Movement in the Constructive Trust

Dr. Matthew Stubbins

The constructive trust, through the various contexts in which it is imposed, plays a fundamental role in Equity protecting, and allowing parties to acquire, equitable interests. These trusts help ensure that pre-existing beneficial interests are protected should the trust property end up in the hands of third-parties[1], and also enables parties to acquire a beneficial interest where a representation as to ownership has been made and detriment incurred[2].

Notwithstanding the clarity of the constructive trust's role, defining these trusts has always proved problematic. There is no singular definition of these trusts which incapsulates all of the circumstances in which a constructive trust will be imposed[3]. Instead, the constructive trust is defined merely as the matrices where an operation of law will impose a trust over property – matrices in which a settlor has not expressed an intention for a trust to come into existence. Instead, as stated by Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington[4],* they come into existence "by reason of his unconscionable conduct" – with unconscionable behaviour being defined as the factual matrices in which a constructive trust is imposed. Consequently, defining the constructive trust is a very circular process with no clear means of providing a workable, coherent theoretical basis for its imposition.

As noted above though, the matrices in which a constructive trust will be imposed by operation of law are evident, as is the primary benefit of a constructive trust being imposed. The constructive trust plays a vital role in preserving beneficial title where trust property has been misappropriated[5]; where property has been acquired by theft or fraud[6]; where a fiduciary makes an unauthorised profit[7]; and where there is a dispute as to the beneficial ownership of property – such as in the family home. Most dramatically, a constructive trust will also be imposed to prevent party who unlawfully kills another from benefiting from the deceased's will[8]. By imposing a constructive trust, Equity is ensuring that the beneficiary of the imposed trust has priority over third parties, and thereby minimises any losses sustained.

This update will consider three recent cases that have provided an update to how a constructive trust will operate in their respective matrices. In *Hudson v Hathway[9],* the High Court has (potentially heterodoxically) commented on whether detriment is required for a common intention constructive trust to arise where an agreement as to the beneficial ownership of the family home is reached *after* the couple have split. It was held that a separate requirement for detriment does not exist, and an agreement as to the property's ownership in itself is sufficient. In *Marsden-Huggins v Marsden Huggins[10]* the uniqueness of land and the importance of

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[1] *Westdeutsche Landesbank v Islington LBC* [1996] AC 669
[2] *Lloyds Bank v Rossett* [1990] UKHL 14
[3] Pearce R, Barr W, *Pearce and Stevens' Trusts and Equitable Obligations,* 7th edn (OUP: Oxford, 2018) at p190
[4] [1996] AC 669 at 705
[5] *Westdeutsche Landesbank v Islington LBC* [1996] AC 669
[6] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45
[7] *Dales v IRC* [1954] AC 11
[8] *Re D W's (Decd)* [2001] Ch 568
[9] *Hudson v Hathway* [2022] EWHC 631 (QB)
[10] [2022] 4 WLUK 304

specific land to a common intention constructive trust claim was reinforced. Finally, in *Crown Prosecution Service v Aquila Advisory Ltd*[11] the principle of separate legal personality and the priority of beneficiaries of a constructive trust was held to be unaffected by the provisions of the Proceeds of Crime Act 2002 allowing for confiscation orders.

Each of these three recent updates will now be considered.

Distribution of Assets at the end of a Cohabitating Relationship

The first recent judgment to impact upon the functioning of the constructive trust is *Hudson v Hathway.* This concerned the ownership of the family home, and the distribution of assets between a formerly cohabiting but unmarried couple.

As established in *Gissing v Gissing*[12], and expanded on in *Lloyds Bank v Rosset*[13], a non-legal owner can establish a beneficial interest in the family home through a common intention constructive trust. These constructive trusts take two forms: the expressed common intention constructive trust, in which the legal owner represents that the claimant has or is to have an interest in land and the claimant then acts to their detriment as a consequence of this representation; or the inferred common intention constructive trust, in which the claimant contributes to the purchase price of the property but is not registered on the legal title. In both circumstances, the representation of the legal owner (whether that be expressed or inferred from their conduct of allowing a contribution to the purchase price) combined with the detriment (whether that be purely financial or domestic contributions) makes it unconscionable for the legal owner to renege on their representation, and so a beneficial interest is acquired by the claimant with the size of this interest determined by the court if no agreement is present.

