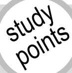
chapter 1

Introduction to Equity and the Trust



After reading this chapter, you will be able to:

- understand what is meant by equity and the role it plays in the English legal system
- appreciate the historical development of the courts of equity and the merger of two systems of courts into one
- learn about the 'equitable maxims' and their application
- understand the origins of the trust and its use to achieve particular objectives
- realise the flexibility and continuing relevance of the trust in the 21st century.

1.1 Introduction

The main focus of this book is the equitable institution of the trust, but the scope and influence of equity is much broader than this. This chapter introduces you to the historical and philosophical origins of equity and gives you some idea of the pervasiveness of equity in the law as we know it today. We will then look at the origins of what today is referred to as the 'trust', drawing attention to the purpose and effect of this particular legal device and its contemporary uses and relevance.

1.2 What is equity?

Equity is a branch of the law with a history dating back to around the 13th century. Its principles and remedies developed over the following centuries and are now found interwoven throughout most of the areas of law in operation today. The law of equity is largely based upon case precedent and as such, but also due its inherent nature, it has the flexibility to evolve as society changes.

This inherent flexibility has at times attracted criticism on the grounds that the outcomes in equity are uncertain and unpredictable. Over the centuries equity has become less flexible and more grounded in precedent and rules, but from time to time equity shows that it is not 'past the age of child-bearing' (a remark once made by Justice Bagnall in the case of *Cowcher v Cowcher* [1972] 1 WLR 425). As you read through this book you will learn the doctrines that have developed within equity and how these have changed and been applied both historically and in the modern context.

However, equity is not just a body of rules and doctrines. It is also a legal philosophy based on ideas of morality and rightness. Equity recognises that the law is not always fair or just, either because of the way it works or the way in which it is administered. When we claim that something is 'inequitable', we are recognising this unjustness. This moral dimension to equity can be understood by appreciating the origins of equity and the relationship between equity and the other major body of law – the common law.

1.3 Historical development

The standardisation of law was integral to the unification of Britain under William the Conqueror from 1066 onwards. Within 20 years of the Norman Conquest, local courts (County courts presided over by a sheriff and Hundred courts dealing with very local matters and presided over by local dignitaries in the feudal system) had been established which reflected the provincial government system and which administered local laws. By 1250 a common law had emerged in order to establish a set of laws which were recognised by everyone, rather than local laws which varied across the country. In order to establish a body of common law, a conscious effort was made to find out what laws were being practised by the common people. The King (Henry I – 1068-1135, then Henry II – 1154-1189) also made sure that the judges of his court (the *Curia Regis*) moved around the country in order to administer the same law to all localities. In the period 1150–1700, in order to standardise procedures and the types of claims that were being brought before the King's courts of common law, a system of 'forms of action' or standardised 'writs' emerged. These were legal templates or protocols which the facts of any claim brought by writ before the court had to fit. If they did not fit there was no recourse to the court. As life became more complicated and different types of legal claims arose – for example in contract and tort – these forms of action proved to be straitjackets on legal development, leaving many potential litigants dissatisfied. Even if a case did fit within an existing form of writ, only damages were awarded by the courts of common law and sometimes this was not appropriate. If the common law failed to provide justice, it became possible to petition the King in Council directly – as the 'fountain of justice' – and ask him to settle the dispute. Over time, and with the growth of the administrative machinery of the court, the King began to refer these petitions to his Chancellor (a member of the King's administrative office which included the Exchequer and Chancery), and by the late 15th century the Chancellor was issuing decrees or judgments in his own name and expanding the role of his office – Chancery. During this early period of equity, the system operated in a discretionary fashion in accordance with the opinion of the Chancellor at that time. Indeed Sir George Jessel stated in the case of *Re Hallett's Estate* (1880) 13 Ch D 696 at 710:

> … it must not be forgotten that the rules of Courts of Equity are not, like the rules of Common Law, supposed to have been established from time

> immemorial. It is perfectly well known that they have been established from time to time – altered, improved and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented.

These early Chancellors were ecclesiastics and filled the royal duty of being keepers of the King's conscience at a time when religion played a key part in people's lives, and spirituality and temporality were closely linked. These Chancellors would not have seen themselves as developing a new system of law but rather as interpreting the existing (common) law in light of their own moral views and providing a remedy where it was just and equitable to do so. To begin with, the Chancellors expanded the existing common law system of writs by using legal fictions or analogies. The Chancellor or his staff would question petitioners directly in the search for the truth, and any orders made would be against the person complained of. These orders went beyond just the award of damages and could extend to ordering a person to carry out an obligation or desist from causing a harm. They were intended to act on the offender's conscience and included remedies found today such as injunctions, rectification of agreements and orders of specific performance. Moreover the Chancellor was free to recognise rights which were not recognised in the common law courts and was not bound by the existing system of writs or forms of action as were the common law courts. Nevertheless, over time, a body of principles emerged from the office of the Chancellor, and by the late 17th century, equity, much like the common law, had become established as a body of principles, based upon precedent. This coincided with the appointment of lawyers as Chancellor rather than ecclesiastics, Lord Nottingham being the first in 1673. Around this period the administration of decisions began to develop into a formal court system known as the Court of Chancery. There were therefore two parallel systems of law: that of equity administered in the Court of Chancery and that of the common law administered in the King's courts. This led ultimately to conflict, not least because the Court of Chancery could send someone to jail for trying to enforce a common law judgment, culminating in what became known as the *Earl of Oxford's Case* (1615) 21 ER 485. The upshot of this rather complicated land case was that the King, James I, decreed that if there was a conflict between the common law and equity, equity would prevail.

