have acted unconscionably. So the addition of the standard of unconscionability will tend to absolve people from liability who would otherwise have been liable for knowing receipt on the basis that they knew about circumstances which should have put them on inquiry.

The net effect in this area of the law has been a dilution of liability. Whereas people would once have been expected to make inquiries once something suspicious came to mind, now the law will not hold them liable if they fail to make any such inquiries. That tells us a lot about the lowering standards in our law. The courts of equity are permitting people to get away with lower moral standards than before. At the same time, however, commercial regulation is becoming more intense. For example, the Money Laundering Regulations 2007 impose obligations on deposit-takers to make active inquiries in relation to any 'suspicious' activity, and ss. 327 and 328 of the Proceeds of Crime Act 2002 require banks specifically to make reports to the authorities of any suspicious activity. It is peculiar that banks acting as trustees may be required to make money-laundering reports when trusts law does not require that of them.

Debate 3

What does is mean to be dishonest?

PHILOSOPHICAL QUESTIONS AROUND DISHONESTY

The question of what constitutes dishonesty interests philosophers as much as anyone.

Ask yourself the following question: What *is* an honest person? Who among your family, friends and acquaintances is 'an objectively honest person'? Do they live a perfect life? Do they never tell lies, not even 'little white lies' to make their friends feel better? Did they never lie as a child? Do they never claim to be busy on a lazy day off when they are accosted in the street by a charity worker with a clipboard? Are there likely to be any secrets in their Internet browsing history? What are the attributes of this perfect citizen? Do they act honestly in every aspect of their life: for example, how do they eat their sandwiches honestly? How does the objectively 'honest person' differ from someone who is a 'reasonable person'? Our suspicion might be that the standard of the 'honest person' which the judges would use would resemble very closely the attitudes of each individual judge.

QUESTIONS ABOUT LYING AND DECEPTION POSED BY PHILOSOPHERS

One question which is currently interesting many philosophers is the following one: What is lying and what is deception? This is an important question for private law in relation to the tort of deceit (i.e. fraud) and in relation to concepts like dishonest assistance. Of course, the concept of dishonesty need not be coterminous with the concept of lying, nor with the concept of deception. One can deceive oneself by believing something which one wants to be true (that a pet will survive

an operation, that a friend did not commit a crime), but that does not mean that one is necessarily dishonest. However, the models of lying and of deception which have been posited by the philosophers are useful because they throw into relief both what is unique to the legal models of dishonesty and what is problematic about trying to erect an objective standard of what is an honest person in equity or a reasonable person at common law.

Carson's definition of lying, and its relation to fraud and dishonesty in law and equity

Thomas Carson, in his book *Lying and Deception*, posits the following definition of lying.[29] A person tells a lie if:

- that person makes a false statement;
- that person either believes that statement to be false or probably false, or does not believe that it is true; and
- that person in some way warrants the truth of that statement.

One key difference between this statement and the common law concept of fraud in the tort of deceit is that it is sufficient for the tort of deceit that the defendant was reckless, or even just careless, as to whether their statement was true or false.[30] Carson wants the liar consciously not to believe it is true; whereas common law liability is met if that person induces another person to rely on the statement in a situation in which they might not know whether the statement is true or not. Thus, legal liability effectively imposes a positive obligation on the makers of such statements not to be careless about the content of their statements, on pain of compensating their listeners for reasonably relying on their inducements. For Carson, there need not necessarily be an inducement to do anything: rather, the lie exists in itself.

The key difference between Carson's model and dishonest assistance is that the model in dishonest assistance is the behaviour of an objectively honest person in such a situation. Dishonest assistance is therefore not limited to lying but rather covers any act which is different from what an honest person would have done in the circumstances. While dishonest assistance would encompass lying on the model set out by Carson, it extends much further than that. As with the test of knowledge in unconscionable receipt, it is suggested that dishonesty in dishonest assistance includes failing to make the inquiries which an honest and reasonable person would have made to establish the true facts, and so is not limited to a belief that the statement is untrue. Again, the law is impliedly imposing an obligation on people to make reasonable inquiries into the facts on pain of bearing the loss that another person suffers by means of a breach of trust. Therefore, stranger liability in general terms is involved in a normative project (which requires people to act in particular ways so as to evade liability) which is not present in the philosophers' models of what constitutes dishonesty.

[29] T. Carson, *Lying and Deception* (Oxford University Press, 2010), 24.
[30] *Peek v Gurney* (1873) LR 6 HL 377.

Lying, 'bullshit' and law

The philosophers' models of deceit are passive in the sense that they do not seek to impose obligations on ordinary citizens like the law does. This is unsurprising, because law is necessarily concerned with allocating liabilities for suffering or having to compensate losses, and thus for creating standards of good behaviour at the same time. However, the philosophers do also consider actions, and where the lines should be drawn between different types of actions and their honesty. So, Carson's definition of lying differs from Frankfurt's concept of 'bullshitting' from his book *On Bullshit*.[31] For Frankfurt, the important thing about bullshit is that the person making the statement does not care whether the statement is true or false. Instead, the bullshitter is simply attempting to convince his listeners to agree with him.[32] Frankfurt's model of bullshit comprises three things:

1. an intention to deceive;
2. not necessarily lying; and
3. being unconcerned with the truth of what is said.

Frankfurt considers that bullshitters are different from liars in that liars must be concerned with the truth of what they are saying (and therefore are consciously saying something they believe to be untrue), whereas bullshitters are concerned only with the outcome of getting other people to believe whatever they say. So, a politician may make a speech which seeks to convince us about the correctness of a military intervention in another country on the (mistaken) basis that that other country has weapons of mass destruction which can be used against us: Frankfurt would consider that that politician is primarily concerned with convincing us about the need for military intervention, but is not necessarily concerned with whether or not there are such weapons in existence, and therefore is not a liar because he is uninterested in the weapons.

There are two problems with this approach. First, the politician is probably actually very concerned about the presence of the weapons, and is operating on the basis of a mistaken perception of the risks which has caused that politician and the people around them to ratchet up their rhetoric to a point where they can gain popular support to carry out the course of action which they consider to be necessary.[33]

---

[31] H. Frankfurt, *On Bullshit* (Princeton University Press, 2005).

[32] Interestingly, even though it is my practice to use the feminine form for hypothetical pronouns (she, her, etc), I have immediately, unconsciously lapsed into referring to bullshitters as being male.

