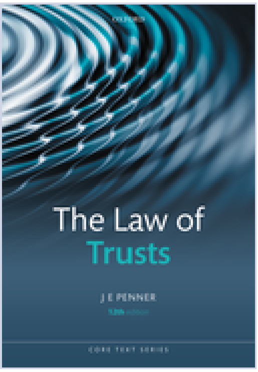

The Law of Trusts (12th edn)

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12. Following, tracing, and claiming

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https://doi.org/10.1093/he/9780192855008.003.0012
Published in print: 04 February 2022
Published online: September 2022

Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter discusses following, tracing, and claiming. Following and tracing are ways in which the beneficiary's equitable interest can be tracked as title to the trust assets changes hands or is substituted for different assets. Whether or not the beneficiary has a claim, at the end of the process of following or tracing, depends on whether the third party is a bona fide purchaser for value. The rules governing tracing are considered in detail—who may trace; what is traced; the impact of *Foskett v McKeown*; tracing amongst innocents. Next, claims against and amongst innocents are considered, followed by claims against wrongdoers and subrogation claims reliant upon tracing. Finally, tracing and claiming at common law (as opposed to in equity) and policy considerations are discussed.

Keywords: tracing, following, claiming, mixed funds, lowest intermediate balance, proportionate shares, rolling charge, backwards tracing, subrogation

Summary

12.1 We have already encountered following and tracing (**2.52**–**2.70**), so you should re-read those passages now.

Following and tracing are evidentiary processes

12.2 The first point to understand about following and tracing is that they are evidentiary processes (*Foskett v McKeown* (2001), 127H–128G). What this means is that they are both ways of tracking the beneficiary's equitable interest, but that process only tells us where the beneficiary's equitable interest is. In the case of following, we track the title to a trust asset as it is transferred from one person to another. In the case of tracing, we track the title to a trust asset into the title of what was received for it in an exchange. But the tracking itself does *not* by itself determine what sort of *claim* the beneficiary can or will have in relation to the followed or traced asset. To take the simplest example, T, a trustee, transfers a trust painting to a third party, 3PR. The beneficiary, B, can certainly follow the title to the painting, which is now 3P's. But this alone doesn't establish that B has a claim. That depends upon whether 3PR is a bona fide purchaser of the painting or not (**2.56** et seq). If she is, then though B can follow the title to the painting into her hands, B will have no claim as p. 292 3PR takes free of B's interest. B can continue following the title to the painting, as it is transferred over the course of time from one owner to the next, until the crack of doom if she wants, but legally this is pointless, since she has lost her claim because of the first bona fide purchase.

12.3 The same is true about tracing. Continuing with the example, let us say 3PR pays T £10k in cash for the painting. B will trace into the title to that asset. Now T pays that money into his bank account. B can follow the title to the cash into the bank's hands, but the bank is a bona fide purchaser of that cash, so B will have no claim against the bank, but B can trace into T's right to the balance in his bank account. As we will see, depending on how T then deals with the money in the account, B will have a choice of claims against T and other 3Ps, and which claim B chooses to press will not be determined by the tracing exercise, though of course it will depend upon it.

Tracing

Who may trace?

12.4 Beneficiaries of a trust can of course follow and trace dispositions of trust assets and make claims reliant upon following and tracing when the dispositions of the assets are in breach of trust. But there is another important class of claimants, those who are the principals of fiduciaries (**3.28**–**3.30**), typically company directors who act as agents of the company, because they are 'custodial' fiduciaries. A custodial fiduciary is one who is much like a trustee because he has the authority and power to deal with the company's assets, in particular transfer legal title to them, and company directors to have the authority and power to do so. On the 'beneficial interest in the trustee's exercise of his powers of title to the trust property' analysis of the beneficiary's interest under a trust (**2.73** et seq), this makes perfect sense, because the director must exercise his powers over the assets for, and only for, the benefit of the company.

12.5 Thus equity will treat a company director who makes an unauthorised transfer of a company asset as equivalent to a trustee in breach, and give the company the same sort of remedies as it would to a wronged beneficiary, allowing the company to follow and trace misapplied company assets (eg *John v Dodwell & Co* (1918); *Re Duckwari* (1999); *JJ Harrison (Properties) Ltd v Harrison* (2002)). As Kay LJ put it in *Re Lands Allotment Co* (1894) (at 638):

> *Now, case after case has decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or quasi trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust.*

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What is traced?

12.6 It is sometimes said that one traces 'value', for example where a third-party recipient (3PR) of £1,000 transferred to her in breach of trust spends that money on a painting, one would say that one 'traces the value' of the £1,000 *into* the painting, but this is misconceived (Penner (2009b)). What one traces is titles, or rights (including shares of rights, eg a co-ownership right). One traces one's equitable interest in the title to the cash into the title to the painting because it was given in exchange for the title to £1,000. The mistaken 'tracing value' formulation is founded on the truism that titles *have* value. In the case of things that can be used, there is both a use-value, eg driving your car or living in your house, and an exchange value—you can hire or rent them out or sell them. In these ways you can *realise* the value of your titles.

12.7 Two other things to notice which prove the point: first, the value of a right or title fluctuates all the time, but the title doesn't fluctuate. Your title to Blackacre is the same however much the market value of Blackacre fluctuates. Second, the exchange of titles upon which tracing is based makes no reference to the values of the titles exchanged. If the 3PR above exchanged her £1,000 for a painting worth £1m, the beneficiary (B) is perfectly entitled to trace into the title to the painting despite the fact that this would be an enormous windfall. Interestingly, Lord Millett speaks of tracing value in *Foskett* (127C, 130G), but seems to appreciate that what one really traces are rights or titles (when discussing mixtures of quantities at 141CF).

Foskett v McKeown (2000)

12.8 *Foskett* is the leading case on following, tracing, and claiming, and indeed the most important case on this topic since the nineteenth century. The facts of the case were somewhat complicated. A Mr Murphy was a trustee of moneys for investors in a property development in Portugal. He wrongly used some of the trust money to pay the fourth and fifth out of a total of five annual premiums on a life insurance policy, the beneficiaries of which were his children. (The source of the funds for the third premium was disputed.) Murphy took his own life, and the investors claimed a share of the life insurance proceeds proportionate to the number of premiums paid with the trust money, as the traceable proceeds of their trust money.

