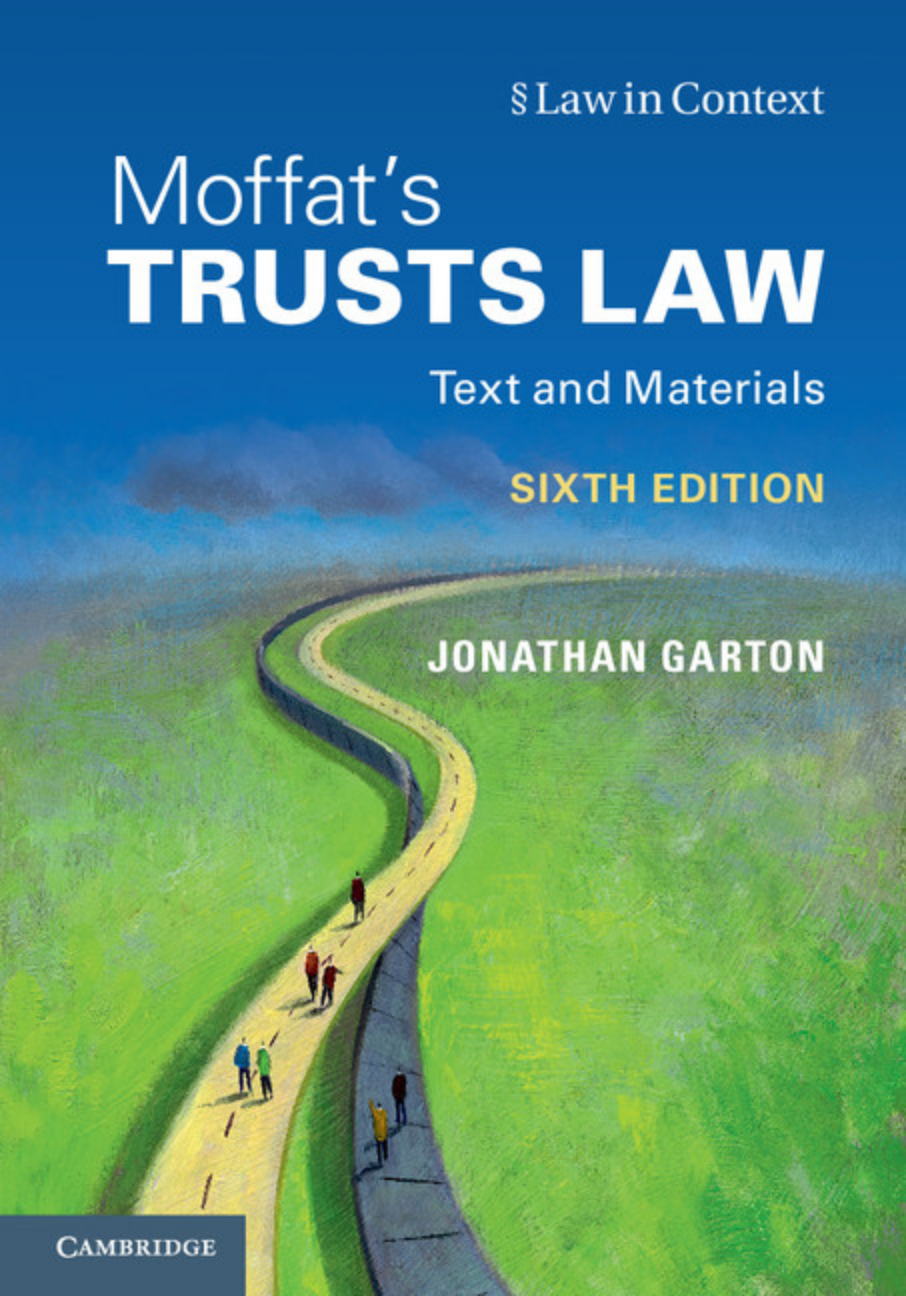
§ Law in Context

# Moffat's TRUSTS LAW

Text and Materials

SIXTH EDITION

JONATHAN GARTON



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## Moffat's Trusts Law

This latest edition of *Moffat's Trusts Law* has been fully revised and updated to cover recent statutory developments and explore the impact of a wealth of new cases, including the Supreme Court decisions in *Pitt v Holt* (2013), *FHR European Ventures v Cedar Capital Partners* (2014) and *Williams v Central Bank of Nigeria* (2014). It has been restructured to incorporate a new chapter on the internationalisation of the trust, which provides an understanding of the new directions being taken in the areas of trust law and equitable remedies. Supplementary material includes an online chapter on occupational pension schemes. With suggestions for further reading guiding the student to contemporary debates, this leading textbook retains its hallmark combination of a contextualised approach and a commercial focus, and remains the serious student's textbook of choice.

**Jonathan Garton** is a Professor of Law at the University of Warwick. His research interests are in the law of trusts, with a particular focus on charities, and he has written widely in this area. He was Specialist Adviser to the Public Administration Select Committee, assisting its 2012–13 inquiry into the regulation of the charitable sector, and is on the international advisory board of the Australian Nonprofit Model Law Project.

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# Moffat's Trusts Law

## Text and Materials

Sixth Edition

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# Contents

# Preface to the sixth edition

This book seeks to present the law of trusts in a different way from conventional texts. The underlying premise is that an investigation of the social and legal contexts in which trusts commonly appear, and of the functions that trusts perform within these contexts, is an essential prerequisite to a proper understanding of trusts law. Developments that have occurred in the relevant social and legal contexts since the first edition of this book have confirmed our conviction in the value of this approach. The bulk of the book is therefore divided into five parts: trusts and the preservation of family wealth (Chapters 3–10); trusts and family breakdown (Chapter 11); trusts and commerce (Chapters 12–15); trusts and non-profit activity (Chapters 16–18); and the internationalisation of trusts (Chapter 19). The last of these, which explores not just the English trust's export to other common law jurisdictions and offshore financial centres, but also civilian responses such as the Italian *trusts interni* and the French *fiducie*, is new to this edition, which also takes full account of the recent work of the Law Commission as well as statutory changes, including the Charities Act 2011, the Trusts (Capital and Income) Act 2013, and the Inheritance and Trustees' Powers Act 2014. Important recent cases, notably *Jones v Kernott*, *Pitt v Holt*, *FHR European Ventures v Cedar Capital Partners* and *Williams v Central Bank of Nigeria* in the Supreme Court, together with an outpouring of academic literature, have all in their different ways contributed to a continuing debate about trusts law, particularly in its relationship to other areas of the common law, and the effect of these influences is evident in all five parts of the book.

As with any new edition, some compromise is inevitable when balancing the desire to retain existing materials with the need for exposition on recent developments if the book is not to increase in size unduly. Happily, the internet now offers something of a solution, and the chapter on occupational pension schemes – a significant commercial context for the trust, but sadly one infrequently taught on undergraduate courses – which featured in previous editions remains, but as an online resource available in updated form at www.cambridge.org/9781107105485. Another infrequently taught area on undergraduate courses, but one of considerable practical significance, is taxation of trusts. In a further compromise we have tried to strike a balance by reducing

our coverage to a single chapter without sacrificing an understanding of the contextual and conceptual relevance of the topic.

Our approach requires that, within each part of the book relevant rules of trusts law are investigated usually only after the reasons why trusts are commonly created within the particular social and legal context – whether expressly by individuals or groups seeking to achieve particular purposes, or by court order – have first been studied. In the working out of this approach, express trusts and non-express trusts receive distinctly different treatment. Express trusts are depicted primarily as property-holding devices or 'institutions' that have been created, modified and refined by generations of practising lawyers in response to the particular purposes sought to be achieved by their clients. The law governing such trusts is presented as the judicial and, to a lesser degree, the legislative response to the aspirations of trusts lawyers and their clients (particularly with regard to the rules determining whether novel forms of trust should be treated as valid), and to the numerous legal problems arising in the course of enforcement of valid trusts. The book shows how, in the main, this response has been supportive; otherwise English law would not include the highly sophisticated body of principles that we call trusts law. But circumstances in which judges or legislators have placed a check on the fulfilment of trust founders' objectives are also noted, along with the reasons why this should have occurred. In relation to non-express trusts, the focus of the book is chiefly on the relatively familiar theme that these contribute a quasi-remedial device for judicial innovation on grounds of 'equity'. But recourse to relevant contextual material paves the way for a discussion of how far 'equity' has in fact been achieved in specific social situations, and whether other express or implicit objectives – for example, legitimation of practices that might otherwise call for redress – are being pursued. The contexts in which these issues are most fully investigated are those of (1) family breakdown, where resulting and constructive trusts and proprietary estoppel have been prominent in a judicial search for some degree of 'equity' for non-earning (usually female) de facto spouses; and (2) commerce, where a battery of remedies, including a constructive trust, may be invoked in response to 'inequitable' behaviour by those in trust-like positions.

Although this way of classifying and analysing trusts law might seem to fragment the subject unduly, there is continued emphasis in the book on the unifying influence of the trust concept itself. Chapter 1 – 'Trusts introduced' – illustrates how the 'trust idea' in English law remains generally constant, despite having immense 'elasticity' (to quote Maitland), such as to render it useful in numerous social situations over several hundred years. This general proposition is reiterated later in the book. Nevertheless, there is a tension between fragmentation of the subject-matter of study and the notion of the 'trust idea' as a unifying feature. We suggest, however, that this reflects a source of tension within the subject itself, namely, the competing influences on the legal development of the claims of pure conceptual clarity as against

pressures for pragmatic resolution of practical problems. An adequate understanding of trusts law requires that both these influences be taken into account by the student. Account also needs to be taken of one additional source of tension in the development of trusts law. A particular feature of our system of private law is the co-existence of overlapping jurisdictions. Circumstances can arise where the jurisdictions of the law of restitution, the law of trusts and even the law of tort can seem to overlap. It is at these points that tension can occur. We suggest that it is important to appreciate that efforts to minimise or remove any resulting dissonance may be a formative influence in recent developments, particularly in the area of remedies for breach of trust or other 'inequitable' conduct.

In form the book is not an orthodox text, nor a set of cases and materials of a familiar type, but something in between. Textual commentary increasingly predominates, but extracts – sometimes quite long – from leading cases, statutes and relevant historical and empirical materials are also included. We assume that teachers using the book for a full-year undergraduate LLB course may want to indicate further cases and articles to be read. Many that are appropriate for this are mentioned in the text.

Many people have contributed to the production of this book. A change from the last edition is that Graham Moffat, the main author of the first five editions, has stepped down from this role, passing the baton to his University of Warwick colleague Jonathan Garton. Despite his reduced role, the intellectual debt owed to Graham is considerable and his co-authors are delighted to see this recognised in the renaming of the book as *Moffat's Trusts Law*. As regards the division of labour in this edition, Graham Moffat remains responsible for Chapter 3 and the new Chapter 19, along with the online occupational pension schemes materials, whilst Rebecca Probert contributed Chapter 11, and Gerry Bean contributed Chapters 13 and 14. Jonathan Garton bears responsibility for the remainder of the book. Much of the scholarship of Michael Chesterman, the co-author of the first edition, remains in this edition, particularly in the area of trust history, and is gratefully acknowledged. We are grateful to Helen Francis and the publishing team at Cambridge University Press for their support and encouragement, and for efficiently producing the index and tables of cases and statutes. The authors would also like to acknowledge the assistance of many trusts students in responding over the years to ideas about trusts law put to them in the classroom and writing learned essays on trusts. Last and most important, as any writer knows, the gratitude owed to family tolerance cannot be overstated.

