Revision Box Questions: Guidance for approach

Revision Box Chapter 17

1. Ensure that you understand and can answer the following:
   (a) Why, following a breach of trust, may pursuing an action for equitable compensation not be satisfactory for a beneficiary?

   This is a personal action against a trustee acting in breach, and its value to a beneficiary depends firstly on the solvency of the trustee who has acted in breach. The value of an action for equitable compensation for a beneficiary will also depend on what has happened to the property after it has been misappropriated/misapplied.

   (b) Why is it necessary to have a suite of actions that are both proprietary and personal, and which are also available against a range of defendants?

   Understanding this requires understanding of how property which is missing as a result of a breach of trust is likely to be passed other persons at some point, and that a number of things can happen to it: it can be substituted with other property, and in this situation as in ones where the property remains in its original form, it can become dissipated or proceeds from its sale can become reinvested profitably in other property.

   (c) Why is a proprietary action a claimant’s action of choice?

   A propriety action attaches to the property itself, and so is theoretically available to a rightful owner of property in respect of anyone who holds what can be identified as his property, and against whom he can make a claim for the return of the property. The limits of a proprietary remedy are such that it only ceases to be available where it can no longer be identified as that of an original owner, with the common law and equity having different parameters for this, and with a proprietary action providing scope for recovery of the property itself and increases in its value which have occurred since being lost from its rightful owner.

2. In relation to equity’s tracing action, ensure that you can explain the following:
   (a) Why do so many non-beneficiary claimants wish to use equity’s tracing rules and what is the jurisdictional basis of this?

   Tracing in equity is the only proprietary action available to a beneficiary under a trust, because although the common law has its own tracing regime, a beneficiary has no property rights which law recognises and will enforce. However, equity’s tracing regime is attractive to a number of potential claimants, including those who can access law’s tracing action. This is centrally because the common law will not allow tracing into mixtures of property; that is once the claimant’s property has become mixed with property which does not belong to him the common law no longer recognises this as the claimant’s property: equity will permit tracing into mixtures of funds on account of continuing to recognise
property as that belonging to a claimant even where it becomes mixed with that belonging to others.

The jurisdictional basis for equity's tracing action is equity's regime of fiduciary governance, and particularly the commission of a breach of trust or breach of fiduciary duty regarded as being equivalent with commission of a breach of trust. This occurs in established fiduciary relationships where the requirement of a fiduciary relationship for establishing the right to trace in equity will be met automatically. Equity is also prepared to recognise a fiduciary relationship has arisen in a wide variety of circumstances beyond this, including for example where the claimant has been the victim of theft. The second requirement is the claimant must have an equitable proprietary interest in the missing property, which apart from being a beneficiary under a trust can arise in circumstances as far-ranging as being an unpaid seller, or victim of fraud or theft. Thirdly, the right to trace must not have been lost, where the property ceases to exist because it is actually destroyed or loses its original identity through manufacturing processes; where property comes into the hands of a bona fide purchaser; or where allowing tracing would be inequitable because an innocent recipient has used the property in ways which cannot be reversed or are not easily reversed. There is also some authority that the right to trace can be lost where a potential defendant has acted in good faith in his use of the property, but this is a very contentious position and has little authority supporting it.

(c) What is meant by a ‘unitary system of tracing’ and to what degree does English law currently embody this?

A unitary system of tracing is one discussed in the book as a hypothetical universal set of rules which we might consider in the light of observation in the House of Lords in Foskett v McKeeown (2000) that there was no sense in having different rules for tracing at law and in equity when one set would be sufficient. From this you are encouraged to think about what such a unitary system of tracing might look like in the light of what you have learned about ones currently subsisting at law and in equity, and which will gravitate strongly around incorporating the flexibility of equity and also the simplicity of the common law. The former can be seen in equity's very accommodating approach to 'mixed substitutions', its approaches to competing innocent claims, and also its facility for allowing recovery for increases in value. In terms of joining this with the simplicity of the common law, we would focus on the much more elementary requirements of using tracing at common law, which means that all that is required is that the claimant owns the property. A universal approach would emphasise a requirement of a proprietary interest in property—at law or in equity—and would enable the current fiduciary relationship requirement for equitable rules dispensed with, which would satisfy criticism that it is unprincipled. Overall this would encourage focus on the issue at heart- namely the recovery of wrongfully taken property—rather than concentrating on the status of the victim.