Lawyers and litigants soon became wise to the merits of 'forum shopping' and cases would move between the two systems of courts, either by choice in order to seek a better outcome, or because the matter raised issues of law and equity, in which case the plaintiff was required to bring two separate claims – one at the King's/Queen's Bench for the common law aspect and another at Chancery in relation to the equitable matters. This was clearly unsatisfactory and to say the least confusing, time consuming and costly. Moreover, just as the common law courts had stagnated under a restricted range of writs, so too did the courts of Chancery stagnate due to becoming overloaded with cases, inordinate delays which meant

cases could go on for years, corruption and under-staffing – there were only two judges in Chancery until 1813: the Lord Chancellor and the Master of the Rolls.

Some reforms were introduced; for example in 1854 the Common Law Procedure Act permitted common law courts to grant equitable remedies, and in 1858 the Chancery Procedure Amendment Act gave the Court of Chancery the power to grant damages alongside or alternatively to equitable remedies. It was not, however, until 1873 and 1875, following the enactment of the Judicature Acts, that the courts were able (regardless of the division) to recognise and give effect to both legal and equitable rights, defences and remedies at the same time. Under the Judicature Acts the previously separate courts of Queen's Bench, Exchequer, Common Please, Chancery, Probate, Divorce and Admiralty were abolished and a Supreme Court of Judicature was created. Each division of the new High Court (Queen's Bench; Chancery; Probate, Divorce and Admiralty) exercised legal and equitable jurisdiction. This merger or fusion of the administration of justice in one set of courts did not remove the possibility of conflict between equity and common law, nor did it change the substantive rules of each body of law. Indeed in s 25(1) of the 1873 Judicature Act we find the following provision:

> Generally, in all matters not hereinbefore mentioned in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, *the rules of equity shall prevail*. (emphasis added)

The Judicature Acts were replaced by the Supreme Court of Judicature Act 1925, and then the Supreme Court Act 1981 (later renamed the Senior Courts Act), the stated purpose of which was to consolidate 'the Supreme Court of Judicature (Consolidation) Act 1925 and other enactments relating to the Supreme Court in England and Wales and the administration of justice therein'.

So it remains today that administratively the rules of the common law and equity may be dealt with via one claim in one court. Whether the reforms of the late 19th century did more than fuse the administration of justice remains a moot point. It would appear that over a century later the concepts of the common law and equitable principles remain separate at the theoretical level, and that in many cases the application of equity will lead to a result that is different from that which would have been achieved were only the common law to be applied.

A fairly recent example of the use of an equitable remedy, which has been used increasingly in the later part of the 20th century and into this century, is in the development of the remedy of proprietary estoppel – a situation where a promise made, and on which the recipient has acted, is not delivered, to the detriment of the recipient. This remedy has been used to ensure, for example, that a person working on a farm for low or no remuneration but who instead was promised the farm on the death of the promisor actually received it when the promisor failed to make the gift in his will. This remedy achieved the delivery of the farm – ie the perfecting of the promise – whereas making a claim under the Inheritance

(Provision for Family and Dependants) Act 1975 would only have resulted in an award of a sum of money in lieu of reasonable maintenance and not the farm nor its equivalent in monetary value – *Thorner v Major* [2009] UKHL 18; *Suggitt v Suggitt* [2011] EWHC 903.

1.4 Maxims

During the development of equity as a branch of the law, certain guiding principles were established to underpin the objective of providing a fair and just solution to the complainant. These principles are known as the maxims of equity and there are said to be at least 12 agreed maxims, although the precise list will differ depending on the author.

The courts frequently refer to these maxims when considering an equitable claim or deciding whether to grant an equitable remedy. However, it should be noted that some are merely overarching principles rather than, for example, grounds for a claim, and others are default principles that the court will apply where necessary or appropriate. The maxims are useful guiding principles but they are not rules, and you will discover that in some cases the maxims appear to be departed from or applied in an inconsistent manner. Some of these maxims are the following:

Equity will not suffer a wrong to be without a remedy

This maxim is fairly self-explanatory and clearly stems from the earliest manifestations of equity in the medieval times (see above and for an illustration, see **1.5** 'What is a trust?' below). It does not mean that every moral wrong will be remedied by the court, but where the common law has failed to provide a solution, equity will step in and fill the gap where appropriate.

He who comes to equity must come with clean hands

The person bringing an equitable claim or seeking an equitable remedy must demonstrate that their past record of dealings is clean and fair. This is particularly relevant in the context of requests for the court to exercise its discretion to grant an injunction or an order of specific performance of a contract.

A relatively recent and interesting example, and one that has now run to nine cases, is the case of *Douglas and Others v Hello! Ltd* (No 1) [2001] QB 967, involving unauthorised photographs of the wedding ceremony of celebrities Catherine Zeta-Jones and Michael Douglas. The litigation involved two glossy magazines specialising in stories and photos of celebrities. The Court of Appeal lifted an interim injunction preventing Hello! magazine from publishing the rogue pictures on the basis that one of the claimants, OK magazine, had pulled a similar stunt at a previous wedding, that of Gloria Hunniford – another celebrity of the time. The maxim applied because OK magazine had not come to court with clean hands and this resulted in the overturning of the injunction.