12.9 Part of the complexity of the facts concerned the terms of the insurance policy. The policy combined a life insurance component, requiring the company to pay £1m on Mr Murphy's death, and an investment component. Each annual premium went to the purchase of 'units' (say six units for each annual premium); then, every year, some of those units (say two units) would be 'cancelled' to pay for the life insurance element, and the rest used to make investments. So in year one, six units would be purchased, but then two would immediately be cancelled for the life insurance component, leaving four units; in year two, the annual premium would purchase six more units, raising the balance to ten units, but then, as in year one, two units
p. 294 would be cancelled to pay for the life insurance component, leaving eight units, and so on. Another term provided that if, in any year, an annual premium was missed, then sufficient investment units acquired in previous years would be cancelled to keep the life insurance component going. Under this unit allocation formula, the first two premiums purchased sufficient units to keep the life insurance component of the policy 'on foot', as the expression goes, for five years. Therefore, since Mr Murphy had paid the first and second annual premiums with his own money, the third, fourth, and fifth payments, the last two of which were definitely paid with trust money, were not required to maintain the life insurance, keeping it on foot.

12.10 The trustees for Mr Murphy's children argued that since the final three payments were not required to keep the policy on foot, the trust beneficiaries should not be able to trace their money into the insurance payout on Mr Murphy's death. This argument was accepted by the dissenting judges, Lords Steyn and Hope, but was rejected by the majority, Lords Browne-Wilkinson, Hoffmann, and Millett. Lord Millett gave the leading judgment. The case establishes a number of important points about the law on following, tracing, and claiming.

12.11 First, it confirms that following, tracing and claiming are distinct, and that following and tracing are evidential processes (**12.1**).

Tracing is transactional, not causal

12.12 Second, and most fundamentally, tracing is transactional, not 'but for' causal. As the children's trustee argued, the fourth and fifth premiums paid for with trust money did not *cause* the £1m payout on Mr Murphy's death, but this was irrelevant. Saying tracing is 'transactional', or a matter of 'attribution', is to say that tracing is about what rights were exchanged for others, and that is all that matters. As Lord Millett put it (137F–H):

> *he [children's trustees'] argument is based on causation and as I have explained is a category mistake derived from the law of unjust enrichment ... But the question is one of attribution not causation. The question is not whether the same death benefit would have been payable if the last premium or last few premiums had not been paid. It is whether the death benefit is attributable to all the premiums or only to some of them. The answer is that death benefit is attributable to all of them because it represents the proceeds of realising the policy, and the policy in turn represents the product of all the premiums.*

12.13 This explains why the windfall argument, that it is unfair that the value of the asset that B traces into is worth far more than the asset exchanged for it (**12.7**) has no merit. Lord Millet said (134G; see also 135C–136B):

> *Where A misappropriates B's money and uses it to buy a winning ticket in the lottery, B is entitled to the winnings. Since A is a wrongdoer, it is irrelevant that he could have used his own money if in fact he used B's. This may seem to give B an undeserved windfall,* p. 295 ↵ *but the result is not unjust. Had B discovered the fraud before the draw, he could have decided whether to keep the ticket or demand his money back. He alone has the right to decide whether to gamble with his own money. If A keeps him in ignorance until after the draw, he suffers the consequence. He cannot deprive B of his right to choose what to do with his own money; but he can give him an informed choice.*

The cherry-picking rule against wrongdoers

12.14 What is sometimes called the 'cherry-picking' rule concerns the rights of B when T mixes trust money with his own, typically misappropriating money from B's trust and adding it to T's own bank account. As put by Lord Millett (132C):

> *Common to both [the common law and equity] is the principle that the interests of the wrongdoer who was responsible for the mixing and those who derive title under him otherwise than for value are subordinated to those of innocent contributors.*

The most extreme version of the principle is stated by Page Wood VC in *Frith v Cartland* (1865), 526; quoted by Lord Millett at 133C):

> *... if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own.*

For the identical position at common law, see *Jones v De Marchant* 28 DLR 561; *Armory v Delamirie* (1722); see also Smith (1997), 158, 183 et seq. Prior to *Foskett*, the cherry-picking rule was framed in terms of alternative 'presumptions' B could draw upon, arising from the decisions in *Re Hallett's Estate* (1880) and *Re Oatway* (1903) (for discussion see Penner (2019), 11.126–11.130) but this approach was rejected by Lord Millett (132B).

12.15 Here is a simple example of how the rule works: T mixes £10k of his own money with £10k of trust money by adding the latter money to his personal bank account, raising the balance to £20k. T then spends £10k on a world cruise which, because it is a payment for a service, rather than a title to property, generates no traceable proceeds. T then spends £10k on shares. Whose money should be allocated to which expenditure? Because T is a wrongdoer, B can choose, because any difficulty in determining whose money went where is the fault of the wrongdoer, T. So B can, and will, claim that his £10k was spent to purchase the shares.

The 'lowest intermediate balance rule'

12.16 Although not specifically cited by Lord Millett, there is also another rule which is pertinent in the case of tracing against a wrongdoer. B's right to control the bookkeeping of the account extends only to withdrawals from the mixture. Subsequent deposits by the wrongdoing trustee to the bank account are not presumed to be repayments to replace any trust moneys that have been withdrawn and dissipated (*James* p. 296 *Roscoe (Bolton) Ltd v Winder* (1915)); this makes obvious sense, because if the trustee wished to make good his breach and restore the trust, it hardly seems likely that he would do so by adding money to his own bank account. This decision leads to the 'lowest intermediate balance' rule of tracing into bank accounts. Beneficiaries cannot trace in an arithmetically impossible way. So, for example, if T paid £500 of trust money into his account with £500 of his own, and then £900 is withdrawn, at least £400 of trust money must have been withdrawn. A subsequent addition of the trustee's own money cannot create a new source of funds into withdrawals from which the beneficiaries can trace.

Tracing amongst innocents

12.17 Finally, Lord Millett also confirmed (132D) that where the money of two innocent parties is mixed, as for example, when T mixes money from B1's trust with money from B2's trust, B1 and B2 must be treated equally between themselves.

