The Development of Equity and the "Good Person" Philosophy in Common Law Systems

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"Common Law"

As a preliminary matter, it is necessary to consider the meaning of the term "common law" because it has three possible meanings depending upon the context in which it is used.

In its broadest meaning, which is the one employed in the title of this lecture, the "common law" encompasses all the laws of a common law jurisdiction, whether created by the judges or by legislation. Thus, we can speak of common law systems as opposed to civil law systems like those of Italy and France. A lesser meaning is that the "common law" is the law created only by the judges rather than by legislation. In its narrowest meaning the "common law" is used to distinguish between "Common Law" and "Equity", two judge-made bodies of law that are the focus of this lecture.

It is vital to appreciate, however, that these are not two rival self-sufficient systems of law: their interlocking relationship creates one system of law. Equity is merely a gloss upon, or a supplement to, the Common Law. If Equity were suddenly to be abolished by statute there would still be the Common Law to enable society to be regulated, though only in a rather rudimentary fashion.[1] If the Common Law were to be abolished there would be anarchy. As Lord Evershed, a Chancery Master of the Rolls presiding over the Court of Appeal in its non-criminal jurisdiction, has stated[2], "The function of equity … was to fulfil the common law: not so much as to correct it as to perfect it." The Common Law laid down general rules but occasionally Equity intervened to provide a liberal and just modification of the law in exceptional cases.

The Common Law was developed by the King's judges administering rules, practices and procedures so that like cases would be treated alike, and decisions of senior courts on legal points would bind lower courts. To bring legal proceedings, a plaintiff had to find a type of writ (a written order of the King) that exactly covered his claim because otherwise he could obtain no remedy. A jury was then used to determine, in the light of a simple explanation of the law provided by the judge, the key facts and to decide the outcome of the proceedings by the award or not of damages (monetary compensation for the damage suffered by the plaintiff). Writs were issued in the King's name by the head of his secretariat, the Chancellor, as the Keeper of the Great Seal needed to authenticate writs. From time to time the Chancellor via his

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[1] See FW Maitland, *Equity,* 2nd ed,1936, pp18-19

[2] 'Reflections on the Fusion of Law and Equity after 75 years' (1954) 70 LQR 326 at 328

Chancery clerks created novel types of writ as appropriate to deal fairly and equitably with situations not covered by existing types of writ. This power was seen as a power to make new law so the aristocracy via Parliament in 1285 undermined the Chancellor's position by depriving him of his power to issue novel writs to deal with novel cases. He was only able to vary very slightly the forms of writs, so that new developments had to come from Parliament[3].

Thus, the growth of the Common Law was substantially blocked and could not develop as in civil law systems to deal harmoniously with the *ius strictum* and the *ius aequm* and take account of *bona fides*. Nevertheless, the law needed to develop in accordance with the needs of society. This proved to be possible through developing the residual role of the King as the fountain and origin of justice, to whom petitions for relief could be addressed to deal with hard cases where the petitioner had been denied justice in the Common Law courts. Early instances were where a common law judgment against a powerful Lord could not be obtained or, if obtained, could not be enforced; or where a lord knight, on going to the Crusades, transferred his castle to a friend to hold to the use of the knight to await his return or, if he died, to hold it for his infant son on attaining full age, yet, on his return or death, the "friend" as the owner at Common Law claimed to keep the castle for himself.

Equity and trusts

The King used to pass these cases on to his Chancellor to advise him, the Chancellor acting as head of the King's council in the absence of the King. If the King made an order, disobeying it would lead to imprisonment or even execution for treason. In the fifteenth century the Chancellor himself was regularly deciding the petitions and making his own orders sitting in his Chancery. For example, he might make an order that the defendant specifically perform his obligations as should a good trustee or good vendor of land, or grant an injunction restraining the defendant from acting badly by doing something he should not be doing. To assist the Chancellor to make his decisions, he developed procedures not then available at Common Law such as orders for disclosure of documents or for written interrogatories to be answered or for one of his officials to draw up accounts to fix how much was due from one party to the other.

