *Ashburn Anstalt*, above.

P, then P is not bound by C's rights which are merely personal and not proprietary. In other words, it is essential that P must have agreed to confer a new right on C: he must have "undertaken a new obligation, not otherwise existing, to give effect to the relevant incumbrance or prior interest. If, but only if, he has undertaken such a new obligation will a constructive trust be imposed".[37] This new right may give C the same rights against P as he would have enjoyed against V, had V never sold the land. But it may also protect C even if C had no right against V, e.g. because he failed to register his interest,[38] and equally if C's valid right against V was destroyed by the transfer to P.[39]

15–10 The "constructive trust" used by the courts to protect C's interests in cases of this sort is probably not a trust at all. The courts find P's conscience to be personally affected by an obligation to give effect to C's interest, and therefore treat him constructively as though he were a trustee, to the limited extent that is necessary to place him under a personal obligation to C.[40] This does not mean that C acquires an equitable interest in the land, for otherwise his contractual licence would be a valid equitable interest binding the land, as would an unregistered void estate contract.

5. The Rule in *Pallant v Morgan*

15–11 "If A and B agree that A will acquire some specific property for the joint benefit of A and B on terms yet to be agreed and B in reliance on A's agreement is thereby induced to refrain from attempting to acquire the property equity ought not to permit A when he acquires the property to insist on retaining the whole benefit for himself to the exclusion of B".[41] The source of this rule is *Pallant v Morgan*,[42] where the parties both wished to buy a piece of land that was to be sold at auction. They agreed that the claimant would refrain from bidding in order to keep the price down, and that the defendant would divide the land between them after he had bought it. After the defendant bought the land, they failed to agree on the details of division and so the defendant kept it all for himself. Harman J. held that the agreement was too uncertain to be specifically enforceable, but that the defendant should nonetheless hold the land on trust for himself and the claimant jointly because his bid had been made on the basis of an agreement for division and it would be "tantamount to sanctioning fraud" to allow him to retain all the land for himself.[43]

15–12 This decision was given a wide interpretation in *Banner Homes Group Plc v Luff Developments Ltd (No.2)*,[44] where Chadwick L.J. noted that the *Pallant v Morgan* equity is often triggered in cases where the claimant has suffered detriment, but held that a constructive trust can also be imposed where the claimant has suffered no detriment, but the defendant has gained an advantage by acting on the parties' arrangement. This may be the aspect of his Lordship's decision that was considered "quite difficult" by an Australian judge, Bryson J., in *Seyffer v Adamson*,[45] adding that "what is altogether necessary, however, is that there be some agreement, arrangement or shared understanding about the way in which some interest in land will be acquired or dealt with". Consistently with this,

[37] *Lloyd v Dugdale* [2002] 2 P. & C.R. 13 at [52], per Sir Christopher Slade.
[38] *Lyus v Prowsa Developments Ltd* [1982] 1 W.L.R. 1044; *Bahr v Nicolay (No.2)* (1988) 62 A.L.J.R. 268 at 288–289; *I.D.C. Group Ltd v Clark* [1992] 1 E.G.L.R. 187 at 190.
[39] *Melbury Road Properties 1995 Ltd v Kreidi* [1999] 3 E.G.L.R. 10; *Lloyd v Dugdale* [2002] 2 P. & C.R. 13.
[40] *Baybut v Eccle Riggs Country Park Ltd* (Ch.D., 2 November 2006) at [60].
[41] *Holiday Inns of America Inc v Broadhead* Ch.D., 19 December 1969, per Megarry J., quoted in *Banner Homes Group Plc v Luff Developments Ltd (No.2)* [2000] Ch. 372 at 391.
[42] [1953] 1 Ch. 43.
[43] *Pallant* at 48.
[44] [2000] Ch. 372 at 396–399, followed in *Cox v Jones* [2004] 2 F.L.R. 1010 at [46]. In both cases, the claimant suffered detriment on the facts.
[45] [2001] NSWSC 1132.

Mummery L.J. held in *London & Regional Investments Ltd v TBI Plc*[46] that a constructive trust can be imposed even though the parties have failed to enter a binding contract, but that no trust will be imposed if the parties have positively agreed not to be bound unless and until formal contracts have been exchanged: where the parties expressly negative an intention to create legal relations, equity should follow the law in declining to place them under enforceable obligations.

6. Shared Homes

A. Background

15–13 In recent decades a growing number of disputes have come before the courts where two parties have lived together in a marital or quasi-marital relationship, and legal ownership of their shared home does not reflect the contributions, financial or otherwise, that each made to the continuance of their ongoing relationship, and/or to the purchase and/or to the upkeep of the property. If the parties' relationship has come to an end, or if the property has been charged to a lender that now seeks to enforce its security, the question can then arise whether the value inherent in the property should be allocated in line with legal ownership, or whether equity should reallocate this value between the parties? To resolve this question, the courts must decide some complex and politically charged questions: what kinds of contribution, made in the context of what kinds of relationship, and born of what kinds of expectation, should engender an equitable interest at variance with the parties' legal rights?[47]

15–14 Most of the cases in this area concern a man and a woman in a heterosexual relationship, legal title to whose shared home is vested in the man alone. Hence the parties will be referred to here as M and W, although this usage is inapt when applied to situations where the woman is the legal owner, and situations concerning couples in a homosexual relationship. If M and W are married and a property dispute arises between them on their decision to divorce, then this will be resolved under divorce legislation[48] that does not apply in cases where the parties are unmarried, where equitable principles may come into play.[49] However, if a dispute arises between W and a bank which has taken a charge over the property from M, then W can invoke equitable principles against the bank whether or not she and M are married.