12.18 'Equally *as between themselves*' is important, because T might have mixed B1's and B2's money *with his own*, say by adding it to T's personal bank account. In this case B1 and B2 are treated, as against T, as proportionate co-owners of the whole of their joint contributions to the account so together they can take advantage of the cherry-picking rule against T, as follows: T pays into his account, which has a balance of £500, which is his own money, £1,000 from B1's trust and then £500 from B2's trust raising the balance to £2,000. Now T withdraws £800 and dissipates the money so there are no traceable proceeds. Using the cherry-picking rule, B1 and B2 will claim that this was an expenditure of T's £500, and they must accept that £300 of their money went to this expenditure. B1 and B2 will share 'ratably' in the remaining £1,200, that is in proportion to their contributions, B1's £1,000 to B2's £500, so B1 will be entitled to two thirds of the £1,200, B1 to one third, so in the amounts £800 and £400 respectively. If T then spends the £1,200 on valuable shares, B1 and B2 will be entitled to trace into the shares in the same proportions.

Tracing amongst innocents—the different rules

12.19 The example in the last paragraph applies the 'proportionate shares' 'solution' or rule, one of the rules which determines how one traces between innocent parties, but there are two other rules that have been applied, the 'first in, first out rule' and the 'rolling charge' solution.

The 'first in, first out' rule

12.20 The 'first in, first out rule' was taken from the common law view of bank accounts for the purposes of regulating the relations between banker and customer, which works as follows. Say A's account has had only two transactions so far: one deposit of £1,000 and one deposit of £500; these deposits are regarded as creating separate debts that the bank owes to A, or from the other way around, separate credits in A's bank balance. If A
p. 297 withdraws £400, the bank in providing him with those funds has extinguished one of these debts by that amount. Either the £1,000 debt is reduced to £600, leaving debts of £600 and £500, or the £500 debt is reduced, leaving debts of £1,000 and £100. At common law *Clayton's Case* (1816) decides that in the case of current or 'running' accounts where the intentions of the parties do not determine the issue the 'first in, first out' rule applies. The first debt is paid off first, as if the debts stood in a queue waiting for extinction. So here the result of A's withdrawal is that the £1,000 debt is reduced to £600, and the £500 debt is untouched. If A had withdrawn £1,200, that would have first fully extinguished the £1,000 debt, and then reduced the £500 debt to £300.

12.21 Now consider this rule if applied to a trustee who deposits trust money into his own personal account. Take the case where the first deposit of £1,000 deposit was money from B1's trust, and the subsequent £500 deposit was money from B's trust. If *Clayton's Case* is followed, then B1 could trace only into expenditures of the £1,000 credit against the bank, and B2 could only trace into expenditures of the second £500 credit. Obviously, it matters if this rule is adopted. For instance, if T buys a valuable painting with the credit B1 can trace, then T applies the credit B2 can trace into by blowing it on his riotous living expenses (giving rise to no traceable proceeds), then B1 and B2 get very different outcomes purely on the basis of the order in which T deposited their money, which is normally thought to be unfair and difficult to justify. The application of the rule to these cases has been criticised (see eg Smith (1997), 193–194), and one alternative rule that has been applied is the 'proportionate shares' solution, as in **12.18**.

The proportionate shares solution

12.22 This rule is analogous to the common law rule governing 'fluid' mixtures, ie mixtures of goods such as oil where the separate identity of the mixed parts cannot be ascertained—the innocent owners of the mixed goods co-own the whole in proportion to the amounts they contributed (see Birks (1992); *The Ypatianna* (1988)).

The rolling charge solution

12.23 Under the rolling charge solution, the money contributed by innocents is traced into mixtures so that they become proportionate co-owners of the whole, but the lowest intermediate balance rule is properly taken account of, as is the *Foskett* presumption against the wrongdoer as between the trustee and the beneficiaries as co-owners of the trust assets. Assume a rogue trustee, T, pays into his account £500 of B1's, and then £500 of beneficiary B2's, which already contains £500 of his own, raising the balance to £1,500. Now T withdraws £750 and dissipates the money. Applying the cherry-picking rule, B1 and B2 will say that the expenditure was of T's money to the extent of his total money in the account of £500, and so only £250 of the trust moneys. As co-owners in proportionate shares, A and B will suffer the loss of £250 equally, each now tracing into a half share of £750. Now T adds £500 from B3's trust. Under the principle of the lowest intermediate balance, it must be the case that A and B can only trace into the £750, which is all the trust money that remains of theirs when B3's money is added, not into B3's contribution. From now on, however, the mixing means that B3's fate is linked with B1's and B2's as proportionate co-owners of the entirety: B1 and B2 each have a (half × £750)/ £1,250 = three tenths share), and B3 has a four tenths share of the whole of £1,250 of trust money.

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Which rule to apply?

12.24 It is orthodox to say that the 'first in, first out' rule is the rule that should be applied by default, but that it should be displaced if the proportionate shares or rolling charge solutions would work better justice between the parties, and as a matter of case law the rule was regularly displaced in favour of one of the other two (see *Barlow Clowes International Ltd v Vaughan* (1992); *Russell-Cooke Trust Co v Prentis* (2003); *Commerzbank Aktiengesellschaft v IMB Morgan plc* (2004)). In *Charity Commissioners v Framjee* (2014) Henderson J said ([49]):

> *[T]he authorities establish that, although the rule in Clayton's Case is probably still the default rule in England and Wales which has to be applied in the absence of anything better, it may be displaced with relative ease in favour of a solution which produces a fairer result.*

12.25 In the Singapore case of *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd* (2018) Audrey Lim QC extensively reviewed the case law, and her conclusions deserve quoting at length (citations omitted):

> *To summarise, the principles to be applied in a situation where there are multiple claimants to a pool of commingled assets that is insufficient to satisfy every claim are as follows:*
>
> (a) *The scope of application for the 'first in, first out' rule in Clayton's Case is limited and can be displaced by a slight counterweight. The rule in Clayton's Case should not be applied if such application would be impracticable or unjust and there is a preferable alternative or if the application of the rule would be contrary to the intention of the claimants.*
>
> (b) *In most cases, a fairer and more equitable method can be employed, being the pari passu [proportionate shares] or rolling charge method. Where practicable and subject to considerations such as the intention of the parties or any agreement to a particular method of distribution, the rolling charge method is to be preferred to the pari passu method as the former more accurately reflects the parties' interests in the mixed fund. In the usual case, the rolling charge method produces a result that is more just as the pari passu method might occasion unfairness to the most recent contributors to the mixed fund. There may, however, be situations in which the pari passu approach is more suitable – for instance, where it would be too complicated or costly to apply a rolling charge approach because of a prohibitively large number of claimants or transactions.*
>
> (c) *The parties' intentions are an important overarching consideration. Where there is an express*
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> *agreement as to the method of distribution, such agreement would be given effect to unless it was unworkable or impracticable to do so. In the absence of such agreement, the court will look at the parties' presumed intentions. To ascertain what the parties' intentions are, the terms and structure of the contribution or investment will be indicative, though all the circumstances of the case must be looked at in the round.*