The Chancellor was a senior ecclesiastic having some knowledge of canon law and civil law, and, perhaps, some Common Law. He dealt with the petitions as reason and good conscience demanded. He was ready, in what developed into his Court of Chancery, to provide relief where the Common Law was unsatisfactory, as where relief could not be obtained because the petitioner's circumstances were not covered by the restricted number of writs available at Common Law. If an order of the Lord Chancellor was not obeyed he could have the defendant

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[3] See W Holdsworth, *A History of English Law* Vol 1 The History of the English Judicial System , Chap V , The Court of Chancery

imprisoned or the defendant's assets sequestered until compliance with the order. Equity thus acted *in personam.* This remains the case and justifies orders being made today against defendants duly sued within the English jurisdiction, though concerning movables or immovables outside the jurisdiction.

The rules, practices and procedures of Equity tended to vary according to what particular Lord Chancellors considered inequitable or unconscionable – or according to the size of their feet as one critic commented.[4] In the 18th and 19th centuries, however, legally qualified Lord Chancellors developed in the Court of Chancery a principled systematised set of rules, practices and procedures. Indeed, for a period these became unduly bureaucratic and time-consuming, as illustrated by the case of Jarndyce v Jarndyce in Charles Dickens', Bleak House, until reforms were effected pursuant to the Chancery Procedure Act 1852.

Because land was the major source of wealth Equity primarily intervened so as to develop land law to meet the needs of society. The classic example is the trust, as where T owns property on trust for A for life, remainder to B. The Common law, via the Common Law courts, protects T's legal title to the property and regulates his dealings with third parties eg under the law of contract or torts (delicts). In these matters it is T who sues or is sued, as the case may be. T is liable to the extent of the whole of his patrimony, though T has a right to be reimbursed out of the trust property unless his conduct amounted to a breach of trust.

If A or B, however, wishes to enforce his rights or if T needs some clarification of his powers or duties when managing the property for the benefit of the beneficiaries, then Equity governs the position via the Court of Chancery. Equity follows the law in recognizing T as the owner at law but insists that T must use that ownership for the benefit of the beneficiaries.

To deal with situations where T transferred his interest in the property to X by way of gift or to Y for half its price, Equity developed the rule that the equitable interests of beneficiaries, like A or B, will bind any transferee of property from T unless he is a bona fide purchaser of that property for value without notice of the trust. "Notice" covers not just actual knowledge but also the knowledge that would have been acquired if the purchaser had made all the inquiries and inspections that an honest and reasonable purchaser ought to make. This is known as constructive notice, while the "actual" or "constructive" notice of a purchaser's agent is the "imputed" notice of the purchaser.

Thus, while property rights at Common Law were **legal** rights *in rem* binding the whole world (unless barred by a statutory limitation period) **equitable** property rights were *in personam* rights that only bound the person who owned the legal right to the relevant property if he was

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[4] Selden in *Table Talk of John Selden* (ed F Pollock 1927) p 43

not a bona fide purchaser of it for value without notice (actual, constructive or imputed) or a successor in title to such a person.

The relevant property extends beyond the original property held on trust for the beneficiaries. It extends by a tracing process to property substituted from time to time for the original property. Take a case where T sold trust assets for €1 million. He then spent half of it on buying some jewellery which he gave to his wife and half on buying some shares which he transferred by way of gift to his adult son. The beneficiaries can trace their money into the jewellery now worth only €250,000 and into the shares now worth €1 million. They have an equitable proprietary right to the shares that has priority over the claims of the son's creditors if he is insolvent. However, because the jewellery has depreciated in value they will claim to have an equitable charge over it, entitling them to sell it to recover €250,000, and claim the balance as if an unsecured creditor. It is important to appreciate that Equity confers the right to recover specific property of any nature, while the Common Law only confers the right to monetary compensation except if someone is claiming a legal right to freehold or leasehold land.