We have sought to take account of the law as at 31 October 2014.

*Jonathan Garton*
*Graham Moffat*
*Gerard Bean*
*Rebecca Probert*

# Acknowledgements

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# Abbreviations

| | |
|---|---|
| Chesterman: | Chesterman, *Charities, Trusts and Social Welfare* (1979) |
| Gardner: | Gardner, *An Introduction to the Law of Trusts* (3rd edn, 2011) |
| Goff and Jones: | Mitchell, Mitchell and Watterson, *Goff and Jones, The Law of Unjust Enrichment* (8th edn, 2011) |
| Hanbury and Martin: | Martin, *Hanbury and Martin, Modern Equity* (19th edn, 2012) |
| Hayton and Mitchell: | Hayton and Mitchell, *Commentary and Cases on the Law of Trusts and Equitable Remedies* (13th edn, 2010) |
| Parker and Mellows: | Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th edn, 2008) |
| Pettit: | Pettit, *Equity and the Law of Trusts* (12th edn, 2012) |
| Snell: | McGhee (ed), *Snell's Equity* (32nd edn, 2010) |
| Underhill and Hayton: | *Underhill and Hayton: Law Relating to Trustees* (18th edn, 2010) |

# Useful websites

None of us can ignore the vast range of internet sources now available and most students will have access to online resources such as Westlaw and/or Lexis. Other general websites that the reader may find useful are: www.bailii.org; www.austlii.org; www.canlii.org; www.wordlii.org; www.lawcom.gov.uk; and perhaps most useful of all is the invaluable 'hub' or 'gateway' maintained by the law librarian at Kent University: www.kent.ac.uk/library/subjects/lawlinks. Two specific websites relevant to Trusts Law are those of the Trust Law Committee (www.kcl.ac.uk/schools/law/research/tlc) and the Charity Commission (www.charitycommission.gov.uk).

This book's online chapter on Occupational Pension Schemes can be found at www.cambridge.org/9781107105485.

# Table of statutes

# Table of statutory instruments

# Table of cases

# 1

# Trusts introduced

## 1. Introduction

A 'trust' in English law is in some measure the translation into legal terms of the word 'trust' as used in ordinary speech. Its conceptual starting point is 'a confidence reposed in some other' (this phrase is from the sixteenth-century legal commentaries of Lord Chief Justice Coke). The 'confidence' so reposed gives rise to moral obligations to which the courts, aided by the legislature, have purported to develop legal parallels. Inevitably, the moral weight given to trust and trusteeship in ordinary usage – to be 'in breach' of a 'sacred trust' is a serious matter, with repercussions possibly in the next world as well as this one – has had a significant impact on both the scope and the content of trusts law principles. There are still some contexts in which it may be difficult to say whether the word 'trust' is used in a legal or purely moral sense.

Yet this is by no means the whole story of trusts law. In the early twentieth century the historian and jurist F W Maitland praised the trust (see *Equity* (2nd edn, 1936), p 23 and *Selected Historical Essays* (1936), p 129); he regarded 'the development from century to century of the trust idea' as 'the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence'. But this was not because the trust embodied basic ethical principles, but rather because of its versatility. It was, he said, '"an institute" of great elasticity and generality; as elastic, as general as contract'. The trust had in fact become a 'lawyers' device', used chiefly within the domain of private property transactions and institutions, and capable of serving a wide variety of purposes. In 1934, one finds a left-wing American commentator suggesting that, whatever the merits underlying the moral principle that a trust should not be breached, the versatility of this lawyers' device was exploited in at least one context – the preservation of private family wealth – in a manner which had little to do with ethics (Franklin (1933–34) 19 Tul LR 473 at 475):

> The trust is an effort to escape from the ever-deepening and ever-recurrent crises in capitalism. It is the confession of the upper middle class – the class that has most used the trust – that the contradictions in capitalism cannot be resolved. The risks of capitalism, therefore, must be minimised as much as

> possible through the employ of an astute, intelligent, ever-watchful class of professional managers of capital who are placed, because they are *élite*, beyond the control of the owner for consumption. But American lawyers do not have to be reminded that capitalism is so sick that even this device to protect the only class that benefits from capitalism has failed pathetically.

These generalisations reveal their origin in 1930s-Depression America (eg, in the reference to capitalism's 'sickness'), but they illustrate well enough that, whatever its underlying moral base, the trust is by no means insulated from its social and political environment or from political controversy. The majority of those who consciously use the trust in a family context have been the minority of individuals and families who own capital to any significant extent. Moreover, the phrase 'professional managers of capital . . . beyond the control of the owner for consumption' suggests a significantly different role for trustees than is implicit in the phrase 'a confidence reposed in some other' or in other lawyers' descriptions of a trust (one of which is cited in the next section).

We refer in the previous sentence to 'description' of a trust because defining the trust, as opposed merely to describing it, has proved to be difficult. A sometimes overlooked facet of Maitland's assessment of the trust, that of development, highlights the difficulty. It was the process of trust development – more in response to pragmatism than principle – that so attracted him. This dynamic nature of the trust device necessarily makes attempts at definition, if by definition we mean stating the essence of a thing, a fraught exercise.

Paradoxically, however, at the very time Maitland was writing it appeared that the development process had reached a terminus. Although our understanding is inexact – the modern history of the trust has still to be fully documented – it does seem that the combined influence of the courts and treatise writers had, during the eighteenth and nineteenth centuries, completed the task of refining the family of concepts that constitute the trust. Accordingly, what Maitland was holding up for inspection looked like a largely finished article with well-established features, though these features reflected the different functions that the trust had performed. However, the pace of fiscal, commercial and social change has quickened noticeably in the last half-century and, for reasons that will become apparent, 'development of the trust idea' is now firmly back on the agenda as attempts are again made to adapt the trust form to novel purposes.

Consequently, how far the principal subject of our study, the trust concept, can be said still to be in a process of development is a recurring theme in this book. At this stage, just one aspect of this need be introduced. We have just referred to 'the trust concept', but this singular notion may itself be misleading. If, with Maitland, we want to understand the process of development we need to consider whether in fact the 'trust concept' is but a collective term for describing a family tree of different trust ideas at various stages of

development. Some branches will have grown to full maturity, whereas others have, as yet, scarcely sprouted, and a process of incremental development, usually gentle but at times more dramatic, is still occurring. We should, therefore, be careful when meeting different types of trust not to assume that what is a central characteristic of one type of trust is a necessary element in all other types. Indeed, we need to consider whether it is preferable to talk not of the law of trusts in the singular, but of laws of trusts in the plural.

## 2. The nature of a trust in English law

One of the major traditional practitioners' texts on trusts law, *Lewin on Trusts*, gives the following description of a trust (18th edn, 2008), p 4:

> [The word 'trust'] refers to the duty or aggregate accumulation of obligations that rest upon a person described as trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called *cestuis que* trust, or beneficiaries, if there be any; if not, for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest.

This is probably the most comprehensive of the 'definitions' of a trust to be found in standard legal works, derived incidentally from the judgment in an Australian case *Re Scott* [1948] SASR 193 at 196, but some additional comments must be made by way of elaboration.

(1) In most cases, a trust arises out of the conscious act or declaration of an individual or group of individuals. To this individual or group no single name is consistently applied: one finds 'founder', 'settlor', 'creator' and 'donor' (or their plurals, as the case may be). Where the trust is created by a will, 'testator' or 'testatrix' – being the words for describing the maker of a will, whether or not it contains a trust – acts as a substitute. A founder of a trust may be a trustee and/or a beneficiary under it (subject to point (3) below). Where a trust arises out of the conscious act or declaration of a 'founder' (as will be seen later, he or she need not actually use the word 'trust'), it is called an 'express trust'.

(2) Where there is no conscious act or declaration that creates the trust, it will owe its existence to legal rules (statutory and judge-made), which in certain defined situations impose trusts on individuals (so that they

thereby become 'trustees') in respect of property owned by them or under their control. In such cases, there is no founder of the trust and the trust can be said to be an 'imputed' trust. 'Imputed' is not a recognised legal term in this context, but we will use it as a synonym for 'non-express'. As will be explained later, there are more specific (though somewhat confusing) sub-classifications: 'statutory', 'implied', 'resulting' and 'constructive' trusts.

(3) A trust can have any number of beneficiaries or founders. The same applies to trustees, subject to practical considerations and to legal rules which insist in some cases that the number of trustees must not exceed four (Trustee Act (TA) 1925, s 34(1)). The same person (private individual or corporate body) may appear in any two or three of these roles, except that the law abhors the nonsense that a person should be sole trustee of property for himself or herself.

(4) The trust property may be any type of estate or interest recognised in property law, ranging from ownership of a car or a piece of land to 'intangible' property, such as a copyright.

(5) Although the Lewin definition refers to the property being 'held' by the trustee, 'or under his control', for practical purposes a trustee generally has legal title to the trust property. Where the trust property is an equitable proprietary interest – it may indeed be an interest under another trust – the trustee's title is equitable only.

(6) The 'consequential benefits and advantages' that accrue to beneficiaries may take the form of benefits in kind (eg, occupation of land held on trust) or cash (eg, income from shares). There is no rule that the entitlements of individual beneficiaries should be fixed in advance or that they should all receive benefit simultaneously; indeed, the allocation of benefits may be left to the trustee(s) (under a so-called 'discretionary trust') or to some third party, who may even have the power to exclude entirely beneficiaries listed or described in the trust deed. Furthermore, it may be stipulated that interests arise only if a specified contingency is satisfied, and a trustee may have the duty or power to withhold all allocation of benefit within a specified period, that is, to 'accumulate' income.

(7) In referring cryptically to 'some purpose which the law will recognise and enforce', the Lewin definition is speaking mainly of charitable trusts. Generally, a trust must have one or more persons as beneficiaries or potential beneficiaries, but if its terms require the trustee to administer the trust property for one or more purposes which fall within an artificial legal definition of 'charitable purposes', the trust may be valid even though it is expressed in terms of purposes rather than of beneficiaries. There are some other narrowly defined situations where the failure to define beneficiaries is not fatal to a trust.

Most aspects of this general description of a trust will, of course, be further dealt with in the course of this book.

## 3. The trust's versatility

What aspects of the trust form give it the versatility so admired by Maitland, so that it has come to be employed for a wide variety of purposes over a long period of time? Very briefly, the secret of the trust's success is to be found in three things. First, in establishing a trust, a founder (or a court, in the case of 'imputed' trusts) can play a whole range of 'tricks' with three particular aspects of property ownership: nominal title, benefit and control. The founder (or the court) can juggle these around in a variety of ways. Second, the rights and obligations expressly created in a trust are fortified by effective equitable remedies and supplemented, so far as is necessary, by a substratum of detailed legal rules (as, indeed, is indicated in the Lewin definition). Third, in the areas where it is predominantly used, the trust performs its 'tricks' with property better, and has stronger legal reinforcement, than other competing legal institutions. We shall consider these factors under separate headings, giving some examples of trust dispositions under the first heading in order to illustrate what has been said so far and to show some of the common types of motive that underlie the present-day use of trusts.