It should be noted, however, that equity does not demand that a claimant shall have led a saintly lifestyle prior to the trial, and it will only take into account behaviour that has a strong relevance to the equitable matter being considered.

He who seeks equity must do equity

Where someone is seeking equitable relief from the court, that individual must be willing to act fairly and be prepared to carry out their own obligations at the same time as obtaining the remedy.

This maxim, therefore, relates to current or future conduct of the claimant as opposed to previous conduct.

In *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, the singer/songwriter, Gilbert O'Sullivan, sought redress for excessive profits paid to his agent during the course of their professional relationship. He was successful in arguing that the agent was in breach of his fiduciary duty and as such liable to pay the excess profits to O'Sullivan. However, the court required O'Sullivan to also 'do equity' by acknowledging that the agent was entitled to a fair payment for the work done, and so the award to O'Sullivan was reduced to reflect the reasonable remuneration deserved by the agent.

Equity regards as done that which ought to be done

Most frequently applied in the context of the remedy of specific performance in contract law, this maxim is also relevant to the finding of a constructive trust (see **Chapter 4**).

An interesting example is the Privy Council case, *AG for Hong Kong v Reid* [1994] 1 AC 324. The public prosecutor in Hong Kong took bribes of approximately HK$12m to obstruct prosecutions in breach of his duty to the Crown. The Court held that a constructive trust in favour of the Crown arose as soon as the bribe monies were received by Reid. So, at that moment, equity considered done that which ought to be done, ie Reid, as holder of the legal title to the money, held it on constructive trust for the Crown.

Equity is equality

A common sense, default provision, 'equity is equality' can be applied to situations where the court is dividing up property between individuals in the absence of another suitable basis for the division.

During the course of a divorce in *Jones v Maynard* [1951] Ch 572, the court applied this maxim when splitting the money in a bank account between the couple. Rather than attempting to dissect every transaction in the account, it was considered more appropriate to simply divide the money between the two of them.

Good reasons to depart from this maxim *might* be, for example:

- Where the parties have not contributed equally to the purchase of an asset, in which case it may be that the shares are proportionate to their contribution (see **Chapter 4**).
- Where the parties have expressly declared that the shares in an asset should be unequal, for example when executing a deed of transfer of land.

Delay defeats equity

This principle is equity's equivalent of a limitation period, although in true equitable fashion there is no set time limit for the bringing of an action.

The old case of *Sayers v Collyer* (1884) 28 Ch D 103 provides an amusing illustration where a house was being used as a beer shop in breach of a covenant on the title deeds. The plaintiff, who had a right to enforce the covenant, was not granted the injunction he desired because he had delayed in bringing an action for three years. This delay was exacerbated by the fact that during the three-year period he had been drinking in the said beer house.

The question of delay or, as it is sometimes referred to, 'the equitable doctrine of laches' may be particularly relevant where an equitable remedy is being sought. So, for example, in the case of *Ong v Ping* [2015] EWHC 1742 (Ch), rectification of a contract relating to the sale of land was being sought. The defendant tried (unsuccessfully) to raise the equitable doctrine of laches, or delay, to defeat the rectification. Similarly, in the case of *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] CTLC 206, the equitable remedy of rescission of a contract for the sale of a car was sought, and again the defence of delay was argued (unsuccessfully) on the grounds that there had been a period of four years between the sale and the claim to rescind.

Equity looks to the intent (or substance) rather than the form

This is one of the maxims that really goes to the heart of equity and the trust and demonstrates the essence of flexibility. It means that the courts will look at all the circumstances of a situation including spoken words, actions, the circumstances, as well as any written documents, in order to determine the intention of the parties to a claim.

The case of *Paul v Constance* [1977] 1 WLR 527 could be said to epitomise this maxim. Here the court declared the existence of an express trust over money held in a bank account on the basis that Mr Constance had said to Mrs Paul on a number of occasions, 'the money is as much yours as mine'. He had not drawn up a trust deed, he had not even used the word 'trust' and quite probably had no knowledge of trusts at all. The court focussed on trying to determine the intention of Mr Constance from the words he used, and also from his actions and the circumstances of the time when the events occurred, rather than insisting on a rigid formula for the creation of an express trust.

It is not intended to provide an exhaustive list of the equitable maxims here, but those listed above will be relevant and of interest to a student of equity and trusts. Throughout this book, where a maxim is applicable it will be highlighted and explained further if necessary. For example, in relation to constitution of trusts in **Chapter 2**, the maxims '**Equity will not assist a volunteer**' and '**Equity will not perfect an imperfect gift**' will be relevant.

1.5 What is a trust?

The law of trusts forms a large part of the law of equity, and arguably the trust is the keystone of equity.

Under the feudal land tenure system introduced by William the Conqueror in 1066, the Crown claimed title to all land, granting estates to loyal followers and seizing the land of those found to oppose the King. In a pyramidal hierarchy of land rights, the great nobles and clergy who were granted estates in land – that is the right to live on and enjoy the land for as long as they had heirs or as long as the King allowed them – in turn granted lesser estates to the next social rank, and so on, down to those who had no interest in land but merely worked the land for others and were allowed to live on it. Within the hierarchical social structure which was closely tied to land and power, each rank had to pay taxes or tithes, originally in the form of services or produce, later in money. Included in these services were 'knights' service whereby a man would go to fight for his overlord (the person in the rank above), often taking a retinue of staff and equipment. From the King's perspective, the payment of taxes and tithes was often not enough to finance the royal expenditure, and so other taxes were also payable. If taxes were not paid or a landlord was found guilty of a felony, or died without an heir, then the land would 'escheat' back to the Crown. In combination, these circumstances meant that succession to estates was precarious – a man might die leaving minor children and a spouse (who would be ineligible to inherit the estate), or might have to perform a service away from his home – perhaps for years at a time – and others might move on to his land or take his harvests.