[33] It is unlikely that an elected politician would bomb another country for fun. However, it is likely that an elected politician (especially one with no experience of war nor of security services) would defer to all of the incorrect, over-excited misinformation being provided to him by the security services, with the result that he comes genuinely to believe that there is a threat (because people who know about these things tell him that they think there is a threat) and therefore seeks to convince everyone else of the course of action which he has come to believe is necessary. It was on exactly this basis that the Hutton Inquiry decided that Tony Blair genuinely believed that the invasion of Iraq was necessary in 2003, that he consequently urged an invasion of Iraq on the British people, and that he was later shown to have been mistaken about the reasons for war which he gave at the outset. It was a case of negligence and error on such a terrible scale that it caused much popular opinion to think that it must have been deceit.

Bullshit and rhetoric are similar here because both are designed to convince the listener of the correctness of a particular course of action. The second problem is that carelessness about the content of what is said is so similar to lying consciously as to be the moral equivalent of conscious deceit. This is why the laws on dishonest assistance, on unconscionable receipt and on fraud all encompass situations in which a person has failed to ascertain the facts or to understand the circumstances (within reasonable limits) before causing or allowing others to suffer loss.

A worked example of the difficulties with dishonesty, bullshit and the reasonable person

Let us take an example of the questions we have considered so far in this chapter. Suppose that the Chief Executive Officer ('CEO') of an investment bank tells the Press that the news that his bank has suffered a loss of $100 million, as a result of a disastrous series of speculations conducted by a poorly supervised trader, is merely 'a blip, because this bank can absorb a loss of $100 million without any problem'. Was he being dishonest if the total losses caused by this trading activity eventually reach more than $6,000 million?[34] These are all the facts that we have for this hypothetical example: when the CEO spoke, the losses were known publicly to be $100 million, but only a couple of months later the true size of those losses would transpire to be $6,000 million (or, $6 billion). Suppose, for the purposes of this hypothetical example, that it is impossible to prove whether or not the CEO had been informed that the losses which the bank stood to suffer were much greater than $100 million.[35] By making that fact unknown, we can explore what we want the law to be in this area, and what might cause us to decide one way or another if the facts turn out to be different. So, was the CEO being dishonest (in a legal and in a non-legal sense) when he spoke to the Press about losses that were known publicly to be at $100 million as being merely a blip, when they would reach $6 billion in a few weeks? Or was the CEO 'bullshitting' when he dismissed the initial losses as being merely a blip: that is, was the CEO consciously misleading the public, or was he unconcerned about the truth of his statement?

If the CEO's intention when he spoke to the Press was to calm the markets, to calm investors in the bank and also to ensure that customers kept their money with his bank, was he simply attempting to create good public relations by minimising the risk to the bank? And, if so, does good public relations involve deceit or bullshitting? After all, as we know from the collapse of US investment bank Lehman

[34] This hypothetical example is only very loosely based on the JP Morgan Chase losses of US$6.2 billion on the so-called 'London Whale' trades. Losses were initially put at a few hundreds of millions of dollars but quickly rose to the much larger figure of US$6.2 billion. JP Morgan Chase was disciplined by its regulators for having failed to inform the regulators when it realised the true scale of its losses. During this mini-crisis, the bank's CEO dismissed the problem as being merely 'a tempest in a teacup'.

[35] This is a sensible approach for us to take as lawyers. Once a trial judge has found what the facts *are* then debate is closed off in many senses. The more interesting debates about the nature of the law require us to struggle without the luxury of a definitive statement of what actually happened. Instead we need to test where the boundary lines should be placed.

Brothers in September 2008, if a bank loses the confidence of the marketplace and its investors, then that bank may see its capital erode very quickly and other banks may refuse to deal with it, thus causing it to nose-dive into insolvency. Therefore, was the CEO trying to fend off that sort of market reaction? In his own mind, was the CEO determined above all else to protect his bank from this short-term crisis in confidence in his bank? If so, he may have been bullshitting in that instance because he wanted to convince the markets of something untrue – that the losses were comparatively small and could be absorbed easily by the bank – in a situation in which he did not care about the truth. All he cared about was the outcome: investors continuing to invest and other banks continuing to deal with his bank. Perhaps there were people working away in his bank while he was speaking, trying both to calculate the potential size of the losses in the future and to minimise those losses.

Of course, much would depend on what the CEO actually knew at the time he made the statement. If the bank was so badly managed that no one in senior management actually knew how large the losses would become, then we might say that the CEO was both negligent (in making a public statement without knowing what the true position was) and nevertheless bullshitting (because he made the statement with the sole objective of achieving a positive outcome for his bank without actually knowing the truth). In defence of the CEO, it might be said that he had asked all the questions he needed to ask internally and that no one could have foreseen the losses which resulted. In such a situation, it could be said that the CEO was misinformed or self-deluding about the profitability of his bank, but not lying because he himself had no reason to believe the losses would have grown beyond $100 million.

If the CEO thereby caused a pension fund (a trust) to invest in his bank, that might cause the trust to suffer a loss when the shares in his bank fall in value when the true extent of the losses are published. If that triggered a breach of terms of pension fund's trust instrument,[36] would the CEO be personally liable for dishonesty? It might be argued that he assisted the breach of trust by inducing the trustees to invest in his bank by under-estimating the impact of those losses; alternatively, it might be argued that his remarks in the Press were too remote from the trustees' decision to invest. Significantly, if the CEO was making those statements precisely to encourage investment, we might argue that he should bear a direct liability to all investors. The question would be as to his dishonesty here. What would an honest person have done in the circumstances?

The more serious suggestion would be whether the CEO was motivated, regardless of the truth, to encourage investors to invest new money with his bank (in the form of buying shares) or other customers to enter into large, new transactions with the bank, as well as convincing existing investors and customers to maintain

[36] E.g., the pension fund's trust instrument may impose a requirement on the trustees as to the credit worth or 'suitability' of any bank or other company in which they invest, something which might be harmed by the revelation of the true size of these losses.

their existing transactions. In that situation it could be said that the CEO was committing fraud where, careless of the truth of his statement, he was seeking to induce large numbers of investors and new customers to deal with his bank regardless of the unfolding story. It could be argued more convincingly that there was a direct link between those new transactions and his purpose in making the statement: one which an objectively honest person might not have made.

All of this discussion leads us is into a difficult set of questions, from the perspective of the law on dishonest assistance, as to what is meant by 'dishonesty'. What would an honest person do in these circumstances? That would be the *Tan* model of this test; but later cases (as discussed above) have emphasised the need to consider the question in the circumstances of the defendant. The question is almost more difficult if it is changed to be: What would an honest person in the circumstances of the CEO (needing to protect his bank from falling in the markets) with his knowledge and experience (and a mindset which convinced him to put the short-term interests of the bank first) do? There are very few bank CEOs in the world. They are not like ordinary people – not least because of their personal wealth, their power within their multinational organisations and beyond those organisations, and their shared belief in free markets with as little financial regulation as possible. If all of those circumstances are to be taken into account then it is more likely that we would excuse a CEO who wishes to protect his bank, because our objectively honest person becomes an objectively honest person whose role is to maintain the viability and profitability of a multinational investment bank, and who is a person whose experience has also led him to believe that those markets should be free from moral and regulatory constraints. Alternatively, we might take the view that this last set of 'experiences' shades into a purely subjective mindset and so ought to be ignored for the purposes of this test.