## 4. Manipulating facets of ownership through trusts

### (a) The trust's 'tricks'

The following are the most important of the trust's 'tricks' in this regard:

Trick No 1 Nominal ownership of property can be separated from benefit and the right of control.

Trick No 2 Benefits may be split amongst two or more beneficiaries, who may be entitled to shares, or successively, or contingently, according to the wishes of the founder of the trust (as set out in the trust) or any person(s) designated by him or her (which may include the trustees). In particular, where the trust property brings in income – such as rent, or royalties or dividends – entitlement to income may be allocated separately from entitlement to capital (ie, to the trust property itself). To have a 'contingent entitlement' means simply that the beneficiary must satisfy some requirement, such as reaching a specified age, before his or her interest will accrue to or 'vest' in him or her.

Trick No 3 Allocation of benefit may be put in suspense according to the wishes of the founder, or any person(s) designated by him or her (which may include the trustees).

Trick No 4 Some or all aspects of control and management of the trust property may be divorced from entitlement to benefit and reserved to the founder of the trust or conferred by him or her on the trustees or any other person.

Trick No 5 When trust property is 'converted' (eg, land is sold, or money subject to the trust is invested in land or shares), the new property which is so acquired by the trustees is held by them subject to the trust.

Trick No 6 Where, for legal or practical reasons, the group of persons intended to benefit, directly or indirectly, from a disposition of property is too large to enable them to be constituted as co-owners holding legal title, the title can instead be transferred to an appropriately smaller number of trustees to be held on trust for the benefit of the intended beneficiaries, who still retain control.

The following examples illustrate how these 'tricks' can operate in practice (the principal relevant 'tricks' are referred to in parenthesis).

Example 1 (trick 1) Wisegirl completes a transfer of 10,000 £1 shares in Run Down plc in favour of Bear, Bull & Stag, her firm of brokers, instructing them to hold the shares as trustees (or 'nominees', as they are sometimes called in this context) for her son Whizz-kid. The shares will be registered in the company's share register in the name of the brokers, but Whizz-kid is entitled to receive the dividends and any other benefits, and to instruct the brokers on all aspects of management, such as exercising the voting power attached to the shares and selling or otherwise dealing with the shares. He is 'the owner in all but name'.

Comment The chief advantage of this arrangement, as against a simple transfer of the shares from Wisegirl to Whizz-kid, is that the latter may hope to conceal his 'beneficial ownership' of the shares from the company. He may want to do this if (for instance) he is a financial entrepreneur who is thinking of attempting a takeover. Note, however, that ss 793 and 820 of the Companies Act 2006 give UK companies the right to ask any registered nominee shareholder to disclose the beneficial owner of shares. It has been estimated that for most UK-registered public companies at least 80% of their share register will comprise nominee names. It is thought that the rights under these sections are now used mainly by management of companies which regard themselves as potential targets for a takeover bid (see Davies and Worthington (eds), *Gower and Davies' Principles of Modern Company Law* (9th edn, 2012), paras 28–49–28–53).

Example 2 (trick 1) The solicitors' firm of Addmore & Charge receives £50,000 from Credulous, a client, in order to pay for Credulous' purchase of a house. By law this money must go into a client's 'trust account' at the firm's bank. In general, the solicitors are entitled to deal with the money only on Credulous' instructions (eg, they will pay it to the seller of the house when they have Credulous' instructions to settle). This type of trust is often called a 'bare trust'.

Comment For practical reasons it is convenient to have the money lodged at the bank in the name of the solicitors so that they can sign the necessary

cheques, but for virtually all purposes it is still the client's money. In particular, if the solicitors go bankrupt, their creditors cannot get hold of the money to satisfy their claims: the client's claim prevails.

Example 3 (tricks 1, 2, 3 and 5) Stern provides in his will that Solemn and Sad, the executors and trustees thereof, should hold a house, 'Funfair', 32 Hootenanny Parade, Crazyville, on trust to permit his housekeeper Strict (if she should survive him) to occupy the same for the rest of her life, and thereafter to sell the house and hold the proceeds thereof (with any income accruing thereto) on trust for his twin sons Serious and Sensible in equal shares when they attain the age of 25.

Comment Here benefit, in the form of actual occupation, and substantial control go first to Strict, but if on her death Serious and Sensible are not yet 25, there is a temporary suspension of benefit and a shift of control to the trustees, Solemn and Sad, insofar as they decide how to invest the proceeds of sale and whether to change the investments subsequently. In a sense, the 'dead hand' of Stern is also involved in control, because he has directed the retention and subsequent sale of the house, and he may also have laid down stipulations as to the mode of investment of the proceeds and other aspects of control. When the sons Serious and Sensible attain 25, they are entitled to require the benefit, which comprises both the trust investments and the income accumulated thereon since the proceeds of sale were first invested, to be transferred to them in equal shares. Ever since their acquisition, these investments have been held subject to the trust just as the land has, but the transfer to Serious and Sensible brings the trust to an end.

Overall, Stern has here provided for his dependants in a manner which he deems appropriate: his housekeeper has been assured of a place to live and his sons each receive a capital sum at an age when they are mature enough to make proper use of it and may well have an immediate need for it (eg, in order to buy their own house). In the meantime, the trust investments have been competently managed.

Example 4 (tricks 1–5) In 1964, land and investments worth £1,000,000 were put into a 'Trust Fund' under a trust deed executed by Lucre, aged 56. He listed the following as the 'specified class': his mother (aged 80); his wife (aged 48); his three children (aged 25, 23 and 20); and his grandchildren, both existing (there was already one, aged three months) and to be born in the future. The trustees are his trusted and prudent friend Solomon and his solicitor Sheba. The key clause of the trust deed is as follows:

> The trustees shall stand possessed of the Trust Fund and the income thereof UPON TRUST for all or such one or more exclusively of the others or other of the members of the Specified Class if more than one in such shares and either

absolutely or at such age or time or respective ages or times upon and with such limitations, conditions and restrictions and such trusts and powers (including discretionary trusts and powers over income and capital exercisable by any person or persons other than the Settlor or any Spouse of the Settlor whether similar to the discretionary trusts and powers herein contained or otherwise) and with such provisions (including provisions for maintenance and advancement and the accumulation of income for any period or periods authorised by law and provisions for investment and management of any nature whatsoever and provisions for the appointment of separate trustees of any appointed fund) and generally in such manner as the Trustees (being not less than two in number or being a corporate trustee) shall in their absolute discretion from time to time by any deed or deeds revocable or irrevocable appoint.

Comment The significant feature of this 'discretionary trust' is that it is still a trust, even though no one in the specified class is entitled under the trust deed to claim a specific share of the trust capital or income, or even to insist at any specific time that all or any part of the capital or income should be distributed. The question of entitlement (as well as choice of investments and other aspects of control) is left entirely to the trustees subject only to any limits specified by Lucre. In the result, Lucre has provided for three generations of his family and ensured competent management of the trust property – as Stern did in the preceding example – but there are three further advantages to be gained from Lucre's trust:

(i) The trustees can allocate the benefit of the trust according to the *current* needs of the various beneficiaries. The comparative rigidity of Stern's will trust in Example 3 could lead to anomalies; for example, if one of his sons becomes a millionaire pop star by the age of 25 while the other is unemployed, there is no provision in the will for giving all or substantially all of the trust fund to the latter. Furthermore, as long as Lucre is still alive, he can exercise de facto influence over his trustees (who may be wholly 'tame') to respect his views in this regard. (NB: For a salutary warning of the perils of behaving as a 'tame trustee', see *Turner v Turner* [1983] 2 All ER 745, and generally Chapter 10.)

(ii) If any of Lucre's beneficiaries go bankrupt, or are desperately trying to raise money to pay for the improvidence sometimes associated with the heirs of the wealthy, they have no ascertainable interest under the trust which their creditors can get hold of or which they themselves can sell or mortgage. To this extent, the trust remains immune from their creditors and acts as a 'caretaker' mechanism to protect them from their own improvidence or ill-luck.

(iii) According to the law, at the time of this trust's fictitious establishment in 1964, the trust had notable tax advantages. In particular, estate duty

would not have been payable in respect of the creation of the trust, being an *inter vivos* disposition, provided Lucre lived for seven more years; and on the subsequent death of Lucre's mother or wife, or indeed any of the beneficiaries, the existence of the trust would not have increased the estate duty payable on the deceased's estate because the deceased beneficiary would have had no fixed interest in the trust fund, but merely an expectation of benefit. (By contrast, the value of Stern's house would have been subject to estate duty twice, in his estate on his death, and in his housekeeper's estate on her death.) Taxation of transfers of capital has changed since 1964, and the discretionary trust is no longer such an outright tax saver (see Chapter 3), but it represents a classic case of tax avoidance through the use of trusts and its importance in this regard over many years has had a significant impact on the law of trusts.

Example 5 (trick 6) Due to complex conveyancing rules, established initially by the 1925 property legislation, land cannot be held under any form of co-tenancy by more than four persons. If seven people wish to hold land in joint tenancy or tenancy in common, it must be vested in trustees in trust for them. If the conveyance simply names the seven individuals as transferees, the first four named will be treated as trustees (holding a joint tenancy) for all seven by virtue of a statutory 'imputed' trust. The changes introduced by the Trusts of Land and Appointment of Trustees Act (TOLATA) 1996 have considerably simplified the rules relating to 'trusts of land', but have not affected this basic formal position on co-ownership. The statute substituted one form of trust – the trust of land – for the two types – trust for sale and strict settlement – that existed under the 1925 legislation. The powers conferred on trustees by the 1996 Act are significantly wider than those under the earlier legislation. These powers will be referred to only briefly at appropriate points in the text because trusts of land and the 1996 Act are more appropriately studied and discussed in the general context of land ownership and control.

Example 6 (tricks 5 and 6) The trust is a convenient vehicle whereby funds contributed or deposited by or on behalf of a large and possibly fluctuating number of people may be put into investments (usually stock exchange securities) for their collective benefit by a small group of trustees and managers. Three examples of this collective investment function of the trust are of particular importance:

(i) The *bond or debenture trust*, whereby a single company solicits loans at fixed interest from the public, arranging for a trustee (usually a corporate body) to act as a nominal lender of the total amount subscribed, a conduit-pipe for interest and principal payments from the company to the individual investor and a watchdog for the investors' interests. It would in theory be possible for the borrower to issue bonds or debenture

stock direct to the lenders/investors. This would involve the disadvantage of the borrower dealing direct with hundreds, perhaps thousands, of the lenders/investors. Arguably, this would be wholly impracticable in the case of a secured debenture issue since each lender would acquire a security interest in the assets of the borrower. The interposition of a trustee as an intermediary avoids these difficulties and provides the advantages referred to previously (see, eg, Duffet (1992) 1 JITCP 23–30; and generally Hayton et al (2002) 17(1) JIBFL 23).

(ii) The *unit trust*, whereby under close statutory regulation a corporate 'custodian trustee' holds a fund gathered from the public in return for the issue of 'units' of the fund, and a corporate managing trustee invests this fund in whatever stock market securities seem best at any given time. Dividends and capital gains earned from the investment accrue for the benefit of current unit-holders (see Fan Sin, *The Legal Nature of the Unit Trust* (1998)).