Monetary compensation can, however, be obtained in Equity by an action for accounts to be taken to ascertain a precise sum due from the defendant to the claimant. Thus, where T makes an unauthorized dissipation of trust money or sells authorized investments in order to purchase unauthorized investments, the beneficiaries do not claim that this is wrongdoing that entitles them to compensation for loss caused by a breach of trust. Instead, they avoid causation problems by taking a hypothetical specific performance approach as if T had acted as a good person should.

They ignore the actual transactions. They enter figures in the accounts to reflect what the position would have been if T as a good person had acted in authorized fashion. He is held to account as if he still had the dissipated money or the wrongfully sold asset or, if the asset had depreciated in value, as if he still had the money wrongfully used to buy it. T cannot deny the beneficiaries' claim that he had acted as a proper trustee and so, by way of substitutive performance of his obligations, he needs to augment the trust fund so that its value reflects that he has done what he ought to have done. Causation of loss issues are irrelevant, as is the fact that T innocently failed to appreciate that he was acting in unauthorized fashion, unless the court is prepared under s 61 of the Trustee Act 1925 to accord full or partial relief to T. It can do this where T acted honestly and reasonably and ought fairly to be excused for the breach *and* for omitting to obtain the directions of the court as to the matter occasioning his breach of trust.[5] A key feature of trusts is that T is entitled to seek advice from the court if having doubts as to a projected course of conduct.

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[5] See the recent *Lloyds TSB Bank plc v Markandan* [2012] EWCA Civ 65 at [54] & [61]

Where, however, T acts in authorized fashion but wrongfully commits a breach of trust due to his negligence or recklessness, the beneficiaries claim that this is wrongdoing. Where this has caused loss the trustee needs to augment the trust fund so that it has the value that it would have had but for his breach of trust.

Trusts of land were first used extensively to avoid feudal taxes so as to preserve family wealth. They were then used to enable land to be passed on by will, rather than automatically passing to the landowner's eldest son, until statute permitted land to pass according to the landowner's will. Trusts were also used to enable married women to have, in effect, separate property of their own when the Common Law did not permit this. In the commercial sphere, merchants involved in joint ventures were able to do business collectively as an unincorporated business under trust deeds. This arrangement provided the merchants with protection from creditors almost as if they had formed a limited company with separate personality. Equity, however, then developed principles making merchant beneficiaries vulnerable to claims of creditors. Parliament then had to intervene with statutes in the mid-nineteenth century permitting businessmen to form limited liability companies.

Other instances of intervention by Equity

A major example of Equity intervening is provided by Equity being prepared to order specific performance of a contract relating to land, forcing the defendant to behave as a "good man" when at Common Law the defendant was permitted to be a "bad man", getting away with keeping the land and only having to pay monetary compensation. The justification for Equity's intervention was the uniqueness of the land as a place for a home or a business, so that specific performance is also available for purchasers of works of art or shareholdings in private companies.

The readiness of Equity to order specific performance helped a contractual purchaser, P1, if the vendor transferred the property to P2, and P2 was not a bona fide purchaser for value without notice. Equity "looked on as done that which ought to be done" treating the position as if specific performance of the contract in favour of P1 had actually been ordered and carried out. It thus regarded P1 as having an equitable property interest capable of binding P2. Similarly, if a lease was granted by L to T without satisfying the requisite legal formalities, so that it was not a legal lease, Equity would treat it as a contract for a lease and T as having an equitable lease, looking on as done that which ought to be done.

This approach where legal formalities had not been complied with enabled Equity to create equitable mortgages and also equitable easements such as positive rights of way over another's land or negative rights of light or rights of support from an adjoining building that restricted a neighbour's conduct on his own land. When the number of legal negative easements was incapable of further development Equity boldly created equitable restrictive covenants (promises contained in a formal deed), that enabled a landowner to restrict a purchaser of part of his land from building more than one building on the land and from constructing or growing anything that might interfere with a view of the sea from the windows of his house.