The momentous judgments of *Stack v Dowden*[14] and *Jones v Kernott*[15] clarified the position with regards to determining the parties' share should the claimant already be registered as the legal owner, and co-ownership be present. In *Jones v Kernott,* the Supreme Court noted that where co-ownership exists, the following process must be undertaken by the courts to determine the parties' respective shares:

1) The starting point is the presumption that the parties own beneficially as joint tenants;
2) This presumption can be rebutted by showing that a common intention existed at the time of purchase that the ownership would not be joint tenants, or evidencing that the common intention changed at a later date;
3) That the common intention, if not express, can be determined from the parties' conduct; and
4) Where the common intention is for ownership not to be joint tenancy, but that the respective shares have not been determined, the court is to have regard to the 'whole course of dealings' and decide the parties' respective shares on what it considers to be fair.

Although not universally applauded by academic commentary, particularly for the guidance on how the respective shares are to be determined, *Kernott* does at least provide a workable

[11] [2021] UKSC 49
[12] [1970] UKHL 3
[13] [1990] UKHL 14
[14] [2007] UKHL 17
[15] [2011] UKSC 53

mechanism through which the courts can seek to determine the size of the parties' beneficial interest. Explicit in determining the parties' shares, and the *'Stack* factors' set out by Baroness Hale in *Stack v Dowden*[16], is the detriment suffered by the claimant, including the financial payments regarding the property, the childcare and domestic duties. This is further demonstrated in *Graham-York v York*[17], where the Court of Appeal, despite evidence showing that the parties had a dysfunctional relationship and one of the parties potentially suffering from Asperger's and post-traumatic stress disorder, resulting in undue levels of control from one partner to the extent that earnings had to be handed over on demand, concluded that only the direct financial contributions of the parties were relevant factors in determining the parties' respective shares.

Within this legal framework, Mr Hudson and Ms Hathway attempted to distribute their assets following the breakdown of their 20-year relationship. The couple originally moved into her property, and they became joint owners of the property and had two children. This original house was sold, and with the help of a mortgage, the disputed property was purchased in joint names. Although co-owners, no express declaration of the beneficial ownership of the property was made at the time of purchase. Owing to changes in Ms Hathaway's career, Mr Hudson contributed substantially more to the mortgage, and despite the relationship breaking down in 2009, he continued contributing to the mortgage.

As part of resolving the relationship breakdown, a division of assets was agreed – Mr Hudson would be allowed to keep his pension and shares, and Ms Hathway would be allowed to keep the equity in the house and savings accumulated in the couple's bank accounts. It was agreed that the house would be sold, but after an incident involving an oil spill, the sale was delayed. Frustrated, Mr Hudson then brought proceedings under s14 Trusts of Land and Appointment of Trustees Act 1996 seeking a sale of the land and an equal distribution of the proceeds. Ms Hathway did not contest the sale, but did contest the equal distribution of the proceeds, arguing that the post-relationship division of assets precluded Mr Hudson from receiving a share as an express common intention constructive trust had arisen.

At the County Court trial, it was established (and Mr Hudson did not object) that an agreement had been reached between the parties as to the beneficial ownership of the family home, and their assets more broadly. However, the central dispute centred on whether sufficient detriment had been incurred by Ms Hathway – she relied on covering the mortgage from 2015, not claiming a share of Mr Hudson's shares or pension, and not claiming financial support for the couple's two children, as forming sufficient levels of detriment to make reneging on the representation unconscionable.