(iii) The *private pension fund*, whereby money paid in on behalf of a company's employees by the company and, in most cases, by the employees themselves is invested by a small group of trustees (who may include one or more representatives from the employer's and the employees' respective 'sides') in order to provide pensions for the employees on their retirement (see the online chapter 'Occupational Pension Schemes').

Example 7 (tricks 4 and 6) Where companies encounter trading difficulties and insolvency threatens it may be possible to refinance the business so as to keep it operating as a going concern. The claims of existing unsecured creditors will be of limited value to them in the event of insolvency. Those creditors may therefore be willing to subordinate their claims to the interests of potential later creditors such as banks, who may then be willing to risk further injections of funds to keep the business afloat. A legal difficulty is that this runs counter to a principle of insolvency law that requires all unsecured creditors to be treated alike, or '*pari passu*' as it is known. Interposing a separate trustee between the company and the creditors can circumvent this problem by arranging that all of certain designated debts are owed to the trustee. The trust instrument, known as a 'subordination trust', can then specify the order in which the creditors will be able to claim in the event of the ultimate insolvency of the debtor company. The example described above is just one of many ways in which the trust can be employed as part of a commercial arrangement (see O'Hagan (2000) 8(2) JITCP 85; and the sources referred to under Example 6(i)).

Example 8 (tricks 4 and 6) About three months after a coal-tip disaster at Aberfan, South Wales, on 21 October 1966, in which 144 people, including 116 children, died, the massive fund collected by public appeals (it ultimately reached about £1,750,000) was transferred in the form of cash and

investments to fourteen trustees. Under the trust deed, it was to be held and applied by them in accordance with the directions of a management committee (which initially comprised six of the trustees and nine other representatives of the local community) on the following trusts:

> (i) for the relief of all persons who have suffered as a result of the said disaster and are thereby in need; and
> (ii) subject as aforesaid for any charitable purpose for the benefit of persons who are inhabitants of Aberfan and its immediate neighbourhood (hereinafter called 'the area of benefit') on the Twenty First day of October One Thousand Nine Hundred and Sixty Six or who now are or hereafter become inhabitants of the area of benefit and in particular (but without prejudice to the generality of the last foregoing trust) for any charitable purpose for the benefit of children who were on the Twenty First day of October One Thousand Nine Hundred and Sixty Six or who now are or hereafter may become resident in the area of benefit.

Comment This was a charitable trust: that is, the purposes elaborated in the clause just quoted fall within the 'legal definition of charity', so the devoting of benefit to purposes instead of benefit to potentially ascertainable people did not invalidate the trust. It was unusual in that the trustees – the nominal owners – and the management committee – those with the right to control – were separate groups: in charitable trusts the trustees usually perform both these functions. But the role played by the trust in centralising nominal ownership and control of the large amount of money contributed whilst benefit could be spread out amongst a whole community (with particular attention to those who had suffered most from the collapse of the coal-tip) was evident enough, and typified the use of the trust for charitable activity.

Example 9 (trick 6) The Bunker Golf Club, having over 300 members, has its own golf course and a number of shares. These are formally vested in two trustees, Tee and Caddy, on trust to hold them for the benefit of the members of the club for the time being.

Comment A trust is used here not merely because of the rules of land law mentioned in Example 5, but also because of the practical consideration that it would be grossly unwieldy to have all the members (who fluctuate from time to time) registered as legal owners of the land or the shares. Questions of control of this property are determined by the club's management body and membership in accordance with the constitution, to which all members have agreed to adhere when they joined the club (see Chapter 15).

Example 10 (tricks 1 and 5) X is the tenant under a lease of business premises on favourable terms. She asks Y, her estate agent, who negotiated the lease in the first place, to try to obtain a renewal for her. Y tells the lessors that X does not want a renewal, and manages, without telling X, to obtain a renewal for himself. X is entitled to claim that Y holds the lease as 'constructive trustee' for X, that is, Y must treat X as the 'owner in all but name' and, if X so requires, must transfer the lease to her.

Comment This example falls within one of the categories of 'imputed' trusts. No one has consciously founded or created the trust, but in order to enforce the obligation binding Y, as X's agent, to act only in X's interests in negotiating the renewal, the law 'imputes' the trust in order to establish that Y's ownership of the renewed lease is nominal only, and the benefit and right of control belong wholly to X.

### (b) Summary

This selected list of the trust's 'tricks' and the examples, fictitious and real, that illustrate them, give a general idea of the trust's versatility and of some of the common types of purpose that a trust's founder may have in establishing a trust. These purposes include concealing ownership, facilitating land conveyancing and other types of dealing in property, holding and controlling property for the sake of large groups of people (particularly in the fields of collective investment and charitable and other non-profit-orientated activity), providing for the founder's family in various ways over long periods of time (both before and after his or her death), protecting property from creditors and from the extravagance of individual members of the family, and cutting down tax liabilities, particularly on the transfer of private capital. In the case of 'imputed' trusts, the underlying purpose is to implement a judicial or legislative intent that, despite the absence of any express declaration of trust, a nominal owner of property should be treated in certain situations as holding the property for the benefit of someone else.

It will be observed that in some cases (eg, Examples 1 and 5), the trust is very short and simple; in others (especially Examples 4, 6 and 7), a long and complex document, setting out detailed powers and duties, is required. Sometimes, the trust is 'embedded in', or very closely linked with, another legal concept or institution, such as a contract (Example 9: the golf club's rules take effect contractually), one or more 'powers' (Example 4) or a will (Example 3). At times, the trust seems to be no more than a mechanical common-form device, fitting in a gap left by technical rules of property law (Example 5); in other cases (eg, Example 4) it will be consciously and deliberately tailor-made to suit an individual founder's specific purposes. In other words, some founders of trusts have trusts thrust upon them, possibly without their realising it, others twist trusts to their own ends and yet others are somewhere in between.

The boundaries of the trust's areas of use are also somewhat random. Why, for instance, should it be prominent in collective investment and non-profit-making activity, but not in ordinary commercial enterprise? If one wants to put property in the name of another, but enjoy the benefits secretly, would not a contract with that person be just as good as a trust? To answer questions such as these, one has to know something of the type of protection and reinforcement which the law gives to trusts and something of the type of 'tricks' that other legal institutions arising in the domain of private property can perform. In a broad sense only, these are the respective preoccupations of the next two sections of this chapter.

## 5. Equity's rules for enforcing trusts and supplementing their terms

The law of trusts consists chiefly of rules for the enforcement of obligations set out in trusts and rules that are designed to supplement these expressly imposed obligations. This does not cover the whole field of trusts law; there are also, for instance, rules for determining whether a valid trust has been properly created. At the risk of stating a commonplace, it must be emphasised that the ambit of the equitable rules that are briefly outlined below is not restricted to the enforcement of obligations associated with the trust. As will be seen at several points in this book, but particularly in Chapters 12 and 14, equitable rules and remedies have a much broader compass.

With regard to the rules concerning enforcement, a brief historical résumé is necessary here, although we consider this topic more closely in Chapter 2. The rules were developed over a long period by a specific court, the Court of Chancery. This existed separately from the common law courts, in which, generally speaking, only common law titles to property were recognised. Chancery never formally denied such common law titles; it simply maintained that when owners of property under common law title held the property by virtue of a disposition that made them trustees thereof, they could be ordered by Chancery to exercise their rights of ownership for the benefit of those designated under the trust as beneficiaries. The development of this parasitic relationship of the trust notion to common law ownership explains why, generally speaking, a trustee is the legal owner of the trust property. The existence of a trust does not take this ownership away from the trustee, but renders it nominal by entitling the beneficiaries to invoke remedies granted by Chancery in order to secure such entitlement (in terms of benefit from the property and control of it) as the trust confers on them.

The remedies thus initially granted to trust beneficiaries took the form of claims against trustees deriving from the trustees' breach of confidence in failing to abide by the trust (cf, the 'moral basis' of trusts referred to in the opening paragraphs of this chapter). In the course of time these remedies became quite extensive, so that nowadays trustees can be ordered (for example) to give accounts of their financial administration of the trust, to pay money out of

their own pockets by way of compensation for damage to the trust or make restitution of profits which they have secretly made for themselves by virtue of their trusteeship, or to refrain from committing specified acts amounting to breach of trust. Concurrently, however, Chancery strengthened this arsenal of remedies by granting beneficiaries redress against third parties in appropriate circumstances. In particular, it developed the principle that, broadly speaking, any person who receives trust property from a trustee with 'notice' of the existence of the trust and/or without giving value for it should be taken to hold the property subject to the pre-existing trust. Even though a bona fide purchaser without notice of the trust is *not* thus bound, this aspect of Chancery's protection of the beneficiary enabled the beneficiary's interest to be treated as akin to a right of property. The same effect has emerged from rules empowering beneficiaries to dispose of their entitlement under a trust like any other item of property; they can even transfer it on a further trust so as to create a 'sub-trust'. It has spread also to 'imputed' trusts: thus, for instance, where X holds property on 'constructive trust' (or any other form of trust) for Y, Y's rights to the property usually prevail over X's creditors.

Paradoxically, whereas the founders of trusts have wide discretions as to the terms of the trust, the sequence of events whereby Chancery developed trust remedies did not confer on them any general right to compel the trustees to observe the trust. To this extent, a transfer on trust operates to sever the founders from their former proprietary rights. But there are mechanisms whereby they can retain specific aspects of control: they may, for example, reserve to themselves a power to revoke the trust, or to determine beneficial entitlement or to dismiss the trustees and appoint new ones.

The supplementing of an express trust by rules of equity chiefly takes the form of defining a trustee's administrative duties and powers where these have not been spelled out. Chancery and the legislature have been assiduous in this respect. For example, the Trustee Acts 1925 and 2000 confer on trustees a wide range of miscellaneous powers, including selling or mortgaging trust property, insuring it, compromising debts or other claims which the trust is entitled to make, maintaining minor beneficiaries out of trust income and applying to the Chancery Division for advice. The Trustee Act (TA) 2000 also contains provisions to facilitate the investment of trust funds and to stipulate the circumstances in which a statutory duty of care will apply to trustees. Most of these trusteeship powers and duties can, however, be abrogated, extended or modified in the trust instrument, and often are.

In the outcome, the extent to which a beneficiary's rights can be conceived as falling short of absolute ownership depends largely on two caveats:

(i) the extent to which powers of control and/or determination of beneficial entitlement are reserved to trustees or third parties; and
(ii) the importance to be attributed to the fact that a bona fide purchaser of the trust property for value and without notice may override the beneficiary, leaving him to pursue remedies against the trustee.

The first of these factors is very much at the discretion of the founder of the trust. The importance of the second factor depends largely on value judgement; given that in most situations purchasers are 'on notice' if they could reasonably have been expected to ascertain the trust's existence, its practical significance is probably not great. The degree of control left to founders after creation of the trust is a flexible matter, but specific powers that they reserve to themselves will receive legal protection. On top of all this, extensive trusteeship duties and powers are laid down by the law in the absence of express provision in the trust. The sum total is an impressive barrage of rules ensuring that trustees cannot abuse with impunity their position as nominal owners, even though in formal terms at least their powers of management may be very wide. The state, chiefly through the Chancery offshoot of its judicial branch, has lavished plenty of care and attention on trusts.