Backwards tracing

12.26 One 'backwards traces' when one traces into property purchased by the recipient before he receives the money that is traced. If T buys an antique table worth £3,000 on credit, by taking a loan from a bank, or by using his overdraft facility, or with his credit card, and then later pays off the debt incurred with trust money, logically it is clear that the antique table is the traceable proceeds of the trust money. As Smith (1997), 146, explains:

> *Suppose that D buys a car from C with some money. If we were tracing the value inherent in ownership of the money, we could trace it into ownership of the car. Now change the facts slightly, so that D buys the car on credit; he takes ownership of the car, but he is C's debtor in respect of the purchase price. A day later, D pays the debt with the money being traced. Can we trace from the money into the car as before? It is difficult to see why not. There is no substantial change in the transaction; the period of credit might be reduced to a minute or a second to better make this point. If that is right, then when money is used to pay a debt, it is traceable into what was acquired for the incurring of the debt ... [I]nstead of tracing through substitutions in D's hands, we could trace through substitutions in C's hands. When the car is bought for cash, the car is the traceable proceeds of the money; that is the substitution in D's hands. Clearly, from the other perspective the money is the traceable proceeds of the car; that is the substitution in C's hands. It is easy to show that adding a period of credit does not change this conclusion ... C gave up ownership of the car in exchange for a debt; that debt asset is therefore the traceable proceeds of the car. Later, the debt is paid with the money in question. This money is therefore the traceable proceeds of the debt; but since the debt was the proceeds of the car, therefore the money is the proceeds of the car, via an intermediate step.*

Unfortunately, the law has not adequately recognised this logical and compelling position, in part as a result of some confusion about tracing into overdrawn bank accounts, ie about the way in which a bank receives deposits.

12.27 Normally, when money is paid into a bank account, there is no difficulty determining the substitution that has occurred. The bank takes title to the money and gives value in exchange in the form of the increased bank balance. The increased bank balance is, of course, the traceable proceeds of the payment in of the money. Where £500 is paid into an account that is £500 in overdraft, resulting in a balance of zero, what are the traceable proceeds? In exchange for the title to the money, the bank gives value in the form of the reduction of the debt it is owed by the customer to zero. No debt now exists between the bank and the customer, and
p. 300 therefore no rights between them that can be the traceable proceeds of the £500 payment. For this reason, it is generally but wrongly assumed that the payment of a debt is the end of the tracing exercise, since there just are no proceeds. While it is absolutely right to deny that anything of value in the account is traceable by the claimant, because there is no existing right between the bank and customer, this does not mean that the tracing exercise must end when the rights between the bank and its customer 'run out'; if you stop there you have merely given up the tracing exercise prematurely; the tracing exercise has not come to a natural conclusion by itself. The overdraft was incurred, after all, by withdrawing funds, and the payment of the overdraft is therefore traceable into those funds, and into whatever those funds were spent upon.

12.28 Of course, tracing into the proceeds of an overdraft may be evidentially difficult, and therefore may often be impossible in practice, but that is no reason to deny this form of tracing in principle, especially in clear cases where it is apparent that what was purchased on credit was subsequently paid off by trust funds. Consider the case of a trustee who uses trust money to pay off his credit card bill: all the card transactions are clearly recorded in his monthly statements and receipts, and it would seem preposterous for the court to refuse to trace into the television, antique table, and suit of clothes so manifestly paid for with the beneficiary's money.

12.29 It is clear that the courts have actually backwards traced in particular cases: in *Agip (Africa) Ltd v Jackson* (1990) the court allowed the plaintiff to treat a payment by Lloyds Bank in London to the defendant as the transfer of his money even though the payment from the plaintiff to Lloyds' correspondent bank in New York *was made later*. Thus Lloyds had made the payment to the defendant before, and in expectation of, receiving a corresponding amount from the plaintiff via a New York bank (see also the tracing through credit facilities in *El Ajou v Dollar Land Holdings plc* (1993)). Furthermore, backwards tracing necessarily underlies the ability of equity to trace through bank payment clearing systems generally, since the settlement between banks is not simultaneous with the crediting and debiting of accounts.

12.30 Most importantly, The HL conducted a backwards tracing exercise in *Foskett* without acknowledging it did so. Remember how Lord Millet characterised the premiums paid. *All the premiums*, from the first to the fifth, equally contributed to the acquisition of the asset, the rights under the insurance policy. He said (137E) 'The nearest analogy is with an instalment purchase'. An instalment purchase is one where the seller transfers to you title to the goods, such as a sofa, but this sale is on credit, so you pay instalments until your debt to the seller is discharged. So under an instalment purchase, according to Lord Millet in *Foskett*, these payments are *attributable*, that is traceable into, the asset you are paying for, the sofa, title to which you already have. So Lord Millett's analysis in *Foskett depends* upon the legitimacy of backwards tracing.

12.31 In *Law Society v Haider* (2003) Judge Richards QC allowed the claimant to trace from a payment discharging a mortgage into the house that was purchased with the mortgage loan, and thence into the proceeds of the sale of that house and into another house purchased with those proceeds. The decision is
p. 301 clearly inexplicable if not for backwards tracing. Notice that tracing into the house in such a case requires that the mortgage loan was a purchase-money mortgage, ie the mortgage loan was used to acquire the house. If a trustee had taken out a loan secured by a mortgage on a house he already owned, one would trace into whatever the trustee acquired with the loan money, not into the house as in this case. The fact that the loan is secured against the trustee's house is utterly irrelevant—it is what the loan money was used to buy that is relevant.