There is another possible approach which is based on a utilitarian attitude[37] to the need for markets and banks to remain operational, even at the expense of a little transparency all the way. Such an objectively honest person might take the view that fending off questions from journalists with a little bullshit is entirely reasonable if it will keep the bank solvent and allow business to continue. The CEO may have a genuine belief in the virtues of maintaining the good standing of his bank so that its failure will not cause the sort of impact which the failure of Lehman Brothers caused to the world economy in 2008 when it collapsed. This might seem to us to be objectively more acceptable than a mere desire to avoid the bank suffering short-term losses: if the CEO was simply trying to keep the bank afloat so that he could receive a personal bonus, then that would appear to us to be unacceptable and possibly even corrupt; whereas a desire simply to maintain order in the financial markets, and so to avoid the sort of harm that is caused by a crash, would appear to be more laudable. What is interesting is that the impact of the statements made in the Press remains the same: investors, regulators and

[37] Utilitarians generally accept a little harm to individuals if the larger benefits to society as a whole justify it.

customers have been misled. What is at stake is whether or not the CEO's personal motivations for saying what he said should make him liable for any losses that resulted.

Alternatively, if all of these circumstances were seen through the eyes of 'the man on the Clapham omnibus'[38] then it might be more likely that we would not accept the probity of the CEO's subjective concerns about keeping his bank in profit, and we might focus instead on his failure to establish all of the facts before he spoke, his underlying desire to keep his business profitable before anything else and so forth. Through those eyes, the CEO might appear to have been self-interested, and therefore wilfully blind to true facts and the harm that might result. We might think that the CEO was taking a risk in the hope that his personal objectives would be achieved.

In 2014, an ordinary member of the public might be less sympathetic to the CEO's actions, particularly at a time when banks are blamed for the economic aftermath of the financial crisis which they caused. For example, the Parliamentary Commission on Banking Standards reported only in 2013 on the many failures of business probity which it had found in banks, so those concerns are not irrational because that was only one report among many to come to the same conclusions.[39] Which raises another question: Is the honest or reasonable person supposed to be divorced from the short-term prejudices of much of the population? Or should the objectively honest person stand outside short-term popular opinions, and thus stand outside time and outside society? If bankers are believed to be selfish, greedy and untrustworthy because of the well-publicised actions of some of them, then should that prejudice be taken into account in deciding what an honest person thinks ought to have been done?

If the honest person has no knowledge of complex investment banking, is that person's mindset the appropriate starting point for measuring the actions of investment bankers? Alternatively, if the benchmark for the honesty of investment bankers is taken to be other investment bankers, then that simply has the effect of closing investment banking off from the ethics and morals of the rest of society, which is clearly undesirable because it prevents the ethics of banking from being connected to any general ethical system, and it may also lead to an entirely separate area of law being created for bankers with different norms from the rest of the law.[40]

Another approach, in relation specifically to banking, would be to look at the regulatory codes (drawn from statute) which apply to banking and use them as part of the objective yardstick. For example, the Financial Conduct Authority's *Principles for Businesses* rulebook in the UK, which sets out the 'high-level' principles by reference to which all regulated persons are to be regulated, requires that

[38] Which is the standard usually used in contract law for identifying the reasonable person.

[39] See Alastair Hudson, *The Law of Finance*, 2nd edn (Sweet & Maxwell, 2013), Ch. 45 generally.

[40] Of course, some would argue that this happens already as lawyers with different specialities split into camps servicing different clients, with different judges and different academics falling into different fields which mirror those in practice. Are commercial lawyers really using the same legal norms as family lawyers, for example?

all such people act 'with integrity', in the best interests of their clients and so forth. By comparison with dishonest assistance in equity, we might say that this principle of 'integrity' could be read in parallel with the equitable requirement that people act in good 'conscience'. Consequently, the contents of the detailed financial rulebooks could be used to establish a code of objective rules governing the activities of bankers. So, where those regulations provide that 'all communications with the public must be fair, clear and not misleading', that might embolden us to say that the CEO was misleading when he sought to encourage us all to believe that his bank had suffered only small losses which were a fraction of the size of the total losses which would materialise in the future. This is more so when the rulebooks also place a personal obligation on that CEO to ensure that there are robust and effective management systems within the bank to identify losses, to supervise employees and so forth. If the CEO had a regulatory obligation to ensure that these sorts of trades were monitored properly, would it be acceptable for him to claim to have had no knowledge of the true position at the time when he made his statements to the Press?

So, one of the real problems in relation to the concept of dishonesty is knowing who the honest person is; just as the problem for the common law is knowing who the reasonable person is. Instead, it will commonly be the case that the judge will simply end up asking whether or not they thought that the defendant acted in a way which the judge considers to have been honest.

11

TRACING

INTRODUCTION

The law on tracing is problematic from its very core. Using tracing, property rights in one item of property may be transferred into different items of property, and even translated into entirely different sorts of proprietary and non-proprietary rights in the form of charges, liens and constructive trusts by way of remedy.[1] Consequently, the claimant can acquire ownership rights against items of property in which the claimant had never previously had any rights. Clearly this form of action achieves justice for claimants who have had property taken from them by fraudsters and other wrongdoers; it also provides a different quality of justice for those who have had property taken from them without their consent in other ways.

What is clear from the case law, in cases such as *Re Diplock*,[2] is that wrongdoing is not a necessary prerequisite for tracing to take place. In that case, trustees mistakenly paid money to a charity; it transpired later that the relevant clause in the trust instrument was ineffective. The beneficiaries were entitled to trace in the wake of the property which had been passed to the charity. The charity was innocent, but the beneficiaries were still entitled to trace so as to protect their original property rights. At that level, it appears that even equitable tracing is not concerned with right and wrong. There are questions as to whether or not constructive trusts imposed as a result of tracing actions are really dependent on demonstrating unconscionability, or whether they are imposed solely to vindicate the claimant's original property rights.

The particular strength of English law tracing is that it permits claimants such as the victims of theft from their electronic bank accounts to pursue their lost funds into the sorts of mixed bank accounts into which criminals usually pay funds of this sort so as to distance them from their original source. At this point many civil code jurisdictions forgo any proprietary rights against the thieves in favour of personal claims akin to tort. The problem with a personal claim in this

[1] For further details on the relevant principles in this area, see A.S. Hudson, *Equity & Trusts*, (Routledge, 2014) Ch. 19.
[2] [1948] Ch 465.

context is that the thieves will usually have paid the money through front companies which will have been wound up, and they will have salted any assets away so that they personally appear to have no assets against which the victims could proceed.