However, the High Court concluded that these actions did not amount to detriment[18]. Given that the parties were unmarried, and so not subject to the redistribution provisions of the Matrimonial Causes Act 1971, Ms Hathway not claiming a share of these assets could not constitute detriment as there was never a claim to desist from initiating – she simply never had a claim to the shares or pension. Similarly, it was held that any proposed claim to financial support for the children was not viable given that the requirements of the Children Act 1989 had not been met[19]. Consequently, it was concluded that she had not suffered any detriment for the purposes of claiming a common intention constructive trust.

[16] [2007] UKHL 17 at 69
[17] [2015] EWCA Civ 72
[18] *Hudson v Hathway* [2022] EWHC 631 (QB) at para 85
[19] Ibid, at para 86

A further submission was also made by Ms Hathway in the High Court however; that detriment was not required at all. It was submitted that, as the courts in *Stack v Dowden* and *Jones v Kernott* had not expressly required detriment to be established in joint ownership cases, it was not necessary for detriment to be present in this case – thereby overcoming the lack of detriment incurred by Ms Hathway. The High Court agreed with this submission, and held that because the Supreme Court had not addressed the issue in *Jones v Kernott,* and thereby remained silent, it could not be a requirement of a common intention constructive trust in joint ownership cases[20]. Hence, the establishment of an agreement between the parties was sufficient to give rise to a common intention constructive trust, and in itself formed the necessary detriment[21].

This interpretation of *Stack v Dowden* and *Jones v Kernott* does allow for some useful evolution. First of all, it permits post-breakdown asset distribution agreements between unmarried couples to be put into effect. Given that the Matrimonial Causes Act 1971 does not apply to unmarried, cohabiting couples, and the biggest shared asset will overwhelmingly be the family home, removing the need for detriment will make enforcement of such agreements substantially easier – potentially providing for a more equitable distribution of assets based on reasoned negotiations.

Notwithstanding this advantage, the interpretation proffered in *Hudson v Hathway* is also extremely problematic. First, in rejecting the need for detriment in joint ownership cases, it means that these cases have divergent requirements to sole ownership cases. In *Lloyds Bank v Rosset,* Lord Bridge was clear that the claimant must have "significantly altered…her position[22]", and in cases such as *Eves v Eves[23]* (sledgehammering and landscaping a garden) and *Grant v Edwards[24]* (paying substantial sums towards the housekeeping expenses and childcare) the need for detriment was reinforced[25]. Given that the courts have never stated that joint and co-ownership cases involve the imposition of alternative and different forms of common intention constructive trust, it deeply troublesome to call for there to be divergent requirements, even if quantification of shares in joint and single ownership cases follows different trajectories.

Moreover, although the majority in the Supreme Court/House of Lords may have been silent on the issue of detriment in co-ownership cases, the need for detriment is implicit in their judgments. In reaching its conclusion, the High Court relied on the judgment of Lady Hale and Lord Walker in *Jones v Kernott[26],* where the process for determining the respective shares was laid out. Although the process does not explicitly reference detriment, it was stated that "Their common intention is to be deduced objectively from their conduct" – conduct, it is submitted that must include any detriment sustained. Equally, in *Stack v Dowden[27],* and the "*Stack* factors" set out by Baroness Hale noted above, it is apparent that detriment plays a vital role in determining the size of the beneficial interest. Factors stated as being relevant include the means of how the property was financed, the couple's financial arrangements, and how household expenses were covered – all clear forms of detriment. In both *Stack* and *Jones v*

[20] Ibid, at para 64
[21] Ibid, at para 70
[22] [1990] UKHL 14 at 132
[23] [1975] EWCA Civ 3
[24] [1986] Ch 638
[25] Bevan C, *Land Law,* 3rd edn (Oxford: OUP, 2022) at 254
[26] [2007] UKHL 17 at 51
[27] Ibid, at para 69

Kernott it was indeed the unequal financial contributions that determined the size of the parties' interest and that an alternative intention existed. Consequently, although not explicit, the majority in both decisions were clear that detriment is still a requirement of joint ownership common intention constructive trust claims.