15–15 If M makes a written declaration of trust of the property in W's favour which complies with the LPA 1925 s.53(1)(b), or else the parties enter a written contract under which W takes a share of the property, and which complies with the Law of Property (Miscellaneous Provisions) Act 1989 s.2, then W will be entitled to a share of the property under the trust or contract. If this has not been done—and very often it will not have been done, no matter how desirable it might have been for the parties to arrange things more carefully[50]—then W will have to rely on alleging an equitable right under a common intention constructive trust, or else bring a proprietary estoppel claim.

[46] [2002] EWCA Civ 355 at [47]–[48]. See too *Thames Cruises Ltd v George Wheeler Launches Ltd* [2003] EWHC 3093 (Ch); *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2005] 2 P. & C.R. 105; *Kinane v Mackie-Conteh* [2005] W.T.L.R. 345; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 W.L.R. 1752 at [30]–[37]; *Benedetti v Sawiris* [2009] EWHC 1330 (Ch) at [504] ff.; *Clarke v Corless* [2009] EWHC 1636 (Ch) at [21]–[24].

[47] Various perspectives on these questions are offered by: L. Flynn and A. Lawson, "Gender, Sexuality and the Doctrine of Detrimental Reliance" (1995) 3 Feminist Legal Studies 105; A. Bottomley, "Women and Trust(s): Portraying the Family in the Gallery of the Law", in S. Bright and J. Dewar (eds), *Land Law: Themes and Perspectives* (1998); J. Mee, *The Property Rights of Cohabitees* (1998), ch.1; J. Miles, "Property Law v Family Law: Resolving the Problems of Family Property" (2003) 23 J.L.S. 624.

[48] For disputes between spouses the Matrimonial Causes Act 1973 s.24 affords the courts plenty of discretion to take into account the wife's home-making and child-raising activities. Substantial contributions to improvements to M's property can enable M's spouse or fiancée to obtain a beneficial interest under the Matrimonial Property and Proceedings Act 1970 s.37.

[49] But see now the Civil Partnership Act 2004 ss. 65–68.

[50] For an empirical study reporting high levels of ignorance and misapprehension about the rights generated by "common law marriage" (over 50% of those surveyed), see G. Douglas, J. Pearce and H. Woodward, "Cohabitation and Conveyancing Practice: Problems and Solutions" [2008] Conv. 365.

15–16 If W directly contributed to the purchase of the property, or undertook with M to contribute a proportion of the purchase price (e.g. using money lent on mortgage), then one might have thought that M should hold the legal title on resulting trust for M and W in proportion to their respective contributions or undertakings.[51] In this situation, however, resulting trust reasoning would give W no more than the share which she paid for (or undertook to pay for) at the outset. This was viewed as unsatisfactory (because it gave W too little) in cases such as *Midland Bank Plc v Cooke*,[52] where the courts accordingly held that if W could establish an interest under a resulting trust, then she could always use this as a "springboard" into establishing that she also had a (larger) interest under a common intention constructive trust. Since then, Baroness Hale has gone still further, in *Stack v Dowden*,[53] holding that the courts should avoid using resulting trust reasoning altogether when establishing equitable interests in shared homes, because it discriminates against women by focusing too narrowly on one type of contribution to the parties' relationship, viz. financial contributions, to the exclusion of other types, e.g. home-making, child-care, etc. Hence the courts will now ignore resulting trust reasoning in most cases and will instead turn immediately to the common intention constructive trust when deciding whether W has an equitable interest.[54]

15–17 Legal title to shared homes is not invariably vested in M alone: sometimes it is vested in M and W as joint legal owners, in which case the courts should take the following approach, according to Baroness Hale in *Stack v Dowden*:[55]

> "Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that [she] has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."

15–18 The essence of the common intention constructive trust is unconscionability. If M is the sole legal owner but W makes a contribution to the accrual of wealth inherent in the property, in reliance on a common understanding between the parties that they would share the beneficial ownership, then a constructive trust will be imposed on the basis that it would be unconscionable for M to keep the whole of the property for himself. Likewise, if the parties are joint legal owners, but W contributes more than M to the repayment of a mortgage loan, household expenses, etc. and does so in reliance on a common understanding that she should have a larger share of the property than M, then again a constructive trust will be imposed on the basis that it would be unconscionable for M to take half of the beneficial ownership. In the following discussion we will first look at the requirement that there must have been a common intention to share ownership, and then discuss the requirement that W must have detrimentally relied on this common intention.

[51] See paras 14–87 to 14–96.

[52] [1995] 2 F.L.R. 915.

[53] [2007] 2 A.C. 432 at [60]. See too *Abbott v Abbott* [2008] 1 F.L.R. 1451 at [4]; *Fowler v Barron* [2008] 2 F.L.R. 831 at [30] and [52].

[54] But cf. *Laskar v Laskar* [2008] 1 W.L.R. 2695: resulting trust reasoning is still relevant where the parties have bought the property for investment purposes only.

[55] *Stack* at [56].