One of the first illustrations of the trust arose from a predicament faced by men taking part in the Crusades, leaving a spouse and minor children at home on their land. During the 12th and 13th centuries these military campaigns in the Middle East meant that English knights and their retinues would often be away from home for long periods. It was common therefore for a knight to transfer his land to, let us say, a trusted friend on the understanding that it would be looked after during his absence and returned to the knight when he came home. This would mean that while he was away, his land would not escheat to the Crown and hopefully he would return to reclaim it. If not, perhaps his eldest son would have reached majority and could succeed to the land. Unsurprisingly, given that knights could be away for years at a time and the possibility of the 'trusted' friend turning into an

unscrupulous opportunist, there were occasions when the land was not transferred back to the knight upon his return.

The common law recognised the transfer of legal title from the knight to the trusted friend but not the underlying agreement for the property to be cared for and then returned to the knight at a later date.

So it was just this type of situation, where a common law claim could not be brought, that the aggrieved knight (or his heir) would petition the King directly and request that a decree or order be issued acknowledging the rights and interest of the knight and/or his children in the transferred land. This early form of trust was called a use, and the beneficiaries were called *cestui que use*.

This is probably the first example of equity stepping in and recognising the split of legal and equitable ownership. The King's equity demanded that the trusted friend should act in accordance with the initial agreement – which was binding on his conscience – and transfer the land back to the knight or his heirs if adult.

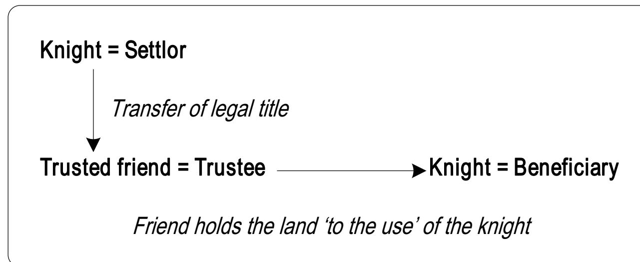


Figure 1.1 Use

This means that equity acknowledges the common law position, that the legal title to the land has been transferred, but then adds in an additional layer of beneficial or equitable title that is held by the knight. This equitable interest allows the knight to assert his rights before the King and obtain redress for breach of the initial agreement.

Although the Crusades ceased to draw men away from their lands, other wars followed and fighting men were always in demand, so this institution continued to be useful and the Chancellor continued to uphold the 'use'. The person who was less pleased with the popularity of this legal development was the King. While tax was payable on transfer of legal title, the common law did not recognise the 'use' and so there was no tax payable on the transfer of beneficial title. In 1535 Henry VIII passed a statute abolishing the use of this device (the Statute of Uses), choosing to recognise that the *cestui que use* would be regarded as legal (rather than equitable) owners of the land. This did not deter clever lawyers who simply added another limb to the device so that it was 'for the use' of X 'on trust for' Y.

After a while the first use fell away – not least because Henry VIII had to capitulate and allow land to be left by will (1540). The result is that today we have a trust

device in which the legal title is held by trustees on trust for beneficiaries who have an equitable or beneficial interest.

1.6 The trust today

The diagram above (**Figure 1.1**) outlines the trust structure that continued to be used for over 700 years and still exists in the same format today. The basic elements of a trust are therefore as follows:

- There is **intention** on the part of the **settlor** to create the trust. The settlor is the initial owner of the property and the settlor transfers it to the trustee.
- The **trustee**(s) is **compelled** to hold the legal title of the property in accordance with the instructions of the settlor while not being entitled to the benefit of the property in the capacity of trustee (the trustee may also be a beneficiary).
- The **benefit** of the property accrues to the **beneficiary**.

The key word here is 'compel', because the trustee must hold the property and distribute it to the beneficiaries as instructed by the settlor.

Another fundamental aspect of a trust is the idea of conscience. The trustee's conscience is said to be bound so that the trustee must follow the settlor's wishes and respect the rights of the beneficiary. The concept of conscience emanates from those early days of the ecclesiastical chancellors issuing moral decrees in order to remedy the deficiencies of the common law and continues to pervade the law of equity and trusts.

Let us take a more contemporary example to explore the position of the parties to a trust a little more deeply.

Robert has a holiday cottage and he wants Caroline, his solicitor, to hold it on trust for the benefit of Jenny, his daughter, until she reaches the age of 21.

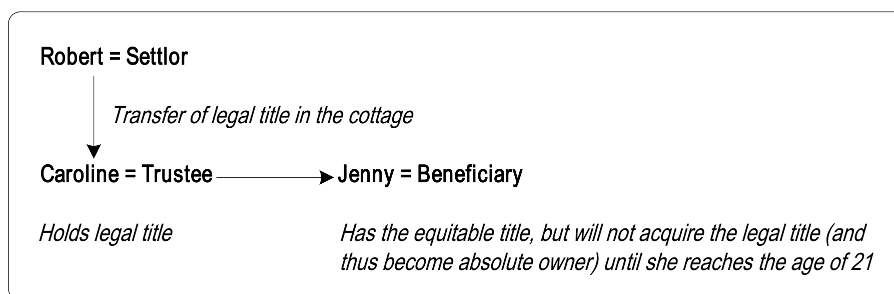


Figure 1.2 Trust today

The ideal course of action is for Caroline to draw up a trust deed setting out the terms upon which the trust is to be set up. The deed will clearly specify Robert's **intention** as **settlor** and he must transfer the legal title in the cottage to Caroline.