3. In relation to equity’s personal actions, consider the following:

(a) What is meant by ‘strangers’ to a trust and why it is said that there are two types of stranger?

(b) How does the type of stranger appear to influence the nature of liability?
The term stranger here applies to those who, prior to the breach were not in any way connected with the trust and its administration. There are said to be two types of stranger on account that those who are innocent can also become embroiled in a breach of trust if they receive wrongly applied trust property without knowing of its provenance. A knowing stranger is one who is aware that property received is not bona fide, or someone who has actually assisted in the breach of trust which has occurred. The type of stranger is central to liability arising in this sphere: traditionally the liability of knowing strangers has arisen by way of constructive trusteeship, reflecting that this is wrongdoing of the type associated with imposition of a constructive trust. This remains so for those who knowingly receive trust property, but it was always the case that those who assist a breach of trust – known as accessories – never actually receive property. The wrongdoing of the latter type was nevertheless treated as a form of constructive trusteeship and this remains so but this view is under scrutiny following the Supreme Court decision in Williams v Central Bank of Nigeria (2014). Innocent strangers do not incur liability as constructive trustees on account of absence of wrongdoing, and the liability associated with them is of a personal nature, and one which appears to be very restricted in application.

(c) Summarize the current law relating to dishonest assistance.

From its origins in ‘knowing assistance’ what is now known as ‘accessory liability’ or ‘dishonest assistance’ (following the decision of Royal Brunei Airlines v Tan (1995) is governed by what is required for the defendant to have acted dishonestly. There have been a number of key cases including Twinsectra v Yardley (2002), and Barlow Clowes v Eurotrust (2006) and Abou Rahmah (2006) and Starglade Properties v Nash (2009) as the courts have tried to clarify whether this is appropriately determined on an objective or subjective approach. In the Court of Appeal decision in Starglade Properties v Nash (2010) and Aerostar Maintenance v Wilson (2010) the approach appears that a defendant acts dishonesty where he does ‘not acting as an honest person would in the circumstances’, with the latter case expressing this as amounting to ‘conscious impropriety’ on the part of the defendant.

(d) Summarize the current law relating to knowing receipt.

In terms of establishing the meaning of ‘knowledge’ for the purposes of knowing receipt, the key case here is BCCI v Akindele (2000), which focused on the “want of probity” approach adopted in Re Montagu’s ST (1987). From this, Akindele is authority that there is no requirement for a defendant to be dishonest for liability to arise, and instead it would do so where the ‘recipient’s state of knowledge’ was such as ‘to make it unconscionable for him to retain the benefit of the receipt’. This was thought to avoid difficulties which can be seen in earlier case law, but Akindele did not actually clarify what the differences between dishonesty and unconscionability might actually amount to. Some clarification came in Criterion Properties v Stratford UK Properties (2003), suggesting the question of unconscionability could not simply be answered by reference to whether or not there was actual knowledge of the circumstances giving rise to the breach of duty, but in the House of Lords it was submitted that neither it, nor Akindele, were truly concerned with knowing receipt. Amidst continuing uncertainty the Court of Appeal stated in City Index Ltd v Gawler (2007) that Akindele ‘represents the present law’- albeit that uncertainties generated by it appear not to have been resolved, and Starglade Properties v Nash (2010) supports this view. Moreover, Williams v Bank of Nigeria has reignited debate evident in
Twinsecra v Yardley on the relative merits and attractions of approaches to recipient liability requiring fault or where liability is strict through references in Williams to non-innocent recipients as ‘merely wrongdoers’.

(e) Summarize the key features of the personal Diplock action.

This action stems from how it is sometimes deemed inequitable to bring a proprietary tracing claim in equity (where this is theoretically possible) because property has been applied to purposes which are not reversible or easily reversed. Such persons aren't entitled to the property because they are volunteers and not bona fide purchasers, but their innocent position renders them subject to a personal action in equity. This action is restrictive in scope compared with other beneficiary actions, appearing to limit recovery to the principal sum misapplied (without interest) and may only be available in the administration of estates (as considered in Re Montagu), and even then only once remedies against ‘wrongdoers’ have been exhausted. It is seeking to balance the competing interests of innocent victims of a trustee’s breach of trust, recognising that volunteers should not take free of a beneficiary’s interests, but that the positon of an innocent recipient who has applied property in ways which cannot easily be undone also requires equity’s careful application of justice and fairness.