12.32 The CA conducted an inconclusive discussion of backwards tracing in *Bishopsgate Investment Management Ltd v Homan* (1995). At first instance Vinelott J was willing to allow backwards tracing in limited circumstances (at 216):

> *... where an asset was acquired by [the defendant] with moneys borrowed from an overdrawn or loan account and there was an inference that when the borrowing was incurred it was the intention that it should be repaid by misappropriation of [the plaintiff's] money. Another possibility was that moneys misappropriated from [the plaintiff] were paid into an overdrawn account of [the defendant] in order to reduce the overdraft and so make finance available within the overdraft limits for [the defendant] to purchase some particular asset.*

Dillon LJ accepted this as correct, but Leggatt LJ found the contention utterly wrong on the basis that it was simply impossible for a claim to be made in respect of an asset acquired before the misappropriation took place.

12.33 As Smith (1994) points out, however, the basis for Vinelott's version of backwards tracing is deficient in any event. As to the first case he mentions, it seems to violate the general principle of tracing to require that the defendant *intends* to *later* use the misappropriated trust property to purchase the asset. Tracing is transactional, tracking the actual exchanges that were made with B's money, not whatever intentions T might or might not have had before he used B's money. As to the second case, this is straightforwardly in violation of the rules of tracing, because if the payment of the overdraft is traced, it should be traced into the asset for which the debt was incurred, not for any new purchases enabled by the reduction of the overdraft. While those purchases might not have been possible on a 'but for' *causal basis*, *Foskett* rightly held that attribution, not causation, underlies the tracing principle. The reduction of the overdraft allows T use the *bank's money* to make more purchases, not to use B's money to do so. B's money can only be traced via the overdraft into what was purchased so as to give rise to the overdraft in the first place.

12.34 A form of backwards tracing has now been recognised, implicitly in the CA's decision in *Relfo Limited v Varsani* (2014), and explicitly in the UKPC in *Republic of Brazil v Durant* (2015). Schematically, both cases involved payments of the following kind: T requested or caused a third party to make a payment to T; T then afterward reimbursed the third party with funds held on trust for B; in both cases, the court held that B could trace the second payment to the third party into the first, prior payment from the third party to T, so that T held those funds as a recipient of B's trust money. Unfortunately, in neither case did the analysis make it clear p. 302 whether the court was adopting the view of 'backwards tracing' endorsed obiter by Vinelott J which we have just seen was criticised by Smith, or whether it was pursuing principles endorsed by Smith.

12.35 Justifying the court's decision in *Durant* to allow backwards tracing Lord Toulson said:

> *[38] The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a co-ordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry. The Board agrees with Sir Richard Scott V-C's observation in* Foskett v McKeown [1998] *Ch 265 that the availability of equitable remedies ought to depend on the substance of the transaction in question and not on the strict order in which associated events occur ...*
>
> *[40] The Board therefore rejects the argument that there can never be backward tracing, or that the court can never trace the value of an asset whose proceeds are paid into an overdrawn account. But the claimant has to establish a co-ordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund. This is likely to depend on inference from the proved facts, particularly since in many cases the testimony of the trustee, if available, will be of little value.*

Apparently, then, the UKPC has adopted a restricted application of backwards tracing, restricted that is to cases where the debt and the payment with which it is discharged are in substance part of the same overall transaction, such that there is some sort of co-ordination between the depletion of the trust fund and the acquisition of the asset. (For discussion, see Penner (2017).)

Claiming

12.36 Where B is able simply to follow the trust property into the hands of the trustee, eg where T takes a trust painting and hangs it in his office, or where T gives possession or transfers title to the painting to a 3PR who is not a bona fide purchaser, the beneficiary simply specifically enforces the trust. The trustee will be required to hold the property on trust again as he should, say putting it into safe keeping. As regards 3PR, the court will order 3PR to deliver it up or assign the legal title back to the trustee; this will be a replacement trustee if the trustee's giving of possession to 3PR or transferring title to her was in bad faith, because by acting in bad faith T reveals himself to be unfit as a trustee (**8.61**), and will be replaced. The trustee may not be
p. 303 dishonest, of course. For example, T may not understand that hanging the painting in his office is not a benefit he is entitled to. Or 3PR might be an object of the trust, but T does not understand that the terms of the trust do not authorise giving possession of the painting or transferring title to her. In any case, by restoring the proper situation, eg getting the painting back into safe keeping, B is just specifically enforcing the trust, getting a decree from the court if necessary.

Claims amongst innocents

12.37 In the case of an innocent third party volunteer, the beneficiary can follow any trust property or its traceable proceeds into the third party's hands; he can then specifically enforce his equitable interest in this property against this third party. Where the innocent third party then himself exchanges this property for another, B can likewise trace into this, and claim ownership of it, and will be able to get the court to order the innocent party to transfer the title to T (or a replacement T). So, for example, if T transfers £5,000 of trust money to his nephew, telling him it is a birthday present, and the nephew spends this money on a motorbike, B can claim the motorbike as a trust asset, and the nephew will be required to transfer title back to T. Take note: if, after receiving the trust property, the innocent third party learns that the property came to him in breach of trust, and subsequently enters into any transaction with the trust property, he will be regarded as a wrongdoer, and the rules regarding claims against wrongdoers will apply.

Mixed funds

12.38 Because the law must deal equally with innocent parties, where innocent parties can trace fund into a mixed fund, they are entitled to claim a co-ownership interest in equity in proportion to their contribution, and can similarly claim a co-ownership interest in any asset which was acquired by an expenditure from that mixed fund. What their co-ownership share will be will be determined by which of the three tracing rules (**12.19**) is applied.

Claims against wrongdoers

Beneficiary's election

12.39 Where the T dishonestly misapplies trust assets, or where 3PR receives assets knowing they were transferred to her in breach of trust, B does not have to trace T's or 3PR's expenditures to found a claim. Both T and 3PR will be personally liable to dig into their own pockets to restore the trust, ie will be ordered by the court to pay the money value of what they received to a replacement trustee who will hold the funds on the terms of B's trust. So, for example, if T withdraws £5,000 from the trust bank account and spends it on shares, or if T transfers £5,000 to a 3PR who knows the money is paid to him in breach of trust and 3PR spends it on shares, in each case B has an election. If the shares rise in value, so are now worth £7,000, B will claim that the
p. 304 money that was used to buy the shares was trust money, claim that the shares are the traceable proceeds of that money, and can get an order from the court against T or 3PR to transfer the shares to a replacement trustee. If however, the shares have fallen in value, B will claim instead that T or 3PR bought their shares *with their own money* (as we shall see (**13.10** et seq), as against the trustee this will amount to 'falsifying the account'), disclaiming any equitable interest in the shares, and enforce T's or 3PR's personal liability to restore the trust, and will get an order from the court requiring them to pay £5,000 (usually plus interest) from their own funds to the replacement trustee; T and 3PR will keep the shares as their own.