Caroline is the **trustee**; she will be the **legal owner** of the cottage and must deal with it accordingly. She may, for example, let it out so that it produces a rental income for the trust. Caroline is not entitled to the benefit of the cottage; she owns the cottage subject to the equitable interest of Jenny. Caroline may not, for example, keep the rent or live in the cottage. She will have positive duties towards Jenny, which are onerous and include acting in Jenny's best interests and distributing the cottage to Jenny when she reaches 21.

Jenny is the **beneficiary**; she has an **equitable interest** in the cottage. She is entitled to acquire the cottage when she is 21 along with any rental income earned. She may also be entitled to receive some or all of the income before she reaches 21. Jenny also acquires rights as a beneficiary. For example, if Caroline were to allow her friends to use the cottage and she received rent from them but kept it for herself, Caroline would be in breach of her duty as trustee and Jenny could bring a claim against her for payment of the rent monies to the trust fund. She could also, if she was really dissatisfied with Caroline as a trustee, go to court to seek her removal.

In practice, for a valid trust to exist, there must be (as described by Romer J in *Green v Russell* [1959] 2 QB 226):

(1) certainty of words – that is, show a clear intention to create a trust;
(2) certainty of subject matter – that is, be clear what assets are to form the trust fund;
(3) certainty of objects – that is, demonstrate clarity as to the beneficiaries who are to benefit from the trust.

1.6.1 Distinguishing the trust

At first sight the trust may look like other legal devices, and so it is important that it is distinguished from the following:

- *A gift* – under which the legal and beneficial title is transferred from a donor to a donee. The donee becomes absolutely beneficially entitled to the property. The donee gives no consideration for the gift. A gift is marked by transfer and the intention to give.
- *A loan* – this is usually governed by contract but may be informal and/or gratuitous. Under a loan there is transfer of the property from the lender to the borrower but the intention is different. The lender retains ownership of the property; the lender only transfers possession/control and usually for a limited time. An example would be the loan of a book or borrowing someone's car to pop to the shops.
- *A mortgage* – this is a form of loan generally secured against land/buildings. In the past the property was actually transferred (conveyed) to the lender with the contractual understanding that the property would be re-conveyed back to the borrower on redemption of the mortgage. Today this transfer does not occur.

Instead the borrower remains legal owner of the property and is allowed to remain in possession of it, and the lender secures the mortgage loan as a charge on the property. In the case of default of the loan arrangements – usually failure to keep up with repayments – the lender has the right to come into possession of the property and sell it. Equity has an important role to play in the law of mortgages but an examination of this topic is beyond the remit of this book.

- *A pledge* – a pledge is the transfer of property (usually personal property) as security for a loan or other benefit. A typical example would be the pledge of goods to a pawn broker or money lender for a loan with the intention of reclaiming those goods when the loan can be paid off. Pledges are governed by the law of contract. The pledgor parts with possession and ownership of the property but has a right to redeem the property. The pledgee has a duty to look after the property and a right to sell it if the debt is not repaid.
- *Bail* – bail or bailment arises where property is in transit or being kept safe for the owner. The keeper, the bailee, has a duty of care to the bailor to look after the goods and to ensure their safe arrival – a typical example would be where goods are being shipped by a third party or stored, as in a furniture depository. The bailee acquires no property interest in the goods even while in control of them. The issues that usually arise in bailment concern the passing of risk and who is to insure against that risk.
- *Agency* – this is where a person (or persons) is authorised to act as the agent of the owner and may exercise all the powers (or some of the powers) of the legal owner in relation to those assets – an example of agency would be the use of a power of attorney.

Foreign jurisdictions which do not have a tradition of using trusts struggle with the concept of what a trust is and how it operates. For example, many of the countries in the European Union have legal systems based on a civil code, and have never known the division between law and equity. The concept of fiduciary is understood, as is the law of contract, but civil law systems find it hard to accommodate the concept of the trust with its division of rights between the trustee(s) and beneficiaries.

1.6.2 Trusts and powers

We should also distinguish between a trust and a power. A power is the authority to do something with property conferred by the donor of the power on the donee of the power. Trustees have a number of powers (see **Chapter 5**) but an instrument that confers a power may fall short of being a trust. There are different types of powers.

- *A bare or mere power* – this arises when the donee of the power is simply given a power with no obligation to exercise it. Such powers may be further sub-divided into general powers, in which case the donee of the power can exercise

it or not as they wish – including in favour of themselves – and special powers, in which case the power can only be exercised according to its terms, if it is exercised at all.

- *A discretionary power* – this arises when the donee of the power may exercise the power but does not have to do so. These kinds of powers are common in trust deeds (and therefore overlap with trust powers) and also arise under statute, such as the trustee's power of maintenance and advancement under ss 31 and 32 of the Trustee Act 1925.
- *A fiduciary power* – if a person is in the position of a fiduciary then if they choose to exercise the power, they must do so in good faith and in the way fiduciaries are expected to conduct themselves (see **Chapter 5**). An example would be a power of attorney.
- *A trust power* – this is mandatory insofar as the donee of the power, the trustee, must consider whether to exercise the power, and if they decide to exercise it, to do so in good faith and intra vires (ie within the scope of the powers given to them for the administration of the trust) (see **Chapter 5**).