There was also a problem because a mortgage of property required the borrower to transfer ownership of his property to his mortgagee as security for repayment of the much-needed loan with interest. The property was only to be transferred back to the borrower if he fulfilled his obligations by a specified date. At Common Law, if the borrower did not fulfil such obligation he lost the property, though still being liable to repay any outstanding moneys. Equity intervened to provide the borrower with an equity of redemption, entitling him to recover the property on repayment of the requisite moneys. Equity looked at the substance of the matter: the land had been transferred as security for performance of an obligation, so that it would be inequitable or unconscionable if the mortgagee did not behave as a good man and transfer back exactly what had been mortgaged once the obligation had been performed, even though later than required.

Equity also intervened to mitigate the strictness of the Common Law in various ways. It developed a jurisdiction to set aside contracts or transfers of property vitiated by fraud, undue influence or mistake and a jurisdiction to rectify documents so that they could not be enforced at face value at Common Law. Similarly, Equity recognized a merely written variation of a Common Law formal deed though the Common Law would not. Where a donor, X, made a gift of land or of shares in a company to a donee, Y, but Y did not acquire the legal title till his name was entered on a land or share register, the Common Law allowed X to revoke his gift at any time before Y acquired legal title. Equity, however held Y's title to be perfect once Y (or his agent) had received from X everything needed to enable Y to get himself registered as owner without further assistance from X. Where E, a debtor of a deceased person, D, had been appointed executor in D's will, E escaped liability to repay the debt because he could not formally sue himself at Common law. Equity, however, compelled E to repay the debt in preparing the accounts of his executorship (unless there was evidence that D had, up to his death, a continuing intention to forgive the debt). Essentially, Equity has picked on particular instances where it considers the Common Law to produce inequitable or unconscionable results so that it needs to intervene with a more nuanced approach so that the defendant acts in good conscionable fashion so as to do substantial justice between the parties.

Conflicts between the Court of Chancery and the Common Law Courts

It will have been seen that the outcome of a matter will often have hinged upon whether the matter was heard in the Court of Chancery or a Common Law Court. What then if the Court of Chancery used the injunction powers that it had – and the Common Law Courts did not have – so as to restrain the plaintiff from pursuing a matter in the Common Law Courts or, if a judgment had already been obtained, from enforcing that judgment? In the *Earl of Oxford's case*[6] in 1615 King James 1 upheld the Lord Chancellor's right to issue such injunctions, so that Equity prevails where there is any conflict or variance between Equity and the Common Law. A major problem remained, however, in that a litigant might well find himself litigating in the Common law Court and the Chancery Court in order to achieve full justice with an appropriate remedy, rather than have his case resolved by one court.

This problem was dealt with by the Judicature Act 1873 which perpetuated the substantive rules of Equity but abolished the two civil justice systems, one administering the Common Law, the other administering Equity. The jurisdiction of the Court of Chancery and various Common Law Courts was vested in the new High Court of Justice, thereby vesting in this Court the administration of both Law and Equity, though divided into three divisions, the Queen's Bench Division, the Probate Divorce and Admiralty Division, and the Chancery Division, for the allocation of different types of court business. Section 25 required these three divisions of the HIgh Court to administer principles of Common Law and Equity and specifically elaborated upon particular instances where Equity was to prevail before there was a general saving provision in s 25(11). This stated that every court exercising jurisdiction in any civil matter shall continue to administer law and equity on the basis that if there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail[7]. In essence, Equity has followed the Common Law except where this would lead to an inequitable or unconscionable result. Thus, if A, Band C were co-sureties for X's debt of €60,000 owed to Y, and X and A became insolvent so that Y called on B to pay the whole €60,000 and B actually did so , at law B could recover €20, 000 from C, while having to prove for €20,000 in A's bankruptcy. In equity, once legal proceedings had been brought against B for €60,000, B was entitled to call on C to pay B €30,000 so that the €60,000 could be paid , leaving B and C to prove for €10,000 each in A's bankruptcy.

The effect of this is to diminish substantive Common Law to the extent of the areas where Equity prevails so as to provide an equitable result, but to leave Equity undiminished and free to be altered, improved and refined from time to time as remarked by the Master of the Rolls,

[6] 1 Ch Rep 1
[7] See now s 49(1) Supreme Court Act 1981, later re-named Senior Courts Act when the House of Lords became the Supreme Court.