12.40 The main point to realise here is that if T or 3PR are solvent, and can pay a money award to restore the trust, then B may not be concerned to trace if it seems unlikely that T or 3PR have any valuable traceable proceeds from the assets they misapplied or received. Secondly, if T or 3PR are insolvent and cannot pay a money award (or the entire amount of it), then B's only hope to recover something for the trust will be to trace, however much the traceable proceeds are lower in value than the original trust asset that was misapplied by T or received by 3PR.

Ownership, co-ownership share, or lien

12.41 In the cases just discussed, B has a further election regarding his claim to the traceable proceeds, the shares purchased for £5,000. B can elect to take a lien, or charge, over the shares, to secure T or 3PR's repayment of the £5,000 to restore the trust (*Foskett*, 131G). A lien is a kind of security interest that works as follows: should T or 3PR fail to pay over the £5,000 to a replacement trustee, the replacement trustee can enforce the lien, by forcing a sale of the shares. The replacement trustee will be entitled to keep as much of the proceeds of sale as is necessary to discharge T's or 3PR's £5,000 personal liability to restore the trust. So (leaving aside issues of interest) if the shares are sold for £6,000 the replacement trustee is entitled to £5,000, and T or 3PR to the £1,000 surplus. If the shares only fetch £4,000, the replacement trustee takes it all, and T or 3PR will still owe £1,000.

12.42 B will obviously choose to claim that the shares are trust property, ie the equitable ownership of the shares is in B, and require T or 3PR to transfer title to them to the replacement trustee if the shares have risen in value. If the shares have fallen in value, B will choose a lien, in particular where it is unclear whether T or 3PR are solvent. The right to a lien is particular helpful when the asset in question was purchased both with trust funds and the wrongdoer's funds, and the asset has declined in value. So say 3PR receives £5,000 in trust funds, and with £5,000 of his own buys shares for £10,000 which have fallen in value to £8,000. B could claim a ½ co-ownership interest in the shares, but this would only be worth £4,000, £1,000 less than the value of the misapplied trust money. Instead he will claim a lien, requiring 3PR to personally repay £5,000 to the replacement trustee, secured by a lien over the shares.

12.43 Regarding the theoretical basis for B's right to a lien, conventionally it is said that the beneficiary can 'bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the p. 305 proceeds to secure restoration of the trust fund' (*Foskett*, 130A, per Lord Millett). But this seems wrong in principle: by electing to enforce T's or 3PR's personal liability, making them dig into their own pockets to restore the trust, B disclaims any interest in the traceable proceeds, and thus should have no right to claim a lien over them, or any other property of T or 3PR for that matter—a personal liability is like an unsecured debt; it does bind or related to any property of the debtor.

12.44 Despite the previous statement quoted above, Lord Millett himself exposed the illogic here in *Foskett* when he criticised the CA's reasoning (140B, see also 138C):

> *I should now deal with the finding of all the members of the Court of Appeal that the plaintiffs were entitled to enforce a lien on the proceeds of the policy to secure repayment of the premiums paid with their money. This is inconsistent with the decision of the majority that the plaintiffs were not entitled to trace the premiums into the policy. An equitable lien is a proprietary interest by way of security. It is enforceable against the trust property and its traceable proceeds. The finding of the majority that the plaintiffs had no proprietary interest in the policy or its proceeds should have been fatal to their claim to a lien.*

12.45 The better way to explain the beneficiary's right to a lien in these circumstances is as follows: a beneficiary can adopt the misapplication of trust funds in any form most valuable to him; here, he will adopt the transaction as a secured loan to the trustee, or as Lord Millett puts it in the quotation above, as proprietary interest by way of security; the beneficiary will claim that the disposition of the trust money was as a loan to T or 3PR, secured against the property acquired with it. Thus the beneficiary claims an equitable lien or charge over the asset, which will in part satisfy his personal claim for repayment of the 'loan' to T or 3PR. To the extent that T or 3PR fail to repay this 'loan', the beneficiary has the right, like any chargee or lien holder, to force the sale of the asset.

Subrogation claims reliant upon tracing

12.46 Subrogation is the acquisition of another person's rights against a third party upon the making of a payment: very roughly, by making a payment the plaintiff 'purchases' those rights. The classic example occurs in the insurance context—if I am insured against injuries caused by the negligence of others, my insurance company, upon paying me an insurance award compensating me for my loss, is entitled to sue the tortfeasor, ie the negligent injurer, in my name for damages. Thus acquiring my right to sue, the insurance company is said to be 'subrogated' to my claim against the tortfeasor. A different sort of subrogation is relevant here. In certain circumstances, if X pays off Y's debt to Z, X will, by operation of law, be subrogated to Z's right as a creditor. In other words, by paying off Z, X will in effect 'purchase' Z's right to the payment of the debt against Y. Notice that in the insurance example, the insurer takes over rights that the insured continues

to have against his tortfeasor. The case is different where X pays off Y's debt to Z. By paying off Y's debt, X
p. 306 extinguishes the debt and thus Z's right as a creditor. The right against Y that X acquires by subrogation is a new right that arises by operation of law; in essence Y's debt is revived in favour of X and, in consequence, this is known as a case of 'reviving' subrogation (Mitchell (1994), 4).

12.47 The theoretical basis for reviving subrogation is still unsettled, in particular in terms of how this remedy relates to the law of unjust enrichment (see *Lowick Rose LLP v Swynson Ltd* (2017)). But one reasonably clear case arises where as part of transaction in which A transfers money to B with the expectation that A will acquire a security interest over B's asset, and B uses the money to discharge C's prior secured debt over that asset, A will be subrogated to C's secured debt.

12.48 Now what, you may ask, does tracing and claiming have to do with this? Well, nothing in principle. Tracing only becomes relevant if A's transfer to B is not direct. *Boscawen v Bajwa* (1995) is an illustration.