The underlying issue with tracing is as to the basis on which property rights in item *x* may be translated into item *y* when the claimant has never previously owned *y*.[3] For example, if the claimant was the sole beneficiary under a trust over shares, how do we justify those equitable property rights being translated into land which was acquired with the sale proceeds of those shares, after they were paid into a mixed bank account which had been held on trust for another person?

In the background there is a constant sense that there is something *just* or *equitable* about that beneficiary being entitled to take rights in the land if it was bought with money which was taken unlawfully from their trust fund. It just seems *right* to an English lawyer somehow that the claimant is able to get something. However, as will emerge below, the courts have been clear that tracing does not operate on the basis of 'justice'; rather, the House of Lords was clear that tracing operates on the basis of hard-and-fast property law.[4] The vindication of property rights, ultimately, must be the justification for tracing actions. Without a lawful reason for using the trust fund in this way – for example, if the trustees had been entitled to sell the shares, or if the recipients of the funds had given full consideration for them or had changed their circumstances in reasonable reliance on receipt of that property – there is something satisfying in permitting the beneficiary to recover either their original property or, if that is impossible in practice, any property which can be demonstrated to have been substituted for that property.

The principal issue remains whether that tracing action is predicated on the wrong which was committed by the first defendant (typically the trustee) in taking the claimant's property unlawfully, or whether there is a qualitatively different type of wrong in a second defendant retaining that property or whether it has another basis. The difficulty with basing tracing on the first defendant's wrong is that the claimant would only have a personal claim against the defendant. Such a personal claim would be limited in practice by any exclusion of liability in a clause in the trust instrument, which would be decisive if the trustee was merely negligent in the management of the trust: that is, the trustee benefiting from such a provision would be able to resist any personal claim. A personal claim against any other defendants would be difficult to maintain unless they had been fraudulent or negligent themselves in inducing a breach of trust (as was discussed in the previous chapter). Moreover, a personal claim will work only if the defendants are solvent and have assets in a jurisdiction against which the tracing action can be enforced.

[3] A. Burrows (2001) 117 *LQR* 412.
[4] *Foskett v McKeown* [2001] 1 AC 102.

If the basis for the action is not a wrong committed by the first defendant or any other person, then the explanation must lie in another area of law. The explanation that is advanced in relation to unjust enrichment, as is explained below, is that a tracing action reverses any unjust enrichment which the recipient of the property may have taken at the claimant's expense, subject to a defence that if the recipient had changed their position in such a way then it would be unjust to require that the property is given up to the claimant. This approach has complications in relation to the establishment of the extent to which the defendant has been enriched and whether that matches the loss to the claimant. The further problem is that the law has historically not been based on unjust enrichment.[5] Rather, the law has been based on property law and the need to protect the property rights of the owners of property against non-consensual abuse by others. The concept that has been used is that of 'vindication' of those property rights, as is considered below. The line between equity and unjust enrichment thinking is explored below. First, we consider the ways in which equity permits tracing into mixed funds; that discussion segues into a second debate about the nature of the remedies which equity permits. Then the ground is set for a consideration of equity and unjust enrichment to round off this chapter.

Debate 1

Which methodology of equitable tracing is better?

Our first debate within the law of tracing concerns the appropriate methodology for carrying out the tracing process in equity. (The other debates tend to revolve around theoretical questions as to the categorisation of tracing within private law, as is considered below.) Tracing is a process in which a claimant seeks to identify property which is a substitute for their own property and against which they will seek to bring a claim in place of their original property.[6] The precise remedy which is sought is a separate question from the property against which the legal action is commenced, as is discussed below.

When the claimant's original property (or its traceable proceed) has been mixed with other property, then that target property can only be traced in equity (and not common law). Equitable tracing is only available under the law as it is currently organised if the claimant's original property had been held on trust, or if there was some similar equitable proprietary right which would call the equitable jurisdiction into play. The debate which is considered here is whether the methodology should proceed under the old 'first-in/first-out' approach, or a newer, proportionate share approach.

[5] See the House of Lords decisions in *Westdeutsche Landesbank v Islington* [1996] AC 669 and *Foskett v McKeown* [2001] 1 AC 102.
[6] Ibid.

The old approach was established in *Clayton's Case* in the early nineteenth century.[7] In essence, *Clayton's Case* held that when tracing of money held in current bank accounts was being conducted into a mixture, then the property in that mixed fund would be deemed to be allocated in accordance with the order in which the claimants contributed to that mixture: the first people to put property into the mixture would be deemed to be the first people to take property out of that fund, the second contributor to that account would be the second to take property from that account, and so on. This approach is based, it is suggested, on older models of property law which were concerned with tangible property, even though *Clayton's Case* itself was concerned specifically with money in current bank accounts. This approach makes sense in relation to soft fruit warehouses, for example. If you were storing oranges in a wholesale warehouse, then you would ship out the oldest oranges in the warehouse when an order arrived because that would prevent those oranges from spoiling; whereas, if the most recent oranges were shipped out first, then the old oranges would continue to moulder at the back of the warehouse. The first oranges into the warehouse would be the first oranges to go out of the warehouse.

The alternative approach has been used in Canada.[8] In essence, when there is a mixture of property, the contributors to that fund take rights against that mixture (and any property acquired from that mixed fund) in proportion to their contribution to it. So, a claimant who had contributed £20 to a fund of £100 (i.e. one-fifth of that fund) would be entitled to take one-fifth of any property which resulted from that mixture. So, if the £100 was invested in shares which increased in value to £200, then that claimant would be entitled to one-fifth of those shares which are now worth £200.

The Canadian approach has not yet displaced *Clayton's Case* in England and Wales, even though there has clearly been a drift in the English cases towards the Canadian approach. The problem has been that the majority of cases have been decided in the High Court, and therefore the *Clayton's Case* approach has not been able to be overruled. However, the only Court of Appeal decision on point, in *Barlow Clowes v Vaughan*,[9] was not able to apply the proportionate share approach to its own facts.[10] In that case, Woolf LJ delivered a judgment in which he clearly suggested a preference for the proportionate share approach, identified the *Clayton's Case* approach as being merely a fiction and suggested that fictional doctrines like *Clayton's Case* should not be used when their results would be 'irrational or arbitrary'.