Sir George Jessel, in *Re Hallett's Estate*[8] in 1879 and as affirmed by the current Master of the Rolls, Lord Neuberger, in October 2010 in a public lecture[9] at Hong Kong University.

Equitable developments or refinements in the last 50 years

Leaving aside significant developments within the law of trusts[10], there were three bold attempts of Lord Denning in the Court of Appeal to develop rules of Equity which failed when later held to be inconsistent with earlier House of Lords authority, though fresh life has recently been given by the Supreme Court to his third attempt. As a Lord Justice in 1950[11] he first attempted to develop an equitable right to have a contract set aside for a mutual mistake of the parties even though it was not fundamental enough to warrant the contract being void for mistake at Common Law. He next attempted[12] to create a deserted wife's equity capable of binding persons in whose favour her husband as owner of the family home had mortgaged it to acquire useful cash for himself and, perhaps, a new paramour – though Parliament subsequently achieved a similar result in the Matrimonial Homes Act 1967, enabling a wife to register a Class F interest against the home.

Subsequently, as Master of the Rolls presiding over the Court of Appeal, he attempted[13] to create a "new model" constructive trust of a family home owned by the man in the relationship "where justice and good conscience required" the man to hold the home on constructive trust in shares that the court thought the parties as fair people ought to have agreed. A New Zealand judge was brave enough to assert that this subjected the law to "the formless void of individual moral opinion"[14]. Lord Denning's views, however, prevailed for twelve years as he ensured as Master of the Rolls, in control of the list of cases, that he heard these cases on any appeals and came to a fair result. No-one was then prepared to run the risk of the costs involved if successfully obtaining leave to appeal to the House of Lords from its appellate committee. After his retirement, the Court of Appeal quietly insisted that an *actual*, express or inferred common

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[8] 13 Ch D 696 at 710

[9] "Has Equity had its day?" at paras 25 and 46. See www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-hong-kong-lecture-12102010.pdf

[10] Eg *McPhail v Doulton* [1971] 1 AC 424, *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, *Barlow Clowes International Ltd v Eurotrust Internatiinal Ltd* [2005] UKPC 37, *Stack v Dowden* [2007] UKHL 17, *Pitt v Holt* [2011] EWCA Civ 197

[11] *Solle v Butcher* [1950] 1 KB 671 (applied in *Grist v Bailey*[1967] Ch 532) rejected by CA in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679 as inconsistent with an earlier House of Lords decision.

[12] See *National Provincial Bank v Ainsworth* [1965] AC 1175

[13] See *Cooke v Head* [1972] 2 All ER 38, *Hussey v Palmer* [1972] 3 All ER 744 at 747 and *Eves v Eves* [1975] 3 All ER 768 at 771,all quietly rejected in *Burns v Burns* [1984] Ch 317 and *Grant v Edwards* [1986] Ch 638 as inconsistent with the House of Lords decision in *Gissing v Gissing* [1971] AC 886, endorsed by *Lloyds Bank* v *Rosset* [1991] 1 AC 107

[14] Mahon J in *Carly v Farelly* [1975] 1 NZLR 356 at 367

intention of the parties was necessary: *imputation* of an intention not actually held was not permitted, and the House of Lords subsequently endorsed this.

Last year, however, the Supreme Court in *Jones v Kernott*[15] , in explaining what the 2007 House of Lords' decision in *Stack v Dowden*[16] really meant, developed the equitable principles concerning the common intention constructive trust of a family home. Where accommodation has been purchased in M's name or the joint names of M and W, one starts with Equity following the Law so that the equitable title reflects the legal title. If, however, in a very unusual case the claimant can provide evidence of an *actual* express or inferred common intention that the beneficial interests are not to reflect the legal title but the precise shares have not been agreed expressly or by inference, the court will *impute* to the parties an intention to have the fair share the court considers each ought to have in the light of the whole course of dealings between them in relation to the property. A 'broad approach' is to be taken as to 'the whole course of dealings. ' Thus, at one final stage in the adjudicatory process Lord Denning's readiness to impute fair shares has found support at the highest level.