## 6. When is a trust not a trust?

The opening chapter of a book on Trusts Law is not usually the place to come across Christmas cracker-like riddles. The reason for posing the riddle is to counter an impression that may be growing on the reader to the effect that there is no limit to the degree of separation of ownership, control and benefit that can be accomplished by use of a trust. That impression would be misleading. There must be some *genuine* separation of those features for a trust to be valid. Let us suppose my wife and I make a declaration of trust under which our house is to be held on trust for her and for my children. We continue to act as if we are absolute owners, even to the extent of obtaining a loan from the bank on the security of the property to finance my business dealings. They turn out to be disastrous and the bank seeks to realise its security against 'my property'. With a flourish I produce the trust instrument, the existence of which I had omitted to inform the bank about, and which purports to show that I have no interest in the house at all. The bank will claim, probably successfully, that the declaration of trust is a 'sham' (see *Midland Bank v Wyatt* [1995] 1 FLR 696, discussed in Chapter 4 at pp 183 et seq). Consequently, the 'trust property' will still be beneficially owned by my wife and myself, and is available to some extent to meet the claims of my creditors. A more elaborate variant of a sham could arise where a settlor does genuinely transfer legal title in property to trustees, but reserves to himself very extensive powers, for instance, to amend the terms of the trust, to appoint new trustees (including himself), to act as investment manager, to add or exclude beneficiaries and so on. If the trustees acquiesce in these arrangements and, in effect, act as a cipher for the settlor a court confronted with claims brought by creditors or by HMRC may decide that the trust is a sham. The outcome would be that the trustees hold the property on a bare trust for the settlor. And the answer to the riddle, of course, is: 'when it is a sham'.

## 7. The trust and 'competing' legal institutions

The material in the foregoing two sections shows that the trust – meaning here particularly the express trust – is potentially of use where it is desired to split the three facets of ownership referred to (nominal ownership, benefit and control) with the assurance that whatever arrangement is decided on will receive adequate protection from the courts. But English law also provides many other ways of permitting someone to deal with property for the benefit of another. When one then turns to ask whether the trust, in a given type of situation, is a *better* legal institution to use for this type of purpose than any other, a whole new range of issues is opened up. One has to consider the strengths and weaknesses of such other legal devices – contracts, bailments, conditions, etc – as appear to offer alternative means of reaching a similar result. These strengths and weaknesses reflect the different legal consequences that attach to each institution or, if you will, their different juridical natures. But in considering, as we do below, what aspects of their respective natures makes, for example, a contract or a trust better for a particular purpose, we should not lose sight of their functional similarities. To continue the contract–trust comparison, the origin of both is commonly a transaction between two persons, in the trust context settlor and trustee, and as Maitland acutely observed, it is impossible 'so to define a contract that the definition shall not cover at least three-quarters of all the trusts that are created' (*Equity* (2nd edn, 1936), p 54; Macnair, 'The Conceptual Basis of Trusts in the 17th and 18th Centuries', in Helmholz and Zimmermann (eds), *Itinera Fiduciae* (1998), pp 207–36; see further Langbein (1995) 105 Yale LJ 625, for an intriguing contemporary resurrection, not to say embellishment, of the 'trust as contract' idea).

We must, therefore, emphasise that a trap to be avoided is one of believing that certain transactions can be achieved *only* by means of a trust and others *only* by means of contract, etc. Indeed, on occasion the one set of facts may permit more than one conclusion. For example, informal domestic arrangements concerning payments for alterations to a house may be construed as creating either a loan or a trust, as in *Hussey v Palmer* (see below, p 23). The situation is further complicated by the fact that the best way of achieving the desired result may be to use the trust in combination with other legal forms. Examples of this have already been given (see Example 9 above).

This introductory section is no place to investigate these issues at length. But at this stage it is useful to consider what sort of factors may give the trust special prominence in particular types of property transaction or, alternatively, may wholly or partly shut it out from use. This will be done by briefly comparing the trust with three other legal institutions: contracts; 'personal representation' with reference to a deceased's estate; and limited liability companies.

### (a) Trust and contract

Let us consider the advantages and disadvantages of the trust and the contract in the 'secret ownership' situation illustrated in Example 1 (p 6). If the arrangement is set up by contract alone – whether it be a contract between the brokers and Wisegirl, or the brokers and Whizz-kid or all three – the major disadvantage from the point of view of Wisegirl and Whizz-kid is that, if the brokers were to sell or give the shares to a third party in breach of the contract, Whizz-kid's claim to the dividends etc, would be overridden even though the third party knew all along about the contractual arrangement. One could evade this by dressing it up as a contract of agency between Whizz-kid (as principal) and the brokers (as agents), because if the brokers then gave the shares away or sold them to a third party who was on notice, Whizz-kid would have so-called rights of 'tracing' against the third party, entitling him to claim the benefit of the shares. But, as we shall see, these rights arise only from a form of 'imputed' trust: in other words, agency smuggles the trust in by the back door. And there is the practical disadvantage that, as Whizz-kid has to be made a party to the contract, the simplicity of Wisegirl's transfer on trust is lost. The only possible advantage of using a contract is that Wisegirl herself (assuming she is a party) can easily sue the brokers if they play false, whereas the trust, it will be recalled, prima facie confers rights of action for breach of trust on the beneficiaries only. There are ways of combining the contract and the trust to achieve this result (eg, the brokers could agree formally with Wisegirl to observe the trust in Whizz-kid's favour), but again the objective of simplicity has been lost.

If one alters the facts slightly, and makes Whizz-kid a bouncing baby or an unborn grandchild instead of a fast operator on the stock market, the trust's advantage over the contract is more obvious. Because Whizz-kid cannot contract with full capacity (if at all), no agency relationship will arise between the brokers and Whizz-kid, and, in the absence of an express trust, Whizz-kid has no claims in any circumstances against a third party who receives the shares.

This is not to say that every time the trust and the contract 'compete' to perform some property transaction, the trust always wins. Usually, in fact, it loses. The contract is adaptable to a far greater number of situations, simple and complex, than the trust and it permeates a considerably wider range of social situations than the property-holding milieu of the trust. But this example does show that, when it comes to making as watertight as possible an arrangement for separating facets of property ownership, the trust's special characteristics are likely to make it preferable.

### (b) Trusteeship and 'personal representation'

The comparison of trusteeship with the position of 'personal representation' occupied by the executor or administrator of a deceased's estate raises a

different issue. Put simply, the administration of a deceased's estate entails collecting all its assets, paying off its liabilities (in particular, debts and inheritance tax) and distributing what remains to those entitled. Where the deceased has left a will which nominates someone to do this and this person accepts the office, he or she is an 'executor' or an 'executrix'; where the will makes no nomination, or there is no will, an 'administrator' or 'administratrix' is appointed by the court. The phrase 'legal personal representative' comprehends both these offices.

Clearly, personal representation has a good deal in common with trusteeship: the legal personal representative is a nominal owner of property who performs certain tasks in relation to it for the benefit of others, that is, the beneficiaries under the will or the next of kin where there is no will. But, in contrast to the trust–contract comparison just described, one cannot consciously choose between trusteeship and personal representation with regard to property dissolution on death. This is because by law the tasks of administration fall wholly to legal personal representatives and are the only tasks required of them acting as such. In practice, the same individuals are often appointed to be executors and trustees; they act first as executors in administering the estate, then hold the remaining property as trustees of the trust(s) set out in the will (Stern's will in Example 3, above, illustrates this process). Similarly, an administrator of an intestate estate becomes a trustee on 'statutory trusts' for the next of kin when administration is over. Thus, while personal representation and the trust are not alternative legal devices for achieving the same end, they have a similar fiduciary character and are, therefore, assimilated by the law in a number of respects, for example, in having certain common powers and duties under the Trustee Acts 1925 and 2000. They are also closely associated in point of time. Indeed, fine legal distinctions have to be drawn to determine how the rules and practices to be followed by trustees and executors differ, and when precisely an executor-cum-trustee exchanges an executor's hat for a trustee's hat (see generally Kerridge and Brierley, *Parry and Kerridge: The Law of Succession* (12th edn, 2009), paras 24-49–24-63). There is one significant distinction that needs to be mentioned and this relates to the interests of those entitled under the will or on intestacy, called legatees or devisees depending on the nature of the assets of the deceased's estate. It is generally accepted that they do not have any equitable ownership in the assets under the administration of the personal representative until the point of time when the personal representative changes hats (see *Stamp Duties Commissioner (Queensland) v Livingston* [1965] AC 694, where the issue of equitable ownership had implications for tax liability). Then they become beneficiaries with full equitable ownership. Until that time the equitable ownership can be said to be in suspense, although, of course, legatees and devisees can call on the remedies that equity provides to ensure that the personal representatives comply with their fiduciary or 'trust-like' duties.

This brief comparison of trusteeship and personal representation helps to show that from a functional point of view the choice of alternatives when one is thinking about manipulating the distribution of one's property after death is between a will (which inevitably brings in administration) and an *inter vivos* trust (which virtually bypasses it as far as the property contained in it is concerned). But unless the mode of distribution is to be fairly simple, the will is likely to contain dispositions on trust, so it is not a matter of choosing between a will and a trust, but deciding whether or not to set up one's trust in a will. A comparison of Examples 3 and 4 above (Stern's will trust and Lucre's *inter vivos* trust) illustrates this.

### (c) Trust and company

We come now to the final comparison to be discussed in this chapter: trust and limited liability company. The similarity here is entirely at the level of function. At the theoretical level, a company is a 'separate legal entity', whereas a trust is not; it follows that, whereas in company law the company is the legal entity liable for its debts, the liabilities claimed against a trust are in the first instance payable by the trustee(s). In practical terms, a company differs from a trust in its personalities – shareholders, directors, etc – its constituent documents, its mode of coming into being (by formal incorporation at Companies House) and in numerous other ways. But a brief historical glance at the way in which these two legal forms have vied with each other in performing a number of functions relating to private property-holding gives useful insights into the sort of circumstances that can bring the trust into prominence or push it into eclipse.

When in the mid-nineteenth century the company with limited liability became freely available, necessitating only a simple registration procedure, the trust had already been an essential ingredient in a form of business association for about 100 years – the so-called 'deed of settlement' company – adopted by many medium- and large-scale industrial and commercial firms (see further Chapter 2). It was also essential to virtually all forms of charitable activity (whether in the form of the charitable trust per se or as part of the legal set-up of unincorporated charitable associations) and to many other forms of collective non-profit-making activity. It could also be used to avoid liability for debts, though the method was cumbersome. To summarise, the trust operated here as a means of association for economic and social purposes.

By about 1910, things had changed drastically. Despite the trust's possible use for avoiding debts, the company form had made a wholesale takeover of commercial and industrial activity (save amongst firms that were too small to have ever needed the trust form anyway). This occurred chiefly because the company offered straightforward limited liability, a separate 'corporate entity' that could hold property and enter into contracts in its own name without the need to appoint and reappoint trustees, and a ready-made demarcation of

shareholders and directors. Yet, while ousted from this area, the trust had embarked on a still persisting competition with companies in the field of collective investment on the stock market. The unit trust (described above) has a functional counterpart in the so-called 'investment trust', which, despite its name, is actually a company set up to perform a similar function. Furthermore, as twentieth-century rises in estate duty and other taxes made tax planning an increasingly absorbing occupation for the rich and their lawyers, the choice between vesting family assets in a trust or a private company was within certain wealth ranges a very fine one, depending on the particular circumstances of the family and the prevailing tax laws (see generally Ashton [1987] BTR 256). With regard to charitable and other non-profit activity of a collective nature, the company limited by guarantee during all this period made inroads on the trust's dominance, though it is difficult to assess the extent of this.