[7] (1817) 1 Mer 572.
[8] *Re Ontario Securities* (1988) 52 DLR (4th) 767.
[9] [1992] 4 All ER 22.
[10] In that case, the government was seeking to recover assets taken from investors by a fraudulently operated financial institution. The government was standing in the shoes of the investors, because the government had already bailed the investors out and was attempting to recover the bail-out money. The large number of investors and investments meant that the Court of Appeal had decided it would be impossible to identify the proportions which were attributable to each investor, and in any event it was unnecessary because the government was simply tracing into the whole of the lost investments.

As a result, later High Court decisions have refused to follow *Clayton's Case* on the basis that its application would have been irrational and arbitrary on their particular facts, thus following Woolf LJ to the letter.

The question, then, is which is the better approach? The first-in/first-out approach has the following problem: if two people contribute equally to a mixture on different days, and half of the mixture is used to buy profitable shares on one day and then unprofitable shares are bought with the other half on another day, then the first contributor would take all of the profitable shares and the second contributor would be left with all of the unprofitable shares. Given that the two contributors in this example have contributed equal amounts to the fund, it is irrational and arbitrary for the first contributor to take all of the profits when the second contributor acquires less valuable shares. The argument accepted in Canada is that the fairer approach is to share the profitable and the unprofitable shares equally between them, because there is no reason to benefit one contributor over the other. Things might be different if the first contributor's trust had been created originally to acquire those specific shares, in which case allocating them to the person who was intended to acquire them all along would be neither irrational nor arbitrary.

Debate 2

Why does a proprietary doctrine use non-proprietary remedies?

The House of Lords in *Foskett v McKeown* (above) confirmed that tracing is part of property law; and yet several of the remedies which follow on from a tracing action are not proprietary remedies strictly so-called. There are four principal remedies available in relation to tracing actions: liens, charges, constructive trusts and subrogation. There is no definitive, comprehensive judicial guidance as to which remedy should be used in which circumstances, once a right to trace into identified property has been established. There are some judgments which comment on the utility of this or that remedy in a particular context, but there is no *comprehensive* discussion of this phenomenon. If we confine ourselves for the moment to equitable tracing, we can see the difficulties in selecting the appropriate remedy from the following introductory discussion.

Take, for example, the equitable lien which is used in many tracing cases. Tracing is a proprietary process in which a claimant seeks to establish proprietary rights over identified property, which flow from some equitable interest in some other property, which has been traced into that identified property which constitutes the subject matter of the claim. If, however, the claimant is seeking to trace her proprietary rights in the original property into the property held by the defendant, then why is she forced to rely in some cases on a merely *possessory* remedy such as the equitable lien to provide her remedy?

A lien, in the strict sense, does not grant the claimant a proprietary remedy. A lien merely grants a right of possession over property, so that the claimant can

detain that property until the defendant pays her whatever sum of money may represent the loss to her of her original property. The holder of that right must apply to the court before the possessory right granted by a lien entitles the rightholder to treat the property as though she has ownership rights in it by selling it. Similarly, a charge does not, strictly speaking, grant a property right to the rightholder; whereas a mortgage (i.e. a charge by way of legal mortgage) does grant a property right to the mortgagee, which can be registered at the Land Registry if it relates to land. Thus, a chargeholder must petition the court to be allowed to sell the charged property. In both cases, a right which requires the permission of the court to exercise that right cannot be a complete right in that property.

There is nothing objectionable in using these sorts of doctrines to provide remedies after the tracing process has been completed, because they provide pragmatic responses to tracing (and have done for centuries). Nevertheless, it is odd that they are not strictly proprietary. By contrast, the constructive trust does grant equitable proprietary rights to the beneficiary, and as such may be a preferable form of right if the claimant wants to take ownership of the property. If the claimant would prefer to acquire a right in money then a lien or a charge will provide her with sufficient security to do so.

Debate 3

Is tracing concerned with property or unjust enrichment?

The Oxford Restitution School, particularly in the work of Professor Lionel Smith,[11] has argued that the law of tracing should be considered to be a part of unjust enrichment law as opposed to being a part of property law. The argument is predicated on the idea that when property is taken from a person (for example, a beneficiary under a trust) and passed to another person, that other person has been enriched at the expense of the previous owner of the property. The question would be as to the remedy to be applied. The original model of restitution, as examined in Chapter 3, considered that it would be a resulting trust which reversed the unjust enrichment by subtracting the enrichment from the defendant. That model of resulting trust was ruled out by the House of Lords in *Westdeutsche Landesbank v Islington*.[12]

The competing approach is that the law of tracing should be considered to be a part of property law, and that it has nothing to do with reversing unjust enrichment at all. A masterly summary of the arguments has been presented by Graham Virgo.[13] In the House of Lords in *Foskett v McKeown*,[14] Lord Millett ruled

[11] L. Smith, *The Law of Tracing* (Clarendon Press, 1995).
[12] [1996] AC 669.
[13] G. Virgo, 'Vindicating vindication: *Foskett v McKeown* reviewed' in A.S. Hudson (ed.), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, 2004), 203.
[14] [2001] 1 AC 102.

definitively that tracing is a part of property law as opposed to being a part of unjust enrichment:[15]

> 'The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no "unjust factor" to justify restitution (unless "want of title" be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair, just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.'

It is suggested that this approach captures the purpose of the law of tracing. The law of tracing takes the approach that if a claimant loses item of property A, and if A is sold and the proceeds are used to buy item of property B, then the claimant should be entitled to trace her rights from A into B, thus grounding a right of some sort against B. The objective of tracing law is therefore to 'vindicate' the claimant's property rights which were originally in item of property A. Those property rights are traced from one item of property to another. Therefore, it is a proprietary doctrine. It is not limited to situations in which the unjust factors which are required by unjust enrichment law are present. Unjust enrichment law would require that there was a mistake or some similar factor; however, that is not the purpose of tracing law. Tracing law exists to protect the value expressed by the original property rights by tracing through different forms of property.

Foskett v McKeown was a perfect factual scenario to raise questions about the nature of tracing. In a slightly simplified form, the facts of that case were as follows. A father had taken out a life assurance policy over his own life in favour of his children and his wife. The policy would pay out approximately £1 million. There were five premiums to be paid for the insurance policy in amounts of approximately £10,000. The father was also a trustee of a trust, from which he took amounts of money in breach of trust to pay the fourth and fifth premium payments. The father later committed suicide, thus triggering a pay-out under the policy. The question was whether the insurance pay-out should go to the children, subject to an obligation to repay the £20,000 to the trust, or whether the beneficiaries of the trust should be entitled to trace their trust moneys into the last two premium payments on the life assurance policy and thus be able to establish rights in two-fifths of the total pay-out of £1 million. It was held that the beneficiaries were entitled to a proportionate share in the insurance pay-out.

Lord Browne-Wilkinson considered whether this area of law was concerned with wrongs or with a general discretion in the court to award whatever is considered fair, or whether it was a part of property law:[16]

[15] Ibid, 127.
[16] Ibid, 109.