1.7 Modern uses

The inherent flexibility of the trust means that it now occurs in many modern contexts. There is an obvious link between all of these uses, and that is the control of assets, the protection of the beneficiaries and often the minimisation of tax liability.

1.7.1 Private (family) trusts

The private family trust developed in the context of the preservation of family wealth, usually with the objective of manipulating control over assets, protecting beneficiaries and avoiding inheritance tax (and its predecessors). Prior to the end of the 19th century, they were also used to secure beneficial property rights for women when they married and for their children (marriage settlements), as on marriage women lost control over their own property until the passing of the Married Women's Property Act 1882.

These trusts might be found in a will (a testamentary trust) and so arise on the death of the settlor (referred to as a testator in the case of a will) or have been made during the settlor's lifetime by the drafting of a trust deed (an inter vivos trust).

The scenario at **1.6** concerning Robert and Jenny is a simple illustration of a family property trust. These are private trusts for the benefit of one or more individuals, often family members, and may be set up as:

- *fixed trusts* – where the settlor specifies the shares of the beneficiaries; or
- *discretionary trusts* – where the settlor specifies a class of beneficiaries but the trustees have the discretion to decide which beneficiaries will benefit and what their share will be.

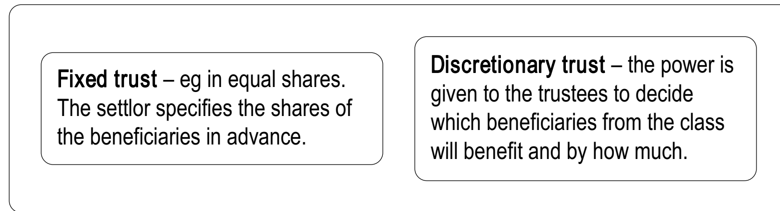


Figure 1.3 Methods of distribution within a typical family trust

It was and still is common for people to provide for children and to specify that the beneficiaries will not receive their share until they reach a certain age (a condition precedent). This allows the trustees to look after the assets for the children until they are old enough to deal with the property themselves.

From 1975 until 2006 these types of trusts were known as Accumulation and Maintenance trusts (A&Ms). A&Ms were a special hybrid of both discretionary and fixed interest trusts affording particularly useful tax breaks. Sadly, A&Ms were abolished by the Finance Act 2006 and replaced by the much more restrictive Bereaved Minor Trusts (BMTs) (which must vest at age 18) and Aged 18–25 Trusts (18–25) (where the vesting age can be no greater than 25).

These new trusts can only be created by the parent, step-parent or person with parental responsibility for the bereaved child and are only available on death. A&Ms could have been created by anyone for a class of children who all enjoyed common grandparents; they could also be created on death or during lifetime and the beneficiary had to get a vested interest by the time they reached 25, but this could be restricted to simply gaining a vested interest in income; whereas, the new trusts have to vest absolutely in both income and capital by either 18 (BMTs) or 25 (18–25).

Another popular trust construction, particularly in wills, is for a testator to leave his or her estate to his or her spouse for the spouse's lifetime and thereafter to their children. This is a successive interest trust and when included in a will is called an 'immediate post death interest'. Typically, the testator leaves his house, investments and cash on trust to his executors as trustees 'to his wife for life and thereafter to his children in equal shares provided they reach the age of 21'.

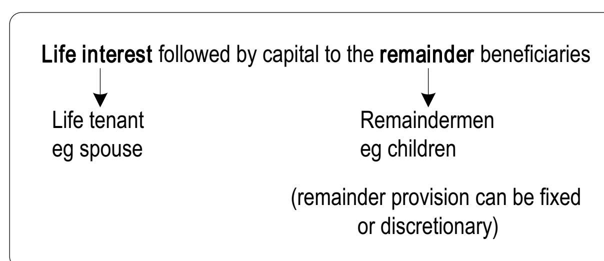


Figure 1.4 Successive interest trusts

The wife and the children are all beneficiaries of the trust with a guaranteed or 'vested' interest but their interests do not run concurrently. The wife's interest is referred to as 'vested in possession' as she has immediate enjoyment of it, whereas the interest of the remaindermen (ie the beneficiaries who take after the death of the wife) will not 'vest in possession' until their mother is dead. They have an interest 'vested in reversion'. If one of the remaindermen satisfies the age condition but pre-deceases the mother, that remainder interest vests in the deceased child's next of kin or passes by way of a will if the deceased child leaves a will. The original settlor/testator may stipulate that the shares of the children are to pass *per stirpes* and/or may stipulate in what circumstances any beneficiary may forfeit their interest – for example if the surviving spouse remarries.