More explicit, though, was the dissenting judgment of Lord Neuberger in *Stack,* who stated that "an agreement or understanding amounting to an intention as to the basis on which the beneficial interests would be held", which may be "express ... or inferred, and must normally be supported by some detriment, to justify intervention by equity[28]". Although a dissenting opinion, it is submitted that nowhere in the majority opinions (as outlined above) is there any contradiction to Lord Neuberger's conclusion that detriment must be present.

Conflating stages in a common intention constructive trust claim has also been explicitly rejected by the courts in *Capehorn v Harris[29]*. In *Capehorn* it was affirmed that the two stages in *Rosset* – express common intention and detriment – must not be conflated and are independent elements. Here it was held that a contribution to a business could not in itself form an express intention. Hence, as affirmed in *Capehorn,* intention and detriment cannot be conflated – they are independent elements that must be independently proven. Consequently, the High Court's interpretation in *Hudson v Hathay* that intention and detriment can be conflated, and that an intention in itself is sufficient and thereby can constitute detriment, is fundamentally flawed.

Finally, it must also be noted the common intention constructive trust is predicated on the existence of unconscionability – that owing to the detriment suffered by the claimant as a result of the legal owner's representation, it would be unjust for the owner to renege on their representation[30]. However, as emphatically noted above, key to this unconscionability is the detriment suffered – that the claimant has expended time, money or given up on opportunities that means the representation cannot be revoked. In conflating the representation as forming detriment, the High Court in *Hudson v Hathway* are permitting common intention constructive trusts where there is no detriment and thereby no unconscionability. Whilst, as acknowledged above, this may serve a useful policy and societal need, Parliament (in their inaction) have been clear that unmarried couples (rightly or wrongly – this discussion lays outside the scope of this update) do not have the same redistributive measures applicable as those available to married couples, and that they must avail themselves on the law of property - and the property rules that have developed require that unconscionability must be present to enforce post-relationship agreements.

As can be seen above, *Hudson v Hathway* provides a potential seismic reform for the law on common intention constructive trusts in instances of joint ownership. By conflating the representation and detriment stages of an express common intention constructive trust claim, and thereby removing the need for detriment, it potentially recasts such trusts as not being founded upon unconscionability. Whilst this may be beneficial from a policy perspective – in that it would become easier to enforce cohabiting couples' post-relationship agreements – as submitted above, there are several flaws to the conclusion from a theoretical and jurisprudential perspective. Whilst a fascinating potential evolution to the constructive trust, and illustrative of the need for unforthcoming legislative reform for a regime for the end of long-term

[28] Ibid, at para124
[29] [2015] EWCA Civ 955
[30] *Westdeutsche Landesbank v Islington LBC* [1996] AC 669

unmarried relationships, it will be necessary to see how the superior courts react to *Hudson v Hatway's prima facie* heterodoxy.

The Continuing Importance and Uniqueness of Real Property

A further, but much less contentious, update to the law on constructive trusts occurred in *Marsden-Huggins v Marsden-Huggins*[31], which too concerned domestic property. This dealt with an application for an interim injunction to prevent the sale of land.

The property in question had been owned by the family for many years and was registered in the mother's name. Through a claim for a common intention constructive trust in the property, the son applied an order to be allowed to purchase the property minus a 50% discount owing to the claim for a common intention constructive trust. In order to allow this claim to proceed, the interim injunction was necessary to prevent the sale of the house which had been agreed with a purchaser – a care home company.

In granting the injunction, it was found that the *American Cyanamid*[32] guidelines had been met. It was held that there was a serious issue to be tried between the parties (ie the beneficial ownership of the property), and that damages would have been an inadequate remedy given the significance of the specific house to the claimant and the fact that they had also agreed to sell a house in Australia to fund the purchase. If the sale had proceeded, then the claimant would have been reduced to a mere account of proceeds from the sale, rather than an interest in the property. Consequently, maintaining the status quo was an appropriate outcome until the common intention constructive trust claim was resolved.