> 'It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.'

Thus, tracing is allocated clearly by the House of Lords to property law. It is neither a zone for pure equitable discretion, nor is it a part of unjust enrichment. However, the choice of remedies available to the parties is part of the general equitable ability to match an appropriate outcome to the facts, as was discussed above.

THE UTILITY OF TRACING

One of the more useful applications of tracing law, and one of the reasons why the English jurisdiction is so popular among banking lawyers, is its ability to recover money which has been laundered through successive bank accounts, misapplied by fraudsters, or treated similarly. Unlike civil code jurisdictions, in which these sorts of events could only be remedied by payment of damages in essence, English law enables a claimant to bring a proprietary claim. The advantage of the proprietary claim in relation to a money laundering or similarly criminal scheme is that the criminals will never leave any entity in the chain with enough money to pay damages; therefore, being able to identify the ultimate destination of the traced property means that the claimant will be able to recover its loss in a form which will defeat an insolvency and most criminal schemes.

VINDICATION OF PROPERTY RIGHTS 產權的辯護

Among the many ideas which teem in tracing law, an important concept which has been advanced within the unjust enrichment scholarship has been the idea of tracing being used in the 'vindication of property rights', in the writings of Graham Virgo.[17] The aim of this mooted head of restitution provides a basis for tracing which recognises that the claimant had rights in property before the unjust or wrongful act of the defendant which led to the defendant taking possession of that property. Lord Millett used this idea in *Foskett v McKeown*[18] to bolster his explanation that tracing is part of property law in that it vindicates the original property rights of the claimant by pursuing them into substitute property.

The etymology of the word 'vindicate' is interesting. While it has a happy coincidence with the Roman action of *vindicatio*, the word 'vindication' culled from that Latin root also has a sense of 'avenging' as well as 'restoring'. In common with what has already been said about restitution for wrongdoing in the preceding section, the notion of vindicating property rights would tally with a sense of

[17] G. Virgo, *The Law of Restitution* (Oxford, 1999), 656.
[18] [2001] 1 AC 102.

punishment in the treatment of those who have wrongfully taken possession of another's property.[19]

Counter-arguments

Birks objected to the idea of vindication in tracing law on the basis that it described a motivation for permitting tracing but does not tell us what has triggered the tracing process. Unjust enrichment specialists prefer that something like mistake or undue influence has triggered the tracing process.[20] The concept of vindication tells us why we might want to trace, but not the legal basis for the action. The counter-argument would be that it hardly matters, because vindication tells us that it is any non-consensual interference with the claimant's property rights which entitles the claimant to pursue her property through a tracing or following process. This is predicated on a high-level principle of the need to protect property rights, and not on the sort of detailed taxonomy on which Birks insists. The Oxford School has persisted with the idea that tracing should operate on a basis akin to civil code attitudes – i.e. that the precise basis for the claim must be demonstrated from a taxonomic list of claims – and on the basis that there must be a distinction between claims to the claimant's original property and claims to substitute property.[21] As to the second point, the distinction between following and tracing claims in *Foskett v McKeown* does recognise that distinction.

WHETHER THERE SHOULD BE ONE FORM OF TRACING OR TWO

There is a strong argument to the effect that there is no need for one set of tracing principles at common law and another set of principles in equity. Lord Millett was clear in *Foskett v McKeown* that there is 'no sense in maintaining different rules for tracing at law and in equity'.[22] Given that tracing is a process which is distinct from the claim which may be brought against the traced property once it has been run successfully to ground, Lord Millett argued that it could not matter whether that detective work of identifying the target property was conducted under common law or equitable principles. His Lordship was clear, however, that his judgment was not to be read as merging the two doctrines, because that would be a matter which would require further consideration. In an essay titled 'We do this at common law and that in equity',[23] Professor Burrows has also criticised the persistence of the division between the two codes. Professor Birks has gone further,[24] pointing out that at least since the decision in *The Mecca* in 1897,[25] the rule in *Clayton's Case* has been used 'on both sides of Westminster Hall', i.e. it has

[19] P. Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, 2000), 374.
[20] P. Birks, (1996) 26 *UWALR* 1; [2002] *CLP* 231.
[21] Burrows, above n 3.
[22] [2001] 1 AC 102, 128, citing P. Birks, 'The Necessity of a Unitary Law of Tracing' in R. Cranston (ed.), *Making Commercial Law* (Clarendon Press, 1997), 239; and Smith, above n 11, 120–30.
[23] Burrows, above n 3.
[24] P. Birks, 'Overview – Tracing' in P. Birks (ed.), *Laundering and Tracing* (Clarendon Press, 1995), 289 at 296.
[25] [1897] AC 286.

been used in common law tracing and in equitable tracing. This point is used by Birks as part of a broader argument that there are in many senses no real distinctions between common law tracing and equitable tracing, and in consequence that the two can be brought together in a unitary law of tracing.[26]

Traditionalists prefer that the division between the two codes of tracing is maintained.[27] Historically, the case law has taken the approach that tracing into a mixture could only be conducted in equity, and only if the claimant had some pre-existing equitable interest in the target property. For a traditionalist, no equitable doctrine should be prayed in aid unless the claimant had a right which justified the use of the equitable jurisdiction: so, parties to a contract had no right to access equity, but a beneficiary under a trust did. A part of the separation of these doctrines is founded on the idea that equity's breadth of remedies (when compared to the narrow range at common law) should only be used where an equitable interest is at issue.

The contrary approach to the traditional model is simply that there is nothing innate in this division between common law and equity. As the French philosopher Foucault suggests, law is simply the product of '*les choses dites*', that is, law is made up merely of things which are said, and therefore those things can be unsaid or said again differently. The current division between the two types of tracing is not innate; rather, it is simply the way in which the law has developed. Those rules could be restated in different ways. The modern approach is to suggest that the equitable tracing process which penetrates mixtures (something which common law tracing has never done) should be available to all sorts of tracing actions. The issue remains whether or not equitable remedies (such as charges, liens and even constructive trusts) could be available in circumstances in which there was no pre-existing equitable interest. It is suggested that the general conception of equity that was set out in Chapter 1 permits equitable doctrine to go anywhere that it is needed. It is the case, however, that doctrines like constructive trust could lose all coherence if they were made available in circumstances where there was no unconscionable conduct or in which there had not been any pre-existing equitable interest in the original property. Therefore, while the tracing process could be unified, the remedies which might flow from tracing would not all be easily applied across all forms of claim.

Debate 4

Do judges create property rights?

WHY ARE JUDGES SO SENSITIVE ABOUT CREATING PROPRIETARY RIGHTS?