1.7.2 Other types of trust

Within private trusts we also find:

- *Protective trusts* – under which a beneficiary is entitled to benefit from the trust unless or until an event happens, such as bankruptcy or criminal prosecution, at which point the beneficiary forfeits their entitlement and becomes a mere object under a discretionary trust. These are governed by s 33 of the Trustee Act 1925.
- *Disabled trusts* – where the prime beneficiary qualifies as a disabled person under Sch 1A of the Finance Act 2005 and receives most of the distributions from the trust whilst alive. In return these trusts are given certain tax benefits (Inheritance Tax Act 1984, ss 89–89B).
- *Secret trusts* – these are intentional testamentary trusts but are not evident from the will. They arise where a testator, prior to death, has asked a third party to hold property on trust for a beneficiary, who may be named or whom the settlor will make known to the intended trustee. If the intended trustee accepts then their conscience is bound. On the face of the will, the testator will have made an outright gift to the intended trustee and there will be no mention of the trust or the beneficiary. Typically this might arise where the testator wishes to keep the identity of the intended beneficiary secret from the testator's family – for example a mistress, illegitimate child, second family etc. It might be thought that there is little need for such trusts in today's more liberal society but they still arise – see, for example, *Gold v Hill* [1999] 1 FLR 54; *Davies v Revenue and Customs Commissioners* [2009] UKFTT 138 (TC) – and may overlap with other implied trusts, as in *AM v SS* [2014] EWHC 2887 (Fam) (see **Chapter 4**).

  Clearly there may be evidential issues here to demonstrate that the conscience of the donee is bound (see for example *McCormick v Grogan* (1869–70) LR 4 HL 82).
- *Half-secret trusts* – these are also intentional trusts but the existence of the trust is evident on the face of the will where property may be left as follows: 'To

James, on those trusts which have been communicated to him.' Here it is self-evident that James is not intended to be the beneficiary of the property but to hold it for another, unnamed beneficiary. There must have been communication to James and acceptance of the obligation prior to the testator's death (given the possibility of the testator changing their will at any point up until death).

There are a number of guiding principles emerging from case law which govern both secret and half-secret trusts. The leading case here is *Blackwell v Blackwell* [1929] AC 318, and a recent case is *Rawstron v Freud* [2014] EWHC 2577 (Ch). Secret and half-secret trusts are not common in practice.

- *Mutual wills* – this is another type of provision arising in the context of wills and occurs where a married couple agree to create a provision in their wills in favour of specified beneficiaries. The couple promise that they will not revoke their will after the death of the first party. The agreement must be binding on both parties. This contradicts the general rules on testamentary freedom but has been allowed by the court (*Re Haggar* [1930] 2 Ch 190). However, it must be clear that both parties intended to be bound by the agreement, otherwise the survivor will be free to leave their estate to whomever they choose (*Re Goodchild* [1997] 1 WLR 1216; *Re Walters* [2009] Ch 212). Where mutual wills are found to exist, a constructive trust arises in favour of the specified beneficiaries and the surviving spouse holds the relevant assets as a constructive trustee (*Re Haggar*). The operation and application of constructive trusts is considered at **4.3**.
- *Personal injury trusts* – the expression 'personal injury trust' is simply a legally binding arrangement, where funds are held by trustees for the benefit of another or others upon the terms of a trust, but where the funds which are held on trust have come as a result of a claim for compensation for injury. Damages for personal injuries may be awarded to a variety of claimants with different needs for the management of their award. The trust could therefore be a bare trust created by an adult who is mentally competent but who needs help with managing the use of those funds. The trust could be either for life or discretionary and created by a court to manage the compensation of a minor or mentally incompetent person.

1.7.3 Public trusts – charities

Trusts have been used for centuries to provide a structure for the administration of charitable funds. Charitable trusts fall within the category of purpose trusts; in other words they are set up for a purpose rather than for human beneficiaries. It will be seen in **Chapter 3** that there are detailed rules regarding the registration of a charity. Once registered, an organisation is eligible to take advantage of many benefits, not least the significant tax privileges available to charities.

1.7.4 The commercial sector

The following examples of modern commercial trusts are types of private express trusts.

1.7.4.1 Pensions

One way in which a pension scheme can be operated is via a trust. This might be a private pension fund or an occupational pension scheme. There are statutory provisions regulating this area and the duties on pension trustees are particularly onerous.

A pension trustee must have the requisite knowledge and understanding of the law relating to pensions, trusts and the principles of scheme funding and investment, whereas there is no restriction on who may act as the trustee of a family trust. Pension trustees also may not exclude their liability for negligence, although other trustees may be so excused in the trust deed.

With an occupational pension scheme, there is the attraction of having the pension funds placed in a trust pot separate from the rest of the company's assets, thereby not forming part of the company's assets for the purposes of insolvent liquidation, for example. However, a pension trust fund is still vulnerable to misappropriation by the trustees, as highlighted by the Robert Maxwell scandal in the early 1990s (see *Bishopsgate Investment Management Ltd (in liquidation) v Homan* [1995] 1 WLR 31).

1.7.4.2 Collective investment schemes

These schemes, administered by professional fund managers, offer investors the opportunity to pool their resources and spread the risk across a wide portfolio of investments. One way in which these schemes are run is by using a trust structure called a unit trust. Investors purchase units in the trust and the value of the units increases or decreases depending on how well the investments are performing. The units can be bought and sold like shares in a limited company.

Barlow Clowes International Ltd (in liquidation) v Vaughan [1992] 4 All ER 22, referred to in the context of tracing in **Chapter 6**, involved a collective investment scheme that went into liquidation following a fraud on the part of its managers. The court was involved in sharing out the remaining funds amongst the investors. See similarly *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), where, although not initially set up as a trust, a number of defrauded investors who collectively had invested in a property development scheme were able to trace their investments under a constructive trust (see **Chapters 4** and **6**).

1.7.4.3 Company insolvency

In the past 40 years or so, there has been a noticeable trend towards claims of express trusts in cases of company insolvencies.