Some of these developments will be referred to later in more detail, but this outline is enough to illustrate how the prominence of trust or company in a specific area often varies as a result of matters extraneous to trusts or company law, such as changes in tax law or even, in the case of the unit trust/investment trust 'competition', in investment experts' predictions of future stock market trends. Thus, the trust–company comparison illustrates, better than any other similar comparisons, that the range of tasks assigned to trusts is very responsive to changes in its 'environment' – social, economic, legal – as well as to changes within trusts law itself, and that in this notion of a legal 'environment' one has to include the law governing other legal institutions having similar functions, such as companies. This is not to say that changes in trusts law itself are unimportant, and in the outcome it is the interaction of trusts law and its 'environment' that ultimately determines the shape of trusts and what they do. Tax considerations may even be such as to prompt the use of trust and company forms in harness, as with the emergence of the 'trading trust' in Australia (see, eg, Finn (ed), *Essays in Equity* (1985), ch 8; Ford and Hardingham, 'Trading Trusts, Rights and Liabilities of Beneficiaries', in Finn (ed), *Equity and Commercial Relationships* (1987); *Jacob's Law of Trusts in Australia* (7th edn, 2006), paras 2042–2044; and Hayton, 'Trading Trusts', in Glasson and Thomas (eds), *The International Trust* (2nd edn, 2006), ch 7).

The company–trust comparison also helps to show how far the character of a trust as a 'reposing of confidence' based on moral law has been transcended by its functions as an instrument of private capital within capitalist society (cf, the opening paragraphs of this chapter). Insofar as it can operate as a basis of association, a legal mechanism for aggregating, organising and preserving wealth at one remove from those who actually enjoy the benefits, it performs roles akin to those of the company, though in a manner less overtly linked with capitalism. The company's capitalist orientations are clearer, partly because it functions primarily within industry and commerce (which the trust does not) and partly because it has no underlying basis of 'confidence' and

'trust' (in the moral sense) to divert attention away from its capital-holding functions. This is not to say that the company operates free from any trust-like or 'fiduciary' obligations. Those who control corporate wealth have had such obligations superimposed upon their roles as managers, both through statute and the common law, and may even be enforced by the device of 'imputed trust'. With the trust the fiduciary concept came first and the rest later, but the end result is similar in important respects.

There are other comparisons that one can draw between trusts and similar legal institutions. One of these – the comparison of trusts and powers – is dealt with in some detail later as part of the discussion of discretionary trusts (Chapter 5). The interaction of these two ideas is too complex and technical to be covered in an introductory chapter. Another – the comparison of trust and debt – is considered in a commercial and consumer context in Chapter 13. To compare trusts with bailments, or conditions attached to a gift or bequest, or equitable charges is useful from the point of view of clarifying the precise legal nature of a trust, but bears little relation to the general themes of this chapter. Accordingly, these comparisons will be mentioned briefly at later points where they tie in with discussion of the trust in historical or contemporary contexts.

## 8. Imputed trusts

The comparisons drawn between the trust and other legal forms refer principally to those circumstances where a conscious decision is taken about the choice of legal form – the 'trust-twisting' end of the spectrum. But, as previously indicated, the trust obligation can come into existence not only through the expression of an intention on the part of the trust founder(s) (an 'express trust'), but also where the law imputes or imposes a trust – an 'imputed trust'. It is necessary to explore a little further the distinctions between and within these different trust types even at this introductory stage. The reader should be aware that there is no unanimously accepted classification of trust types and, more importantly, that they do not divide into watertight, mutually exclusive compartments.

We need to refer first, if only briefly, to the express-imputed distinction. No possibility of confusion can arise in the overwhelming number of situations, the trust founder's intention being made quite explicit in writing. But express trusts can be created informally, an intention to do so being inferred from the actions of the trust founder. In such circumstances the distinction between inferring an intention to create a trust and the court imputing a trust can be a very fine one indeed, as we shall see when 'intention' is discussed in detail in Chapter 4.

Within the categories of imputed trusts themselves, a further subclassification of one type of imputed trust, resulting trusts, into 'automatic' and 'presumed' resulting trusts has until recently been generally

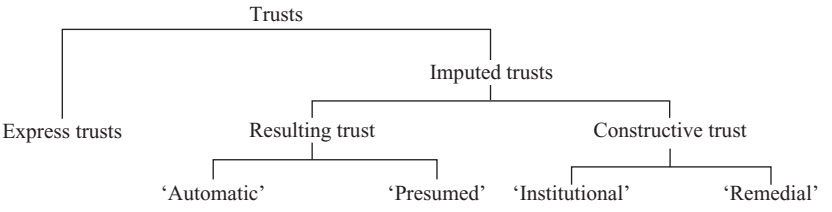


**Figure 1.1** A trust typology

accepted. The first type arises where an express trust fails for some reason; the trustees cannot, of course, take the property for their own use and so, as the name implies, the beneficial interest in the property 'results', or goes back to, the trust founder. As we shall see in Chapter 4, where we look at the rationale of this trust, reservations have been expressed about the appropriateness of the 'automatic' label; but for our immediate purposes, and in the absence of an accepted alternative, we will persevere with the present terminology. By way of contrast, a 'presumed' resulting trust can arise where one person, A, gratuitously transfers property to another, B, in circumstances wherein equity adopts a rebuttable presumption that B then holds the property, not as beneficial owner, but on trust for A. This initially surprising presumption acquired a contemporary relevance in resolving property disputes where families break up, and the presumed resulting trust is discussed principally in that context (see Chapter 11). The second type of imputed trust, a constructive trust, is one imposed by operation of law irrespective (generally speaking) of the intention of the parties, and, indeed, quite possibly contrary to their intentions. Thus, we have arrived at the classification set out in Figure 1.1.

Any impression of orderliness conveyed by this classification would be misleading for a number of reasons. We have not, for example, mentioned implied trusts. 'Implied trust' has been used, as we use imputed trust, as an umbrella term covering resulting trusts and constructive trusts. Indeed, in Chapter 11, reflecting recent judicial usage, we adopt 'implied trusts' as the umbrella term for resulting trusts and constructive trusts in the family home context. Unfortunately, 'implied trust' has also been used to mean resulting trusts only, or presumed resulting trusts only, or even those express trusts where the intention has to be inferred from ambiguous language or conduct. Chapter 11 excepted, we therefore avoid using the term and can only reiterate that there is no authorised classification and that we restrict ourselves to the categories of constructive trusts, of which more shortly, and resulting trusts, the latter being subdivided for present purposes into 'automatic' and 'presumed', although this terminology will be reassessed in Chapter 4 (see p 214). A further reason why the appearance of an orderly structure would be misleading is that the linguistic confusion is in fact symptomatic of a more

general conceptual uncertainty pervasive in imputed trusts. Two instances, one specific and one more general, illustrate the point.

Considering the specific example first, on occasions the courts have been less than scrupulous in distinguishing different forms of imputed trusts. In *Hussey v Palmer* [1972] 3 All ER 744, for example, the plaintiff, 'well over 70 and an old-age pensioner', paid £607 to a builder to erect an extra bedroom on a house belonging to her daughter and son-in-law for the plaintiff to live in. They quarrelled and the plaintiff left the house. Subsequently, she sued to recover the £607. In the course of his judgment Lord Denning, the then Master of the Rolls, made the following observation (at 747):

> Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words than anything else. The two run together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it . . . [The trust] is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

Despite Lord Denning's view, it has conventionally been accepted until recently that whether a court imputes a 'presumed' resulting trust (as would have been the case in *Hussey v Palmer*) or, alternatively, a constructive trust, can have significant consequences. It was, for instance, thought to affect the proportion of 'the property or a share in it' that a successful plaintiff would be awarded as a remedy (see *Re Densham* [1975] 1 WLR 1519). Subsequent decisions of the courts, in particular those of the House of Lords in *Lloyds Bank plc v Rosset* [1991] 1 AC 107 and *Stack v Dowden* [2007] UKHL 17, have left us with a considerable degree of uncertainty about these matters (see generally Chapter 11, where they are explored in detail).

Our second instance of conceptual confusion concerns the circumstances in which a constructive trust will be imputed. The sweeping nature of the jurisdiction claimed by Lord Denning in *Hussey v Palmer*, for what he was to term elsewhere 'a constructive trust of a new model' (*Eves v Eves* [1975] 3 All ER 768 at 771), has been subject, perhaps unsurprisingly, to considerable academic and judicial criticism (see generally Chapter 11). Notions of 'justice and good conscience' can in the alternative be interpreted in terms of 'unpredictability and palm-tree justice'. Bagnall J in *Cowcher v Cowcher* [1972] 1 WLR 425, a case decided some six months before the hearing in *Hussey v Palmer*, captured the strong sense of unease in those who are uncomfortable with this sort of discretion being exercised in the area of property rights (at 430):

> I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts.

He went on to add that any developments in the law should be legitimate – 'by precedent out of principle' – 'since otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit'. The 'new model' was therefore sometimes contrasted unfavourably with the established or 'institutional' constructive trust whose incidence and consequences were thought to be more clearly defined. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, Lord Browne-Wilkinson summarised the distinction in the following manner (at 714–715):

> Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court. Thus for the law of New York to hold that there is a remedial constructive trust ... gives rise to different consequences from holding that an institutional constructive trust arises in English law.

An example of an 'institutional constructive trust', although not an example that is an everyday occurrence, is where A leaves property in her will ostensibly to B, but on an understanding reached between them that B will pass it on to C. If B, having acquired legal title to the property under A's will, were to claim that the property was his rather than C's a court might say that B holds it on constructive trust for C. Of course, we might say that since this complies with A's original intention, why do we not call it an express trust? We will have to address that question in Chapter 4 when we examine this arrangement – called a secret trust – in some detail since the classification of the trust is a matter of debate. Consider next the case of D, a company director of XYZ plc, who instead of obtaining a contract with ABC plc on behalf of XYZ plc as is her duty as a director – called a fiduciary duty – acquires the contract for her own use. A court might say that D holds the benefit of the contract on constructive trust for XYZ plc (see Chapter 2 at p 197). In both these instances we might equally say that it would be 'unconscionable' for B and D to assert

their own rights under the will and contract, respectively, to the detriment of those of C and XYZ plc. But unconscionability used in this sense has a narrow meaning, being determined, as Lord Browne-Wilkinson points out, by rules of law rather than judicial discretion. The practical point to emphasise here is that the circumstances when the institutional constructive trust can be imposed are thought to be more predictable, some would claim more principled, than those applicable to a remedial constructive trust. In fact, as is implicit in the opinion of Lord Browne-Wilkinson, there are a number of well-established instances where a constructive trust may be imposed, and these constitute the heartland of the subject (see Oakley, *Constructive Trusts* (3rd edn, 1997), for a detailed categorisation).