It is a feature of the English property law system that judges are reluctant to create property rights out of thin air. Instead, they prefer to recognise their existence or

[26] Ibid.

[27] For an account of the rules that are presented in the traditional approach, see D. Hayton, 'Equity's Identification Rules' in Birks (ed.), above n 24, 1; or indeed any textbook on trusts law.

to establish their creation on objective, rational grounds. So, in relation to constructive trusts, the institutional constructive trust in English law is established on such a complex basis precisely because the judges do not want to be seen to create those rights out of thin air. Consequently it is said that the constructive trust arises automatically on the defendant's conscience being affected, and therefore it is said that the property rights attached to it are not created by the judges.

Tracing is particularly interesting in this regard. Professor Craig Rotherham considered tracing as operating in the following way:[28]

> '[T]racing can only be regarded as a remedial process that gives rise to new property rights – an understanding which cannot be easily reconciled with traditional notions of property.'

That must be right. The point of an action based on tracing is that it acquires rights for the claimant in property which he had not previously owned. Rotherham's book[29] is a study of judges' reluctance to be seen to be *creating* property rights, as opposed simply to observing that they are already in existence. It is also a study of the ways in which many doctrines in our legal system do create property rights out of thin air. Clearly, the tracing process leads to property rights being created over new property in place of the property which the claimant formerly owned.

THE EXAMPLE OF PROPRIETARY ESTOPPEL

What makes equity so difficult for the occasional visitor to it from other legal fields is that it is only really comprehensible as a complete whole. Taken as a whole, equity is built around the central idea that people must act in good conscience. More specifically, it is organised around the idea that equity will intervene to prevent a defendant from benefiting from any unconscionable act. On some occasions, this unconscionability is met by a proprietary response and on other occasions it is met by a merely personal right. Rotherham has explained that the English judiciary is uncomfortable with the idea of simply awarding proprietary rights ad hoc, and how in consequence the institutional constructive trust was developed so as to justify the award of proprietary rights to a claimant on the basis of some earlier unconscionable act on the part of the defendant.

The doctrine of proprietary estoppel is a particularly clear example of a pure equitable right in the sense that, once the entitlement to the estoppel has been made out,[30] the claimant may receive, at one end of the spectrum, almost any remedy, ranging from a personal right in money to compensate her detriment,[31] right through to the award of the largest proprietary right in land in the form of

[28] C. Rotherham, *Proprietary Remedies in Context – A Study in the Judicial Redistribution of Property Rights* (Hart Publishing, 2002), 89.
[29] Ibid.
[30] That is, on the basis of a representation made by the defendant which caused the claimant to act in reliance to her detriment.
[31] *Burns v Burns* [1984] Ch 317.

the fee simple absolute in possession at the other end of that spectrum[32] or anything in between.[33] The courts have commonly awarded a mixture of monetary compensation and a right to specific property to a single claimant.[34] In one remarkable case, the court required a previously divorced wife and the widow of a deceased man to cohabit in the same dwelling by way of a remedy for the divorced wife's claim in estoppel.[35] This remedy was in recognition of the divorced wife's purported rights in relation to that dwelling. Quite how the parties' entitlements would be unravelled if it transpired that they could not cohabit harmoniously together is something which remains at large. The remedy was intended to resolve the dispute between the parties and not to present a new paradigm in taxonomically pure property theory.

The doctrine of proprietary estoppel cannot be understood in taxonomic terms precisely because the judges have such a wide discretion available to them. Indeed, efforts at taxonomy in this field are doomed to failure precisely because the courts require flexibility in reaching judgments which are appropriate for specific circumstances.[36] The only successful accounts, such as that set out by Elizabeth Cooke in *The Modern Law of Estoppel*,[37] recognise that proprietary estoppel is part of a larger network of estoppels available in equity which are all ultimately co-ordinated around central principles of good conscience and the avoidance of uncompensated detriment (in circumstances in which the claimant had been relying on the defendant's representations) on the grounds of its unconscionability. The most successful accounts of proprietary estoppel in the case law have been in the clarity of the requirements of representation, reliance and detriment as set out by Edward Nugee QC (sitting in the High Court) in *Re Basham*,[38] and the identification of the underlying concept of dealing with 'unconscionability' at the heart of proprietary estoppel by Walker LJ in *Jennings v Rice*.[39] The doctrine of proprietary estoppel may look like a subject in need of order to an eager taxonomist, but this individual doctrine is entirely coherent when it is understood as being part of the matrix of equitable doctrines which seek to deal with unconscionable activity.

[32] *Pascoe v Turner* [1979] 2 All ER 945; *Re Basham* [1986] 1 WLR 1498; *Thorner v Major* [2009] 1 WLR 776.
[33] *Gillett v Holt* [2000] 2 All ER 289.
[34] Ibid.
[35] *Porntip Stallion v Albert Stallion Holdings Ltd* [2010] 1 FCR 145.
[36] See the forthcoming B. MacFarlane, *The Law of Proprietary Estoppel* – a title which in itself is doomed to misunderstand the nature of the subject matter.
[37] E. Cooke, *The Modern Law of Estoppel* (Clarendon Press, 2000).
[38] [1986] 1 WLR 1498.
[39] [2003] 1 P&CR 100.

PART THREE

OVERARCHING THEMES IN EQUITY AND TRUSTS

12

WOMEN AND THE LAW OF TRUSTS

INTRODUCTION

Equity has always had a complex relationship with women and with 'the feminine'. In its earliest incarnations, the role of trusts law was conceived of as being a means of protecting women from the social mores of the time. Briefly put, a settlor could settle property on trust in a way that would protect the rights of the woman to use the trust property, whereas if the property had belonged entirely to the woman then it would have passed to her husband when she married. The trust offered protection for the woman. However, other commentators have questioned whether or not equity really did serve women so well, as is discussed below.[1]

There are people who consider equity to be a 'feminine' way of thinking because it is not obsessed with detailed rules and does not treat law-making as being a sort of car maintenance which operates mechanically but rather involves open-textured, sensitive decision-making which fits the context. There is only so far one can get with that sort of nonsense: just imagine a woman with a spanner or a man choosing furniture for his living-room, and these stereotypes collapse. Not all men think alike and not all women think alike. Nevertheless, there is the odd remark made by the philosopher Immanuel Kant, that equity is 'a silent princess who never speaks', that persists in the literature.

What is important in the consideration of trusts law is the need to understand its social role, especially in the eighteenth century when its role was very important. That is where we shall begin.

[1] S. Scott-Hunt and H. Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001).

Debate

How were women treated by property law?