12.49 In *Boscawen* a Mr Bajwa intended to sell his mortgaged land for a price roughly equal to what he owed under a mortgage to the Halifax Building Society. On the sale Bajwa would be required to use the purchase money to pay off the mortgage, which would leave him with little if any proceeds for himself. The purchasers raised £140,000 on a mortgage loan from Abbey National, and the money was transferred to solicitors in advance of the completion of the sale under a conventional SAT (**11.7** et seq). In breach of trust the money was advanced before completion to the vendor's solicitors and was applied to pay off the mortgage loan to Halifax. The transfer never occurred, nor did the vendor's solicitor acquire a charge over the land for Abbey National. As a result Bajwa ended up with an unmortgaged property, while Abbey National had advanced funds and received no mortgage on the property in return. The CA held that Abbey National was entitled to be subrogated to Halifax's mortgage on the land, thus entitling them to priority over a charge on the land that had been subsequently granted by the court to judgment creditors of Bajwa. But because the payment of Abbey National money was not paid to Bajwa directly—the money went first to the purchaser's solicitor, then to the vendor's solicitor, and then to the Halifax to fulfill Bajwa's intructions to do so, Abbey National needed to trace its funds to show that the money paid to the Halifax was its money in equity, which it clearly was.

12.50 Arguably this case doesn't even belong in a trusts text. All it shows is that to establish a subrogation claim the claimant may have to show that the payment to B was of funds held on trust for him. But the case does have some relevance because of its interaction with tracing trust moneys.

12.51 First, if backwards tracing is a principle of general application, then Abbey National would have an alternative claim to trace their money in the asset acquired with the original loan moneys.

12.52 Secondly, and much more importantly, *Boscawen* does not decide that whenever trust money is misapplied to discharge a debt, the beneficiary acquires a subrogation claim. The subrogation claim is
p. 307 restricted to those cases where A intends to receive a security interest, but one which doesn't eventuate. This has practical importance, particularly in the case of an innocent volunteer recipient of trust property transferred to her in breach of trust, for example a nephew of the trustee who innocently receives £5,000 misappropriated from the trust, the trustee telling him it is a graduation present.

12.53 As we shall see (**15.29** et seq), the rule regarding the personal liability of innocent volunteers is that they are not personally liable when they innocently dissipate trust property they have received. B can still trace and claim against them for any traceable proceeds, but if the nephew, for example spends all the money on a holiday B will be out of luck vis-à-vis the nephew: no traceable proceeds and no personal liability either. (Of course T will be personally liable for the whole raised £5,000 plus interest.) If, however, B can claim to be subrogated to any debt that the nephew discharges with the trust money, then this picture regarding the nephew's personal liability radically reverses. Why? Well, notice that the subrogation claim does not turn on the fact that the debt that was paid off with trust money was a secured debt. The right to be subrogated would apply to the payment of any debt the recipient makes with trust property. Of course, this right to be subrogated to the payment of an unsecured debt will only give the beneficiary a personal right against the recipient to repay the money expended on the debt, and where T misapplies trust money this will be a pointless, additional right, because the trustee is strictly personally liable to restore the trust anyway (**13.10** et seq); the same applies to the case of 3TP who knows that the property in his hands is trust property; he will be strictly personally liable as well (**15.29** et seq).

12.54 If, however, the subrogation claim is available to B whenever trust money is expended to discharge a debt, then it is likely that the innocent recipient will be personally liable to restore the trust to a large extent, because if you think of the way people spend money, they almost always do so in the discharge of debts. Except for gifts and over-the-counter shop sales (see Penner (1996a)), most expenditures of money pay off contractually incurred debts of one kind or another. When you pay your restaurant bill at the end of dinner, you pay off a contractual debt incurred when you ordered the meal; when you pay for your vacation you pay off the debt incurred when you booked the holiday. Everything you ever buy on a credit card, ie on credit, creates a debt that you must ultimately discharge. Thus if a beneficiary can be subrogated to the rights of all the debtors whom a recipient pays off with trust money, and, as we have just seen, most payments a person makes discharge debts, then the beneficiary is subrogated to an array of personal claims against this innocent recipient, with the result that, contrary to what the traditional law teaches us, the innocent recipient is largely personally liable to restore the trust out of his own pocket. But this is largely a theoretical worry (at least one hopes so). As far as your author is aware, such an argument for the personal liability of the volunteer recipient has never reached a court.

Litigation stages and tracing orders

12.55 Although tracing is not itself a remedy, you may come across the term 'tracing' order, which may occur as one of the orders a judge may give at the end of a trial. As you may know, under the rules of civil procedure
p. 308 orders for 'discovery' or 'disclosure' may be made by the judge, so that, for example, documents relevant to the litigation are provided to the other side in advance of the trial. These can require a defendant, for example, to disclose what happened to an asset he received if the claimant alleges that he is entitled to the traceable proceeds of that asset.

12.56 Where the defendant disputes liability, such an order might not be given. Consider the case where a company sues one of its former directors, alleging that he misappropriated company assets, and wishes to trace into any traceable proceeds there may be. The former director stoutly denies liability. As you can imagine, providing all the relevant information regarding the traceable proceeds of the alleged misappropriation may be expensive and time-consuming, so the judge might require the company to establish the director's liability at trial first. If the company is successful, one of the orders it may seek from the court is a tracing order. This will then require the director to provide all relevant information concerning the application of the assets he wrongfully received.

Tracing and claiming at common law

12.57 In *Foskett* Lord Millett said (128G):

> *Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough.*

This is perfectly sensible, and needs to be said, because the idea that there are different tracing rules at common law and equity is commonly thought to be true. But this rests on a confusion. The difference between the common law and equity lies in the differences between *claiming*, not following and tracing.

12.58 So, for example, it is sometimes said that the common law cannot trace through mixtures, in particular moneys 'mixed' in a bank account. However the idea that the common law was mentally deficient in this respect is clearly belied by the fact that the common law developed principles to deal with the mixing of goods, as where a quantity of one individual's oil was mixed with that of another (**12.22**), or the rule in *Clayton's Case*, whereby a bank balance is treated as a series of individual debts. The real issue becomes clear when we pay attention to the distinction between tracing and claiming. The common law, no less than equity, was and is capable of tracing through the proceeds of exchanges; but, unlike equity, the logic of the common law resists giving the claimant a *legal* entitlement to proceeds (see Smith (1997), 321–339). As Smith (1997, 330) argues:

> *[C]ommon law rights ... serve as a baseline. They can be transferred at will by the one who holds them. If it is necessary to change the result, one looks to equity, which can encumber legal rights in various ways ... It is*
p. 309 *true that equitable proprietary rights may ↵ be hidden, but for this very reason, they are fragile, always destroyed where a bona fide purchaser acquires a legal interest for value without notice of the equitable rights.*

(See also Matthews (1995b).)