The converse perception that the new model or remedial constructive trust is uncertain in application clearly carries weight, and the consequences for the interests of third parties of imputing a trust in the manner envisaged by Lord Denning cannot be lightly dismissed. Nevertheless, legal systems tend to need some leeway to infuse elements of 'fairness' and to recognise novel claims of right. Indeed, such notions can be thought of as important legitimating mechanisms for a legal system (see Chesterman, 'Equity in the Law', in Troy (ed), *A Just Society* (1981)). In any event, criticism notwithstanding, Lord Denning's prototype, or at least the desirability of an equivalent, has exhibited some resilience and, in a modified form, has re-entered academic and juristic debate as a 'remedial constructive trust'. The principal area of operation of this type of trust remains that of family property disputes, although its presence has also been felt in some areas of commercial activity. Nevertheless, it must be conceded that a jurisdiction of this nature remains contentious in the extreme and we will therefore revisit this issue briefly at the end of section 9 of this chapter. For the moment it is sufficient to note that depicting the circumstances in which a constructive trust, of whatever type, will be imposed, defining the nature of that trust and, as importantly, determining the appropriate remedy are proving to be elusive goals (but see, eg, Wright, *The Remedial Constructive Trust* (1998), reviewed critically by Birks (1999) 115 LQR 681; Millett [1999] 14 Amicus Curiae 4; Millett (1998) 114 LQR 399; Rickett and Grantham [1999] LMCLQ 111; Rickett (1999) 18(3) NZULR 305; Birks, 'Proprietary Rights as Remedies', in Birks (ed), *Frontiers of Liability*, vol II (1994), p 214; and Evans (2001) Sydney LR 463). It is worth noting, however, that uncertainty and disagreement about the scope for the constructive trust is not a phenomenon that first emerged with Lord Denning's 'new model constructive trust'. On the contrary, it appears that the roots of the difference in approach adopted in English trusts law to this issue as compared with that of the US can be detected in contrasting analyses of this issue first evident in the mid-Victorian trusts law treatises (see Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), pp 281–4).

One problem in studying constructive trusts, therefore, is whether we can identify some unifying principle common, for example, to the trustee of an

express trust who renews in his own favour a lease previously held for the trust, and to the 'secret trust' and to the company director who appropriates to herself a contract that she should have taken up on behalf of her company, other than a conclusion that constructive trusteeship may be imposed on all of them. A widely adopted approach is to examine in one chapter these and other circumstances in which a constructive trust has been imposed. This would certainly provide us with a mode of classification. It might also enable us to draw tentative conclusions about the nature of a constructive trust and to move towards identifying some common principle. This superficially attractive approach is, however, not without its dangers. It may provide an impression of coherence and certainty that one cannot confidently assert exists. Furthermore, if the categories as currently defined are construed as prescriptive rather than as just descriptive, then devoting excessive deference to them may hinder our understanding of any incremental process of legal change.

This area of law remains in something of a ferment and there is controversy as to the direction and desirability of change, particularly when it occurs in a more overtly remedial fashion. However, as will be seen, notably in Chapter 11, various Commonwealth jurisdictions are developing different rationales for a 'remedial' form of constructive trust: unjust enrichment in Canada; versions of unconscionability in Australia and New Zealand; and estoppel as a juridical base in English law. We would suggest, however, that common to them all is an underlying problem that is intrinsic to this subject. Can the doctrines and practices of equity provide an adequate response to unconscionable conduct in a way that does not degenerate in the manner envisaged by Bagnall J in *Cowcher v Cowcher*? Although this book is predominantly concerned with the English law of trusts, at numerous points we refer to the different ways in which other Commonwealth jurisdictions are implicitly addressing that fundamental question. This is not comparison just for the sake of comparison; if, as some say, there is a cross-fertilisation of ideas between jurisdictions, then we need to know something of what others do if we are to understand the responses of our own system and the processes of legal change.

This pattern of legal change returns us in a roundabout way to our family tree of trusts and to the emphasis that Maitland placed on the development of the trust idea and with which this introductory chapter began. The imputed trust branches are still developing and our preferred approach is therefore to forsake any claim to unity and instead fragment our treatment of imputed trusts in general and constructive trusts in particular. There are no chapters devoted specifically to resulting trusts or constructive trusts. Accordingly, whilst we still examine the constructive trust imposed on, for example, our trio of defaulting trustee, 'secret trustee' and disloyal company director described above, we do so in their respective family trust (Chapters 4 and 8), commercial (Chapters 12 and 14) and, if we add property relations between cohabitating partners to the equation, family breakdown contexts (Chapter 11).

We cannot quite leave the topic there, however. The brief discussion above about imputed trusts might create the impression of an area of trusts law hermetically sealed, divorced from other legal doctrines. At the boundaries this is emphatically not the case. Indeed, the use by Lord Denning of the term 'restitution' in *Hussey v Palmer* (see p 23) and our reference above to 'unjust enrichment' hint at the existence of broader horizons beyond the boundaries of trusts law, as conventionally defined.

## 9. Marking the boundaries

The broader horizons and some of the accompanying doctrinal tensions were succinctly summarised by Lord Goff in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 685:

> Ever since the law of restitution began, about the middle of this century, to be studied in depth, the role of equitable proprietary claims in the law of restitution has been found to be a matter of great difficulty. The legitimate ambition of restitution lawyers has been to establish a coherent law of restitution, founded upon the principle of unjust enrichment; and since certain equitable institutions, notably the constructive trust and the resulting trust have been perceived to have the functions of reversing unjust enrichment, they have sought to embrace those institutions within the law of restitution, if necessary moulding them to make them fit for that purpose. Equity lawyers, on the other hand, have displayed anxiety that in this process the equitable principles underlying these institutions may become illegitimately distorted; and though equity lawyers in this country are nowadays much more sympathetic than they have been in the past towards the need to develop a coherent law of restitution, and of identifying the proper role of the trust within the rubric of the law, they remain concerned that the trust concept should not be distorted, and also that the practical consequences of its imposition should be fully appreciated. There is therefore some tension between the aims and perceptions of these two groups of lawyers, which has manifested itself in relation to the matters under consideration in the present case.

This is not the place to explore in any great detail those 'matters under consideration' in the case nor the kaleidoscope of opinion and comment that the case has generated. Suffice to say here that the factual matrix was relatively straightforward. The council and the bank were engaged in a financial market arrangement termed a 'swap agreement', whereby in effect the council received capital (£2.5m) 'up front' in return for making staged repayments over several years. These contractual arrangements became almost commonplace during the stringent controls on local authority finance during the 1980s as they provided local authorities with a means of raising funds for expenditure

without, it was thought, infringing statutory controls. Then, in 1992, in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, the House of Lords held that such swap agreements were ultra vires the local authorities. Westdeutsche, which had been repaid about half the capital by Islington London Borough Council, sought to recover the balance. The bank succeeded in its claim; the ground of recovery need not concern us save to note that it was at common law. One issue was left outstanding: interest was payable on the amount to be repaid, but was this to be calculated as simple interest or compound interest? The legal significance of this was that on a common law claim simple interest only could be awarded, whereas in equity in certain circumstances compound interest could be awarded against a trustee or other person in a fiduciary capacity. And therein lay a problem for Westdeutsche. If their Lordships were not prepared to align the criteria for awarding interest so that the claim for compound interest could be upheld on the alignment basis alone – and they were not – could the bank establish that the local authority held the capital as a trustee? The House of Lords decided unanimously that there was no fiduciary relationship and held by a 3:2 majority that the bank was not entitled to compound interest (the minority judges, of whom Lord Goff was one, considered that compound interest could be awarded on other grounds).

One source of the tension referred to by Lord Goff was to be found in one of the core arguments advanced on behalf of the bank and based on the law of restitution. Before considering the particular argument advanced in the case it is necessary to comment very briefly on the law of restitution. At its most straightforward, and for present purposes, it can be said to be concerned to a considerable extent, but not exclusively, with reversing the unjust enrichment gained by one person at the expense of another (see Birks, *An Introduction to the Law of Restitution* (rev edn, 1989), and *Unjust Enrichment* (2nd edn, 2005); Virgo, *The Principles of the Law of Restitution* (2nd edn, 2006); but, cf, for a different perspective Jaffey, *The Nature and Scope of Restitution* (2000)). As is apparent from the words of Lord Goff in *Westdeutsche*, the law of restitution is a relative latecomer to the English legal scene. Many of the restitutionary claims were initially seen as a somewhat miscellaneous collection lying outside the established categories of contract and tort, hence, the search for some explanatory principle and the ambition, in Lord Goff's words, 'to establish a coherent law of restitution'. (Lord Goff, with Gareth Jones, was the original author of the path-breaking English law text on this subject, *The Law of Restitution* (1966), now in its 8th edition as Mitchell et al, *Goff and Jones' The Law of Unjust Enrichment* (2011).) The outcome of the 'search for coherence' is that the English law of obligations now constitutes a triumvirate of contract, tort and restitution rather than contract, tort and 'a miscellany of other claims'. The search did not rest there, but, again as Lord Goff points out, also potentially brought within the ambit of the law of restitution aspects of the law of trusts. It is that conjunction of ideas that was to provide that core

argument for the bank in *Westdeutsche*. Based on an argument developed by Professor Peter Birks ('Restitution and Resulting Trusts', in Goldstein (ed), *Equity: Contemporary Legal Developments* (1992)), it was claimed that where there was any voluntary transfer of legal title with no evidence of any intention to make a gift – as where money is paid under a mistake or on a condition which is not subsequently satisfied – then a resulting trust should be presumed to operate at once to reverse the enrichment of the recipient. Put simply, in the context of *Westdeutsche*, the gist of the argument was that there was a void contract, that the bank in those circumstances had clearly not intended to make a gift to Islington London Borough Council, who therefore held the legal title on resulting trust for the bank. To reiterate, the point of making the argument in these terms was to establish a claim in equity; there was no doubt, as already indicated, that the bank was entitled to recover the capital and simple interest under a common law action. To accept the resulting trust argument would, in the view of the House of Lords, have involved an extension of the scope of resulting trusts – beyond that outlined above at pp 22–3 – which would involve 'a distortion of trust principles' (*per* Lord Browne-Wilkinson at 715; see Birks [1996] 4 RLR 4, for an initial response to the judgment).

The core trust principle identified by Lord Browne-Wilkinson was that 'Equity operates on the conscience of the owner of the legal interest', and therefore '[that owner] cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others' (at 705, but, cf, Swadling, 'The Law of Property', in Birks and Rose (eds), *Lessons of the Swaps Litigation* (2000), pp 242 at pp 257–64, where reservations are expressed about the authority for and implications of the proposition, particularly as regards the centrality accorded to 'conscience'). It would be remiss to pretend that other pragmatic considerations were not at work in the outcome of the *Westdeutsche* case. Lord Browne-Wilkinson specifically refers to a concern that any extension of proprietary interests in personal property in the manner argued for on behalf of the bank would be bound to produce commercial uncertainty (at 705):

> If the bank's arguments are correct, a businessman who has entered into transactions relating to or dependent upon property rights could find that assets which apparently belong to one person in fact belong to another; that there are 'off balance sheet' liabilities of which he cannot be aware; that these property rights and liabilities arise from circumstances unknown not only to himself, but also to anyone else who has been involved in the transactions. A new area of unmanageable risk will be introduced into commercial dealings. If the due application of equitable principles forced a conclusion leading to these results, your Lordships would be presented with a formidable task in

> reconciling legal principle with commercial common sense. But in my judgment no such conflict occurs. The resulting trust for which the bank contends is inconsistent not only with the law as it stands but with any principled development of it.