TRUSTS IN THE NOVELS OF JANE AUSTEN

The Austen heroines at the whim of family settlements

The heroines of Jane Austen's novels were the victims of trusts. In *Sense and Sensibility* and in *Pride and Prejudice*, the female characters were all entering adulthood in strait-laced, bourgeois English society. The houses in which they lived, the sources of their money and all of the chattels which they used, were held on trust. At that time, complex family settlements were used to allocate rights to all forms of family property (houses, heirlooms, plate and other chattels) down the generations. Investments were slow-paced by modern standards: they were intended to bring in steady incomes over time.

The settlements in the Austen novels were generally organised on a 'fee tail' basis, whereby the property would pass to the next male heir. Austen heroines were always the children of a father who was the last man in his line. After their fathers died, their property would pass to a distant male relative. The result for the young heroines in the novels was that they would lose their homes and much of the property which they had used day-to-day. Therefore, Austen heroines were at risk of losing everything, because of the terms of the settlements which governed their lives. Much of the drama in Austen novels is therefore predicated on the obsessive need their mothers feel to marry their daughters off as quickly as possible to eligible husbands. The life of an upper middle-class woman in eighteenth-century England was precarious. It depended on her parents' ability to contract a successful marriage for her, or on the kindness of relatives taking her in.

The limited rights of married women to property and other things

It is easy to think of eighteenth- and nineteenth-century trusts law as being set in a distant time with distant concepts, but that would be to overlook something important about equity and trusts. It has sometimes been said that equity was the protector of women, and at one time there was some truth in this. For example, if you were to read the Jane Austen novel *Persuasion* then you would come to know that Anne Eliot was at risk from a fortune-hunting suitor who appeared to be wealthy and attentive at first. However, his goal was to marry her for her money, because at that time, when a couple married, all of the wife's property would become her husband's. The metaphor which was used at the time was that the wife became 'the shadow of her husband'. That seemingly innocuous idea in the Christian marriage concept that husband and wife become 'one flesh' takes on a very disturbing dimension when you realise that metaphorically the wife's flesh was taken to merge with her husband's, with the result that she effectively disappeared. The very fact that married women became merely the shadows of their husbands meant that they ceased to exist at all. Their property rights evaporated as soon as they married.

Even in a decision of the House of Lords in 1965 in *National Provincial Bank v Ainsworth*,[2] the rights of wives were described by Lord Wilberforce by beginning with the following, peculiarly old-fashioned concepts:[3]

> 'For though the wife had (apart from dower) no proprietary interest at law or in equity, in her husband's property, she had certain rights against her husband by virtue of her status of marriage … [A] wife acquired the right to two things: the right of cohabitation with her husband and the right to support according to her husband's estate and condition. She could obtain against him, from the ecclesiastical courts, an order for restitution of conjugal rights which, in its usual form, ordered him to take her home and receive her as his wife and render conjugal rights – an order which could be enforced by attachment for non-obedience. … [H]er rights were not rights *in rem*, nor were they related to any particular property; they were purely personal rights against her husband, enforceable by proceedings against his person, which he could satisfy by rendering her conjugal rights, i.e. by living with her and supporting her in a suitable home.'

The ecclesiastical courts would in essence order that a marriage be consummated, as well as that the wife be provided with an appropriate home. In *Scott v Scott*,[4] for example, a divorce was ordered on the basis that the wife was proved still to be a virgin after the marriage on the basis of a medical examination. Otherwise, conjugal rights were 'enforceable by proceedings against [the husband's] person', which sounds like a euphemism for something. The wife had no rights in property but only the earthier right to be 'received as a wife'. The significant point is that women were treated as being merely maternal, sexual vessels and property-less persons, who needed to be supported by their husbands.

Unfortunately, some of these attitudes were still present in the minds of some judges in the late twentieth century. Even though Lord Denning had developed the concept of the 'deserted wife's equity' in the 1960s, he still had the following to say in one volume of his memoirs, about the perceived differences between men and women:

> 'No matter how you may dispute and argue, you cannot alter the fact that women are different from men. The principal task in life of women is to bear and rear children: and it is a task which occupies the best years of their lives. The man's part in bringing up the children is no doubt as important as hers, but of necessity he cannot devote so much time to it. He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds …'[5]

---

[2] [1965] AC 1175, [1965] 3 WLR 1, sub nom *National Provincial Bank v Hastings Car Mart Ltd* [1965] 2 All ER 472. The same case is referred to by different names in different law reports. In essence, the husband here used the company as a cypher for himself in an attempt to defeat his wife's claims to the family home.

[3] [1965] 3 WLR 1, 31.

[4] [1913] AC 417.

[5] A. Denning, *The Due Process of Law* (Butterworths, 1980), 194.

There really is nothing more to be said about these antediluvian attitudes. However, they explain the nature of pre-modern property law.

THE SUPPOSED ROLE OF TRUSTS LAW IN PROTECTING WOMEN

The ancient rule, discussed above, that married women could not own their own property, meant that women were always at risk of losing property which had been theirs before marriage precisely because their husbands became, at law, the owners of their wives' property on marriage. The use of the trust was one way in which the rights of those women could be protected. Structuring the trust so that there was purportedly more than one beneficiary with rights to the trust property, meant that that property could be held on trust for that woman and also for other people as beneficiaries, with the result that the woman was not the outright beneficial owner of the property in question. The result was that this trust property did not pass to the woman's husband when she was married, precisely because the trust property was not entirely hers in equity. The husband could only become the owner of property which his wife owned outright; a well-structured trust would not be owned outright by the woman in equity. Therefore, a kindly father who wanted to protect his daughter against the possibility of her property being taken from her by an unkind husband, would settle that property on trust for his daughter in such a way that she did not have to lose it to her husband. In consequence, the trust appeared to be the defender of women in this context.

TRUSTS AND THE LOWER CLASSES

It is important to point out one thing: all of the preceding discussion has related to the upper classes. The trust played no meaningful part in the lives of the working class. It is all too easy to consider trusts law as simply a parade of legal rules which are politically neutral. As Dicey put it: '[T]he daughters of the rich enjoyed for the most part the consideration and protection of equity; the daughters of the poor suffered under the severity and injustice of the common law.'[6] So, women in rich families could have the protection of family settlements. By contrast, women in poor families would not have the benefit of trusts at all, both because their families had no property to settle on trust and because they could not afford the advice of expensive trusts lawyers.[7]

RIGHTS OF WOMEN TO THE HOME

The issues considered in Chapter 9 in relation to trusts of homes are significant in that they tended to demonstrate a particularly gendered approach to trusts law,

[6] A.V. Dicey, *Law and Opinion in England*, quoted in Crane, 1965, 254.
[7] E.M. Forster expressed a similar idea in *Howard's End*, to the effect that to trust is 'a luxury in which only the wealthy can indulge; the poor cannot afford it'.