12.59 The case of bank accounts shows the good sense of the common law's resistance to granting a legal title to a claimant to traceable proceeds. Say A deposits B's money into his personal bank account. B can clearly trace his money into the new balance in A's account, but what would it mean to say that B has a *legal* entitlement to the money? A's right to the balance in his account is a legal chose in action created by the banker-customer contract with his bank. His contractual right under the contract *is* his legal title, and whilst he can obviously hold that legal title on trust for someone, it is conceptually awry to say that anyone else is *a party* to the banker-customer contract giving them *legal* rights to the balance.

12.60 It would also give rise to commercial mayhem if a third party could have such a legal right, for then the position of banks and their account holders would be impossible. If the true legal title to the bank balance belonged to someone other than the account holder under the banker-customer contract, the bank can never, in principle, know who it owes a debt to, and they are placed under an enormous risk they can do nothing to prevent every time their customers pay funds into their accounts (see further Matthews (1995b); Smith (1997), at 329–30).

Policy considerations

12.61 Even when the claimant clearly establishes a right to traceable proceeds, are there any cases where he should be disentitled from claiming those proceeds? This is very much a matter of one's judgements about fairness between the parties, and the author shall not press his own views. But there are three cases which are commonly considered. The first two involve injecting an element of 'but for' causation into the analysis.

12.62 Discussing Hayton (1995), 11–12, in Foskett Lord Millett said (139F–140A):

> *Professor Hayton is dealing with the ... case of the party who decides to purchase an asset and has the means to pay for it, but who happens to use trust money which he has received innocently, not knowing it to belong to a third party and believing himself to be entitled to it. In such a case his decision to use the trust money rather than his own is independent of the breach of trust; it is a matter of pure chance. This is a problem about tracing, not claiming ... It is a difficult problem on the solution to which academic writers are not agreed.*

Lord Millett is wrong when he says this 'is a problem about tracing, not claiming'. The whole problem of fairness arises because the trust beneficiary can clearly trace the trust money into the asset; the question is whether he should have a claim to it, given that on a 'but for' causal analysis, the innocent third party would have acquired it in any event.

p. 310 **12.63** Hayton and Mitchell ((2005), 12–97) argue that where the trustee buys an asset with both trust money and some of his own, but the facts indicate that but for the use of the trust money he would not have been able to acquire the asset at all, then if the asset rises in value the beneficiary should be able to claim ownership of the whole asset subject to a charge in favour of the trustee for the value he put in. For example, if the trustee because of his credit record is unable to borrow money to buy a house, and puts in £40,000 of trust money with £10,000 of his own to buy a house now worth £100,000, why, Hayton and Mitchell ask, should the beneficiaries be restricted to a co-ownership share of four-fifths, ie £80,000? Should they not be able to claim the whole subject to a charge in favour of the trustee for the return of his £10,000 plus interest?

12.64 It is always worth remembering in respect of tracing and claiming that the more favourable the rules are to B, the less favourable they are not only to T or 3PR but also to their creditors. It is often said that their creditors cannot benefit any more than T or 3PR from money received in breach of trust, and this is quite right. But notice how the tracing rules are 'bent' against wrongdoers. Consider this simple case of insolvency. T's bank account balance stands at zero, but then he misappropriates £10k from B's trust, depositing the money into his account; T then borrows £10k from L, and deposits this money into his account; T then buys shares with £10k from the account, which rise in value to £15k, and dissipates the rest of the money in the account leaving no traceable proceeds. Besides the shares, T has no other assets. T is then declared bankrupt. If B can apply the cherry-picking rule here because T is a wrongdoer, then B can claim the entire interest in the shares, and L will recover nothing in T's insolvency (see also Penner (2012), 1007). Would it not be fairer, in this case, to treat B and L as co-innocents for the purposes of tracing and claiming?

Further reading

Birks (1997a)

Conaglen (2011)

Matthews (1995b)

Penner (2009b, 2012, 2017)

Smith (1994, 1997, 2009)

Must-read cases: *Foskett v McKeown* (2000); *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd* (2018); *Republic of Brazil v Durant* (2015)

Self-test questions

1. Distinguish following, tracing, and claiming.
2. What are the various rules which govern tracing amongst innocents? How should the court decide to apply one rather than another?
3. p. 311 What is the cherry-picking rule, and how is it justified?
4. What are the current limits on backwards tracing? Should those limitations be relaxed?
5. Are there any cases in which it would unfair strictly to apply the rules of tracing and claiming?
6. Tom is the trustee of the Higgins family trust. He misappropriates £30,000, which he pays into his bank account raising the balance to £40,000. He makes the following payments from his account. He buys shares for £5,000, which are now worth £10,000. He uses £20,000 to pay off the mortgage on his flat. He then adds £10,000 of his own to the account, raising the balance to £25,000. He gives £10,000 to his son, Ted, who is ignorant of the source of the money. Ted uses it to buy ten cases of vintage wine; he drinks up five of the cases, and lays down the rest. Tom dissipates the remaining funds in the account.

   Discuss the liability of Tom and Ted.
7. Max, a trustee, transferred £100,000 from the trust account into his own bank account, raising the balance to £150,000, immediately using £120,000 to buy a London flat. Six months later, he sold the flat for £180,000 and spent the entire amount at auction for a painting that has since been independently appraised to be worth only

£100,000. Of the remaining £30,000 in his account, Max used £20,000 to clear a gambling debt with Horatio, and gave £10,000 to his son, Philip, who used the money to pay off his credit card bill, the charges on which he had mostly incurred in taking holidays over the past several years. Max is now bankrupt. Advise the beneficiaries.

8. Tom is a director of two private companies, A Co and B Co Tom buys borrows $100,000 from his bank to buy a sculpture, intending to misapply money of A Co to pay off the loan. Tom buys the sculpture, but instead uses money of B Co to discharge the loan. Advise B Co.

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