Although not a significant as *Hudson v Hathway,* and not providing an update to the law on constructive trusts itself, *Marsden-Huggins v Marsden-Huggins* does provide a recognition of the role that constructive trusts continue to play in determining property rights, the importance that land plays for parties and the lengths the courts will go to protect parties' potential rights.

The Continuing Priority of Proprietary Rights under a Constructive Trust

The final recent judgment to have an effect on upon the operation of the constructive trust has been *Crown Prosecution Service v Aquila Advisory Ltd*[33]. This appeal to the Supreme Court concerned the priority of a company to assets held by two directors on constructive trust for breach of fiduciary duty when those assets were also subject to a proceeds of crime confiscation order in favour of the Crown Prosecution Service.

Aquila concerned two directors – Mr Faichney and Mr Perrin - who, in breach of fiduciary duty, made a secret profit of £4.55m. As a result of this secret profit, and the Supreme Court's judgment in *FHR European Ventures LLO v Mankarious*[34], Vantis Tax Ltd (VTL - the company in which Mr Faichney and Mr Perrin were directors) had a beneficial interest in the secret profit through a constructive trust. Concurrent with this secret profit claim held by VTL, the directors were also convicted of cheating the public revenue, and confiscation orders equalling £1,457,692 were made against them in favour of the Crown Prosecution Service.

[31] [2022] 4 WLUK 304
[32] [1975] AC 396
[33] [2021] UKSC 49
[34] [2014] UKSC 45

However, owing to the constructive trust imposed as a result of the secret profit claim, it was contended that this claim had priority over the CPS' confiscation orders.

Central to resolving this issue of priority was the Proceeds of Crime Act 2002. It was noted by the Supreme Court in *Aquila* that whilst Part 2 of the Act does permit the CPS to apply for a confiscation order to recover the 'benefits from conduct' from a defendant, the Act is also clear that such orders do not interfere with existing-third party rights[35]. Presently, however, although a secret trust had been imposed owing to the directors' secret profit (giving them a third-party property right), the CPS contended that actions of the directors should have been attributed to VTL itself, and so their claim to the assets should be barred on the grounds of illegality as VTL stood to profit from the illegal acts of the directors.

Whether the fraudulent acts of an agent could be attributed to its principal had been resolved in the previous judgment of *Bilta (UK) Ltd v Nazir*[36]. Here the defendant directors had used Bilta to purchase carbon credits from a Swiss company net of VAT, sell those credits to U.K. companies inclusive of VAT, and the proceeds were paid to Switzerland and an offshore company. This meant Bilta was unable to meet its obligations to account for the VAT owed, and so was declared insolvent. The directors were alleged to have breached their fiduciary obligations by removing the means to pay the VAT owed to HMRC, but the Swiss company and its chief executive submitted Bilta could not seek to recover funds for assisting in a breach of fiduciary duty as it was itself a party to the fraud. It was held by the Supreme Court, however, that the acts of director could not be attributed to the company. Consequently, and applying *Bilta* to the facts of *Aquila,* the CPS' claim that the acts of the directors should be attributed to VTL could not succeed as they were solely the acts of the directors, not the company[37].

Aquila, as with *Marsden-Huggins v Huggins,* does not impact on the law regarding the factual matrices in which a constructive trust will be imposed – this had previously been clarified in *FHR v Makarious,* where it was confirmed that a constructive trust would be imposed in instances where a fiduciary makes a secret profit. Instead, *Aquila* reinforces the priority that beneficiaries of constructive trusts enjoy – they enjoy priority over the trust assets (thereby minimising any potential losses that are sustained) over third parties, even including the CPS when they are seeking to claim the assets under confiscation orders. It demonstrates not only the separate legal personality that exists between a company and its directors[38], but also the lengths that Equity through the constructive trust will go to protect companies (who cannot control themselves) from the unconscionable actions of their directors.