Some have been successful, such as in *Re Kayford Ltd (in liquidation)* [1975] 1 WLR 279, where the directors of a mail order company, realising it was in financial difficulties, sought to protect customer money by placing it into a separate bank account. The company went into liquidation and the court held that the money was held on trust for the customers, thereby giving them priority over other creditors of the company.

Others have not, such as in the unfortunate case of Farepak in 2006 (*Re Farepak Food and Gifts Ltd (in administration)*, *Dubey v HM Revenue & Customs* [2006] EWHC 3272 (Ch)).

These issues will be developed further in **Chapter 2**. As we will see there is some debate as to whether these are express trusts or implied trusts which arise when the purpose of the intended transfer of beneficial interest fails – eg the goods which are paid for are not dispatched owing to the company's liquidation, or where money is loaned for a particular purpose which is not carried out (*Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567).

1.7.5 Implied trusts – division of the family home

The previous sections have involved express trusts, ie situations where someone has created a trust intentionally.

However, trusts can be implied from the circumstances, even though the parties involved may not be aware of this fact unless the situation comes under the scrutiny of the court.

Implied trusts fall into two categories: resulting trusts and constructive trusts. These trusts arise in a variety of situations and will be dealt with in **Chapter 4**.

An excellent modern-day example of the use of implied trusts occurs when a cohabiting couple separates and there is a dispute over the division of the home they shared together. Many such cases involve a house being purchased in the name of one partner (as happened in the case of *Oxley v Hiscock* [2005] Fam 211), but the principles have also arisen in joint names cases (as in the case of *Stack v Dowden* [2007] 2 AC 432). The claimant is the partner who argues that he or she is entitled to a share even though he or she is not on the title deeds, or where he or she is a joint owner (and therefore on the title deeds) but claims a larger share in the property than initially either expressly or impliedly agreed. That claim may be raised against the other partner or against a bank seeking to obtain vacant possession where there has been a mortgage default. Possession may be resisted by the claimant asserting an overriding interest based on actual occupation derived from a proprietary interest.

In such cases the courts may declare the existence of an implied trust, such as a constructive trust, to resolve the dispute, specifying that, for example, the sole owner holds the house on trust for the two of them as beneficial owners, or that

both partners hold the house on trust for themselves as beneficiaries but in some unequal proportion. This will be explored in detail in **Chapter 4**.

1.8 Future developments

At the time of writing there are two relevant projects being undertaken by the Law Commission. First, a consultation completed in 2017 on reform of the law governing the making of wills is currently in the policy development stage but is paused. The consultation brief refers to statistics from the Family Court in 2016 indicating that around 40% of adults die without making a will. The remit of the consultation was:

(a) to gain an understanding of why people may not make a will and how this could be addressed;
(b) to update the 19th century laws governing wills;
(c) to modernise the rules around capacity to make a will in light of medical advances in understanding mental health and dementia; and
(d) to address changes in societal behaviour such as cohabitation and digital technologies.

Chapter 2 looks at issues of capacity to make a will and a trust, and **Chapter 4** addresses the complex law on cohabitation and ownership of the family home.

Secondly, the Commission has embarked on a potentially broad-ranging project proposal entitled 'Modernising Trust Law for a Global Britain'. This is still at the 'initiation' stage and the problem is identified as follows:

> English trust law hasn't been comprehensively reviewed since 1925. Meanwhile, places like Singapore and New Zealand have updated their laws and been creative in maintaining a healthy trust market.
>
> A number of leading stakeholder groups have outlined various technical problems and limitations with our current trust law. Other countries have also come up with new trust and trust-like structures to meet demand.
>
> Not all of these structures may be suitable for this jurisdiction, but there is a strong argument that their advantages and disadvantages should be evaluated.

The proposal states that there will be an initial scoping exercise to identify areas for review and potential reform. This is definitely a project to keep an eye on.

1.9 Further reading

Greg Allan, 'Case Comment: AM v SS: Fraud and Flexibility' (2015) 4 *Conveyancer and Property Lawyer* 340–8.

Emma Challinor, 'Debunking the myth of secret trusts?' (2005) *Conveyancer and Property Lawyer* 492–500.

Sarah Hayden, 'Gifting chattels: the available methods considered' (2014) (3) *Private Client Business* 119–24.

Peter Jaffey, 'Explaining the Trust' (2015) *Law Quarterly Review* 377–401.

Margaret Halliwell, 'Equitable property rights, discretionary remedies and unclean hands' (2004) *Conveyancer and Property Lawyer* 439–52.

David Hayton, 'The development of equity and the "good person" in common law systems' (2012) *Conveyancer and Property Lawyer* (Editorial) 263–73.

William Batstone, 'One day all this will be yours', TEL & TJ, 2015, 170 (Oct), 18–21.

Lesley King, 'Detrimental move?', LSG, 25 October 2012, 109(40), 26.

Equity developed in response to the shortcomings of the courts of common law, and although today equity and common law are administered in one unified court system, there remain distinctions between these two branches of law. The impact of equity ranges further than the law of trusts but the focus here is on the trust, an equitable institution which evolved to meet a social need and has continued to demonstrate a remarkable flexibility to survive and be applicable in contemporary circumstances.

1. An appreciation of the maxims of equity helps us to understand the way in which equity works. Would you agree?
2. The trust is distinct as a legal institution because it separates legal from beneficial interests in respect of the same property. Explain how it does this and what the consequences are for the trustee and the beneficiary.
3. How is the trust used today and what advantages does its use have for the settlor?