In 1975 Lord Denning MR was successful in *Mareva Compania Naveiera SA v International Bulkcarriers*[17] in developing the equitable jurisdiction to grant an injunction so as to freeze certain English assets of a defendant to prevent them being hidden or dissipated in anticipation of the plaintiff's claim succeeding (though this confers no priority in the event of the insolvency of the defendant). These freezing injunctions currently can only be granted in support of a substantive claim before the English courts (or by statute before EU or EFTA courts), but there is scope as Lord Nicholls has pointed out[18] to develop the jurisdiction (as has happened in some offshore jurisdictions[19]) for a "free standing" injunction to cover cases where it is likely that if foreign proceedings are successful steps will be taken in England to enforce the judgment against English assets.

Some months after the *Mareva* case, Lord Denning MR in *Anton Piller KG v Manufacturing Processes Ltd*[20] extended equitable inspection principles so as to create search orders entitling a plaintiff to enter and inspect premises to acquire papers or articles, like pirated copies of films or counterfeit goods, where there was good reason to believe that, otherwise, the defendant would be likely to destroy or hide them.

A further possible development in the remedial context concerns the possible award of exemplary or punitive damages. Traditionally, Equity has not awarded such (or other) damages

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[15] [2011] UKSC 53, [2011] 3 WLR 1121
[16] [2007] UKHL 17, [2007] 2 AC 432
[17] [1975] 2 Lloyd's Rep 509
[18] *Mercedes Benz* v *Leiduck* [1996] 1 AC 284 at 306 et seq
[19] Jersey, Isle of Man, BVI and Bermuda
[20] [1976] Ch 55

against trustees and other fiduciaries, relying only upon making them pay amounts of losses or profits due upon the taking of accounts but with compound interest. In Canada and New Zealand the courts, however, have begun to award exemplary or punitive damages for particularly outrageous breaches of fiduciary duties, though subsequently the Australian New South Wales Court of Appeal was divided on this issue[21]. Because remedial flexibility is a characteristic of Equity it is possible that the English courts could award exemplary damages in an appropriate case of outrageous behaviour by a trustee or other fiduciary, but, on the other hand, it may very well be that these issues can be adequately covered by claims for damages for breaches of the Human Rights Act 1998.

An important development in substantive equitable principles occurred in 1993 when Lord Templeman in giving the unanimous judgment of the Privy Council in *Att-Gen for Hong King v Reid* [22]developed the equitable rules as to the liability of a trustee or someone in a similar fiduciary position who had received a bribe from exploiting his fiduciary position. The fiduciary is, of course, liable to pay up an amount equivalent to the amount of the bribe, but what if he uses the bribe money to purchase an asset for himself and then becomes insolvent or the value of the asset doubles? Can the beneficiaries assert an equitable proprietary entitlement to the asset?

The Privy Council held that he can. Just as a fiduciary who uses trust *property* to make a profit for his own patrimony holds that profit on constructive trust for the beneficiaries of the fiduciary relationship, so a fiduciary who uses his fiduciary *position* to make a profit eg a bribe or secret commission, holds that profit on constructive trust for the beneficiaries. Thus, New Zealand land bought with bribes amounting to Hong Kong$12 million could be claimed by the plaintiff as Hong Kong Government property. A caveat could therefore be registered against the properties to prevent Reid from dealing with them till the final outcome of court proceedings against him.