<u>*Clarifying Charitable Trustees' Ethical Investment Obligations*</u>

In addition to the several facets of the constructive trust considered above, there have also been updates to charitable trustees' obligations when considering what investments should be made. This occurred in *Butler-Sloss v Charity Commission for England and Wales*[39], where clarification of *Harries v Church Commissioners for England*[40] was provided by the High Court.

[35] *Crown Prosecution Service v Aquila Advisory Ltd* [2021] UKSC 49 at 33
[36] [2015] UKSC 23
[37] *Crown Prosecution Service v Aquila Advisory Ltd* [2021] UKSC 49 at 81
[38] *Salomon v Salomon* [1896] UKHL 1
[39] [2022] EWHC 974 (Ch)
[40] [1992] 1 WLR 1241

In *Butler-Sloss,* two charities, the Ashden Trust and the Marks Leonard Trust – both part of the Sainsbury Family Trusts network and that had assets of £42 million and £22 million respectively - sought clarification of whether their intended policy of excluding investments that conflicted with their charitable purposes was permissible. Precisely, the two charities' purposes were, amongst others, environmental protection and relief of those in need. The trustees thereby wished to divest the trust of investments that were not aligned with the United Nation Framework Convention on Climate Change – better known as the Paris Agreement. However, the law's position on trustees' obligations in regard ethical investments, although contained in *Harries,* remained unclear and prevented the trustees from acting without clarification.

As noted by the High Court, the Charity Commission provides guidance on whether charitable trustees can make ethical investments[41]. The guidance, at section 3.3, concludes that trustees can make ethical investments where:

a) The investment conflicts with the aims of the charity;
b) The charity may lose supporters if it does not invest ethically; and
c) There is no significant financial detriment.

The guidance also states that trustees must provide clear reasons for any exclusions, and an evaluation of the effect of the policy on investment returns and lower balance sheets must also be undertaken. This guidance helps give effect in the context of charities to the wider duties under the Trustee Act 2000, which requires trustees to apply the standard investment criteria[42] and to seek proper advice before making an investment unless it would be inappropriate to do so[43].

The tension trustees face between ethics and rates of return when investing was brought into focus in *Cowan v Scargill*[44]. This dealt with a mineworkers' pension scheme, in which half of the trustees were appointed by the National Union of Mineworkers (NUM). The central figure to the NUM's appointees was Arthur Scargil, who blocked the scheme's plans to invest in foreign investments and energy sectors that competed with coal – investments that were contrary to the NUM's policies. As this was not a charitable trust, it was held that the trustees were under a duty to provide the best rate of return – however, if the beneficiaries themselves wished for the non-financial benefits, then the trustees could make investments with a lower rate of return. Consequently, in express private trusts, ethics are only relevant if the beneficiaries are in like-minded to the intended social causes.

The *Bishop of Oxford* sought to resolve this issue in relation to ethical charitable investments. It dealt with the investment policy of the Church of England, where there already was an ethical investment policy excluding armaments, gambling, and tobacco. However, the Bishop sought a stricter policy on dealing with investments in newly post-apartheid South Africa. The Bishop's request was rejected, but Vice-Chancellor gave *obiter* guidance on charitable trustees' investment obligations – the only guidance to have been handed down by the courts.