Some of the other legal implications of *Westdeutsche* will be considered at various points in this book, as will the significance attached to the commercial consequences of legal change. For the moment we are concerned simply with some more general implications for our understanding of contemporary developments in the law of trusts. First, the case highlights a particular feature of our system of private law: there are potentially overlapping jurisdictions. The law of restitution and the law of trusts can be conceived of as occupying two eccentric circles. It is where the borders overlap that friction can occur. The friction arises in part because the 'search for a coherent law of restitution' can elide into a more ambitious and wide-ranging agenda of reclassification of private law. This book is not the place to engage in an analysis of the pros and cons of the restitution enterprise, not least because the scholarship deployed in the considerable literature on the subject now embraces a diversity of views, some of which have changed as the scholarship develops (see, eg, Burrows, *The Law of Restitution* (2nd edn, 2002); Birks, *An Introduction to the Law of Restitution* (rev edn, 1989), and *Unjust Enrichment* (2nd edn, 2005); Virgo, *The Principles of the Law of Restitution* (2nd edn, 2006); Jaffey, *The Nature and Scope of Restitution* (2000); and the iconoclastic approach of Hedley, *Restitution: Its Division and Ordering* (2001)). There is no unanimity, for instance, about the precise relationship between the law of restitution and the reversal of unjust enrichment, nor indeed about whether there is or should be a distinct legal category of unjust enrichment. This does not mean that we ignore the insights that are provided by restitutionary analyses. These are discussed at various points in the book, primarily in Chapters 10, 12 and 14, where the remedies that might be invoked for breach of trust take centre stage. Consideration is also given, although to a lesser degree, to another boundary, that between trusts law and tort law, particularly where the competence and integrity of trustees and other fiduciaries is at issue. It is important in trying to understand the pace and direction of legal change that efforts to minimise or remove any dissonance resulting from these boundary conflicts may be a formative influence in current developments. More prosaically, it may also be helpful to be aware that linguistic purity is not always present in this area. Thus, a common complaint of restitution lawyers is that the term 'restitution' is on occasion used when what is meant is that a person is receiving compensation or what a common lawyer might call 'damages'. Restitution, in contrast, involves the surrendering up of a benefit gained from another person.

There remains one 'bit-part actor' on the *Westdeutsche* stage that we have not yet mentioned. One of the underlying themes in the case was how far it

was appropriate for a more extensive proprietary restitutionary remedy to be developed using trusts law. On this point, Lord Browne-Wilkinson commented (at 716):

> Although the resulting trust is an unsuitable base for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue.

The glimmer of light for such hopeful claimants, often seeking priority over other claimants in an insolvency, indicated by Lord Browne-Wilkinson's comments in *Westdeutsche* was, however, quickly put out by the Court of Appeal in *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 (see Chapter 14 at p 806, where the remedial constructive trust is considered in a comparative and commercial context). Whether this rejection proves to be a temporary or permanent roadblock in English law is uncertain. A pragmatic objection to a remedial constructive trust is the possible consequences for the property interests of third parties, particularly creditors of a defendant. But, as Lord Browne-Wilkinson acknowledged in the extract above, in jurisdictions where the remedial constructive trust is employed as a response to unjust enrichment the courts have a wide discretion as to the remedy to be awarded. The interests of creditors can be taken into account. A more fundamental objection is encapsulated by the comments of Bagnall J in *Cowcher v Cowcher* (see above). That concern is the fear of unfettered discretion and accompanying lack of predictability of outcome or more prosaically 'palm-tree justice'. Such concerns should not be discounted, but, as we shall see at various points in the book, trusts law and equity are replete with concepts of an open-textured nature. We shall encounter, inter alia, the language of 'unconscionability', 'undue influence' and 'legitimate expectations'. None of these are any more susceptible to precise definition than, one might suggest, is the 'neighbour principle of negligence'. But nor does such terminology lead to the exercise of that unfettered discretion. One of our tasks is therefore to tease out the interpretation given to these terms in the different factual contexts in which they are deployed. We need not assume that the claims of 'unconscionability' will be treated with equal regard in such diverse contexts as family breakdown and corporate malfeasance. (See generally Birks (ed), *Frontiers of*

*Liability*, vol 2 (1994), chs 13–17, for an excellent introduction to the remedial constructive trust.)

## 10. Focus on social contexts where trusts are used

Although, to repeat Maitland's words, the trust is a legal device 'of great elasticity and generality; as elastic, as general as contract', there are relatively few social contexts in which it has consistently been used to any significant degree. One may compare the position with contracts: the standard situations where these are commonly made are many and various. One thinks readily, for instance, of contracts of sale (relating to goods or land), contracts of hire or lease, contracts of employment, contracts of insurance and the contract existing between members of a company or unincorporated association. There are many more categories of contract not on this list. By contrast, the contexts in which trusts, express or imputed, regularly make an appearance can be narrowed down to five, as follows:

(1) Preservation of family wealth The aggregation and management of invested wealth, chiefly for the benefit of members of a family, and usually involving some element of transmission of wealth from one generation to the next.

(2) 'Family breakdown' Imputed trusts are used to reach a just and fair result in the allocation of property between de facto partners on the break-up of their relationship. (Where the persons concerned have been married to each other, this aspect of their divorce is regulated by statute rather than trust principles.)

(3) Finance and commerce The trust impinges on financial and commercial activity in three important ways. First, it provides a medium for collective investment: examples are pension funds and unit trusts. Second, it is used on occasions as a device for securing commercial debt. Third, fiduciary law and doctrines of constructive trust form the basis for imposing standards of honesty and good faith on individuals engaged in business, in particular, on partners and company directors. (See Bryan, 'Reflections on Some Commercial Applications of the Trust', in Ramsay (ed), *Key Developments in Corporate Law and Trusts Law* (2002); and in a US context, Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 Yale LJ 165.)

(4) 'Voluntary' activity 'Voluntary' – or, more precisely, non-profit – activity attracts the use of trusts where it is carried out *either* for welfare-oriented purposes, which the law regards as 'charitable', *or* by an unincorporated association.

(5) Model for export The English trust has not just been exported to other common law jurisdictions, but its unique features as an asset management device are exploited by various offshore financial centres. There has also been a civilian response with the emergence of trust-like devices, such as the Italian *trusts interni* and French *la fiducie*.

One further context where the trust plays a prominent part is in ownership of the family home. Where a home is in shared ownership, legal title is generally held, possibly to the puzzlement of the owners, on a statutory trust of land, now by virtue of the changes introduced in the TOLATA 1996. This arrangement is more usually and appropriately discussed in land law books (eg, Gray and Gray, *Elements of Land Law* (5th edn, 2008)).

The approach in this book is to examine the development and the present content of trusts law in conjunction with a study of each of the five contexts (1)–(5) above. The remainder of this book is accordingly divided into five corresponding parts.

The first of the five contexts – preservation of family wealth – has been in many respects the most important in terms of the development of trusts law. The trust notion was originally conceived and given legal recognition on account of the efforts of medieval conveyancers to protect the landholdings of their clients from certain forms of feudal taxation, and to increase the range of dispositions of land which their clients could legally make on death. Most of the principles governing the creation, duration and administration of express trusts have been developed in this context of family wealth-holding. But each of the other contexts has provided an increasingly important basis for significant elaborations of trust doctrine.

# 2

# The evolution of the private express trust

## 1. Introduction

As indicated at the end of Chapter 1, the trust concept originated in English law in medieval times, chiefly as a result of the efforts of conveyancers to preserve the landholdings of their clients from certain forms of feudal taxation and to increase the range of dispositions of land which their clients could legally make on death. The emergence of the trust concept at this time is intimately bound up with the assumption of jurisdiction in legal matters by the Lord Chancellor on grounds of 'equity'. In time, as we will see, that jurisdiction became sufficiently pervasive and ordered so as to justify substituting an upper case 'E' in place of the lower case 'e'. The development of Equity in that manner involves matters that range far beyond those concerning the trust. Since it is the latter that is our prime concern, the roles are reversed here and Equity therefore appears in our story mostly as a member of the supporting cast only.

This chapter seeks to explain the development of major segments of trusts law – specifically, the law governing private express trusts – from these early beginnings until, approximately, the beginning of the twentieth century. It does so with particular reference to trust transactions which served, in various ways, to aggregate and safeguard privately held wealth for the benefit of members of a family and to ensure the smooth transmission of wealth from one generation of a family to the next. Towards the end of the chapter, some general comments are offered on the historical role of private family trusts. The chapter concludes by returning to the broader topic of the relationship between Equity and other areas of the common law, a topic that has of late been attracting close academic and judicial scrutiny.

First, however, a general note of caution needs to be aired about our capacity 'to explain'. In this chapter, and elsewhere in this book, we are concerned with change over time. But Milsom's words of warning are apposite here ('"Pollock and Maitland": A Lawyer's Retrospect' (1996) 89 Proc Br Acad 243 at 251):

> since it is almost a function of law to hide change, few developments other than those made by explicit legislation can be pinned down and dated. The same rule works differently. The same word changes its meaning. The same action is put

> to a fresh purpose. The same situation is analysed in a new way. It follows that there will be few conclusions that are securely established as one can establish a regular historical fact.

Whether or not one thinks that Milsom's general proposition about secure conclusions can be applied to the history of the trust, the elements of legal change that he identifies certainly have a compelling resonance in this context. There is, as we shall see, explicit legislation that, together with a hardening of doctrine, has at times imposed constraints on the 'efforts of conveyancers'. But there has also been scope to manipulate rules and language, which, when the social and economic climate is right, stimulated inventiveness. One modest conclusion can be drawn: we are dealing with a process of creating law that has often operated 'from the bottom up'.

## 2. Medieval 'uses' of land

(For general discussion of the origins of uses, see, eg, Milsom, *Historical Foundations of the Common Law* (2nd edn, 1981), ch 9; Bean, *The Decline of English Feudalism 1215–1540* (1968); Biancalana, 'Medieval Uses', in Helmholz and Zimmermann (eds), *Itinera Fiduciae* (1998), p 111; Fratcher, 'Uses of Uses' (1969) 34 Miss LR 39; Holmes, *The Estates of the Higher Nobility in 14th-Century England* (1957), pp 41–84; Barton, 'The Medieval Use' (1965) 81 LQR 562.)

The medieval forerunner of the modern trust was not called a trust, but a 'use'. The term 'use' is a corruption of the Latin phrase '*ad opus*'. The background to its emergence in the thirteenth century was a common law system of land-holding based on feudal conceptions. As reconstructed by modern historians, with some divergences of opinion, a tenant of land under post-Conquest feudalism had the legal right to possess the land (known as 'seisin'), and to receive some degree of patronage and protection from the lord from whom the land was held. In return, the tenant was bound to render due homage and various services and 'incidents' (ie, material benefits of different kinds) to the lord and, in the case of tenants lower down the scale, to submit to the lord's jurisdiction in the manorial courts. The system was based on the idea that no one was the absolute owner of land. Instead, chains comprising these two-way relationships of tenure stretched downwards from the king, who was the ultimate overlord. The chain might have only one link, in which case the tenant, a so-called 'tenant-in-chief', held directly of the king. Or there might be several links, in which case the tenant with actual seisin was the 'tenant in demesne', and the intervening persons, each of whom was both a lord of the tenant below him and a tenant to the lord above him, were called 'mesne lords'.