The justification for this is the “good man” philosophy of Equity, already adverted to where beneficiaries who complain of unauthorized behavior of their trustee, T, have accounts drawn up on the basis that T had behaved in authorized fashion as a good man should. This philosophy also underlies proprietary claims via the tracing purpose. Where T used trust money to purchase an unauthorized asset for his own patrimony and the asset has increased in value the beneficiaries will claim that the asset was rightfully purchased for them by T as a good man who cannot deny this. This is true even where T had mixed trust money with his own so that he had made it impossible to ascertain whose money had been used to acquire the valuable asset: T cannot disprove the beneficiaries’ claim that it was their money that T had used as a good man

[21] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10
[22] [1994] 1 AC 324

acting to profit his beneficiaries. If, however, the mixed money was used to buy unauthorized shares in a now worthless company or was used to pay off T's own debts, the beneficiaries can claim that such money was rightfully paid by T as a good man out of T's own money and T cannot disprove this[23]. Thus the money remaining in the account or subsequently used to buy a valuable asset is, or represents, trust money, as the case may be. As Lord Greene MR stated of a trustee or other fiduciary in *Re Diplock*[24], "he is, of course, precluded from setting up a case inconsistent with the obligations of his fiduciary position," in particular, his obligation not to profit from preferring his own interests to those of his beneficiaries.

Thus, if a fiduciary takes a secret commission he is precluded from denying his beneficiaries' claim that, in accordance with his core obligation not to profit from his position (unless authorized, as in the case of entitlement to agreed fees), he acted in authorized fashion to take the profit for his beneficiaries, so the bribe is held on trust for the beneficiaries[25].

Back in 1890 this approach was not brought to the attention of the Court of Appeal in *Lister v Stubbs*[26] which held that the wrongful receipt of a bribe gave rise only to a personal liability to pay over an amount equivalent to the amount of the bribe. The Privy Council in *Reid* had closely examined *Lister* but rejected it.

Despite this, the Court of Appeal in *Sinclair Investments Ltd v Versailles Trading Group Ltd*[27] in 2011 considered itself bound by the doctrine of precedent to follow *Lister* rather than *Reid.* It seems that the Supreme Court should give its views on this issue. After all, the High Court and the Court of Appeal cannot act inconsistently with a decision of the Supreme Court or its earlier incarnation, the House of Lords, yet they can, according to *Sinclair,* act inconsistently with a decision of the Privy Council even though its members are primarily drawn from the Supreme Court or, previously, the House of Lords.

The court was happy to follow *Lister* because it considered that, in the interests of insolvency law in the commercial world, the taking of bribes should only give rise to a personal liability, not a proprietary liability. If, however, the bribe had been successfully invested in an asset now worth more than the amount of the bribe, there ought to be a personal liability equivalent to

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[23] A beneficiary can "cherry-pick": *Shalson v Russo* [2005] Ch 281 at [144]

[24] [1948] Ch 465 at 525

[25] AS pointed out by Millett J in [1993] Restit LR 7 at 20 and relied on in *Reid*

[26] 45 Ch D 1. Contrast Kekewich J in *Re Smith* [1896] 1 Ch 71 at 77: the court "treats the trustee as having received such a bribe not on his own behalf but on behalf of and as agent for the trust estate."

[27] [2011] EWCA Civ 347, [2011] 3 WLR 1153 applying *National Westminster Bank plc v Spectrum Plus Ltd*[2004] EWCA Civ 670 at [58] but overlooking two Court of Appeal decisions (*Doughty v Turner Manufacturing Ltd* [1964] 1 QB 518 and *Worcester Works Finance Ltd v Cooden Engineering Ltd* [1972] 1 QB 210) applying Privy Council decisions that disapproved earlier Court of Appeal decisions

the value of that asset. This rejection of any proprietary liability is a controversial issue which the Supreme Court will need to resolve in due course.

In Australia the Full Court of the Federal Court of Australia in *Grimaldi v Chameleon Mining*[28] has rejected *Sinclair Investments* and *Lister* in favour of *Att-Gen for Hong Kong v Reid* to hold that a proprietary constructive trust can be imposed on a bribe or secret commission. It indicated, however, that the Australian court has a discretion in the event of the insolvency of the bribed defendant where the invested bribe has appreciated in value, to impose simply a lien (an equitable charge) on the investment for the amount of the bribe, so that the windfall profit is available for all creditors. The UK Supreme Court may perhaps take this view in due course where a trustee or fiduciary has misused his position.

Thus, to this day the principles of Equity are still being refined and developed in order to meet evolving social and economic needs.

[28] [2012] FCFCA 6 at [569]-[584]