[41] *Charities and Investment Matters: A Guide for Trustees* – Charity Commission 2014
[42] S4 Trustee Act 2000
[43] S5 Trustee Act 2000
[44] [1985] 1 Ch 270

The Vice-Chancellor began by identifying that the primary duty of a charitable trustee is to further the purposes of the charitable trust. The help achieve this, the trustees must invest the trust's assets, and their 'starting point' is that these investments should maximise financial returns because the charity will always need more money[45]. It was noted there were three exceptions to this 'starting point', including the first exception of where an investment would directly conflict with the charity's purpose – such as a cancer research charity investment in a tobacco company. Secondly, there is the 'indirect conflicts' where an investment might alienate supporters or donors to the extent that they will end their association with the charity, and a final nebulous exception of "*where trustees are justified in departing from what would otherwise be their starting point* ". This latter category was not explained, but it was noted that investment decisions should not take moral considerations into account:

> "[Trustees] must not use property held by them for investment purposes as a means for making moral statements at the expense of the charity of which they are trustees. Those who wish may do so with their own property, but that is not a proper function of trustees with trust assets held as an investment[46]."

This was echoed, albeit in a different context, in *R (Palestinian Solidarity Campaign Ltd and anor) v Secretary of State for Housing, Communities and Local Government*[47] where the Supreme noted that moral considerations could only be taken into account provided there was no significant risk to the charity and support from those associated with the charity.

In seeking to apply these principles to the instant case in *Butler-Sloss,* the High Court held that the primary issues was whether there was an absolute prohibition on making investments that conflict with the charity's purpose or merely a discretionary obligation should the conflict become substantial[48] - something that was not made clear in the *Bishop of Oxford* case. It was held that there was no absolute prohibition contemplated by the Vice-Chancellor in *Bishop of Oxford,* but that any conflict must be balanced against the financial hit incurred by the trust for not making/divesting the investment[49].

Consequently, although not under an absolutely obligation to divest the trusts of conflicting investments, the trustees in *Butler-Sloss* did have the power to divest the trusts of their conflicting investments. In doing so, they were under an obligation to consider the financial impact of their proposed policy, and the views of those connected with the charity. The High Court has thereby helped clarify the investment obligations of charitable trustees, and made clear that so long as there is an objective justification (and not merely moral ground) for making ethical investments then they are permitted to do so. This process was nearly summarised by Mr Justice Michael Green:

"(1) Trustees' powers of investment derive from the trust deeds or governing instruments (if any) and the Trustee Act 2000;
(2) Charity trustees' primary and overarching duty is to further the purposes of the trust. The power to invest must therefore be exercised to further the charitable purposes;
(3) That is normally achieved by maximising the financial returns on the investments that are

[45] [1992] 1 WLR 1241at 1246
[46] Ibid, at 1247
[47] [2020] 1 WLR 1774
[48] [2022] EWHC 974 (Ch) at 69
[49] Ibid, at 70-71

made; the standard investment criteria set out in s.4 of the Trustee Act 2000 requires trustees to consider the suitability of the investment and the need for diversification; applying those criteria and taking appropriate advice is so as to produce the best financial return at an appropriate level of risk for the benefit of the charity and its purposes;
(4) Social investments or impact or programme-related investments are made using separate powers than the pure power of investment;
(5) Where specific investments are prohibited from being made by the trustees under the trust deed or governing instrument, they cannot be made;
(6) But where trustees are of the reasonable view that particular investments or classes of investments potentially conflict with the charitable purposes, the trustees have a discretion as to whether to exclude such investments and they should exercise that discretion by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion of such investments;
(7) In considering the financial effect of making or excluding certain investments, the trustees can take into account the risk of losing support from donors and damage to the reputation of the charity generally and in particular among its beneficiaries;
(8) However, trustees need to be careful in relation to making decisions as to investments on purely moral grounds, recognising that among the charity's supporters and beneficiaries there may be differing legitimate moral views on certain issues;
(9) Essentially, trustees are required to act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity and its purposes. Where there are difficult decisions to be made involving potential conflicts or reputational damage, the trustees need to exercise good judgment by balancing all relevant factors in particular the extent of the potential conflict against the risk of financial detriment;
(10) If that balancing exercise is properly done and a reasonable and proportionate investment policy is thereby adopted, the trustees have complied with their legal duties in such respect and cannot be criticised, even if the court or other trustees might have come to a different conclusion.[50]"

[50] Ibid, at 78